



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW APPLICATION NUMBER 47 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF POLITICAL PARTIES.....1<sup>ST</sup> RESPONDENT**

**THE POLITICAL PARTIES TRIBUNAL..... 2<sup>ND</sup> RESPONDENT**

**ALBERT MBAKA NYAUNDI.....3<sup>RD</sup> RESPONDENT**

**FRANCIS NJOROGE KARIUKI.....4<sup>TH</sup> RESPONDENT**

**KEN MARITA.....5<sup>TH</sup> RESPONDENT**

**JUBILEE PARTY.....6<sup>TH</sup> RESPONDENT**

**VERONICA MAINA.....7<sup>TH</sup> RESPONDENT**

**EXPARTE**

**EDWARD KINGS ONYANCHA MAINA.....1<sup>ST</sup> SUBJECT**

**PHELLIS CHERUIYOT.....2<sup>ND</sup> SUBJECT**

**JERRY KENYANSA.....3<sup>RD</sup> SUBJECT**

**CHARLES NYANDUSI.....4<sup>TH</sup> SUBJECT**

**PATRICK MOSOTI AGISI.....5<sup>TH</sup> SUBJECT**

**ONESMUS KIOKO.....6<sup>TH</sup> SUBJECT**

**JULIANA CHEBET.....7<sup>TH</sup> SUBJECT**

**JOHN O'MORAGIA.....8<sup>TH</sup> SUBJECT**

**JUDGEMENT**

## Introduction

1. By a Notice of Motion dated 13<sup>th</sup> February, 2017, the *ex parte* applicants herein substantially seek the following orders:

1. That an order of certiorari be issued removing into this Court for the purposes of being quashed and quashing the Gazette Notice Number 7317 published on 9<sup>th</sup> September, 2016 in the Special Issue of the Kenya Gazette in so far as it relates to the de-registration of Forum for Restoration of Democracy of the People Party (Ford Party) (hereinafter referred to as “the Party”) and merging it with other twelve political parties into Jubilee Party.
2. That an order of certiorari be issued removing into this Court for the purposes of being quashed and quashing the ruling given by the Political Parties Tribunal in Appeal No. 6 of 2016 as well as the judgement given on the January, 2017 in the same Cause.
3. An order of mandamus compelling the Registrar of Political Parties to restore the said Party.
4. An order of mandamus compelling the Jubilee Party and the Respondents herein to surrender and return the members’ party list belonging to the Party and that the said Respondents return all the properties and documents belonging to the Party.
5. An order of prohibition prohibiting the Jubilee and the Respondent from retaining the aforesaid properties and documents and carrying out themselves as officials of the Party.

## Applicants’ Case

2. According to the *ex parte* applicants who claim to be members of the aforesaid Party, the Political Parties Tribunal (hereinafter referred to as “the Tribunal” by its ruling given on 10<sup>th</sup> April, 2016 held that **Albert Nyaundi** lacked the legal mandate and directed him to seek the legal mandate through elections and regularise his position as the Secretary General of the Party. However on 2<sup>nd</sup> and 8<sup>th</sup> September, 2016, the said person masqueraded as the National Chairman of the Party, chaired a meeting at which he supervised the passing of a resolution merging the Party into the Jubilee Party (hereinafter referred to as “Jubilee”).

3. According to the applicants the said **Albert Nyaundi** has never been elected National Chairman of the Party. Similarly, **Francis Njoroge** who convened the said meetings has never been elected the National Secretary General of the Party.

4. It was therefore averred that the deregistration of the Party by the 1<sup>st</sup> Respondent herein, the **Registrar of Political Parties** (hereinafter referred to as “the Registrar”) vide Gazette Notice No. 7317 aforesaid was not in compliance with the Constitution of Kenya, the constitution of the party and the provisions of the **Political Parties Act**, No. 11 of 2011 (hereinafter referred to as “the Act”).

5. It was the *ex parte* applicants’ case that as members of the Party they neither consented to nor were privy to the said resolutions.

6. It was averred that as a result of the foregoing the Registrar surrendered the membership lists of the Members of the said Party to Jubilee hence the applicants were arbitrarily made members of the said Jubilee Party yet they have never desired nor sought to be members of the Jubilee. The said action, it was averred violated the applicants’ freedom of association and to be involved in political dispensation hence the orders sought herein.

