



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 305 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLES1, 2, 10, 99, 165 AND 169 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 40 AND 41 OF THE POLITICAL PARTIES ACT**

**AND**

**IN THE MATTER OF SECTIONS 8(2) OF THE MAGISTRATES COURT ACT**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHAIRMAN, POLITICAL PARTIES DISPUTES TRIBUNAL.....1ST RESPONDENT**

**HON MARGARET WANJIRU KIIRU.....2ND RESPONDENT**

**AND**

**JUBILEE PARTY.....1ST INTERESTED PARTY**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND INTERESTED PARTY**

**EX PARTE: SUSAN KIHIKA WAKARURA**

# JUDGEMENT

## Introduction

1. By a Petition dated 2nd June, 2017, the 2nd Respondent herein, **Hon Magaret Wanjiru Kiiru,** moved the Political Parties Disputes Tribunal (hereinafter referred to as "the Tribunal" or "the PPDT") vide Petition No. 315 of 2017 alleging that though the ex parte applicant was still holding a public/state office, she had been nominated by the 1st interested party herein, Jubilee Party (hereinafter referred to as "the Party") as its candidate for the position of the Senator for Nakuru County.

2. It was therefore contended that the ex parte applicant is not qualified to be elected as Senator for Nakuru County pursuant to Article 99(2)(a) and (d) of the Constitution of Kenya. It was therefore alleged that it would be a waste of public funds for the Party to present the name of the ex parte applicant for elections when the applicant is not disqualified to be elected as a Member of Parliament (Senator). The 2nd Respondent therefore urged the Tribunal to declare the ex parte applicant as not qualified to be so elected as such.

3. It was pleaded that section 40(1) of the ***Political Parties Act*** gives the Tribunal the jurisdiction to hear and determine disputes between a political party and an independent candidate. The 2nd Respondent herein therefore sought the following orders:

> **a). A declaration that the candidature of Ms. Susan Wakurura Kihika for the position of Member of Parliament (Senator) is unconstitutional.**
>
> **b). A order in the form of an injunction restraining the Independent Electoral and Boundaries Commission from processing the candidature of the Interested party for the position of Senator, Nakuru County for the 8th August, 2017.**

4. On 12th June, 2017, the ex parte applicant herein moved this Court for an order seeking leave to commence these proceedings, in which she sought the following orders:

> **1) THAT the Honourable Court be pleased and do hereby grant Judicial Review Order of Certiorari to remove into this Honourable Court and quash the decision of the Political Parties Disputes Tribunal to illegally assume jurisdiction to determine questions of constitutional interpretations other than Article 25 (a) & (d) of the Constitution.**
>
> **2) THAT the Honourable Court be pleased and do hereby grant Judicial Review Order of Certiorari to remove into this Honourable Court and quash the decision of the Political Parties Disputes Tribunal to assume jurisdiction to determine a dispute between an independent candidate and a member of a Political Party in violation of Section 40 of the Political Parties Act.**
>
> **3) THAT the Honourable Court be pleased and do hereby grant Judicial Review Order of Certiorari to remove into this Honourable Court and quash the entire proceedings before the PPDT in respect to *Petition No 313 of 2017 Hon Margaret Wanjiku Kiiru V Jubilee Party & Another*.**
>
> **4) THAT the Honourable Court be pleased and do hereby grant Judicial Review Order of Prohibition to remove into this Honourable Court and prohibit the PPDT from further hearing and determining the petition dated 2nd day of June 2017 *Petition No 313 of 2017 Hon Margaret Wanjiku Kiiru V Jubilee Party & Another*.**
>
> **5) THAT such further and other reliefs that this Honourable Court may deem just and expedient to grant.**

5. This Court accordingly granted the leave sought and directed that the said leave would operate as a stay of the proceedings before the Tribunal. That notwithstanding the Tribunal proceeded to determine the said Petition and by its decision of 12th June, 2017 allowed the petition and granted the said declaration, in effect shutting the ex parte applicant from the Senatorial race for Nakuru County on Jubilee ticket.

6. In his submissions, **Prof. Ojienda**, who appeared for the ex parte applicant submitted that despite the order staying the proceedings before the Tribunal and the Notice of Motion having been served at 12.30 pm and 2.00pm respectively, the Tribunal proceeded to deliver its said decision at 5.00pm notwithstanding the fact that the existence of the order was brought to the attention of the Chairperson of the Tribunal.

