



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**JUDICIAL REVIEW CAUSE NO. 9 OF 2017**

**(FORMERLY NAKURU J.R. CAUSE NO. 28 OF 2017)**

**ANTONELA LOBURA.....EX PARTE APPLICANT**

**VERSUS**

**1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

**2. MODESTA LALAIKIPIANI.....RESPONDENTS**

**AND**

**SAMBURU COUNTY ASSEMBLY.....INTERESTED PARTY**

**RULING**

1. On 23/11/2017 this court (Kasango, J.) granted the Ex Parte Applicant, **Antonela Lobura**, leave to institute judicial review proceedings to seek an order of *certiorari* “to call for and quash the decision of the 1<sup>st</sup> Respondent herein vide the **Kenya Gazette Notice No. 9391 of 26/09/2017**...in respect of Samburu County replacing the name of ANTONELA LOBURA with MODESTA LALAIKIPIANI, 2<sup>nd</sup> Respondent.” The Ex Parte Applicant subsequently filed her substantive notice of motion dated 30/11/2017.

2. On 29/01/2018 the 1<sup>st</sup> Respondent filed a **notice of preliminary objection** in respect to that substantive motion. Two points of law are taken up in the notice –

(i) That by dint of the official gazettement and swearing in of the Samburu County Ward Representatives, the Ex Parte Applicant ought to have moved the court by way of an election petition. The substantive judicial review application filed herein is therefore bad in law, incompetent and fatally defective.

(ii) That this court lacks jurisdiction to hear and determine the substantive judicial review application.

The 1<sup>st</sup> Respondent also filed on the same date grounds of opposition to the substantive motion.

3. On 21/05/2018 the court directed that the preliminary objection be heard on 19/06/2018 and the parties to file and exchange written submissions before that date.

4. The 1<sup>st</sup> Respondent, that is, the **Independent Electoral and Boundaries Commission**, filed its submissions in respect to its preliminary objection on 18/06/2018. No other party has filed any submissions in respect to the preliminary objection. However, the Interested Party, **Samburu County Assembly**, had filed submissions on 01/02/2018 in respect to the substantive notice of motion. It fully supported the Ex Parte Applicant’s case as laid out in the statement of facts and verifying affidavit that were filed together with the application for leave.

5. That case of the Ex Parte Applicant is that she was duly nominated by her political party as a member of the Samburu County Assembly, her nomination was duly gazetted on 28/08/2017, and on 05/09/2017 she was duly sworn in as a specially elected member of the county assembly. Her election to the county assembly was therefore complete and could only be challenged by way of a petition in an election court under the relevant provisions of the Elections Act, and the election could only be nullified by an order of such election court.

6. Instead and completely contrary to law, the 1<sup>st</sup> Respondent purported to nullify the aforesaid election of the Ex Parte Applicant by issuing a subsequent gazette notice purporting to delete the name of the Ex Parte Applicant and substituting the name of the 2<sup>nd</sup> Respondent MODESTA LALAIKIPIANI in her place. That subsequent gazette notice, *prima facie*, is a nullity in law and cannot defeat the completed election (by way of nomination) of the Ex Parte Applicant.

7. It is thus extremely cynical and in bad taste for the 1<sup>st</sup> Respondent to use the same legal arguments available to the Ex Parte Applicant to try and defeat her substantive case through the preliminary objection the subject of this ruling. It is a perverse thing to try to do!

8. To uphold the 1<sup>st</sup> Respondent's preliminary objection would be to permit the perpetuation of an illegality committed by the 1<sup>st</sup> Respondent and gross injustice to the Ex Parte Applicant. This court will not countenance that.

9. The preliminary objection is overruled with costs to the Ex Parte Applicant and the Interested Party as against the 1<sup>st</sup> Respondent. The Ex Parte Applicant is at liberty to prosecute her substantive motion for judicial review. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS DAY OF OCTOBER 2018**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 11<sup>TH</sup> DAY OF OCTOBER 2018**