7. In a further affidavit, the applicants disclosed that on 10<sup>th</sup> May, 2016 the Tribunal removed the then Chairman of the Party, **Henry Obwocha** on the grounds that he was holding a State Office and the

following day, 11<sup>th</sup> May, 2016, the 3<sup>rd</sup> Respondent called an *ad hoc* meeting at which he was appointed the chairman of the Party. In the applicants' view the meeting was not properly constituted because half the members were not informed of the same and the people who attended the same were strangers. At that meeting the 3<sup>rd</sup> Respondent who was acting Secretary General was made the chairman, the 4<sup>th</sup> Respondent who was the acting treasurer was made the Secretary General while the 5<sup>th</sup> Respondent who as a National Executive Committee was appointed the Executive Director. Subsequently on 8<sup>th</sup> September 2016 the party was unlawfully dissolved during the launch of Jubilee by a not properly constituted National Delegates Council.

8. According to the applicants though they requested for documents relating to he said merger the documents they were supplied with by the Registrar were not those they had requested.

9. The applicants however disclosed that the 3<sup>rd</sup> applicant filed a suit in the Tribunal being case no. 26 of 2016. Following a ruling delivered thereat on 15<sup>th</sup> September, 2016, an appeal was lodged to the High Court being Appeal No. 579 of 2016 in which it was directed that the matter be referred back to for the Internal Resolution Mechanism of the Party and the Registrar was notified accordingly. However the Registrar did not respond but her legal adviser responded that the Party had already been dissolved hence it was not proper to form an Internal Disputes Mechanism.

10. Following this directive, the 4<sup>th</sup> applicant appealed to the Tribunal vide appeal no. 6 of 2016 challenging the decision by the Registrar to dissolve the party but the Tribunal held that it had no jurisdiction to hear the matter and referred the same back to the Internal Dispute Mechanism. An application seeking review of the said decision was however dismissed leading to these proceedings.

11. In their submissions the applicants reiterated the foregoing and contended that the affidavit in reply filed herein were incompetent for breaching section 34 of the *Advocates Act* for failure to disclose by whom the said affidavit was drawn. It was further submitted that the said affidavit did not disclose the authority under which the same were sworn. It was further submitted that the said replying affidavit was filed outside the period directed by the Court.

12. It was submitted that these proceedings were commenced on 7<sup>th</sup> February, 2017 which was within six months limitation period since the Gazette Notice that precipitated these proceedings was issued on 9<sup>th</sup> September, 2017.

### **1<sup>st</sup> Respondents' Case**

13. The 1<sup>st</sup> Respondent herein, the Registrar of Political Parties opposed the application vide the following grounds of opposition:

**1. That the application is incompetent as it has not been accompanied by a supporting affidavit as required by Order 53 rule 3(1) of the *Civil Procedure Rules*.**

**2. That no decision has been made by the 1<sup>st</sup> Respondent in the Gazette Notice No. 7317 dated 8<sup>th</sup> September, 2016 capable of being quashed.**

**3. That the application is premature for the reason that the ex parte applicants have not used the internal political party dispute resolution mechanisms as required under section 40(2) of the Political Parties Act No. 11 of 2011. Furthermore they have not taken this matter against the Respondents to the Political Parties Tribunal in the first instance as provided for under section 40(1)(f) of the *Political Parties Act*.**

**4. The filing of this judicial review application amounts to forum shopping and is an abuse of court process as it violates the doctrine of *res judicata* in section 7 of the Civil Procedure Act, Cap 21. The challenge against the Gazette Notice issued by the 1<sup>st</sup> Respondent has been**

heard and finally decided in the following fora:

i. **Political Parties Disputes Tribunal Appeal No. 6 of 2016** wherein judgement was entered against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> ex parte applicants on 9<sup>th</sup> January, 2017; and

ii. **High Court Civil Appeal No. 579 of 2016** wherein judgement was entered against the 3<sup>rd</sup> ex parte applicant on 27<sup>th</sup> October, 2016.

5. That there is pending in a Court Civil Appeal No. 24 of 2017 filed by the 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> ex parte applicants with judgement due to be delivered on 5<sup>th</sup> April, 2017.

14. On behalf of the Registrar it was submitted that this Court lacks the jurisdiction to hear and determine this matter. Based on **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** and **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, it was submitted that Article 163(7) of the Constitution of Kenya, 2010 provides that all courts other than the Supreme Court are bound by the decision of the Supreme Court and whereas the jurisdiction of this Court is set out in Article 165(3) its scope does not extend to cover the instant matter and based on the **Caltex Case, Kenya Ports Authority vs. Kunston (Kenya) Limited [2009] 2 EA 212** and **Kenya Ports Authority vs. African Line Transport Company Limited [2014] eKLR** it was submitted that where the Court’s jurisdiction has been ousted by statute, the parties cannot confer jurisdiction on the superior court. It was therefore submitted that it is in this respect that the Parliament has limited the jurisdiction of the High Court in disputes involving political parties through the Act. This position was grounded on the decision of the Court of Appeal sitting in Kisumu in **Eliud Wafula Maelo vs. Ministry of Agriculture and 3 Others [2016] eKLR** .

15. It was the Registrar’s case that the proper forum of addressing this matter in the first instance is the Tribunal established under section 39 and whose jurisdiction is provided for under section 40 of the Act. In the Registrar’s view, the present dispute falls under section 40(1)(c) of the Act whose procedure is provided for under subsection 2 thereon which procedure is mandatory. In this respect the said respondent relied on this Court decision in **Republic vs. National Police Service Commission ex parte Daniel Chacha Chacha [2016] eKLR** in which this Court with approval the case of **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587**.

16. It was contended that the ex parte applicants have not provided evidence of any attempts at resolving their dispute using internal political party dispute resolution mechanisms and that they did not refer the matter to the Tribunal as required by the Act before approaching this Court. It was averred that the applicants were required to first exhaust all the options set out in the Act before approaching the Court through section 41(2) of the same on appeal from the decision of the Tribunal. It was contended that the Court’s jurisdiction is further limited by section 9(2) of the ***Fair Administrative Action Act*, 2015** and that though section 9(4) thereof provides for exemption; no application for the same was made. The said Respondent relied on the decision of **Mumbi Ngugi, J** in **Rich Productions Limited vs. Kenya Pipeline Company & Another [2014] eKLR**.

17. It was further submitted that the instant application is barred for both cause of action *res judicata* and issue *res judicata* and therefore should be dismissed. In the Registrar’s view, the challenge against the Gazette Notice issued by it has been heard and finally decided in Political Parties Disputes Tribunal Appeal No. 6 of 2016 wherein judgement was entered against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> ex parte applicants on 9<sup>th</sup> January, 2017 and High Court Civil Appeal No. 579 of 2016 wherein judgement was entered against the 3<sup>rd</sup> ex parte applicant on 27<sup>th</sup> October, 2016.

18. It was further submitted that the application was incurably and fatally defective for failure to comply with the provisions of Order 53 rule 4(1) of the ***Civil Procedure Rules*** which require that copies of the statement accompanying the application for leave be served with the notice of the motion, and copies of any affidavits accompanying the application for leave to be supplied to the Respondents. Since these documents were not served, it was submitted that the 1<sup>st</sup> Respondent was unable to analyse the evidence

disclosed hence the application ought to be struck out.

19. It was further contended that since there was no decision made by the Registrar which was capable of being quashed, certiorari cannot issue. According to the Registrar its action in simply gazetting the merger resolution of the various political parties was simply an administrative act pursuant to section 11(6) of the Act as opposed to resolutions made by the said parties to deregister and merge the said parties.

### **6<sup>th</sup> Respondent's Case**

20. On the part of the 6<sup>th</sup> Respondent, **the Jubilee Party**, it was contended that sometimes in the year 2016, being the electioneering period, over ten (10) like-minded political parties made a crucial decision to form a major political merger herein the **“Jubilee Party”** following resolutions passed by the members of the said parties to dissolve and form a merger which is permitted under section 11 of the ***Political Parties Act* 2011**. The said political parties including the Ford People Party through their party officials signed the Merger Agreement to form the Jubilee Party which Merger agreement document was lodged with the offices of the Registrar for publication in to the Kenya gazette. The Registrar in exercising its mandatory powers donated under section 11(6) of the Act published the said merger in the Kenya Gazette Vol. CX VIII No. 109 vide Gazette Notice No. 7317.

21. According to Jubilee, the Applicants herein being aggrieved by the said Gazette Notice filed an Appeal before the Political Parties Dispute Tribunal being Civil Appeal No. 6 of 2016 which appeal was dismissed by the tribunal on 9<sup>th</sup> January, 2017 on the grounds that, the Gazette Notice published by the 1<sup>st</sup> Respondent did not constitute a decision capable of being appealed from. The Applicants herein, thereafter filed an Application for review for the Tribunal to review its orders which application was subsequently dismissed for lack of merit and did not meet the threshold for grant of review orders. The Applicants herein lodged an Appeal in the High Court against the said Judgment of 9<sup>th</sup> January, 2017 vide HCCA No. 24 of 2017 which appeal is pending Judgment on 5<sup>th</sup> April, 2017.

22. It was therefore Jubilee's case that the Application as filed was incurably defective and offended the mandatory provisions of Order 53 of the ***Civil Procedure Rules 2010*** and this was so because, the Applicants had not filed or if filed, served the Affidavit verifying the facts relied on in the statement of facts contrary to Order 53 rule 4 of the Rules. According to Jubilee, that provision is very clear that an Affidavit must accompany any application for leave. And once leave is granted, any statement and Affidavits accompanying the Application for leave must be served upon all the parties affected. It is also very significant note that it is the Verifying Affidavit which carries the evidence in support of the motion. It carries the evidential value without which, the application becomes defective. In this respect reliance was placed **Republic vs. Busia Chief Magistrate & 2 others ex Parte Mathias Murumba Makokha [2016] eKLR** in which the Court relied on **Kisumu Civil Appeal No. 45 of 2000 Between Commissioner General, Kenya Revenue Authority through Republic & Silvano Onema Owaki T/A Marenga Filling Station**. It was contend that in this case the Applicants did not serve upon the 6<sup>th</sup> Respondent a Verifying Affidavit giving evidence of the law that was allegedly faulted either by the Registrar or the Respondents herein.

23. Jubilee averred that as if that is not enough, whereas the Applicants seek to quash the proceedings and Judgment and Ruling of the Political Parties Dispute Tribunal in Civil Appeal No. 6 of 2016, they did not produce the proceedings of the Tribunal nor the Judgment or Ruling for the court to be able to discern the procedure that was followed or the irregularities or impartialities complained of. Neither have the Applicants complied with the provisions of order 53 rule 7 of the ***Civil Procedure Rules*** yet it is only through a Verifying Affidavit that such facts and evidence can be adduced in court.

24. Jubilee's case was therefore that in light of the glaring breach of the substantive procedural requirements observed above, the Applicant's application frivolous, vexatious and an abuse of the court process. The Application as it stands is fatally defective and is a good case to be struck out with costs.

25. According to Jubilee, the Applicants in their statement of facts contend that the Registrar of Political Parties publication under Gazette Notice Vol. CX No. 109 Gazette Notice No. 7317 in the special issue of the Kenya Gazette deregistered the Ford People Party and that the said Gazette Notice lacked any tinge of compliance with the Constitution of the Nation and that of the Ford People Party and the Political Parties Act 2011. To Jubilee, decisions capable of being quashed by an order of Certiorari are contemplated Under Order 53 rule 2 which include and limited to judgment, order, decree, conviction or other proceedings for purposes of being quashed. In this respect Jubilee referred to **Black's Law Dictionary** (9<sup>th</sup> Edition) (2009) on what constitutes a decision thus; a “**a decision is a judicial or agency determination after consideration of the facts and the law**” as well as **Republic vs. Commissioner for Lands & 13 others Ex-Parte Eleri Co. Ltd. & 8 Others [2013] eKLR.**

