



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E052 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

HON. RAPHAEL TUJU ACTING SECRETARY GENERAL, JUBILEE PARTY.....2ND RESPONDENT

EX PARTE APPLICANTS:

HON. JOHN KIERU WAMBUI

HON. KARIUKI MUCHIRI

RULING NO. 2

The Application

1. This Court delivered a ruling herein on 14th April 2021 transferring this matter to Nyahururu High Court, on account of the fact that the *ex parte* Applicants and some parties who are likely to be affected by this matter reside in and work for gain in Nyandarua County. The *ex parte* Applicants herein have consequently filed another application by way of a Notice of Motion dated 15th April 2021, in which they are seeking the following orders:

(a) THAT this application be certified as urgent and be heard forthwith ex parte.

(b) THAT pending the hearing and determination of this application, the orders of this Court issued on the 14th April, 2021 be stayed.

(c) THAT the orders of this Court issued on the 14th April, 2021 be reviewed and/ or set aside and this court proceeds to hear the chamber summons dated the 13th day of April, 2021 on merit.

(d) THAT the costs of this application be provided for .

2. The application is supported by an affidavit sworn on the same date by the 1st *ex parte* Applicant. I have perused the said application and supporting documents, and note that the *ex parte* Applicants state that the impugned decision was made in Nairobi City County where the Respondents are domiciled, even though it was meant to affect the state of affairs in the County Assembly of Nyandarua, and is therefore properly within this Court's supervisory Jurisdiction stemming from its territorial jurisdiction over decisions made within Nairobi City County and by persons domiciled in Nairobi City County .

3. The *ex parte* Applicants also averred that if the Court deemed it fit to have the said County Assembly of Nyandarua and the Nyandarua County Assembly Service Board participate in the instant proceedings, then the Court ought to have ordered that the chamber summons filed herein together with the substantive notice of motion be served upon the said institutions at the substantive stage of the judicial review

proceedings for them to participate.

4. Lastly, the *ex parte* Applicants annexed a copy of the decision of the Political Parties Disputes Tribunal striking out their suit therein, and averred as follows as regards the said ruling:

“the same had not been sent to the parties at the time when the chamber summons herein was drafted and filed since the decision of the PPDT was made on the same day the chamber summons was drafted and filed being the 13th April, 2021 at around 3:45 pm and by the time of filing the said chamber summons, a copy of the said decision had not been supplied to the parties, even though it is not the impugned decision herein for there to be a strict requirement that it ought to have been filed together with the application for leave.”

The Determination

5. The applicable law for setting aside or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

“Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

6. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

“ (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

7. Section 15 of the Civil Procedure Act in this regard provides that the place of suing in civil cases shall be the place where the defendant resides or cause of action arises, unless otherwise specifically provided for under the Act. The *ex parte* Applicants have argued that the Respondents are headquartered and resides in Nairobi within the jurisdiction of this Court, and that the subject cause of action arose in Nairobi. This is sufficient reasons to set aside the ruling and orders granted herein on 14th April 2021 which are hereby set aside, as they were erroneously predicated on the residence of the *ex parte* Applicants and other affected parties.

8. This Court will therefore proceed to determine the *ex parte* Applicants’ Chamber Summons application dated 13th April 2021 on its merits. It is notable that the said application is seeking following orders:

(a) THAT the application be certified as urgent and service thereof be dispensed with at the first instance.

(b) THAT the Court be pleased to grant leave to the Applicants to apply for an Order of Certiorari to remove into this Court for purposes of quashing the decision of the 1st Respondent through the 2nd Respondent contained in a letter dated 11th January, 2021 purporting to remove the Applicants from the Nyandarua County Assembly Service Board.

(c) THAT the Court be pleased to grant leave to the Applicants to apply for an order of Prohibition prohibiting the Respondents by themselves, their agents and/ or any one claiming under them from removing the applicants from the membership of the Nyandarua County Assembly service board and/ or interfering with their functions as such members.

(d) THAT the grant of leave to apply for an Order of Certiorari and Prohibition aforesaid do operate as a stay of the decision of the 1st Respondent through the 2nd Respondent contained in a letter dated 11th January 2021 purporting to remove the applicants from the Nyandarua County Assembly Service Board .

(e) THAT the costs of this application be provided for.

