IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & GATEMBU, JJ.A)

CIVIL APPEAL NO. 214 OF 2017

BETWEEN

JUDITH ANYANGO ELIZABETH OYUGI …….…… …… APPELLANT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC) (DISPUTES RESOLUTION COMMITTEE OF THE INDEPENDENT ELECTORAL BOUNDARIES COMMISSION)……..1ST RESPONDENT JOSEPH NUNDA AWICH …….……....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY…….…… 3RD RESPONDENT

(Being an appeal from the Ruling and the Order of the High Court at Siaya, (Makau, J.) delivered on 30th June, 2017

in

Judicial Review Appl. No. 2 of 2017

Original No. 332 of 2017

Arising from Complaint No. 334 of 2017 – Nairobi)

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REASONS FOR THE JUDGMENT OF THE COURT (Rules 32(5) of the Court of Appeal Rules)

This Court in a judgment rendered on 21st July, 2017 allowed the appeal lodged by the appellant challenging the decision of the High Court in Siaya H.C. Misc. Application No. 2 of 2017 by setting aside the ruling and orders made by that court on 30th June, 2017. We also, by that judgment, directed the 1st respondent to gazette the name of the appellant, Judith Anyango Elizabeth Oyugi, as the nominee of the 3rd respondent for Member of the County Assembly, East Asembo, Rarieda Constituency, Siaya County and to revoke Kenya Gazette No. 6759 of 14th July, 2017 in the Sixth Schedule, Serial No.1467 in which the 2nd respondent was gazetted as the latter's nominee. Each party was to bear its own costs of this

appeal. We reserved the reasons for the said judgment, which we hereby give within the same context outlined in the aforesaid judgement.

This is how this dispute arose.

The appellant and the 2nd respondent were among the eight candidates who sought nomination of the 3rd respondent to represent the people of East Asembo Ward as Member of the County Assembly. At those primaries, the appellant came second while the 2nd respondent was fourth. It is not apparent from the record, but it would seem that something aggrieved the candidates who had ranked first, second and third. They are alleged to have threatened to decamp from the 3rd respondent to contest the general elections as independent candidates. Indeed some, including the appellant, were cleared to independently contest and her name was in fact gazetted in Kenya Gazette No. 4888 of 19th May, 2017 as an independent candidate. It was the case for the 2nd respondent that following these events, and though he was ranked fourth in the contest, the 3rd respondent issued to him direct nomination certificate. As will be seen shortly, this claim was vehemently denied by the 3rd respondent which insisted that by the time the 2nd respondent went for clearance, it (the 3rd respondent) had already issued to the appellant with the nomination certificate as its nominee. It is this purported change of mind by the 3rd respondent that precipitated a complaint by the 2nd respondent to the 1st respondent. He applied that the appellant's nomination be declared invalid, null and void and for her nomination certificate to be revoked.

At the hearing of the complaint which proceeded *ex parte* on 8th June, 2017, counsel representing the 2nd respondent in a very brief address explained to the members of the 1st respondent that "**the 2nd respondent** (now the appellant) **was cleared as an independent candidate yet she belonged to a political party. She is an independent candidate".** At the end of that address, the 1st respondent reserved its decision for that very evening at 6pm. In a terse judgment, the 1st respondent noted that the appellant, having been gazetted to contest as an independent candidate, could not at the same time be nominated by the 3rd respondent. In allowing the complaint, the 1st respondent ordered its Returning Officer in Rarieda Constituency to issue to the 2nd respondent a clearance certificate to contest on the 3rd respondent's ticket.

Aggrieved by that determination , the appellant moved to the High Court with an application under **Articles 22, 23, 47** and **258** of the Constitution, **sections 8** and **9** of the Law Reform Act and **Order 53 Rules 1(1) (2)** and 4 of Civil Procedure Rules praying that;

> **"(a) An order of *CERTIORARI* to remove into this Honourable Court and quash the *Ex-Parte* judgment delivered by the respondent on 8th June, 2017 and instead order that the *Ex-Parte* applicant who had already been cleared to contest as the nominated Orange Democratic Movement Party (ODM) Member of County Assembly for East Asembo Ward, within Rarieda Constituency, Siaya County remains the Nominated candidate for that seat.**
>
> **(b) The *Ex-Parte* judgment delivered by the respondent on 8th June, 2017 be quashed.**
>
> **(c) An order of PROHIBITION directed at respondent prohibiting them from gazetting the names of the 1st Interested party (Joseph Nunda Awich), at the Kenya gazette as the purported nominated Orange Democratic Movement Party Constituency, Siaya County and in place thereof Gazette the Ex-Parte applicant as the duly nominated Orange Democratic Movement Party (ODM) Member of County Assembly for East Asembo Ward within Rarieda Constituency, Siaya County.**
>
> **(d) In the event that 1st Interested Party (Joseph Nunda Awich), has been gazetted at the Kenya Gazette** (sic) **as the nominated Orange Democratic Movement Party (ODM) Member of County Assembly for East Asembo Ward within Rarieda Constituency, Siaya County, the said gazettement be declared null and void.**

(e) Costs of and incidental to the Application be borne by the 1st Interested party……".