26. It was contended that from the foregoing observations the Registrar of Political Parties in issuing the said Notice did not make a decision capable of being subject of judicial review. The decision to dissolve the Ford Party and merge was made by the party members in a General Meeting that was convened at the party level. The Registrar did not preside over the meeting that informed the dissolution of the Ford People Party. The Registrar did not adjudicate, make a judgment or pass a decree capable of being quashed within the meaning of order 53 of the **Civil Procedure Rules 2010**. The provisions of section 11 (5A) & (6) of the **Political Parties Act** are couched in mandatory terms. It requires the Registrar to upon receipt of the merger document publish the same in the Kenya Gazette within a period of seven (7) days. That section does not enjoin the Registrar to inquire or investigate how the merger was formed as long as the dissolution and the merger documents are proper and in order *ex facie*, then it is an absolute presumption that all the necessary procedures were followed to the latter at the party level. The Registrar's actions were purely administrative actions based on the information it had received for the Party officials. In fact the Gazette Notice was simply meant to convey the information for consumption by members of the Public.

27. In Jubilee's view, keenly looking at the pleadings and proceedings before the Tribunal, the Applicants are indeed challenging the process on how the decision to merge was reached. For example, whether or not some party members masqueraded as party officials and passed a resolution to dissolve the Ford People Party and subsequently formed the merger. Such issues ought to have been dealt with within the ambits of the Ford People Party's Internal Dispute Resolution Mechanisms, then to the Political Parties Dispute Tribunal in the order. To Jubilee, the Applicants have not demonstrated how the decision to publish the decision to form the merger constituted a decision tainted with illegality, irrationality and procedural impropriety on the part of the Registrar of Political Parties. They have not demonstrated which law was violated, or whether the Registrar acted in excess of power, ultra vires or unfairly. To the contrary, the Registrar lawfully acted within her powers donated under the provisions of section 11 (6) of the **Political Parties Act 2011** and within the set timelines.

28. It was contended that the decision to grant or not to grant judicial review orders is at the discretion of the court. The court must therefore take into account a number of factors in arriving at its decision and reference was made to **Republic vs. County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR**. It was contended that if at all the Applicants were dissatisfied with their party members' decision to dissolve and form a merger, they ought to have raised the concern and put the Registrar on notice *ab initio*. Secondly, they ought to have first exhausted the Internal Dispute Resolution Mechanism within the Ford Party. All these lawful procedures were never followed. It is therefore all clear that the Applicant's Application is now too little too late. The Jubilee Party structures and management is now at an advanced stage. The interest of all the players from the over ten political parties that formed the merger are well taken care of including the members of the defunct Ford People Party.

29. The Court was therefore urged to dismiss the application.

### **Determination**

30. I have considered the issues raised in this case.

31. The first prayer being sought by the applicants is an order removing into this Court for the purposes of

being quashed Gazette Notice Number 7317 published on 9<sup>th</sup> September, 2016 in the Special Issue of the Kenya Gazette in so far as it relates to the de-registration of Forum For Restoration of Democracy of the People Party and merging it with other twelve political parties into Jubilee Party.

32. Section 11 of the *Political Parties Act* aforesaid provides as hereunder:

**(1) A political party may merge with another political party by—**

**(a) forming a new political party; or**

**(b) merging into an already registered political party.**

**(2) A Political party shall not merge with another political party unless the merger is in accordance with the Constitution, rules and procedures of the political parties.**

**(3) The decision to merge shall be in writing and shall be duly executed by the political party officials authorized to execute agreements on behalf of the political parties.**

**(4) The governing body of each political party that intends to merge under subsection (2) shall—**

**(a) determine the Constitution, rules, regulations and the principles which shall form the basis of the merger in accordance with the constitutions of the respective political parties; and**

**(b) sign the merger agreement.**

**(5) The merger agreement signed under subsection (4)(b) shall be deposited with the Registrar within twenty-one days of the signing of the agreement.**

**(5A) Upon receipt of the merger instrument under subsection (1)(a), the Registrar shall immediately withdraw and cancel the certificates of registration of all the political parties that have merged and shall gazette the dissolution of the merged parties within seven days and a certificate of full registration issued to the new political party.**