9. The application is supported by a statutory statement dated 13th April 2021 and a verifying affidavit sworn on the same date by the 1st ex

parte Applicant. The grounds for the application are that the 1st Respondent through the 2nd Respondent and without according the applicants a fair hearing or at all purported to remove the applicants from the Nyandarua County Assembly Service Board through a letter dated 11th January, 2021. Further, that Under the County Governments Act No. 17 of 2012 section 12 (5) (a), the Respondents do not have any authority and/ or power to remove the applicants from the Nyandarua County Assembly Service Board as the intention of the said provision of the law is intended to protect the applicants' security of tenure of office in the said board and actually insulates the said Board from political manipulations.

10. The *ex parte* Applicants also stated that a result of the impugned decision of the Respondents, they approached the Political Parties Disputes Tribunal in PPDT Complaint Number E005 of 2021, wherein they were granted interim orders staying the said impugned decision. However, that the said suit was struck out for want of jurisdiction on the 13th April 2021.

11. I have perused the ruling dated 13th April 2021 delivered by the Political Parties Disputes Tribunal in PPDT Complaint Number E005 Of 2021, and note that the complaint therein concerned the same decision impugned herein dated 11th January 2021, that was made by the Respondents to remove the applicants from the Nyandarua County Assembly Service Board. Further, that the said ruling was on a Preliminary Objection brought by the Respondents herein that the dispute at hand is between members of a political party and a political party and that pursuant to Section 40(2) of the Political Parties Act, the same should have been subjected to internal dispute resolution mechanisms under the party constitution prior to moving this Tribunal.

12. The Political Parties Tribunal in upholding the Preliminary Objection found in its ruling dated 13th April 2021 that and in the absence of any evidence by the to demonstrate that their attempt to invoke internal dispute resolution mechanisms was frustrated, the Tribunal was not properly seized of jurisdiction. The *ex parte* Applicants' instant Chamber Summons application is therefore not only *res judicata* but in abuse of the process of Court, for the reasons that the *ex parte* Applicants have not brought any evidence of exhaustion of internal remedies as held and required by the said ruling of the Political Parties Tribunal, and as required by Article 159 of the Constitution and section 9 of the Fair Administrative Action Act.

13. Section 40 of the Political Parties Act provides as follows in this regard issue of exhaustion of internal remedies :

1) The Tribunal shall determine—

- (a) disputes between the members of a political party;**
- (b) disputes between a member of a political party and a political party;**
- (c) disputes between political parties;**
- (d) disputes between an independent candidate and a political party;**
- (e) disputes between coalition partners; and**
- (f) appeals from decisions of the Registrar under this Act;**
- (fa) disputes arising out of party primaries.**

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

14. The exhaustion of alternative remedies is a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and is also exemplified by emerging jurisprudence in cases such as those by the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others [2015] eKLR.

15. Sections 9(2) (3) and (4) of the Fair Administrative Action Act provides as follows in this regard:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

16. An available adequate alternative remedy is therefore a material consideration in the exercise of the Court's discretion to grant leave to commence judicial review proceedings, for the reasons that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised in relation to the actions or decisions of a public body. Furthermore, contrary to the *ex parte* Applicants' averments, section 7 of the Civil Procedure Act forbids this Court from relitigating this issue, in light of the findings in the ruling delivered

on 13th April 2021 by the Political Parties Tribunal.

17. Lastly, the *ex parte* Applicants, if aggrieved by the decision of the Political Parties Tribunal, ought to have appealed the decision as provided for in the provisions of section 41 of the Political Parties Act. The *ex parte* Applicants are instead, and in abuse of the process of Court, seeking to use the instant judicial review proceedings to circumvent and thereby annul the ruling of a competent Tribunal that has not been lawfully set aside.

The Disposition

18. Arising from the foregoing observations and findings, I accordingly hereby order as follows

i. The *ex parte* Applicants' Notice of Motion application dated 15th April 2021 is hereby certified urgent and admitted to hearing *ex parte* in the first instance.

ii. The ruling and orders issued herein on 14th April 2021 are hereby set aside, and the suit herein is hereby reinstated for hearing by this Court.

iii. There shall be no order as to the costs of the *ex parte* Applicants' Notice of Motion application dated 15th April 2021.

iv. The *ex parte* Applicants' Chamber Summons application dated 13th April 2021 is certified urgent and admitted to hearing *ex parte*.

v. The *ex parte* Applicants' Chamber Summons application dated 13th April 2021 is found to be incompetently filed before this Court and is in abuse of the Court process, and is hereby struck out with no order as to costs.

vi. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicants by electronic mail by close of business on Tuesday, 20th April 2021.

vii. Parties shall be at liberty to apply.

19. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF APRIL 2021

P. NYAMWEYA

JUDGE