Having considered the grounds upon which the application was premised and the respective replies of the respondents, the learned Judge framed two issues thus; whether it was in error for the 1st respondent to proceed to render a judgment without hearing the appellant and secondly, whether the appellant was, at the time of her nomination by the 3rd respondent a member of the 3rd respondent or an independent candidate.

In answer to the first question, the learned Judge came to the conclusion that the appellant was aware of the hearing date having been informed of it through a telephone call after efforts to serve her personally became futile; and that having failed to locate the appellant, service was effected upon her advocate on 8th June, 2017 at 3.20 pm, the same day of the hearing. The learned Judge, for this reason, was therefore of the view that the appellant and her advocates were aware of the hearing and further that they had sufficient time between 3.20 pm and 6.00pm to present their defence or to seek adjournment before the judgment was rendered; and finally that the appellant had herself frustrated efforts for personal service leaving the 1st respondent with no alternative but to proceeded with the hearing. In the penultimate paragraph, the learned Judge stated that;

> **"I therefore find the *ex-parte* applicant is to blame for her absence from the hearing and cannot claim she was condemned unheard contrary to the rules of natural justice. That once a party is served and fails to attend hearing, there is nothing wrong with the tribunal proceed *ex-parte.* I find no justification in the *ex-parte* applicant's allegation that she was condemned unheard".**

On whether the appellant was at the time of her nomination a member of the 3rd respondent or an independent candidate, the learned Judge, like the 1st respondent, relied on Kenya Gazette Notice Number 65 of 19th May, 2017 to find that the appellant, having been gazetted as an independent candidate, could not in law be nominated by the 3rd respondent; and that the 3rd respondent's own nomination rules were not complied with in issuing the nomination certificate to the appellant. For instance, the learned Judge cited the requirements in the rules that a candidate seeking nomination must, *inter alia*, be a registered voter in the ward or county, for which he/she seeks election, be a registered member of the party and must demonstrate active participation in party programs six months prior to seeking nomination. In the end, the learned Judge concluded on the second point that;

> **"17. I find the *ex-parte* applicant assertion that she withdrew from list for independent candidates, from East Asembo Ward, Rarieda, Siaya, untenable and without any basis as the *ex-parte* applicant did not follow the matter with IEBC to have her name revoked from the list of the gazetted independent candidates. I therefore find and hold that the IEBC Dispute Resolution Committee in their judgment of 8.6.2017 rightly found the *ex-parte* applicant was duly gazetted as an independent candidate vide Gazette Notice Number 4891 of 2017 at page 2412 at Number 1547.**
>
> **18. The motion before me is devoid of merit and is dismissed with an order that each party bear its own costs".**

With those two determinations, the court ordered that the 2nd respondent's name be gazetted by the 1st respondent as the 3rd respondent's nominee.

Dissatisfied with that decision, the appellant has now brought this appeal to challenge it on 15 grounds which in her written submissions have been condensed into only two broad grounds, arguing that the learned Judge misapplied the principles of judicial review by considering the merits of the decision of the 1st respondent instead of the process by which that decision was reached; and that by that misapplication of the law, the learned Judge erred in not finding that the 1st respondent did not provide the appellant with sufficient opportunity to be heard. The appellant cited **Articles 47(1)** and **50(1)** of the Constitution,

section 4(3) of the Fair Administrative Action Act and several authorities to the effect that the learned Judge ought to have satisfied himself that the action of the 1st respondent was in conformity with the requirements for procedural fairness before making the impugned decision.

The second ground questioned how the appellant as an independent candidate could secure a nomination certificate of a political party, the 3rd respondent.

The 1st and 2nd respondents opposed the appeal arguing that the learned Judge properly applied the principles of judicial review and thereby correctly found that the appellant was properly served with the hearing notice, and secondly that she was not a member of the 3rd respondent because she had been gazetted as an independent candidate.

