IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU, J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 193 OF 2017

KYALO PETER KYULU ……..……APPELLANT

VERSUS

HON. WAVINYA NDETI……..……..……..1ST RESPONDENT

WIPER MOVEMENT POLITICAL PARTY ….....……2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION …….....……1ST INTERESTED PARTY

REGISTRAR OF POLITICAL PARTIES .....…2ND INTERESTED PARTY

(Being an Appeal from the entire judgment and decree of the High Court of Kenya at Nairobi (Odunga J) dated 21st June 2017 in

Judicial Review Misc.

Appl. No.301 of 2017)

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JUDGMENT OF THE COURT

The Background

[1] The Genesis of the appeal now before us is the nomination process carried out by Wiper Movement Political party (hereinafter referred to as Wiper Party) for the gubernatorial position in Machakos County. Wiper Party is the 2nd Respondent in this appeal. The Wiper Party first conducted the nomination on 30th April 2017. Following a complaint and orders made by the Political Parties Dispute Tribunal (PPDT) the nomination process was repeated on 6th May 2017. On 29th May 2017 the repeat process was successfully challenged before the PPDT who declared the process null and void and ordered the Wiper Party to directly nominate its preferred candidate for the gubernatorial position in Machakos County within 24 hours of the Tribunal's judgment. Consequently on 1st June 2017, the Wiper Party nominated Hon. Hon. Wavinya Ndeti (Hon. Wavinya) to be the Wiper Party's candidate for the position of governor of Machakos County.

[2] The direct nomination of Hon. Wavinya aggrieved Peter Kyalo Kyulu (herein appellant) who moved to the IEBC and lodged a complaint under rule 9 of the Rules of Procedure on settlement of Disputes (LN 139/2012). The appellant contended inter alia that Hon. Wavinya was not qualified to be nominated by the Wiper Party and that her nomination contravened the Wiper Party's Constitution and Nomination Rules, and the Political Parties Act, 2011, of the Elections Act 2011. In particular that Hon. Wavinya having only become a member of Wiper Party on 6th April her nomination less than a month later was irregular as it did not meet the threshold under the Wiper Party 's nomination Rules that required a person to;

"demonstrate active participation in party program three months prior to seeking nomination."

[3] In addition the appellant contended that the nomination of Hon. Wavinya contravened section 14(5) of the Political Parties Act that prohibited a person from being a member of more than one political party at the same time.

[4] Hon. Wavinya objected to the complaint maintaining that the question of her nomination and competence to contest for the position of governor under Wiper Party and her nomination having been heard and determined by the PPDT, and no appeal having been lodged the issue was *res judicata*, and could not be re-opened before the IEBC committee In addition Hon. Wavinya maintained that she had in fact resigned from her former party Chama cha Uzalendo (CCU) and was not therefore in two parties at the time of her nomination.

[5] In its ruling the IEBC committee found that at the time of her nomination Hon. Wavinya was a member of two political parties and this was a contravention of section 14(5) of the Political Parties Act, and therefore Hon. Wavinya ought not to have been nominated by the Wiper Party as its flag bearer in the Gubernatorial position.

[6] It is that ruling of the IEBC committee that spurred Hon. Wavinya to move to the High Court as the *exparte* applicant for orders of: certiorari to quash the decision made by the IEBC committee; prohibition to prohibit the IEBC from implementing the impugned decision; and Mandamus to compel the IEBC committee to include the name of Hon. Wavinya as the Wiper Party's nominee for Machakos gubernatorial elections scheduled to be held on the 8th August 2017.

The Judicial Review Proceedings

[7] Hon. Wavinya's application for Judicial Review was anchored on the grounds that the decision of the IEBC committee was illegal as she was at the time of nomination only a member of one political party, having resigned from CCU her former party; that the I.E.B.C. Tribunal ignored the doctrine of *res judicata* by failing to follow the decision of the PPDT that Hon. Wavinya is a bona fide member of the Wiper Party; that the IEBC committee decision was irrational and unreasonable; and that Hon. Wavinya's legitimate expectation that the I.E.B.C. Tribunal would follow the Constitution and the law was breached.