**(6) Upon receipt of the merger instrument under subsection**

**(1)(b), the Registrar shall gazette within seven days the dissolution of the parties that have resolved to dissolve and the registered party the parties have merged into.**

**(7) Where a party merges under this section, a member of the political party that has merged with another political party shall be deemed to be a member of the new political party.**

**(8) Despite subsection (7), a member who is a President, Deputy President, Governor or Deputy Governor, Member of Parliament or member of a County Assembly, and who does not desire to be a member of the new political party registered after the merger shall continue to serve in such elected office for the remainder of the term, and may join another political party or choose to be an independent member within thirty days of the registration of the new party.**

**(9) Where political parties have merged and are dissolved the particulars including their names, symbol, logo, slogan and colours shall be removed from the register of political parties and such names, symbols, logos, slogans and colours shall not be available for registration by any person as a political party in the subsequent election following the merger.**

**(10) Despite subsection (9), where the merging parties wish to register and use any of the merging parties' names, symbols, logos, slogans and colours, such registration shall be permitted.**

***(11) The records, assets and liabilities, rights and obligations of all the dissolved political parties shall be the records, assets and liabilities, rights and obligations of the new political party including their entitlement to the Political Parties Fund under section 25 of the Act.***

33. It is therefore clear from the foregoing once the Registrar of Political Parties receives a valid merger instrument he has no discretion in the matter and must proceed in accordance with section 11(5A) of the aforesaid Act and immediately proceed to withdraw and cancel the certificates of registration of all the political parties that have merged and gazette the dissolution of the merged parties within seven days and issue a certificate of full registration to the new political party. Where the Registrar has acted as aforesaid, this Court cannot fault him or her for doing so since orders of judicial review cannot issue against the express statutory provisions. It is however clear from the foregoing provisions that the decision to merge must be in writing and must be duly executed by the political party officials authorized to execute agreements on behalf of the political parties. Under section 34(1) of the ***Political Parties Act***, one of the functions of the Registrar of Political Parties is to register, regulate, monitor, investigate and supervise political parties to ensure compliance with the Act. Accordingly, I agree that as the regulator, monitor and supervisor of political parties, it is upon the Registrar to ensure that those who purport to have entered into the merger agreement are indeed the duly authorised officials of the party or parties in question of course without purporting to micro-manage the manner in which the said parties conduct their affairs. To that extent I agree with the decision of the Political Parties Disputes Tribunal in Appeal No. 5 of 2016 - **Party of National Unity & Another vs. The Registrar of Political Parties & 2 Others** - that the Registrar is not simply a conduit but a critical player in determining whether parties seeking to merge have complied with the law. Where therefore the law is not adhered to those aggrieved by the decision are at liberty to invoke the jurisdiction of the Tribunal to resolve their grievances.

34. Section 40 of the said Act provides as follows:

***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.***

35. In this case what is being challenged is the gazetting of the merger agreement by the Registrar of Political Parties. Jubilee Party is of the view that the gazetting is not a decision. What then amounts to a decision? A decision, it has been defined, is a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. See **Public Administration, a Journal of the Royal Institute of Public Administration, By P H Levin, at page 25**. In this case I have found that before the Registrar takes the course of gazetting the merger, he must be satisfied that certain legal provisions are adhered to. In other words, he is expected to generate a commitment on his part towards an envisaged course of action of some specificity.

36. In **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, it was held that the

requirement that administration and remission orders made by the Minister under two statutory provisions (section 7(1) of the **Customs Tariff Act** of 1976 (Act 12 of 1976) and section 28(1) of the **Sales Tax Act** 1976 (Act 13 of 1976)), being administrative acts with no legislative effect whatever, be given publicity in the Gazette, was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation. Therefore, it is my view and I so hold that unless the instrument in question expressly provides that the envisaged action is effective only upon gazette, the gazette is merely informative and serves the purpose of transmitting a decision already made. To this extent I adopt the views expressed in **Republic vs. Commissioner for Lands & 13 Others Ex-Parte Ereri Co. Ltd. & 8 Others [2013] eKLR** where **Omondi, J** opined that:

**“The major concern is whether this decision is capable of being quashed by way of certiorari. This court was urged to be guided by R v Ministry for Transport and Communication and 5 Others, Misc. Civil Application No.617 of 2003 where it was held that a gazette notice was a mere report by the Minister for consumption of the general public and therefore not capable of being quashed by an order of certiorari. The relevance of this comes in the light of provisions of Order 53 Rule 2 of the Civil Procedure Rules (2010) which is to the effect that a decision capable of being quashed would either be a judgment, order, decree, conviction or any decision emanating from a proceeding. It is argued on behalf of the interested parties that the letter by the Chief Land Registrar does not fall within the category. The question this court must consider is whether the Chief Land Registrar had a duty to act judiciously, and whether he had to consider any evidence at some stage? My view is that this was decision arrived at by considering the procedure adopted in releasing those letters, and its contents did not constitute a decision capable of being quashed by way of certiorari...”**

37. However there may be instances where there is no separate decision and in fact the Gazette is deemed as the decision. This was the situation alluded to in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, where it was held that the decision to alienate land or to allocate the same was not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the question of attacking it under Order 53 rule 7 would not arise and there is nothing capable of being exhibited thereunder. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law. In other words, where there is no specific decision, save for the gazette, nothing stops the Court from considering the gazette as the decision for the purposes of judicial review application. In this case, as there is no evidence that the Registrar made a different decision apart from the gazette, nothing bars this case from quashing the gazette.

38. The law is however clear that the first port of call in respect of disputes pitting members of a political party, the party itself or the Registrar must be handled by the internal political party dispute resolution mechanisms then by the Tribunal where they involve members inter se or members and the party and the Tribunal where they involve the Registrar. I therefore associate myself with the position adopted by the Court of Appeal sitting in Kisumu in **Eliud Wafula Maelo vs. Ministry of Agriculture and 3 Others [2016] KLR** where it was held that:

**“The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute...The subject’s right of access to the courts may be taken away or restricted by statute...Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court’s jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”**

39. I also agree with **Mumbi Ngugi, J's** position in **Rich Productions Limited vs. Kenya Pipeline Company & Another [2014]** where the Learned Judge held that:

**“The reason why the Constitution and law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 of the Constitution to supervise bodies such as the 2<sup>nd</sup> Respondent such supervision is limited in various respects, which I need not go into here. Suffice it that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issues in dispute into constitutional issues when it is not.”**

40. In this case the applicants having invoked the jurisdiction of the Tribunal can only challenge that decision before this Court and cannot be permitted to challenge the Registrar's decision in these proceedings as to do so would amount to short circuiting the procedure provided under the statute.

41. It follows that prayer 1 of the instant Motion cannot be competently granted as sought.

42. The applicants also seek an order of certiorari removing into this Court for the purposes of being quashed and quashing the ruling given by the Political Parties Tribunal in Appeal No. 6 of 2016 as well as the judgement given on 23<sup>rd</sup> and 9<sup>th</sup> January, 2017 respectively in the same Cause. In its Judgement, the Tribunal found that the appeal before it was filed out of time. Secondly it found that the Registrar's action was not a decision.

43. The applicants were aggrieved by the said decision and applied for review and it was the application for review that gave rise to the ruling alluded to hereinabove. That application for review was found unmerited. Whereas this Court has some reservations with respect to the Tribunal's findings on whether the Registrar's decision constituted a decision, in light of its own decision in Appeal No. 5 of 2016 - **Party of National Unity & Another vs. The Registrar of Political Parties & 2 Others**, having applied for review of the Tribunal's judgement, the only option available to the applicants was to appeal against the Tribunal's decision since that subsequent decision was made on merits. For this Court to revisit the Tribunal's judgement, I agree would amount to sitting on appeal against the decision of the Tribunal.

44. Consequently, this application is devoid of merits, fails and is hereby dismissed but with no order as to costs as the disputes substantially pits members of a political party as against fellow members and the party itself.

45. It is so ordered.

**Dated at Nairobi this 11<sup>th</sup> day of May, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Onyancha the 1<sup>st</sup> applicant**

**Mr Mungai for Mr Imende for the 1<sup>st</sup> Respondent**

**Mr Ayieko for Jubilee Party**

**CA Mwangi**