



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.....1ST

APPLICANT

VAHMED MAALAM

ADAN.....2ND APPLICANT

VERSUS

THE MINISTER FOR LOCAL

GOVERNMENT.....1ST RESPONDENT

THE P.S. LOCAL

GOVERNMENT.....2ND

RESPONDENT
TOWN CLERK OF WAJIR COUNTY
COUNCIL.....3RD RESPONDENT
INDEPENDENT INTERIM ELECTORAL
COMMISSION.....4TH RESPONDENT
MARTHA KARUA AND DANSON MUNGATANA
(BEING SUED AS OFFICIAL OF NATIONAL RAINBOW COALITION (NARK
KENYA).....5TH RESPONDENT
THE ATTORNEY
GENERAL.....6TH
RESPONDENT

RULING

A preliminary objection on a point of law has been raised by the 5th 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 5th 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 5th 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 3rd day of March, 2011.

W. OUKO

JUDGE