REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 301 OF 2017

IN THE MATTER OF AN APPLICATION BY HON. WAVINYA NDETI FOR ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF AND/OR VIOLATION OF ARTICLES 10, 25, 38, 47, 50, 81 OF THE CONSTITUTION, 2010

IN THE MATTER OF THE ELECTIONS ACT

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTERS 26, LAWS OF KENYA

AND

IN THE MATTER OF ORDERS 53 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

REPUBLIC…….…….APPLICANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……...……RESPONDENT

WIPER DEMOCRATIC

MOVEMENT (KENYA)……..……..……1ST INTERESTED PARTY

REGISTRAR OF POLITICAL

PARTIES……..……..2ND INTERESTED PARTY

KYALO PETER KYULI……..……..3RD INTERESTED PARTY

EXPARTE

HON. WAVINYA NDETI

RULING

1. On 8th June 2017, the Respondent herein issued an order whose effect was to bar the applicant herein from participating in the coming general election.

2. The applicant has now moved this Court seeking to have the said decision quashed. According to the applicant, the said decision is illegal in the sense that the Commission contrary to the doctrine of res judicata presided over a matter which had been determined by another Tribunal. Secondly, it is contended that the decision was tainted with irrationality in the sense that the applicant was not afforded a fair hearing as she was denied opportunity of being represented by counsel of own choice. It is also contended that the decision has an adverse effect against third parties who were never afforded an opportunity of being heard. The applicant also contends that the Commission failed to consider relevant material such as the decisions made by the Wiper Movement Political Party, the Chama Cha Uzalendo Party and the Registrar of Political Parties whose evidence were key to unlocking the dispute.

3. The requirement for leave was explained by a three judge bench comprising **Bosire, Mbogholi-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another ex Parte Nzioka [2006] 1 EA 321, Nyamu, J** (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development ex Parte Kaimenyi [2006] 1 EA 353.**

4. Waki, J (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".**

5. This position was confirmed by the Court of Appeal in **Meixner & Another vs. Attorney General**

[2005] 2 KLR 189 in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

6. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

> **"The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power…the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter… It is not the absoluteness of the discretion nor the authority of exercising it that matter but whether in its exercise, some of the person's legal rights or interests have been affected. This makes the exercise of such discretion justiciable and therefore subject to judicial review. In the instant appeal, it is of no consequence that the Attorney General has absolute discretion under section 11(1) of the Act if in its exercise the appellant's legal rights or interests were affected. The applicant's complaint in the High Court was that this was so and for that reason he sought leave of the court to have it investigated. It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"**

7. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)**, the Court stated:

> **"There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved…. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of *John vs. Rees [1970] Ch 345 at 402.* In the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration."**

8. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile.

9. In this case there was no objection to the grant of leave. On my part having considered the application I am of the view that the issues to be raised in the substantive Motion are substantive and cannot be termed as frivolous. They in fact raise prima facie issues for the purposes of leave since irrationality, illegality, failure to consider relevant materials, failure to exercise discretion reasonably and breach of legitimate expectations are some of the grounds for the grant of judicial review.

10 In the premises I find that the applicant has established a prima facie case warranting the grant of leave sought which I hereby grant and direct that the Motion be filed and served by mid day on 12th June, 2017.

11. With respect to stay, it is my view that being a discretionary remedy, the courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

12. In **IL Nwesi Company Limited & 2 Others vs. Wendy Martin Civil Application No. Nai. 291 of 2010 [2011] eKLR** the Court of Appeal held that:

> **"Finally, the court has considered the provisions of sections 3A and 3B of the Appellate Jurisdiction Act which the applicants have also invoked. These are fairly recent amendments in the law requiring that the court, in exercise of its powers or in the interpretation of the provisions of the Act, shall facilitate the just, expeditious, proportionate and affordable resolution of the matters before it. Such is the overriding objective of the Act. There has, however, been considerable learning on the application of those provisions. The jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court's view, dealing with a case justly includes *inter alia,* reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in the court's view, calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases. That, however, is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles."**

13. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

14. Maraga, J (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

> **"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited…The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process**

being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken."

