



**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**JUDICIAL REVIEW NO.85 OF 2009**  
**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**  
**AND**  
**IN THE MATTER OF LOCAL GOVERNMENT ACT, CAP 265 OF LAWS OF KENYA**  
**AND IN THE MATTER OF POLITICAL PARTIES ACT**  
**AND**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**BETWEEN**

HALIMA BARE HAIYE.....1<sup>ST</sup> APPLICANT

VAHMED MAALAM ADAN.....2<sup>ND</sup> APPLICANT

**VERSUS**

THE MINISTER FOR LOCAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT

THE P.S. LOCAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT

TOWN CLERK OF WAJIR COUNTY COUNCIL.....3<sup>RD</sup> RESPONDENT

INDEPENDENT INTERIM ELECTORAL COMMISSION....4<sup>TH</sup> RESPONDENT

MARTHA KARUA AND DANSON  
MUNGATANA (BEING SUED AS OFFICIAL

OF NATIONAL RAINBOW COALITION (NARK KENYA....5<sup>TH</sup> RESPONDENT

THE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT

**RULING**

A preliminary objection on a point of law has been raised by the 5<sup>th</sup> respondent in this motion for judicial review. The point was canvassed *ex parte* as the applicant's counsel, despite being aware of the date for arguments failed to attend court. It was submitted that the judicial review proceedings herein are totally defective for the following reasons:

- i) the summons for leave did not specifically seek for leave;
- ii) the requirement for service on the registrar a day preceding the presentation of the summons for leave was not complied with;
- iii) the 5<sup>th</sup> respondent is improperly joined and misdescribed as a respondent;
- iv) the motion is defective for failure to state the grounds on the face thereof;
- v) the orders sought are out of time and also unavailable to the applicant;
- vi) no cause of action against the 5<sup>th</sup> respondent has been disclosed in the application.

Other than i) and ii) above, the rest of the grounds were not argued. Instead, counsel raised other points not in the preliminary objection. The requirement that a notice of preliminary objection be given to the other side and perhaps to the court is to give the other side an opportunity to rebut the points. It was therefore irregular for counsel to argue points not enumerated in the preliminary objection to which the other party and the court had notice of.

It is now settled beyond debate that a preliminary objection can only be raised on a pure point of law, argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The objection must be capable of disposing of the matter. See **Mukisa Biscuits Manufacturing Company Limited Vs. West End Distributors Limited** (1969) EA 696.

The issue of whether or not stay was sought cannot amount to a pure point of law; it cannot of itself dispose of the matter. But it is noted that in paragraph 5 of the summons for leave, there was a specific prayer for stay. Again, whether or not a notice was served upon the registrar a day preceding the presentation of the application for leave is not a pure point of law. It is a question of fact which must be ascertained. It follows that the rest of the grounds must fail on similar arguments.

The objection is overruled with costs to the applicant.

**Dated, Delivered and Signed at Nakuru this 3<sup>rd</sup> day of March, 2011.**

**W. OUKO**  
**JUDGE**