[8] The IEBC and the appellant who were joined in the proceedings as respondent and 3rd Interested Party respectively, opposed the application for Judicial Review. IEBC contended that Hon. Wavinya's rights were not violated as she was given an opportunity through her advocate to ventilate her case before the IEBC committee; that the decision of IEBC was properly based on the evidence before it and was therefore devoid of any irregularities, prejudice, illegality or unconstitutionality; that the IEBC committee did not contravene the doctrine of res judicata as it dealt with a different issue which was Hon. Wavinya's membership in Wiper Party and whether she was fit to be nominated, and not the issue as to whether Hon. Wavinya belonged to two political parties at the time of her nomination; that IEBC had on 27th March 2017 received a letter and a DVD from Wiper Party containing a list of members and Hon. Wavinya's name was not in the list; and that Hon. Wavinya had failed to avail to the court the full proceedings of the IEBC committee that would have shown that the decision of the committee was devoid of extraneous matters.

[9] The appellant opposed Hon. Wavinya's application for judicial review maintaining that the order

made by PPDT was proper because Hon. Wavinya did not qualify to be nominated by the Wiper Party since she had defected to the Wiper Party from CCU twenty four days before the nomination process; and that she had not been an active participant in terms with Rule 17.31 of the Regulations and therefore did not comply with section 14(5) of the Political Parties Act. The appellant maintained that the decision of the IEBC committee was fair, rational and reasonable and that the I.E.B.C. was not motivated by malice but was carrying out its statutory duty to ensure that only qualified persons are declared to run for elections. He dismissed Hon. Wavinya's contention regarding her right to fair hearing maintaining that she was heard through her counsel.

[10] Further the appellant maintained that the matter that was before the IEBC committee was not *res judicata* firstly because it involved a different complainant from the previous matter, and secondly, the issues were different as the question before the PPDT was whether or not Hon. Wavinya was a member of the Wiper Party while the question before IEBC committee was Hon. Wavinya's dual party membership status. The appellant argued that the PPDT determined the issue before it wrongly as it ignored the statutory timelines and relied on a coalition agreement made between the Wiper Party and CCU, and that *res judicata* cannot be raised as a ground for judicial review.

[11] In his judgment the learned judge (Odunga J) allowed the application for Judicial Review holding *inter alia* that the issue before the court was not *res judicata* because although the dispute before the PPDT and IEBC committee were substantially similar the issue before the PPDT being whether or not Hon. Wavinya was a member of Wiper Party while the issue before the IEBC committee being Hon. Wavinya's alleged dual party membership, the disputes involved different complainants. Secondly, that the decision of the PPDT was a decision meant to define the status of Hon. Wavinya vis a viz the Wiper Party and was therefore a decision *in rem* which could only be challenged by invoking the court's appellate jurisdiction. The learned judge further held that the court had inherent jurisdiction to prevent the abuse of its process and therefore although the doctrine of *res judicata* would ordinarily not apply in judicial review proceedings the court could use its inherent jurisdiction to prevent what was an abuse of court process by bringing litigation to finality where a court of competent jurisdiction has pronounced itself on the matter.

The Grounds of Appeal

[12] Being dissatisfied with the judgment of the High Court, the appellant has now lodged an appeal before us raising 18 grounds. In brief the appellant contends that the learned Judge erred in law in invoking the inherent powers of the court to overrule an established principle of law that res judicata does not apply in judicial review proceedings; in ignoring the appellants evidence and submissions, and taking into account evidence not tabled before the IEBC committee; in questioning the merit of the IEBC committee decision, and substituting the IEBC Committee opinion with his own; in ignoring section 14(1) of the Political Parties Act 2011 and holding that it was irrational for IEBC committee to find that Hon. Wavinya was statutorily disqualified for promoting ideologies, interests, and policies of another political party; in interfering with the statutory obligation of the IEBC; and in granting orders of certiorari in total disregard of the provisions of Order 53 Rule 7(1) of the Civil Procedure Rules.

[13] The appellant was represented in the appeal by a team of advocates led by Mr. Waweru Gatonye instructed by the firm of Nchogu, Omwanza and Nyansimi Advocates. In support of the appeal, the appellant filed written submissions that were duly highlighted by counsel during the hearing of the appeal.

Appellant's Submissions

[14] The appellant argued the appeal in six clusters that addressed the following issues:

(i) Whether the complaint before the IEBC Committee was *res judicata*.

(ii) Whether the learned judge erred in finding that the doctrine of *res judicata* could be applied by invoking inherent jurisdiction.

(iii) Whether in making its decision the IEBC Committee relied on relevant or irrelevant considerations.

(iv) Whether the decision by the Commission was irrational.

(v) Whether the judge questioned the merits of the decision of the IEBC Committee.

(vi) Whether the judge granted the order of certiorari in blatant disregard of Order 53(1) of Civil Procedure Rules 2010.

[15] In regard to the issue of *res judicata* it was submitted that the elements required for the doctrines to be applicable are: that the issues were the same; that the decision of the previous adjudicating body was final; and that the parties in the two suits were the same. It was argued that the issues before the IEBC committee and PPDT were different as the PPDT did not address the issue of Hon. Wavinya's resignation, but dealt with the question whether Hon. Wavinya Ndeti was a member of Wiper Party as at the time the gubernatorial nominations were being conducted. On the other hand the IEBC addressed the issue whether Hon. Wavinya was a member of two parties as at 5th April 2017 which was the final date when she could have changed parties under the law.

[16] It was argued that IEBC's findings touched on Hon. Wavinya's conduct subsequent to PPDT's decision. In addition there was a further distinction in that the PPDT was dealing with a dispute on party primaries while the IEBC committee was dealing with nominations in general. In light of these distinctions it was argued that neither issue estoppel, nor *res judicata* apply as the parties were not the same, and the issues were different. ***The Communication Commission of Kenya v Royal Media Limited & others (2015 eKLR)*** was relied upon in support of the proposition that the principle underlying the rule of issue estoppel is that the same issue of fact, and not law must have been determined in the previous litigation.

[17] On the issue of inherent jurisdiction, the learned judge was faulted for invoking his inherent powers to apply the doctrine of *res judicata* that does not apply in judicial review proceedings; that the inherent power of the court is used to address procedural technicalities and not substantive questions of law, and cannot therefore apply in judicial review proceedings.

[18] On the issue of rationality, it was submitted that the learned judge was right in finding that the IEBC relied on irrelevant considerations. It was argued that during the proceedings before the IEBC, Hon. Wavinya had only annexed copies of the decision of PPDT in complaint No.218A and 218B of 2017 and a copy of her resignation letter, but during the judicial review proceedings, Hon. Wavinya added new evidence that included a copy of form PP.7, a copy of certificate of membership, a copy of letter by the Registrar of Political parties dated 8th June 2017, a copy of a letter by Hon. Wavinya's advocate dated 8th June, 2017 and an unsigned and undated letter, and these documents greatly influenced the mind of the learned judge in deciding in favour of Hon. Wavinya. The learned judge was faulted for taking this evidence into account as it led him into merits of the case, and this was beyond his judicial review jurisdiction.

[19] In addition it was submitted that no complete record of the IEBC committee proceedings resulting in the decision sought to be quashed were laid before the court making it impossible for the judge to apprehend the basis of the complaint lodged before the IEBC. The learned judge was faulted for re-evaluating the evidence before the IEBC in light of new evidence leading to his conclusion that Hon. Wavinya had resigned from CCU; that in effect the learned judge overturned the IEBC's finding that Hon. Wavinya's resignation had not taken effect and that the learned judge misapprehended his jurisdiction and assumed appellate jurisdiction by carrying out a merit review and replacing the IEBC's opinion with his own.

[20] Further, it was concluded that the decision of IEBC was legal as the IEBC was mandated under Article 88(4)(e) of the Constitution of Kenya, Section 4(e) of the Independent Electoral and Boundaries Commission Act 2011, and section 74 of Elections Act 2011 to solve disputes arising from the

nominations. There being no evidence that the letter of resignation written by Hon. Wavinya was received by CCU or that CCU notified the registrar of Political Parties of Hon. Wavinya's resignation, or indication of reliance on applicable law, the decision of the IEBC committee was reasonable and fair as it was based on the evidence before the IEBC that Hon. Wavinya was an official of CCU until 11th May 2017.

[21] The learned judge was faulted for accusing the IEBC of bias and the Court urged to find that the learned judge had no reason to interfere with the IEBC exercise of its statutory duty. In this regard, the Supreme Court decision in ***Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others (2016 eKLR)*** was relied upon, the court being urged not to defeat the electoral disputes resolution mechanism.

[22] In regard to Hon. Wavinya's cross appeal, the court was urged that the appellant was a law abiding politician who was only questioning the statutory qualifications of Hon. Wavinya with a view to saving Kenyans from politicians who take the law and twist it for their gain; that the appeal was for the benefit of not only the people of Machakos County but also of general public interest; and the court should not therefore penalize the appellant by ordering him to pay costs.

Hon. Wavinya's Submissions

[23] Hon. Wavinya who opposed the appeal was represented by a team of advocates led by Mr. Nzamba Kitonga SC instructed by Otieno Ogola & Company advocates. Written submissions were filed on behalf of Hon. Wavinya which submissions were orally highlighted before us during the hearing of the appeal. It was Hon. Wavinya's submission that the learned judge did not err in law in finding that the appellant's complaint before IEBC committee was *res judicata*; that the IEBC acted illegally and unreasonably by failing to appreciate the doctrine of *res judicata* and purporting to sit and hear a matter that had already been heard and determined by a tribunal that had competent jurisdiction; that the IEBC subjected Hon. Wavinya to double jeopardy and infringed her right to access to justice, right to equal protection of the law and right to fair hearing as guaranteed under Articles 48, 27(1) and 50 respectively of the Constitution.

[24] It was submitted that the judgment of PPDT was a judgment *in rem* and the appellant was bound by it and the issues that were raised by the appellant before the IEBC fell within the issues that were before the PPDT and therefore the IEBC acted illegally, unreasonably and irrationally by ignoring the doctrine of *res judicata* and exercising a jurisdiction that it did not have. The case of ***Okiya Omtattah Okoiti v Communication Authority of Kenya and 14 others – Petition No.59 of*** **2015** was relied upon on the issue of finality to litigation. The case of ***Trade Bank Limited v L Z Engineering Construction Ltd (2000) IRA 266*** was also relied upon it being argued that IEBC was barred by the doctrine of issue estoppel taken together with *res judicata* from reopening issues that had been judicially determined by a competent court.

[25] On the issue of the learned judge's application of inherent jurisdiction, it was noted that Article 159 of the Constitution gives the court the power to exercise judicial authority and to uphold and promote the purpose of the principles of the Constitution that also entails access to and administration of justice; that the learned judge properly invoked both his constitutional and inherent powers in ensuring the observance of the due process of the law and preventing the abuse of the process and blatant disregard by the IEBC committee of the doctrine of res judicata and estoppel.

[26] On the issue of bias, Hon. Wavinya maintained that the learned judge was not in any way biased; that bias constitutes "*an inclination, bent, preposition, a preconceived opinion, a predisposition to decide a cause or an issue in a certain way that does not leave the mind perfectly open to conviction*;" and that the test to be applied is an objective test. It was argued that in the instant case the learned judge could not be faulted for interpreting and applying the law as his holding and reasoning did not reveal bias nor was it in such a manner that could not leave the mind perfectly open to conviction; and that in any case the appellant did not challenge or appeal against the judge's ruling on his application for recusal.

[27] On the exercise of the learned judge's judicial review jurisdiction, it was submitted that the learned judge did not in any way question the merits of the decision of IEBC, nor did he err in quashing the decision of the IEBC committee; that the process leading to the impugned decision was marred by illegalities, irrationality and unreasonableness; that Hon. Wavinya had challenged the IEBC's decision on ground of infringement of rights to fair administrative action as guaranteed under Article 47 of the Constitution as read with the Fair Administrative Actions Act; that it was within the jurisdiction of the court to make a finding on the process leading to impugned decision and grant judicial review orders; and that the learned judge being fully aware of the limit of his jurisdiction on merit review, appreciated all the evidence before it and analyzed the same before coming to his conclusion.

[28] Further it was argued that the decision of the learned judge was in accordance with section 14(2) of the Political Parties Act and judicial pronouncements of that provision as evident from the cases of ***William Omondi v Independent Electoral and Boundaries Commission & 2 others – Petition 288 of 2014***; and ***Caroli Omondi v Registrar of Political Parties & another – No. 195 of 2017*** amongst others; that in light of section 14(2) of the Political Parties Act, and the evidence concerning Hon. Wavinya's resignation the IEBC acted unreasonably and irrationally by holding that Hon. Wavinya was a member of two political parties; that IEBC though a constitutional body is bound by Article 2(1) as read with Article 249 of the Constitution; that judicial review is a constitutional remedy for supervision of public bodies; and that the court could therefore grant appropriate relief.

[29] Finally it was argued that the court could not be faulted for granting the order of certiorari quashing the decision of IEBC committee; that it was sufficient that the decision sought to be quashed was availed in the judicial review proceedings; and that the rationale behind Order 53 rule 7 of Civil Procedure rules is that the applicants ought to furnish the court with the decision that is sought to be quashed.

[30] On the issue of costs Hon. Wavinya cross appealed urging the court to award the costs of the appeal and the suit in the High Court to her not only because costs should follow the event, but also that the appellant in moving the IEBC was merely abusing the court process and vexing Hon. Wavinya by reopening issues that had been litigated upon by a court of competent jurisdiction.

Submissions of Wiper Party

[31] The Wiper Party did not file any submissions but was represented during the hearing of the appeal by Ms Wambui Gathii who indicated that the Wiper Party opposed the appeal and associated itself with the submissions made by Hon. Wavinya. In addition Counsel orally submitted on three issues; First on Hon. Wavinya's *bonafide* membership of Wiper Party, counsel maintained that the question whether Hon. Wavinya was in fact a member of Wiper party by virtue of her nomination, was integral to the judicial review application; that this issue was decided by PPDT in complaint No.40 of 2017 when the tribunal declared Hon. Wavinya a bona fide member of Wiper Party; that the remedy of the appellant, if aggrieved by that decision, was to invoke the High Court's appellate jurisdiction, which remedy the appellant did not pursue nor did he seek a review of the decision of the tribunal. Counsel supported the observation by the learned judge that pursuant to Article 169(1) of the Constitution, both the PPDT and the IEBC committee are subordinate courts with no jurisdiction to overrule each other; and therefore the IEBC committee had no power to arrive at a decision whose effect would nullify the decision of PPDT and therefore the learned judge could not be faulted.

[32] On the Wiper Party's political right to front a gubernatorial candidate at the general elections, it was submitted that the Wiper Party through due process, consultation and in accordance with its constitution and party elections, and nomination rules nominated Hon. Wavinya as its gubernatorial candidate; that had the IEBC committee decision been left to stand, the Wiper Party would have been prejudiced as Bernard Muia Kiala the other contestant for nomination for gubernatorial seat had already resigned from the Wiper Party and the IEBC's decision would have undermined the exercise of free franchise of the voters. It was maintained that the complaint presented to IEBC against Hon. Wavinya's nomination was made in bad faith and did not serve the interests of the people of Machakos.

[33] On the issue of illegality and rationality of the decision of IEBC committee, it was argued that the

committee's decision was contrary to express provisions of the law and violated section 13(1) of the Elections Act 2011 on the right of a party to nominate a person in accordance with the party's nomination rules and the constitution; that the certificate of nomination issued to Hon. Wavinya being valid, the IEBC cannot revoke the candidature of Hon. Wavinya as section 13(2) of the Elections Act bars such revocation. The Wiper Party supported the learned judge in finding that the issue of whether Hon. Wavinya lawfully joined the Wiper Party was never addressed by the IEBC committee nor was the issue whether Hon. Wavinya could by virtue of being such a member of Wiper Party be validly nominated by the Wiper Party, and therefore could not properly conclude that Hon. Wavinya was a member of two political parties and that the learned judge was right in finding that in accordance with section 14(2) of the Political Parties Act, Hon. Wavinya's resignation took effect upon being received by her former party.

2nd Interested Party

[34] Mr. Kerandi Manduku appeared for the Registrar of Political Parties who was joined as 2nd Interested Party. Mr. Manduku explained that the 2nd Interested Party did not file any submission or response to the application as it was taking a neutral position in the matter.

[35] We have considered the record of appeal, the written submissions and authorities filed by the parties as well as the oral submissions made before us by counsel. We commend counsel that notwithstanding the time constraint some have still managed to file written submissions and availed a wealth of authorities that have greatly assisted the court. It is not possible for us to refer to all the authorities cited. Suffice to state that we have found many of the cited cases useful and appreciate the effort of counsel.

The Facts

[36] The appeal before us being a second appeal in a party dispute, it is limited by virtue of the appellate provision provided under section 41(2) of Political Parties Act to matters of law only. Be that as it may, it is necessary to set out the facts, which in any case are generally undisputed. Central to the dispute is Hon. Wavinya's direct nomination as the flag bearer for Wiper Party for the gubernatorial seat of Machakos County. This was following an order made by PPDT in complaint No.218B of 2017 that Wiper Party undertakes direct nomination of its preferred candidate for the gubernatorial position of Machakos County. Two previous nomination exercises carried out by Wiper Party for the same purpose aborted after the process was declared null and void by the PPDT on the ground that the nomination process had not been properly done. One of the issues raised before the PPDT was that Hon. Wavinya was not a member of the Wiper Party. In the PPDT complaint No.40 of 2017, PPDT ruled that Hon. Wavinya was a member of Wiper Party. Following the direct nomination made pursuant to the PPDT order, the appellant moved to the IEBC and challenged Hon. Wavinya's direct nomination. The IEBC committee having heard the complaint ruled that the nomination of the appellant was contrary to section 14(5) of the Political Parties Act, as she was at the material time a member of two political parties. Thus in the complaint to the IEBC committee the nomination of Hon. Wavinya was also central although there was a twist in that the allegation did not concern Hon. Wavinya not being a member of Wiper Party at the time of her nomination, but the focus was on her alleged membership of two political parties at the time of her nomination.

The Judicial Review Jurisdiciton

[37] This appeal having stemmed from a judicial review application, we reiterate the judicial review jurisdiction as stated in **Municipal**

Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001, 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…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

[38] Thus in the judicial review proceedings, the High Court was called upon to determine whether the IEBC had acted unreasonably, in excess of its jurisdiction and or contrary to the rules of Fair Administrative Action. In this regard the learned Judge was alive to this obligation as evident from paragraph 172 and 173 of his judgment that states as follows:

"172. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

173. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See Reid vs. Secretary of State for Scotland [1999] 2 AC 512."

The Issues

[39] In considering whether the learned Judge was faithful in discharging his duty as above stated we bear in mind the issues that have been raised in this appeal as well captured by the appellant in their written submissions. We are satisfied that the following issues of law arise for consideration in this appeal:

(i) Whether the IEBC committee had jurisdiction to determine the complaint against Wavinya

(ii) Whether the principle of *res judicata* was applicable to the complaint before the IEBC Committee in light of the decision of PPDT in Complaint 40 of 2017 in regard to Hon. Wavinya's the nomination.

(iii) Whether the learned judge erred in finding that the doctrine of *res judicata* could be applied by

invoking inherent jurisdiction.

(iv) Whether the learned judge exceeded his judicial review jurisdiction by questioning the merits of the decision of the IEBC Committee or assuming appellate jurisdiction.

(v) Whether in reviewing the decision of the IEBC committee the learned judge took into account irrelevant consideration or failed to take into account relevant consideration.

(vi) Whether the decision by the Commission was irrational or unreasonable such as to justify the intervention of the court through the remedy of judicial review.

(vii) Whether the learned Judge exhibited bias

(viii) Whether the learned judge erred in granting the order of certiorari in blatant disregard of Order 53(1) of Civil Procedure Rules 2010.

Analysis and Determination

[40] We wish to first address the issue of the alleged bias on the part of the learned judge. From the proceedings, it is evident that an application was made for the learned judge to recuse himself from hearing the judicial review proceedings. While the appellant indicated through his counsel that they did not doubt the court's impartiality, competence and objectivity, the learned judge was urged to recuse himself so that the matter could be dealt with by another judicial officer with a fresh mind. This was in view of the fact that the learned judge was dealing with some contempt proceedings in regard to the gazettement of CCU party leaders and this was likely to raise a perception of bias. On 14th June, 2017, the learned judge gave a considered ruling in which he dismissed the application holding that the issues raised did not meet the test for recusal or disqualification of a judge. The appellant did not file any appeal against that ruling. Indeed, both the notice of appeal and the appeal before this Court were against the judgment dated 21st June, 2017. Moreover, our perusal of the proceedings does not reveal any circumstances upon which a reasonable man can anchor perception of bias on the part of the learned judge.

[41] In considering the proceedings that were for review before the learned Judge, understanding the jurisdiction of the IEBC committee is important. In this regard the learned Judge rendered himself as follows:

> ***"117. …In my view the IEBC Committee exercises original jurisdiction under section 74 of the Elections Act unlike the Political Party Dispute Tribunal which exercises an appellate jurisdiction. Accordingly, in matters which purely fall within section 74 of the Elections Act and within the exclusive jurisdiction of the IEBC Committee, it is my view that the Committee is not deprived of jurisdiction by the mere fact that the complainant did not lodge his complaint with the Party's Internal Dispute Resolution Mechanism.***
>
> ***118. Whereas the PPDT and the IEBC have jurisdiction over electoral disputes, the Court must interpret their jurisdiction in a manner that does not render one statutory tribunal redundant. The Court must in such matters adopt a purposive interpretation of the respective electoral statutes. Therefore to interpret their jurisdiction in a manner that gives leeway to parties to either bypass one or ignore decisions made by the other would militate against the purpose for which the two Tribunals were set up.***
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> ***119. It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an***

appellate Tribunal over the decisions of the PPDT. That scenario would also imply that even where a decision of the PPDT has been the subject of the High Court's appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent."

[42] We have perused Article 88(4)(e), Section 74 of the Election Act and section 4(e) of the Independent Electoral and Boundaries Commission Act, in regard to the jurisdiction of IEBC in the settlement of electoral disputes, and Section 40 and 41 of the Political Parties Act in regard to the jurisdiction of PPDT. In regard to the jurisdiction of PPDT Section 40 states as follows:

"40. Jurisdiction of Tribunal.

(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) disputes between an independent candidate and a political party;

(e) dispute between coalition partners; and

(d) disputes arising out of party primaries.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b) or

(e) unless the dispute had been heard and determined by the internal political party dispute resolution mechanism.

[43] It is evident from the above that the jurisdiction of PPDT extends beyond the party primaries. Save for this fact, we are in agreement with the learned Judge's understanding of the jurisdiction of the two bodies and the apparent distinction.

[44] From the record of appeal it is apparent from the complaint and affidavit sworn by the appellant that was received by IEBC Committee that the complaint concerned party primaries in which it was alleged that Wiper nominated candidate Hon Wavinya was not qualified to be nominated as: she became a member of Wiper Party irregularly after the prescribed period; she had not been an active member of the party prior to her nomination; her name was not on the party list as required by section 28 of the Elections Act; and she was a member of Wiper Party and CCU Party contrary to the Political Parties Act. These were issues that fell within the IEBC committee's ostensible jurisdiction as set out under section 74(1) of the Elections Act and section 4(e) of the Independent and Electoral Boundaries Commission Act. It was also an issue that fell within the jurisdiction of PPDT, and this complicated matters as the issue of Hon Wavinya's nomination had already been subjected to the jurisdiction of the PPDT as a party primary dispute, and a decision made on Hon Wavinya's membership of the Wiper partyThe learned judge noted as follows:

"123. …..as regards the contention that the question before the PPDT was whether or not the exparte applicant was a member of Wiper Party while the question before the respondent tribunal was on dual membership status of the exparte applicant, that in my view is a distinction without a difference. In my view the issues were substantially similar and if the tribunal could deal with one there was no reason why it could not deal with other issue……

134. In this case the decision of PPDT was meant to define or otherwise determine the status of the exparte applicant vis a viz the Wiper Party. Therefore in so far as the issue in question revolves around the resolution of the issue whether the applicant was a member of Wiper Party or not, as a 3rdInterested party himself admits the PPDT resolves the status of the expare applicant. The 3rd Interested Party's contention is that the decision was wrong. If that was the position, the remedy lay in the appellate jurisdiction of the High Court and not in the original jurisdiction of the Commission. Such a decision is a decision in rem which are defined as final judgments or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing not as against any specific person but absolutely. (See Koech v African Highland & Produce Ltd. & another [2006] 2EA 148……

136. It therefore follows that the committee ought to have considered the decision of the PPDT with respect to the membership of the exparte applicant of Wiper and once it found that the issue was determined by the PPDT give effect to it."

[45] The above extract from the judgment of the learned judge gives a clear indication that the learned judge was satisfied that the issue of Hon. Wavinya's membership to Wiper Party as well as the issue of dual partnership were issues that ought to have been determined in the proceedings before the PPDT and that the IEBC was bound by the finding that Hon. Wavinya was a member of Wiper Party. We cannot therefore fault the learned judge's finding in this regard.

[46] In addressing the question whether it was open to IEBC to reopen the issues which were subject of the dispute concerning Hon. Wavinya's nomination as Wiper Party's candidate, the learned judge examined the jurisdiction of IEBC Committee and the PPDT. In this regard the learned judge had this to say:

"140. In determining this application it is important to find out the nature of the exact dispute before the committee since this court being a judicial review court cannot turn itself into an appellate court and reevaluate the evidence presented before the committee and arrive at its decision. This court's duty is simply restricted to examining the decision made by the committee and the basis thereof in order to find out whether it was legal, procedural, reasonable or tainted with any other recognized impropriety that would render it unsustainable."

[47] Clearly, the learned judge properly directed himself in so far as jurisdiction of judicial review was concerned and his approach to the task before him. In exercising his jurisdiction, the learned judge concluded that the decision of the IEBC Committee that Hon. Wavinya was promoting the ideology, interests, or policies of CCU by virtue of the Ex parte applicant's name being in the list that was sent to the Registrar of Political Parties for gazettement, was irrational. Irrationality and unreasonableness as a ground for judicial review is explained in ***Associated Provincial Picture Limited vs. Wednesbury Corporation [1947] 2 All ER 680;***

[1948] 1 KB 233 by **Lord Greene MR** at pages 681 – 682 as follows:

"If, in the statute conferring discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; they must disregard these matters…

Unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that has all been referred to as being matters which are relevant for consideration… For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to the matter that he has to consider. If it does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably"… Similarly, you may have something so absurd that no sensible person could ever dream that it

would lay within the powers of the authority…"

[48] In arriving at his conclusion the learned judge took into account the documents that were before the IEBC Committee. The learned judge did not exercise a merit review nor did he exercise appellate jurisdiction. The examination of the documents was simply to determine the relevancy of the documents that were submitted to the IEBC. In our view, the IEBC Committee did not properly direct itself in regard to the issue of the party list for CCU and took into account irrelevant matters. In light of the extraneous matters taken into account, the decision of the IEBC Committee was unreasonable.

[49] In this case, the issues that are being raised in the complaint before the IEBC Committee were in substance similar to the complaint that was raised before the PPDT. Indeed at paragraph 6 of his affidavit the appellant made it clear that his complaint was brought under Rule 9 of Procedure on Settlement of Disputes that provides for complaints relating to the nomination of a candidate. The matters being raised by the appellant before the IEBC Committee were generally the same issues that the PPDT ought to have addressed. In inviting the IEBC Committee to determine the complaint, the appellant was in effect reopening the issue of Wavinya's nomination. This amounted to inviting the IEBC Committee to sit on appeal or review the decision of PPDT a power that the IEBC Committee did not have. To this extent, the IEBC Committee wrongly exercised its powers.

[50] It is trite that the principle of *res judicata* does not apply in the exercise of the powers of judicial review. Nevertheless, the High Court could not ignore the fact that PPDT had made a clear pronouncement in its decision in regard to Wavinya's status, nor could the court sit back where it is clear that a quasi-judicial body such as the IEBC Committee is abusing its powers. Contrary to the submissions made by the appellant, the inherent power of the Court is the essence of its judicial authority to ensure that justice is done to all. Moreover, in discharging its duties, the learned judge had the responsibility to ensure that the purpose and principles of the Constitution are protected and promoted without the Court being shackled with undue regard to technicalities; and that the dignity of due process is maintained. Therefore, it was proper for the High Court to exercise its inherent jurisdiction in preventing the apparent abuse of process by the IEBC Committee.

[51] While it was admitted that part of the record of pleadings and materials that were before the IEBC were not submitted before the learned judge during the judicial review proceedings. The learned judge had the decision that was sought to be quashed and other material that enabled the court to determine the application for judicial review. Moreover, the appellant had the opportunity to provide the missing documents but failed to do so. The learned judge cannot therefore be faulted for issuing the orders of certiorari, prohibition and mandamus.

[52] On the issue of costs, under section 27 of the Civil Procedure Act, although costs generally follow the events, the trial judge has discretion to make orders as he may deem appropriate. In this case, the learned judge considered the issue of costs and the submission by Hon. Wavinya's advocate that costs should be awarded to her, the learned judge decided "in the spirit of promoting reconciliation" that each party bears its own costs. We find no reason to interfere with the exercise of the learned judge's discretion.

[53] In conclusion, we find that the learned judge properly considered the application before him and the law applicable; and gave detailed reasons for allowing the application for judicial review. In the circumstances, we find no merit in this appeal. Accordingly we dismiss the appeal and the cross-appeal. In furtherance of the objective of reconciliation stated by the learned judge, we order that each party shall bear their own costs.

Dated and delivered at Nairobi this 14th day of July 2017

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR