



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**JUDICIAL REVIEW NO. 1 OF 2015**

**NAOMI BOSIBORI..... APPLICANT**

**-VERSUS-**

**POLITICAL PARTIES DISPUTE TRIBUNAL & THREE (3) OTHERS....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

The exparte applicant herein Naomi Bosibori was duly sworn in on 6<sup>th</sup> September, 2013 and nominated member of Nyamira County Assembly- thereafter, a complaint was brought by one **Doris Nyabiange Simba** and another purporting to declare that one **Naomi Bosibori Amenity** as the duly nominated and gazetted member of the Nyamira County Assembly.

The 1<sup>st</sup> respondent herein the Political Parties tribunal, after hearing the said complaint by the 2<sup>nd</sup> respondent delivered its judgment on 1<sup>st</sup> October, 2015 directing that 2<sup>nd</sup> respondent be sworn in within the next 30 days in the place of the exparte applicant. It is therefore the exparte applicants case that the hearing at the 1<sup>st</sup> respondent took place without her knowledge, she was never served with the said hearing notice contrary to the *audi alteram partem rule*.

The exparte applicant aggrieved by the above decision of the 1<sup>st</sup> respondent applied for leave to this court to institute judicial review proceedings against the **1, 2, 3 & 4 respondents**. On 22<sup>nd</sup> October, 2015 leave was accordingly given to the exparte applicant to apply for a judicial review order of certiorari bringing into this court for purposes of quashing the 1<sup>st</sup> respondent's decision issued on 1<sup>st</sup> October, 2014 in Nairobi purporting to declare the 2<sup>nd</sup> respondent as duly nominated and gazette member of the 4<sup>th</sup> respondent to represent the 4<sup>th</sup> respondent in Nyamira County Assembly.

Subsequently, the exparte applicant filed her substantive application on 11<sup>th</sup> November, 2015.

**THE PLEADINGS**

However, before her substantive application was heard, the 2<sup>nd</sup> respondent filed a notice of Motion dated 4<sup>th</sup> February, 2016 **under Order 45 Rule 1 & 2, order Rule 1 of the Civil procedure Rules 2010, Section 1A, 1B, 3 3A 63 (e) & 80 of the Civil Procedure Act** under certificate of urgency seeking:-

**1. Spent**

**2. That this Honourable Court be pleased to lift, vacate, discharge, review vary and/or set**

aside the exparte orders of this Honourable court given and issued in 22<sup>nd</sup> October 2015.

### 3. That cost of this application be provided for.

The above application was supported by a lengthy affidavit by the 2<sup>nd</sup> respondent deponing that the exparte applicant substantive applicant (**Notice of Motion**) was not paid for as reasonably expected and directed hence the beneficiary of the orders of this court has also disobeyed and violated the said rights so as to render the same untenable.

She further deponed that at the time of filing this application the exparte applicant had still not complied with directions of the court by paying for the substantive application hence subsistence of the exparte applicant substantive motion be crushed on account of lack of legal competence hence this court should expunge the same and render the initial orders inapplicable null and void abinitio.

She further deponed that the exparte applicant was duly served with the requisite complaint/suit papers in response to which the exparte applicant appointed an advocate by the name **Stephen Mogaka** to appear and represent her in the proceedings. Thus she contends that hearing with the 1<sup>st</sup> respondent's failure to utilize the right to be heard which was patently openly and clearly extended to her.

She further deponed and termed the exparte applicants application and orders issued exparte be set aside, reviewed varied as the same are frivolous, vexatious and an abuse of the court process. That furthermore she contended that the exparte applicant is currently a suspect in a criminal case at **Kisii Law Courts before CMCC.3806 of 2014** and that she has come to this court in blatant abuse of the process of the court and for furtherance of an illegality.

The exparte applicant on her part in response to the above application swore a replying affidavit dated 17<sup>th</sup> February, 2016. In the said replying affidavit, she deponed that delivery of the 1<sup>st</sup> respondents decision rendered on 1<sup>st</sup> October 2015, she felt aggrieved and dissatisfied and consequently, she engaged her advocate previously on record to commence/lodge the instant judicial review proceedings thereafter she paid funds necessary to facilitate filing of pleadings to her previous advocate.

She further deponed that the issue of nonpayment of court fees on the substantive application was only brought to her attention by her current advocates on record when they wanted to have the motion listed for hearing on 26<sup>th</sup> January 2016 after her new advocate had filed a Notice of Appointment of Advocate. She further contends that owing to the information concerning the non-payments of the court fees, she made arrangements, and paid to her advocates on record KShs.7,000 on 26<sup>th</sup> January 2016 as evidenced by a copy of the acknowledgement issue to that effect and marked as "**NB 1**". However that subsequently, her advocate on record on proceeding to the registry for purposes of paying court fees, the honourable court declined to accept the said sum and advised that the relevant charges ought to be Kshs.18, 000. That the registry on its part availed the necessary schedule showing the manner of computing and charging court fees for judicial review matters as evidence by a copy of the said schedule marked as "NB2".

She further deponed that upon being informed of the new development by her advocates on record, she rendered the outstanding shortfall to her advocates on the 9<sup>th</sup> February 2016 as evidenced by a copy of the acknowledgement receipts issued to that effect is marked as "**NB3**". Subsequently, her advocate on record paid the requisite court fees in respect of the substantive motion application dated 11<sup>th</sup> November 2015 as evidenced by a copy of the revenue receipt issued on 12<sup>th</sup> February, 2016 marked as "**NB4**" it is therefore the exparte applicants case that upon the payment of the requisite court fees albeit just the event, it is apparent that the requisite court fees stands duly paid and it can therefore not be argued that court fees has not been paid in respect of the substantive Notice of Motion application.

She has further deponed in reference to the applicants present application that arguments founded on non-payment of court fees are misplaced, technical in nature and hence old school in so far as provisions of **Article 159 (2) (d) of the constitution 2010** abhors upon reliance on procedural technicalities, to defeat

substantial justice, she therefore contends that the Judicial review, proceedings is well grounded and legally tenable as they raise a fundamental aspect of the law touching in the right to reasonable notice and fair hearing .

She has further deponed that the issues being raised by the 2<sup>nd</sup> respondent including the existence of criminal charges against her are still pending before the Chief Magistrate's Court at Kisii and the same has not been determined, issues of fraud and illegality which form substratum of 2<sup>nd</sup> respondents application are misconceived; and hence that this court is only concerned who the propriety and validity of the decision of the Political Party's Tribunal and compliance with the provisions of the constitution 2010.

She has further contended that if the 2<sup>nd</sup> respondent is keen to prove the fraud and forgery alluded to in the supporting affidavit, the same should do so in the appropriate forum and in the circumstances the Notice of Motion Application is deponed of merits and ought to be dismissed

The 3<sup>rd</sup> respondent on his part swore grounds of opposition in application dated 11<sup>th</sup> November 2015 and 8<sup>th</sup> February 2015 on the following grounds:

- 1. That the application as filed is frivolous and an abuse of the due process of court.**
- 2. That the court is yet to make a finding in Kisii Criminal Case No.3806/2014.**
- 3. That the 3<sup>rd</sup> respondent is ready to comply with any court verdict, ordered and or judgment from the pending application, and results.**
- 4. That the 3<sup>rd</sup> respondent is a stranger to the issues between the applicant and the 2<sup>nd</sup> respondent.**
- 5. That the 3<sup>rd</sup> respondent has never colluded with any party herein whatsoever or at all since its position has nothing to do with issuance of identification be dismissed with costs.**
- 6. That the application be dismissed with costs.**

When the above matter came before me on 29<sup>th</sup> February, 2015 it was agreed that the same be argued by way of written submissions. Counsels for the 2<sup>nd</sup> respondent, 3<sup>rd</sup> respondent and exparte applicant have all filed their written submissions and I have read the same.

## **DETERMINATION**

Having considered the 2<sup>nd</sup> respondent's application and supporting affidavit the exparte applicants replying affidavit and their respective advocates written submissions, the following issues present themselves for determination by this court:-

- 1. What is the purpose of leave in a judicial review proceedings?**
- 2. What is the nature of a judicial review application?**
- 3. Does the non-payment of requisite court fees lead to striking out an application before the court?**

With regard to the importance of obtaining leave in judicial review applications:

**Order 53 Rule 4 (2)** provides that:

**"An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and by affidavit verifying the facts relied on".**

In Lady Justice Joyce Khaminwa -versus- Judicial Service Commission & Another [2014] eKLR Odunga J rendered himself thus on the importance of the leave stage in judicial review proceedings:-

**"The rationale for the requirement that leave be sought and obtained is to exclude frivolous vexatious or applications which prima facie appear to be abuse of the process of the court in those applications which are statute based. However 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. Leave stage is therefore a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure in 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 paralyzed for months because of pending court orders which might turn out to be unmeritorious"**

In the instant case, this court upon evaluating the ex parte applicant's chamber summons at leave stage was satisfied that she had a prima facie arguable case which merited further investigation by the court.

With regard to the second issue, the present application presented by the applicant contends that the ex parte applicant is guilty of fraud and hence her application for judicial review is unwarranted for.

In Municipal Council of Mombasa -versus- Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 it was held that:

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

In the instant case, this court has not been called upon to investigate on whether or not the ex parte applicant presented fraudulent documents which led her being sworn in as a nominated member of the Nyyamira County Assembly **BUT** on whether due process was followed by the 1<sup>st</sup> respondent when it heard the complaint raised by the 2<sup>nd</sup> respondent against the ex parte applicant.

With regard to the third issue, the ex parte applicant was by the time of filing leave for judicial review before this court represented by the firm of M/S Musyoki Mogaka & Company Advocates. It is the ex parte applicants contention that the said advocates were duly instructed retained and paid both their professional fees and the disbursements.

That that notwithstanding, the said firm failed to pay the said sum to the Honourable Court when presenting the substantive Notice of Motion. It is now the ex parte applicants contention that nonpayment of the said court fee was never brought to court's attention. That the ex parte applicant then instructed her present firm of advocates to M/S Oguttu Mboya & Co. Advocates to take over this matter from his previous advocates and it is the current firm acting on her behalf who brought the issue of non-payment to her attention. This court notes that this fact has not been rebutted by the 2<sup>nd</sup> respondent by either filing grounds of opposition or replying affidavit.

That upon realizing her previous advocates lapses, the ex parte applicant arranged and thereafter paid the requisite court fees charges on 12<sup>th</sup> February, 2016 as evidenced by **annexture (NB4)** 8 days after the

2<sup>nd</sup> respondent filed the present application before this court.

In Kenya Commercial Bank Limited -versus- James Osebe (1982- 88) 1KAR at pages 48 -55 the court held:-

**"The failure to include the prescribed fee when the Notice of Appeal was filed was cured by the subsequent cheque sent by the advocate 7 days later" [my emphasis].**

It is important to note that the above decision was made way before the promulgation of the constitution 2010. At present **Article 159 (2)** of the constitution would clearly come to the aid of such a litigant who at first may not have complied with rules and procedures but subsequently he makes efforts/attempts to comply with procedures as stipulated by the law. In addition to this **Section 3A of the Civil Procedure Rules** also talks about the overriding objective. In Abdirahman Abdi also known as **Abdirahman Muhamed Abdir - versus- Safi Petroleum Products Ltd & 6 Others an Application No.173 of 2010** where a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the court [**Omolo, Bosire & Nyamu —J-CA**] observed that:-

**"The overriding objective in civil litigation is policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice....**

**In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Section 3 A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later Article 159 (2) (d) of the Constitution of Kenya 2010 changed the position. The former provisions introduced the overriding objectives in Civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before arriving to a decision overriding on the other. Article 159 (2) (d) of the constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however, to say that procedural improprieties are to be ignored altogether. The court has to weigh the procedure that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion".**

In the present case, having considered the exparte applicant's explanation on why the court fees was not paid in time and having established the fact that the said court fees was subsequently paid, this court finds that striking out the exparte applicants substantive application will prejudice the exparte applicant and will not serve the wider interests of justice which in my view will be to proceed with the substantive notice of motion and either confirm or quash the 1<sup>st</sup> respondent's decision.

Having stated the above this court will proceed to dismiss the 2<sup>nd</sup> respondent's application dated 4th February 2016. Costs of this application shall be borne in the cause.

**Dated at Nyamira this 11<sup>th</sup> day of July 2016.**

**C. B. NAGILLAH**

**JUDGE**

In the presence of:-

Ogari hold brief for Mose for Applicant

Ogari hold brief for Oguttu for the Respondent

Mercy — court clerk