7. It was submitted that since under section 40(2) of the ***Political Parties Act***, the decisions of the Tribunal are enforceable as decisions of the Magistrate's Court, the Tribunal enjoys the powers of the lower Court. It was submitted that the substance of the petition before the Tribunal was seeking an interpretation of Article 99(2)(a) and (d) of the Constitution since in effect the petition was seeking orders that the nomination of the ex parte applicant was unconstitutional. It was submitted that this is a question of the interpretation of the law as to whether the Speaker is required to resign before seeking an office outside the County Assembly.

8. It was contended that though the 2nd Respondent was seeking an interpretation affecting a person seeking election, the decision had the effect of applying to all officers holding one office but seeking an elective office hence this was a substantive question of power play.

9. Reference was made to section 8(1) of the ***Magistrate's Courts Act*** which provides that the interpretative power conferred under Article 25(a) and (b) of the Constitution is subject to the High Court's power to interpret the Constitution. Accordingly, the attempted power exercised by the Tribunal to entertain a petition seeking prayers in the interpretative nature was a clear violation of the Tribunal's powers under section 40 of the ***Political Parties Act***. It was contended that by attempting to determine matters falling within the province of the High Court, the Tribunal acted illegally and unconstitutionally hence its decision should be quashed.

10. It was further submitted that the Tribunal lacked the jurisdiction to inquire into a matter involving an independent candidate where the question does no concern the candidate and the political party. In this case it was contended that the Tribunal entertained the matter when there was no dispute between the candidate and the political party. It was submitted that in this case the 2nd Respondent was an independent candidate hence was the ex parte applicant's competitor and since the dispute is between the two, the Tribunal had no jurisdiction in the matter.

11. It was submitted that by proceeding to deliver its decision after being served with the order for stay, the Tribunal violated a Court order and amounted to procedural impropriety and smacked of bad faith as the same amounted to a disobedience of a Court order.

12. The application was supported by **Mr Macharia**, learned counsel for the 1st interested party, the **Jubilee Party** (hereinafter referred to as "the Party"). In his view the petition emanated from a premature attempt to stifle democratic expression. It was submitted that the matter before the Tribunal was predicated upon Article 99(2) of the Constitution which deals with qualifications for being elected. However what ought to have been before the Tribunal was a nomination dispute. It was submitted that the matters that fall for determination thereunder are particularised in section 31 of the Elections Act. According to learned counsel, since Article 99 is not one of the provisions mentioned under the said section, matters falling under Article 99 cannot be termed as nomination disputes as that provision deals with elections. Such objections, it was submitted can only fall under section 43(5) of the ***Elections Act*** which deal with the point of resignation. Learned counsel submitted that there is no absolute bar as to when the public officers should resign.

13. It was submitted that the conclusion of a nomination process necessarily includes the completion of the dispute resolution mechanisms and unless the same is completed you cannot seek to shut out someone

on the basis of Article 99.

14. The decision of the Tribunal was further faulted on the ground that it was delivered in contravention of a Court order.

15. Similarly, the application was supported by **Mr Karanja**, learned counsel for the 2nd interested party, the **Independent Electoral and Boundaries Commission** (hereinafter referred to as "the Commission'). According to him, the Tribunal has no jurisdiction at all to entertain the matter before it. It was argued that in order to determine the issue of jurisdiction, the Court must look at the dispute and merely because the dispute is between a party and a political party cannot be determined without looking at the documents.

16. In this case it was submitted that the petition involved various constitutional provisions which makes the petition sustainable by the Tribunal. It was submitted that in order to respond to Article 99, one would have to also consider inter alia Article 101 hence the reason for concluding that there are serious issues to be dealt with. It was however contended that Article 88(4)(e) is clear on disputes relating to nominations. However the dispute before the Tribunal was a dispute rating to two nominees since there was no prayer against the Jubilee Party. Accordingly, there was no dispute between a person and a political party. In any case the fact that IEBC was not a party before the Tribunal, the Tribunal ought not to have entertained the matter.

17. It was submitted that if the Petitioner felt that the nomination was unconstitutional, he ought to have approached the High Court with respect to the interpretation of the Constitution since the matter was a serious constitutional issue and could not be sneaked before the Tribunal.

18. The Court was therefore urged to allow the application.

19. The 1st Respondent herein, the **Political Parties Disputes Tribunal** (hereinafter referred to as "the Tribunal") was not represented in these proceedings for reasons not known to the Court despite being made aware of the same. The application was however opposed by the 2nd Respondent.

20. According to its learned counsel **Mr Sore**, there are three main issues for determination in this matter.

21. Firstly, when are subordinate courts allowed to enforce the Constitution? It was submitted that the Constitution contemplates that the Tribunal and the Subordinate Courts interpreting the Constitution and reference was made to Article 20(4) of the Constitution as well as the case of **Charles Otieno Opiyo & 3 Others vs. Orange Democratic Movement Party & Another [2017] eKLR**.

22. It was submitted that section 40 of the Political Parties Act creates a jurisdiction to resolve disputes between a candidate and a political party hence the Tribunal has the jurisdiction to apply the Constitution. It was further submitted that pursuant to section 40(1)(d) of the ***Political Parties Act***, the Tribunal can hear a dispute between a political party and an independent candidate. Therefore the question is whether there is a dispute between and independent candidate and the political party in this case. It was submitted that the Tribunal ought to have been given an opportunity to determine the issue and thereafter a party aggrieved would be at liberty to appeal pursuant to section 41 of the same Act. According to the Respondent since the Party herein holds a different view on the matter, there was a dispute and reference was made to ***Black's Law Dictionary***.

23. It was submitted that the submissions made by **Mr Macharia** went to the merits of the case yet the matter before the Court is an issue of jurisdiction.

24. According to learned counsel, since the close of nomination is defined in section 2 of the ***Elections (General) Regulations*** as 4.00pm on the day of the nomination it cannot be correct to contend that nomination encompasses the period when the dispute resolution mechanisms were ongoing.

25. While conceding that the Tribunal had no power to direct the Commission not to accept nominations,

it was the Respondent's case that the prayer for declaration could be issued. It was however submitted that a complaint to the Commission is not the only way in which the Commission can exercise its discretion since the Commission is bound by the law to enforce the Constitution.

26. In a rejoinder **Prof. Ojienda** submitted that Article 165(3)(d) of the Constitution is specific on jurisdiction of the High Court and that any interpretation of section 40(1)(e) of the ***Political Parties Act*** is subject to Article 165 of the Constitution within which any dispute resolution mechanism must fall.

27. It was submitted that it is clear from the petition that there was no prayer sought against Jubilee Part as the dispute was solely between an independent candidate and the ex parte applicant herein hence did not fall within the jurisdiction of the Tribunal.

28. Learned counsel urged the Court to allow the application with costs against the members of the Tribunal for disobeying the Court order.

**Determination**

29. I have considered the material placed before this Court relevant to this ruling.

30. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** **Nyarangi, JA** expressed himself as follows:

> **"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

31. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or**

**tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

32. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

**"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

33. According to Article 169(2) of the Constitution, Parliament is empowered to enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1) which clause establishes subordinate courts. Under section 169(1)(d) subordinate courts are Magistrate's Courts, Kadhi's Courts, Courts Martial and any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2) of the Constitution. The Political Parties Tribunal is established pursuant to section 39 of the ***Political Parties Act***. Pursuant to Article 169(2) the jurisdiction, functions and powers of the subordinate court are conferred by the respective Acts of Parliament establishing the particular subordinate Court. In other words subordinate courts being creatures of the statute must only exercise the powers conferred upon them by the statute creating them pursuant to the Constitution.

34. Article 23(1) and (2) of the Constitution of Kenya, 2010 which provides for jurisdiction in matters dealing with applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights for example provides as hereunder:

***(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***

***(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."***

35. It is therefore clear that subordinate Court can only be empowered by Parliament in appropriate cases to deal with applications seeking redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. From the said Article, it is Parliament that determines the parameters of the said appropriate cases since it was left to Parliament to enact the legislation conferring jurisdiction on the subordinate courts. It is however clear that the people of Kenya in their wisdom did not expressly empower Parliament to enact legislation empowering subordinate Courts to deal with questions respecting the interpretation of the Constitution. It must be presumed that the people of Kenya had a good reason for this.

36. It is however contended that under section 20(4) of the Constitution subordinate court are empowered to apply the Constitution. The provision provides as follows:

***In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—***

***(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and***

***(b) the spirit, purport and objects of the Bill of Rights.***

37. In my view this provision only applies where the Bill of Rights is being applied in a matter in which the Tribunal is seized of jurisdiction. In my view the subordinate courts are entitled to apply the Constitution in maters which they ordinarily have jurisdiction. To set out to place before a subordinate court what in effect is a constitutional petition when the Act of Parliament creating the Tribunal does not clothe it with such jurisdiction is to embark on a futile mission.

38. It is therefore trite that a judicial or quasi-judicial tribunal, such as the Tribunal herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

39. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461**.

40. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

41. Therefore where the law exhaustively provides for the jurisdiction of an executive body, authority or tribunal as is the case herein, the body, authority of tribunal must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it as long as such powers are permitted by and under the Constitution, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law.

42. The 1st Respondent has not referred this Court to any particular provision that empowers it to interpret the Constitution. There is a world of difference between applying and interpreting the Constitution. In this

case, Article 99(2) of the Constitution requires an interpretation of the Constitution as opposed to applying the same. The said provision provides that:

> ***A person is disqualified from being elected a member of Parliament if the person—***
>
> > ***(a) is a State officer or other public officer, other than a member of Parliament;***
> >
> > ***(b ) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission;***
> >
> > ***(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;***
> >
> > ***(d) is a member of a county assembly;***
> >
> > ***(e) is of unsound mind;***
> >
> > ***(f) is an undischarged bankrupt;***
> >
> > ***(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or***
> >
> > ***(h) is found, in accordance with any law, to have misused or abused a State office or public office or in any way to have contravened Chapter Six.***

43. In my view the said provisions necessarily call for an interpretation of the term "disqualified from being elected". At what point for example is one deemed to be disqualified? Take the example of a person who it is alleged ***has not been a citizen of Kenya for at least the ten years immediately preceding the date of election***. Should the declaration of ineligibility come before or after the election date? In the instant case similarly, should the determination of ineligibility based on membership of a county assembly come before or after the election date? These in my view are weighty issues that cannot be determined through the auspices of an Act of Parliament whose preamble states that it is meant "***to provide for the registration, regulation and funding of political parties, and for connected purposes***".

44. This is therefore not an issue which the Tribunal can under the guise of exercising its powers under that Act purport to preside over. Section 40 of the ***Political Parties 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) dispute 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.***

45. Clearly the petition before the Tribunal did not fall within the ambit of section 40(1)(a), (b) (c), (e), (f) or (fa). The only contention is that the dispute fell within section 40(1)(d) which deals with disputes between an independent candidate and a political party. In my view what is contemplated under the said

provision is that the particular dispute must be one limited or restricted between the particular candidate and the particular political party. Where the resolution of the dispute has the potential of affecting persons who are not parties to the dispute, the Tribunal cannot under the guise of resolving the dispute make a determination whose effect transcends the political stratosphere of the country. That is a matter which can only be dealt with by the High Court with the jurisdiction to interpret the Constitution.

46. In this case the only prayer that the Tribunal appreciated it had jurisdiction to deal with was the prayer seeking a declaration that the ex parte applicant's candidature for the position of Member of Parliament (Senator) was unconstitutional. In my view the intention was to bar the ex parte applicant from being nominated to vie for the said post. To my mind it is the substance of the case that determines whether the matter falls within the jurisdiction of a particular Tribunal. In this case the substance of the petition was clearly directed at the ex parte applicant. In other words this was substantially a dispute between the ex parte applicant and the 2nd Respondent. It was in effect a dispute between an independent candidate and a nominee of a political party. That is not one of the disputes that a Tribunal can purport to entertain pursuant to its powers under section 40 of the ***Political Parties Act.***

47. Apart from the foregoing, it is clear that before the Tribunal delivered its decision this Court had halted its proceedings. In **Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013** this Court held that:

> **"In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void."**

48. In this case however it was contended which contention was not seriously disputed that the existence of the order was brought to the attention of the members of the Tribunal who decided to disregard the same. The judicial hierarchy of Courts and Tribunals is very clear in this Country and it is important that Tribunals appreciate their rung in the judicial ladder. Subordinate Courts, of which Tribunal such as the Political Parties Tribunal are part, are subject to the supervisory jurisdiction of the High Court. Once a High Court has given an order directed at a Tribunal, the Tribunal must defer to it whether it is happy with it or not. To paraphrase **Lenaola, J**, in **Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588** the allegations made against the Political Parties Disputes Tribunal is a cause of anxiety as it depicts a scenario where the Tribunal deems itself to be in competition with the High Courts as to who has more "muscle" in certain matters where its decisions have been questioned and are under scrutiny in the High Court. This Court is neither guided by expediency, popularity gimmicks, chest-thumping nor competitive streaks but is guided by and beholden to law and to law only. Where subordinate Courts therefore by their actions step outside the boundaries of the Constitution and the law, this Court has the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws. The High Court orders must be obeyed by the subordinate Courts whether they agree with them or not; whether pleasant or unpleasant. To blatantly ignore High Court orders and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which the High Court is established.

49. I similarly agree with the decision in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013** that:

> **"A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion on a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option."**

50. In my view a judicial or quasi-judicial authority should be in the forefront in upholding the rule of law which is one of the values and principles of governance under Article 10 and which binds state organs such as the Tribunal herein and state officers such as the chairperson of the Tribunal and its members. The need to defer to the decisions of Courts of higher tiers was emphasised by a five judge bench of the Court of Appeal in **Mwai Kibaki vs. Daniel Toroitich Arap Moi Civil Appeal Nos. 172 & 173 of 1999 [2008] 2 KLR (EP) 351; [2000] 1 EA 115** where the Court followed the decision in **Cassell & Co. Ltd vs. Broome & Another [1972] AC 1072** where it was held that:

> **"…the fact is and I hope it will never be necessary to say so again, that in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of higher tiers…and that it does not entitle it to question considered decisions in the upper tiers with the same freedom."**

51. A similar view was expressed by the Court of Appeal in **National Bank of Kenya Ltd vs. Wilson Ndolo Ayah Civil Appeal No. 119 of 2002 [2009] KLR 762** where it was held that:

> **"It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter."**

52. Similarly, a Tribunal may find a decision of this Court disagreeable but it has no option but to follow the decision. That is the way judicial systems operate the world over. As was stated by **Omolo, JA** in **Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 Others Civil Appeal No. 238 of 2003**:

> **"The learned judge of the High Court had no jurisdiction to over-rule a decision of the Court of Appeal even if she disagrees with the decision and the comments in her judgement must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. Like all other judges in her position, under the doctrine of precedent, she is bound by the decision of the Court of Appeal even if she may not approve of a particular decision and any attempts to over-rule or side-step the court's decisions can only result in unnecessary costs to the parties involved in the litigation."**

53. Having considered the issues raised in this application, I have no doubt in my mind that the 1st Respondent had no jurisdiction to embark on the hearing of petition 315 of 2017. Apart from that as its proceedings had been stopped by this Court its decision rendered thereafter was unlawful and was tainted with illegality. Accordingly the decision made on 12th June, 2017 must be null and void since as was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169** at **1172** where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.

**Order**

54. I the premises I grant the following orders:

> **1) An Order of Certiorari removing into this Court for the purposes of being quashed the proceedings and decision of the Political Parties Disputes Tribunal in Petition No. 315 of 2017 - Hon Margaret Wanjiku Kiiru vs. Jubilee Party & Another- which decision is hereby quashed.**
>
> **2) As the proceedings and the decision have been quashed there nothing remaining to be prohibited.**

55. The applicant sought orders for costs against the members of the Tribunal. However pursuant to Article 160(5) of the Constitution, since the Tribunal was exercising judicial authority, its members cannot be held liable an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. I do not have material on the basis of which I can find that the members of the Tribunal did not perform their functions in good faith.

56. Consequently the 2nd Respondent, who was the prime mover of the proceedings before the Tribunal will bear the applicant's costs of these proceedings.

57. Orders accordingly.

**Dated at Nairobi this 15th day of June, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Mutua for Prof Ojienda for the applicant***

***Mr Juma for Mr Sore for the 2nd Respondent***

***Mr Karanja for the interested party***

***CA Mwangi***