



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 4 OF 2018**

**IN THE MATTER OF AN APPLICATION BY NYANGI JOHN JUMA FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI AND PROHIBITION**

**-AND-**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**-AND-**

**IN THE MATTER OF THE URBAN AREAS AND CITIES ACT (NO. 13 OF 2011)**

**-BETWEEN-**

**NYANGI JOHN JUMA .....APPLICANT**

**-VERSUS-**

**THE MIGORI COUNTY GOVERNMENT**

**THE COUNTY PUBLIC SERVICE BOARD – MIGORI..... RESPONDENTS**

**RULING**

1. The (*Exparte*) Applicant herein, **Nyangi John Juma**, first moved this Court *vide* the Chamber Summons dated 28/06/2018 for leave to apply for orders of Judicial Review. Upon grant of the leave sought the Applicant served the Respondents who immediately filed a Preliminary Objection on the jurisdiction of this Court. The Objection is dated 02/07/2018.

2. The crux of this Judicial Review application (hereinafter referred to as ‘**the application**’) is that the Respondents, the Migori County Government and the County Public Service Board – Migori, respectively, are in the process of appointing Board Members for various urban areas whose status have not been legally conferred by the law as Municipalities and Towns in total contravention of the **Constitution, the Urban Areas and Cities Act** (**‘the Cities Act**) and **The County Governments Act** (**‘the Act**’).

3. The Applicant is aggrieved by the decision-making processes and contend that the Respondents are acting *ultra-vires* the law by creating governing bodies before creating the institutions intended to be governed by such bodies. The Applicant therefore sought various reliefs to quash the processes until the law is complied with.

4. This Court directed that the Preliminary Objection be heard by way of Written Submissions. Both parties duly filed their respective submissions and referred to various judicial decisions. Counsels agreed not to render any oral highlighting.

5. I have carefully read the Written Submissions filed by all the parties. The main salvo by the Respondents is that this application offends **Section 77 of the Act** and as such this Court lacks the jurisdiction to deal with the application. That the application therefore ought to be struck out *in limine* with costs for being incompetent and an abuse of the Court process.

6. **Section 77 of the Act** provides that:

*1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the service Commission (in this part referred to as the “Commission”) against the decision.*

2. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of -

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decisions the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

3. An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

4. the Commission shall not entertain an appeal more than once in respect to the same decision.

5. Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review and the Commission may admit the application if-

(a) the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or

(b) there is an error apparent on record of either decision.

6. An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it.

7. The Respondents' position is that since the dispute at hand challenges the decision of the 2<sup>nd</sup> Respondent to recruit county officers as regulated by **the Act** and it is not challenging the creation of the subject municipalities within the County then the dispute falls squarely within the legal confines of the **Public Service Commission** (hereinafter referred to as '**the Commission**') and not before this Court hence the jurisdictional challenge.

8. The Respondents are therefore urging this Court to accordingly down its tools and strike out the application.

9. The Applicant has resisted the characterization of the dispute as one falling within the jurisdiction of the Commission under **the Act**. The Applicant argued that he is challenging the process of appointing county officers to fill in positions in non-existent bodies. To him the Respondents are putting the cart before the horse. He further argued that there is an elaborate legal procedure for creation of Municipalities and Towns under **the Cities Act** and that any recruitment to fill in those positions can logically be undertaken only after the Municipalities and Towns are first legally created.

10. Whereas the Respondents relied on the decisions in **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited and 2 Others (2012) eKLR** and **James Tinai Murete & Others -vs- County Government of Kajiado & 22 Others (2015) eKLR** in support of their position, the Applicant relied on the decisions in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**, **Republic vs Kenya Power Company Limited, Administrative Review Board And Binary Computer System KLR JR Case No 88 of 2013**, **Samuel Okuro & 7 Others v Kisumu County Public Service Board The Government Kisumu County & another [2017] eKLR**, **Municipal Council of Mombasa vs Republic and Umoja Consultants Limited (2001) eKLR**, **Githunguri vs Republic (1985) KLR**, **Republic vs Commission of Mines and Genealogy & 2 Others (2011) ELC**, **Republic vs Kenya Revenue Authority Ex-parte Yaya Tower Limited (2008) eKLR**, **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others 2014 eKLR**, **Raila Odinga & Others vs The Independent Electoral & Boundaries Commission and Others No. 5 of 2013 eKLR**, **Republic vs Commission of Mines & Geology Ex-parte Kutima Investment Limited & 2 Others 2013 eKLR**, **In the matter of Republic vs Chairperson Business Premises Rent Tribunal ex parte Ibrahim Sheikh Abdulla and 2 Others (2012) and Seven Seas Technologies Limited vs Eric Chege 2014 eKLR** in support of his case.

11. The key question is whether the Applicant is barred by **Section 77 of the Act** from approaching the Court with his grievances or at all. The application before Court is a Judicial Review application. It is settled in law that a High Court exercising its jurisdiction in Judicial Review applications must confine itself to the decision-making processes and not the merit of the decisions.

12. I have severally dealt with the legal position in judicial review applications. This is what I stated in **Meru High Court Judicial Review No. 2 of 2018 Republic vs. Agriculture and Food Authority - Tea Directorate, Exparte Njeru Industries Ltd: -**

26. Judicial review has over time been a subject of litigation and the Court of Appeal in the case of Municipal Council of Mombasa –vs- Republic & Umoja Construction Ltd in Civil Appeal No 185 Of 2001 stated its parameters as follows: -

**“Judicial Review is concerned with the decision-making process not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision makers took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions.”** (emphasis added).

27. The above position was restated in the case of Republic –vs- Kenya Revenue Authority exparte Yaya Towera Ltd (2008) eKLR with the holding that the remedy of judicial review is concerned with reviewing not the merits of the decisions of which the application of judicial review is made but the decision making process itself.

28. The Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. (1)(1) at paragraph 60 gives a caution that it must always be remembered that in every case the purpose of Judicial Review is to ensure that an individual is given a fair treatment by the authority in which he has been subjected to and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question and unless the restriction on the power of the Court is observed, the Court, will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

29. Be that as it may, the grounds on which the Court exercises its judicial review jurisdiction have also been a subject of consideration by Courts. In the Ugandan case of Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300, the Court citing with approval the cases of Council of Civil Unions vs Minister for the Civil Service (1985) AC 2 and An application by Bukoba Gymkhana Club (1963) EA 478 held as follows: -

**“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example , illegality, where a Chief Administrator Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the power to do so are vested by law in the District Service Commission....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision is usually in defiance of logic and acceptable moral standards..... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural favour towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”** (emphasis added).

30. This Court is alive to the truism that the grounds upon which it exercises its judicial review jurisdiction are incapable of exhaustive listing due to the developing jurisprudence and as so stated by the Court of Appeal in the case of David Mugo -vs- The Republic , Civil Appeal No. 265 of 1997(unreported) that as long as orders by way of judicial review remain the only legally practical remedies for the control of administrative decisions and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review orders shall continue to extend so as to meet the changing conditions and demands affecting administrative decisions.

31. The above analysis is in tandem with the holding in Re Bivac International SA (Bureau Veritas) (2005) & EA 43 where the development of judicial review was equated to the Biblical mustard seed which a man took and sow in his field and despite being the smaller of all seeds, it grew to become the bigger shrub of all and became a tree so that the birds of the air came and sheltered in its branches.

32. Judicial review therefore stems from the doctrine of ultra-vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality or impropriety of procedure (the three “I’s”) and has become the most powerful enforcement of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It is said that the grounds of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoglu vs Stephenson in the last century.

33. The above position was also captured by Nyamu, J (as he then was) in Republic vs Commissioner of Lands exparte Lake Flowers Limited Nairobi HC Misc Application No. 1235 of 1998 (unreported) when he held as follows: -

**“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..... The High Court has the same power as the High Court in England upto 1977 and much more because it has the exceptional heritage of another constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.. The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectation... Even on the important principle of establishing standing for the purposes of judicial review the courts must resist being rigid chained to the past defined situations of**

*standing and look at the nature of the matter before them..... Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”*

34. I believe I have said enough on the jurisdiction of this Court on judicial review. It is hence on the foregone that further discussions shall follow. I will now begin with a consideration as to whether the contents of the Respondent's letter dated 19/03/2018 (hereinafter referred to as '**the letter**') ought to be impugned.

13. The preamble to **the Cities Act** state as follows: -

**AN ACT of Parliament to give effect to Article 184 of the Constitution; to provide for the, classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes.**

14. **Part II of the Cities Act (Sections 4 to 10 inclusive)** provides for the classification and establishment of urban areas and cities. **Section 5** thereof provides for the criteria for classifying an area as a city whereas **Section 6** thereof provides for the management of a city. **Section 7** thereof is on the conferment of a city status and **Section 8** thereof is on how an application for conferment of a city status shall be handled. **Section 9** provides for the conferment of a municipal status and **Section 10** thereof provides for the eligibility for grant of a town status.

15. **Part III of the Cities Act (Sections 11 to 31 inclusive)** elaborately provides for the governance and management of urban areas and cities. The law provides for the creation of Boards and how they will be variously constituted with the mandate to manage the Cities, Municipalities and Towns.

16. It is on the foregone that the Applicant contend that the Respondents are filling in the positions of the various Boards even before first establishing the Boards of the said Municipalities and Towns. The Applicant argues that since he is challenging the process of filling in the Boards' positions before the respective Boards of the Municipalities and Towns are duly established and not the respective appointments which are legally made by the County Public Service Board then this Court has the jurisdiction over the application.

17. A look at the application reveals that indeed the Applicant is not *per se* challenging the recruitment undertaken by the County Public Service Board, but the processes towards undertaking such recruitment exercises. To me, and without any shred of doubt, the position taken by the Respondents that this Court lacks the requisite jurisdiction over the application cannot be holding. The Respondents' position would be right if the Applicant was challenging the recruitment exercises which are the exclusive preserve of the County Public Service Board with appeals to the Commission.

18. As the major complaint is that the Respondents are acting *ultra-vires* the law and their actions are tainted with illegality and procedural impropriety, this Court is seized of the application. However, it will be upon the Applicant to prove those allegations if the application is to see the light of the day.

19. It is on the foregone that this Court declines the invitation to strike out the application on account of lack of jurisdiction. Conversely, the Preliminary Objection dated 02/07/2018 be and is hereby dismissed. Costs in cause.

Orders accordingly.

**DATED, SIGNED and DELIVERED at MIGORI this 11<sup>th</sup> day of December 2018**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Mr. Muga and Miss Matiko**, Counsels for the Respondents.

**Mr. Mohochi**, Counsel for the Applicant.

**Evelyne Nyauke** – Court Assistant