15. In making a determination whether or not to grant the stay, the Court must place the respective cases of the parties before it in a legal scale. It must balance the competing interests in order to arrive at a just decision. Where the Court has found that there are issues in the suit which deserve further investigations, the Court is enjoined to preserve the substratum of the suit so that at the conclusion of the case, its decision will not be merely an academic exercise. The Court therefore has a duty to ensure that its proceedings are geared towards the achievement of a meaningful determination otherwise litigants who come to Court to seek redress therefrom will lose faith in the judicial system if the Courts cannot, during the pendency of the dispute preserve the subject of litigation. In my view the Court must have the power to guard against actions by some of the parties to the suit which are geared towards the dissipation of the subject matter before it before a determination is made one way or the other with respect to the rivalling issues placed before it. In other words, the Court must be in a position to ensure that whatever decision it finally arrives at, the proceedings before it are not seen to have been a circus.

16. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** this involves:

"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court…a situation of complete hopelessness or render nugatory any order of the…Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right…or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds…there would be no return to the status quo."

17. Therefore this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

"It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore…parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."

18. It is therefore my view that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."

19. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

20. Apart from that as the Supreme Court appreciated in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.

21. It was contended to grant the orders sought herein would amount to granting the final orders at this stage. **Dyson, LJ** in **R (H) vs. Ashworth Hospital Authority [2003] WLR 127** at 138 where the held that:

> **"The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell, LJ said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review…Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect."** [Underlining mine].

22. What I understand the Court to be saying is that stay may include stay of the decision itself where the circumstances permit. However, whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. It is in this light that this Court understands the decision of **Gladwell LJ** in **Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

> **"An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay."**

23. The matter before me is not a private dispute between two parties. Rather, it is a matter that revolves around governance. It is a matter in which the residents of Machakos County have a stake. Therefore it is my view that such a matter cannot be decided merely by considering the interests of the protagonists before the Court. Rather, the Court should be guided by the pronouncement of the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others [2014] eKLR** where the highest Court in the land held:

> **"'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the *inherent merit* of the case, bearing in mind *the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes*."**

24. According to **Francis Bennion** in ***Statutory Interpretation***, 3rd Edition at page 606:

> **"it is the basic principle of legal policy that law should serve the public interest. The court… should therefore strive to avoid adopting a construction which is in any way adverse to the public interest".**

25. In **Re McBride's Application [1999] NI 299** the Court expressed itself as follows:

> **"…it appears to me that an issue is one of public law where it involves a matter of public**

interest in the sense that it has an impact on the public generally and not merely on an individual or group…..it seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity."

26. I therefore associate myself with the decision in **Konway vs. Limmer [1968] 1 All ER 874** that there is the public interest that harm shall not be to the nation or public and that there are many cases where the nature of the injury which would or might be done to the Nation or the public service is of so grave a character that no other interest public or private, can be allowed to prevail over it.

27. That the Court may grant stay was appreciated by the Supreme Court in **Zacharia Okoth Obado vs. Edward Akong'o Oyugi & 2 Others [2014] eKLR** where it held that:

"Article 3(1) of the Constitution imposes an obligation on every one, without exception, to respect, uphold and defend the Constitution. This obligation is further emphasized with regard to the exercise of judicial authority, by Article 159(2) (e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of the Constitution being protected and promoted. However, all statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker."

28. In this case the applicant contends that unless I direct that leave do operate as a stay she will not be able to proceed with her campaigns and therefore even if the application is allowed she would not be able to recover the time and ground lost. The 3rd interested party on the other hand is of the view that whereas the applicant may be free to campaign the stay ought not to be granted in such a manner as would amount to compelling the Respondent to gazette the applicant's name.

29. With due respect this is a distinction without a difference. Once the stay is granted its effect is to suspend the decision in question with the effect that the applicant will be in the position she was in before the decision was made. In my view to decline to grant the stay in the circumstances of this case would have the effect of making it impossible for the applicant to recover the ground that shall have been lost during the pendency of these proceedings while her opponents will be at liberty to continue with their campaigns that putting her at a disadvantage contrary to the overriding objective that requires that equality of arms be maintained in the exercise of discretion.

30. On the other hand even if the applicant's name is included in the gazette notice and eventually the application fails, nothing stops the Commission from omitting her name from the ballot papers with the result that no one shall have been unduly prejudiced.

31. Therefore balancing the interests of the parties before me and taking into account the public interest, it is my view that the leave granted herein ought to operate as a stay. Accordingly there will be a stay of implementation of the decision of the Commission pending hearing and determination of the intended motion. For avoidance of doubt and in the interim the Commission is directed that when publishing the names of the candidates it ought to include the name of the applicant therein.

32. Costs will be in the cause.

33. It is so ordered.

Dated at Nairobi this 9th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Otieno Willis with Mr Munyithya for the ex parte applicant

Mr Sore for the 1st interested party

Mr Bosire for the 2nd interested party

Mr Omwanza for the 3rd interested party

CA Mwangi