In supporting the appeal, the 3rd respondent for its part maintained that both the appellant and the 2nd respondent were its registered members; that the appellant was its duly nominated candidate for the position of Member of County Assembly for East Asembo Ward; that the 1st respondent subsequently cleared her as the sole candidate for the 3rd respondent; that the claim by the 2nd respondent that he had been given direct nomination was dishonestly made since, at no time was he issued with nomination certificate having ranked fourth in the party primary. The 3rd respondent further maintained that due to that dishonest claim and bad faith the 2nd respondent deliberately failed to join it in the proceedings before the 1st respondent; and that the appellant had never resigned from the 3rd respondent.

In contention in the first instance is the question whether the learned Judge erred in finding that the appellant was duly served with the hearing notice. Both the Constitution and statute recognize the right to a fair administrative action, defined in **section 2** of the Fair Administrative Action Act to mean;

> **"….any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates"**.

Because of their importance, we set out below the two provisions in so far as they are relevant to the matters at hand. **Article 47 (1)** aforesaid stipulates that;

> **"47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) …….**
>
> **(3) Parliament shall enact legislation to give effect to the rights".** (Our emphasis).

Pursuant to **sub Article (3**) above, Parliament enacted the Fair Administrative Action Act, where the right to administrative action is elaborately given effect in **sections 4** to **10** as follows;

> **"4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **……..**
>
> **(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
>
> **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
>
> **(b) an opportunity to be heard and to make representations in that regard;**

…….

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

…….

7. (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

(a) a court in accordance with section 8; or

……..

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

……...

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

…….

(c) the action or decision was procedurally unfair;

……

(f) the administrator failed to take into account relevant considerations;

……

(k) the administrative action or decision is unreasonable;

……..

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power". (Our emphasis).

With these new constitutional and statutory underpinning, the previous judicial decisions on the subject must be read with these developments in mind. Following the promulgation of **Article 47** of the Constitution and the enactment of **sections 7** and **11** of the Fair Administrative Actions Act, the courts in interpreting those provisions have expanded the scope of judicial review to include a limited consideration of the merit of the decision of a public body. For instance, in **Suchan Investment Limited**

vs. Ministry of National Heritage & Culture & 3 others [2016] eKLR, the Court, (Koome, Sichale & Otieno-Odek, JJ.A.) explained in great detail the new paradigm thus;

> **"An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. …..Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution, to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator."** (our emphasis).

See also subsequent decisions supporting the proposition in **Kenya Pipeline Company Limited V. Hyosung Ebara Company Limited & 2** Others [2012] eKLR and **Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium V Public Procurement Administrative Review Board**

another [2017] eKLR.

From the language of **sections 4** to **6,** it is clear that in addition to this new thinking, the traditional rule that the remedy of judicial review must be concerned more with the decision-making process remains a critical requirement in judicial review applications. This is because the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. In doing so, it must be remembered that the court ought not to substitute its opinion for that of the public body constituted by law to decide the matter in question. See **Republic V. Kenya Revenue Authority Ex parte Yaya Towers Limited** [2008] eKLR.

Secondly, the court will also interfere with the decision of a public body if it is outside the band of reasonableness as provided for today under **section 7(2)** of the Fair Administrative Action Act in accordance with the **Wednesbury Principles**, so called after the decision in **Associated Provincial**

Picture Houses Ltd. V. Wednesbury Corporation (1948)1 K.B. 223.

Finally, on the applicable principles, it is incumbent upon a party in a judicial review application who wishes the court to grant any of the discretionary orders under **sections 8** and **9** of the Law Reform Act, **section 11** of the Fair Administrative Actions Act and **Order 53 Rules 1(1) (2)** and **4** of Civil Procedure Rules to present proof of the existence of any of the above criteria for that party to succeed in the claim.

Before the High Court, the appellant applied for an order of *certiorari* to quash the judgment entered *ex parte* by the 1st respondent on 8th June, 2017 and an order prohibiting the 1st respondent from gazetting the name of the 2nd respondent as the 3rd respondent's nominee. It is established that an order of *certiorari* will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice have not been complied with while an order of prohibition is issued by the High Court and directed to an inferior tribunal or body forbidding that tribunal or body from continuing with proceedings before it in excess of its jurisdiction or in contravention of the laws of the land. See **Kenya National Examination Council V. Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others;** [1997] eKLR.

Although the Fair Administrative Action Act does not use the conventional terms like *certiorari*, *mandamus* and prohibition, **section 11** thereof provides for these and more remedies in general terms as follows;

> **"11. (1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-**
>
> **(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**
>
> **(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**
>
> **(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**
>
> **(d) prohibiting the administrator from acting in particular manner;**
>
> **(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**
>
> **(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**
>
> **(g) prohibiting the administrator from acting in a particular manner;**
>
> **(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**
>
> **(i) granting a temporary interdict or other temporary relief; or**
>
> **(j) for the award of costs or other pecuniary compensation in appropriate cases".** (Our emphasis).

Starting with the prayer for *certiorari,* it is not denied that the appellant was notified of the hearing of the application filed by the 2nd respondent with the 1st respondent at 3.30pm after the application itself had been heard and a ruling reserved for 6.00pm that very evening. Of what use, we ask was the hearing notice? It was *fait accompli* and no purpose was intended to be served by the belated service of the hearing notice. *Ex parte* orders whose effects are likely to affect a substantive right of a party who has not

been heard on the dispute can only be granted in obvious cases and as a fundamental principle of justice, no person can be condemned without a hearing, the *audi alteram partem* rule.

In **Onyango Oloo V. Attorney General** [1986-1989] EA 456 this Court emphasised this point saying;

> **"…....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. ……..**
>
> **The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated.....Denial of the right to be heard renders any decision made null and void *ab initio*.**"

On this question, we come to the conclusion that the appellant was treated unfairly as a decision that had far reaching ramifications was reached without her being heard and in contravention of the **Wednesbury principle.** In any case, it was in error for the learned Judge to substitute the decision of the 1st respondent with his own opinion by making an order directing the 1st respondent to gazette the 2nd respondent's name as the 3rd respondent's nominee.

Turning to the merit of the decision, the main argument was that the learned Judge erroneously determined the question whether the appellant was a member of the 3rd respondent or an independent candidate. In the past it would have been argued, as the appellant did, that the court below had no powers to review the merit of the decision of the 1st respondent. We have already found that the court could consider and determine this question. The learned Judge, guided by the Kenya Gazette Notice No 4888 of 19th May, 2017 held that the appellant having been gazetted as an independent candidate could not be nominated by the 3rd respondent as its candidate. That the appellant was gazetted as an independent candidate is a statement of fact. It is equally true that subsequent to the gazette notice, the 3rd respondent by two letters dated 30th May, 2017 and 9th June, 2017, respectively nominated the appellant as its candidate. The 1st respondent upon receipt of these letters cleared her on 31st May, 2017 as the only nominee of the 3rd respondent. This was followed by the issuance of Kenya Gazette Notice No.6251 of 27th June, 2017. These events, we hold, subsumed the earlier gazette notice of 19th May, 2017, where the appellant was said to be running as an independent candidate. By **Article 85** of the Constitution and **section 33** of the Elections Act, a person is only eligible to stand as an independent candidate for election if the person is, *inter alia,* not a member of a registered political party and has not been a member for at least three months immediately before the date of the election. On the other hand, under **section 14** the Political Parties Act, a member of a political party who intends to resign from the political party is required to give a written notice prior to his resignation to the political party and the resignation will only take effect upon receipt of such notice by the political party. It is the political party that will notify the Registrar of Political Parties of the resignation within seven days of the resignation. **Sections 6(2) (d)** and **9** of the Political Parties Act require every political party to have a constitution.

Article 5.4 of the ODM Party Constitution provides that a member ceases to be one;

> **"… Upon written resignation to the relevant Branch.**
>
> **Membership shall terminate with effect from the date of the receipt thereof, provided that the termination shall not absolve the member from performing any outstanding obligations owed to the Party or other members qua members……"**

Upon termination of membership, a member's name will be struck off the register of party members and it is only upon receiving the notification from the party that the Registrar of Political Parties will cause the name of such member to be removed from the membership list of that political party.

To the enquiry by the 1st respondent regarding the membership of the appellant, the 3rd respondent, on two separate occasions, confirmed that the appellant was its member and nominee. The process of party membership termination and resignation as laid out in the preceding paragraph has to be shown to have been followed before any inference can be drawn that the member had resigned. As the Supreme Court said in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others** [2014] eKLR, a gazette notice, though an essential procedure that serves as an official record, conveying important information, it cannot override a statute.

Finally, three months had not elapsed between the time the appellant is alleged to have left the 3rd respondent to run as an independent candidate. In thecircumstances therefore orders of *certiorari* and prohibition were available to the appellant.

In view of the above findings, and having carefully considered the entire record of appeal, submissions by counsel and the cited authorities, and bearing in mind the corollaries of our decision as it related to the general election that was scheduled to take place in 17 days' time, we therefore allowed the appeal and made the orders as outlined in paragraph 1.

Dated and delivered at Nairobi this 29th Day of December, 2017.

P.N. WAKI

…….…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

…….……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR