



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. MISC. E033 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SPEAKER OF THE NAIROBI COUNTY ASSEMBLY..''1st RESPONDENT

THE CLERK OF THE NAIROBI COUNTY ASSEMBLY.....2nd RESPONDENT

THE NAIROBI COUNTY ASSEMBLY.....3rd RESPONDENT

THE NAIROBI COUNTY ASSEMBLY SERVICE BOARD.....4th RESPONDENT

HON. CATHERINE AKOTH.....5th RESPONDENT

EX PARTE APPLICANT:

HON. MAURICE OTIENO GARI

RULING

Introduction

1. This ruling is on the *ex parte* Applicant's Chamber Summons dated 4th September 2020 and on the 1st to 5th Respondents' Preliminary Objections made thereto. The *ex parte* Applicant sought the following orders in the application dated 4th September 2020,:

- a) **THAT** the Applicant be granted leave to institute judicial review against the Respondents, seeking the following orders: -
- i. An order of Certiorari to remove to this Honourable Court; for the purpose of being quashed, the 1st Respondent's gazette notice instituted on 26th August, 2020 and published on 28th August, 2020, in respect of appointment of the 5th Respondent to the County Assembly Service Board.
 - ii. An order of Mandamus directed to the Respondents compelling them to abide by the initial gazette notice dated 22nd October, 2019 wherein the Ex-parte Applicant's valid nomination and appointment was pronounced.
 - iii. An order of prohibition directed to the 1st to the 4th Respondent from removing the Ex-parte Applicant from his position at the 4th Respondent save for pursuant to operation of the law, accordingly.
- b) **THAT** the leave granted do operate as stay of implementation of the gazette notice number 6390 dated 26th August, 2020, pending hearing and determining of these review proceedings.
- c) **THAT** costs for and attendant to this Application be provided for.

2. The application is supported by a statutory statement dated 4th September, 2020 and a verifying affidavit sworn by the *ex parte* Applicant on even date. The *ex parte* Applicant also filed supplementary affidavit dated 7th October 2020. The 1st to 5th Respondents filed various Notice of Preliminary Objection in response to the *ex parte* Applicant's application, whereupon this Court directed that the said application and the 1st to 5th Respondents' Preliminary Objections would be heard and determined together. A summary of the respective parties' cases as stated in their pleadings set out in the following sections.

The *ex parte* Applicant's Case

3. The *ex parte* Applicant averred that he is member of the County Assembly of Nairobi duly elected on 8th August, 2017 as representative of Nairobi West Ward, Lang'ata Constituency. He further averred that pursuant to his election, he was nominated and appointed to the 4th Respondent pursuant to section 12(3)(c) of the County Government Act (as amended by Section 46 of the County Assembly Services Act), which information was disseminated to the 1st Respondent on the 16th October, 2019. That upon that communication, he was duly gazetted on 22nd October, 2019 through a special gazette number VOL. No. CXXI-No. 144, and his appointment verified and affirmed through the letter dated 14th January, 2020. However, that the 1st Respondent proceeded to swear in and gazette the 5th Respondent as a member of the 4th Respondent in utter defiance and disregard of the orders of the Political Parties Disputes Tribunal (hereinafter "PPDT") dated 25th August, 2020, staying implementation of the impugned letter from the Orange Democratic Movement purporting to make changes in the minority leadership.

4. It is therefore the *ex parte* Applicant's case that the operative and substantive law to be applied in vacation from office of a County Assembly Service Board member is section 12(5) of the County Government Act, and that the impugned decision by the 1st Respondent is not authorized by any law or statute and therefore lacks justification, transparency and intelligibility within the decision-making process. In his view, the 1st Respondent acted beyond his statutory duty, and the decision-making process was marred with illegalities, unfairness, unreasonableness and contrary to the rule of law.

5. In conclusion, the *ex parte* Applicant averred that he has neither ceased being a member of the County Assembly neither has his term in office lapsed, therefore the requisite threshold required in law to validate vacation from office has not been met. In addition, that by flouting a court order, the 1st Respondent violated a core value in Article 10 of the Constitution. Lastly, that upon gazette of the 5th Respondent, the jurisdiction of the PPDT was divested and the orders sought herein are only attainable before this Court. Accordingly, he urged that these proceedings raise cogent points of law and ought to be allowed.

The Respondents' Cases

6. In response to the application, the 1st and 4th Respondents filed a Notice of Preliminary Objection dated 14th September, 2020. They contended that the *ex parte* Applicant's application together with the statutory statement have been filed in direct violation of the express provisions of Section 40 (2) of the Political Parties Act, and is thus incapable of invoking the jurisdiction of this Court. Furthermore, that the application and statutory statement do not raise any justifiable issues, and are therefore frivolous and vexatious with no valid grounds for adjudication by this Court.

7. On their part, the 2nd and 3rd Respondent also raised a preliminary objection and Grounds of Opposition all dated 9th October, 2020. They also challenged this court's jurisdiction pursuant to Section 41 of the Political Parties Act. It is their case that the cause of action herein arose from a decision of the *ex parte* Applicant's political party, which dispute can only be determined by the PPDT by law. Furthermore, it was their contention that the *ex parte* Applicant's application is in conflict with the doctrine of exhaustion of local remedies. Be that as it may, they contended that the *ex parte* Applicant has not demonstrated any justifiable interest, issue or claim against the actions of the 2nd and 3rd Respondents, and his application is therefore incompetent, misadvised and bad in law.

8. The 4th and 5th Respondents similarly filed a Notice of Preliminary Objection dated 17th September, 2020. In their view, this Court lacks jurisdiction to adjudicate the issues raised having not exhausted the dispute mechanisms provided for under Section 40(2) of the Political Parties Act. Furthermore, that this Court lacks jurisdiction by virtue of Article 47(3)(a) of the Constitution and Section 9(2) and (3) of the Fair Administrative Actions Act, 2015.

The Submissions

9. The *ex parte* Applicant's advocates on record filed written submissions dated 6th October, 2020 and 19th November, 2020. On jurisdiction, counsel submitted that pursuant to Article 165(6) of the Constitution, this court is conferred with jurisdiction to seize and determine the constitutionality and legality of the exercise of powers by public bodies and authorities. It was further submitted that pursuant to section 40 of the Political Parties Act, it is apparent that the PPDT shall be seized of disputes that remain within the political parties and its membership and which have not extended to other institutions and bodies. Further, that pursuant to section 12 of the Employment and Labour Relations Court Act, the Employment and Labour Relations Court shall primarily exercise its jurisdiction over employment disputes.

10. To that end, counsel cited the case of **National Bank of Kenya Limited vs Leonard Gethoi Kamweti (2019) eKLR** where the learned Judges of Appeal determined that the mere mention of employment or labour relations does not automatically cloth the Employment Court with jurisdiction over a matter. The court further espoused that in order to determine if a matter arises from and or connected to employment or labour relations, an interrogation of the cause of action has to be done. In the same breadth, counsel cited the case of **Attorney General & Another vs Andrew Maina Githinji & Another (2016) eKLR** where the Court of Appeal pronounced that a cause of action is the act on the part of a Defendant which gives the Plaintiff his cause of complaint.

11. In counsel's view therefore, the act giving rise to the cause of the complaint is the illegal, invalid and irregular swearing in and gazette by the 1st Respondent of the 5th Respondent as a member of the 4th Respondent, contrary to the provisions of Section 12(5) of

the County Government Act. That the impugned swearing in and gazettelement is founded upon the disobedience of an express order from the Tribunal and has the consequential effect of curtailing the political rights of the *ex parte* Applicant contrary to Article 38 of the Constitution. Counsel further submitted that the purported act of the 1st Respondent whilst comprised of a public action was irregularly, illegally and invalidly performed contrary to the provisions of Article 47 of the Constitution. Ultimately, that the decision-making process by the 1st Respondent is marred with illegalities, procedural impropriety and violation of statutory law. In sum, it was submitted that upon the impugned swearing in and gazettelement, the nature of the dispute materially changed such that it could not be seized even by the Tribunal.

12. On the exhaustion principle, counsel cited the case of **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others (2015) eKLR**, where it was held that the exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. To that end, counsel submitted that it is clear from the verifying affidavit, the supplementary affidavit and the statutory statement that the *ex parte* Applicant conducted due diligence. Be that as it may, counsel was of the view that the nature of the suit dictates that this Court is the one which is conferred with requisite authority to accordingly adjudicate upon it. Counsel further cited the case of **Nderitu Gachagua vs Thuo Mathenge & 2 Others (2013) eKLR** whereby it was held that the orders sought by the *ex parte* Applicant cannot be issued by any other forum therefore rendering this Court as the correct forum.

13. On whether the PPDT rendered itself with regard to Complaint No. 15 of 2020, counsel invited the court to take judicial notice that on 10th November, 2020, the Tribunal rendered itself with regard to that complaint where it determined that it did not have jurisdiction over that matter. Counsel further submitted that even if the political party can decide to resolve the dispute internally, the result thereof would not have impetus to oust provisions of statutes to replace any member of the County Assembly Service Board contrary to the provisions of section 12 of the County Government Act

14. It was thus urged that leave be granted, and the said leave sought should operate as stay. Counsel cited Order 53 Rule 1(4) of the Civil Procedure Rules and the case of **Munir Sheik Ahmed vs Capital Markets Authority (2018) eKLR** where it was held that the purpose of leave to file for judicial review is to preserve *status quo* and ensure that the proceedings are not rendered nugatory. He also cited the case of **R (H) v Ashworth Special Hospital** for a similar proposition. Indeed, counsel submitted that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances whereas where the action or decision is implemented, then the court needs to consider the completeness or continuing nature of such implementation. In counsel's view, a perusal and review of the manner in which the impugned decision of the 1st Respondent ought to be implemented is one of continuing nature as there are further acts that need to be taken by parties as regards the implementation.

15. Counsel further submitted that the public interest element in grant of stay was also the subject of the decision in **R (H) v Ashworth Special Hospital (supra)** where the court held that where there is a public interest involved, the court ought to strike a balance between individual rights and the public interest and in striking that balance, the court should grant stay unless satisfied that there is a strong and not merely an arguable case that a tribunal's decision was unlawful. Further, counsel argued that the nugatory effect, if stay is not granted, is demonstrable in the fact that the Court ought to ensure that the ultimate ends of justice are met. In conclusion therefore, counsel argued that an analysis of the facts, transition of the dispute, regulatory scheme and nature of interests involved including the public interest and the polycentricity of the issue, it bears that this Court comprises of the appropriate forum to seize and determine the application in, counsel urged that the application be allowed.

16. The 1st Respondent's advocates on record also filed written submissions dated 13th November, 2020 in support of the Preliminary Objection dated 14th September, 2020. Counsel argued that the preliminary objection is grounded on section 40 of the Political Parties Act which provides for the jurisdiction of the PPDT. In his view therefore, it was improper for the *ex parte* Applicant to file this suit without first exhausting the process they had begun by filing a complaint before the PPDT as the present dispute involves members of a political party on the mode of appointing its representation to the Board in the Nairobi City County Assembly.

17. To buttress his argument, counsel cited the case of **Republic vs National Police Service Commission ex parte Daniel Chacha (2016) eKLR** where the court dismissed a suit on a preliminary objection when the *ex-parte* Applicants did not provide evidence of any attempts at resolving their dispute using internal political party dispute resolution mechanism. Counsel went on to submit that the first port of call in disputes pitting members of a political party, as is this case, must be handled by the internal political resolution mechanism then by the Tribunal as was held in the case of **Eluid Wafula Maleo v Ministry of Agriculture & 3 Others (2016) eKLR**. Counsel also cited the case of **Rich Productions Limited v Kenya Pipeline Company & Another (2014) eKLR** where it was held that the reason why the Constitution and the law establish different institutions and mechanisms for dispute resolution in different sectors, is to ensure that such disputes as may arise, are resolved by those with the technical competence and jurisdiction to deal with them.

18. Counsel also cited the cases of **Francis Mutuku v Wiper Democratic Movement Kenya & 2 Others (2015) eKLR**, **Clerk Nairobi City County Assembly v Speaker, Nairobi City County Assembly & Another** and **Mohamed Abdi Farah v Speaker Garissa County Assembly & 2 Others (2020) eKLR** for a similar proposition. In conclusion, he urged that this Court has no jurisdiction to entertain the application and referred the court to the locus classicus case on jurisdiction of **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited (1989) KLR 1** and the Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR**.

19. The 2nd and 3rd Respondents advocate on record filed written submissions dated 18th January 2021 in support of their preliminary objection dated 9th October, 2020 and against the chamber summons application dated 4th September, 2020. On the issue whether the *ex parte* Applicant had exhausted the local remedies within law, counsel also referred the court to section 40 of the Act and cited the case of **Gabriel Bukachi Chapia vs Orange Democratic Movement & Another (2017) eKLR**, where it was held that PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism. This position according to counsel was reiterated in the case of **Clerk, Nairobi City County Assembly v The Speaker Nairobi City County Assembly & Another; Orange Democratic Party & 4 Others (Interested Parties) (2019) eKLR**.

20. Indeed, counsel submitted that if the 1st Respondent had acted *ultra vires* in blatant disregard of the order issued by the PPDT as alleged, then they ought to have approached the PPDT for the enforcement of its own order pursuant to section 41 of the Act. Counsel also referred the court to the case of **John Musakali v Speaker County of Bungoma & 4 Others (2015) eKLR**, where the court declined to assume jurisdiction over a dispute relating to minority and majority leaders as in the instant case. In counsel's view, the dispute before this court arose from a decision of the *ex parte* Applicant's political party's decision to nominate the 5th Respondent to the County Assembly Service Board in place of the *ex parte* Applicant and as such, the PPDT is clothed with the power to hear and determine it pursuant to Section 9(2) of the Fair Administrative Actions Act. In conclusion, counsel urged that the Chamber summons be dismissed.

21. On jurisdiction, counsel cited the case of **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited (supra)** and **Adero & Another v Ulinzi Sacco Society Limited (2002) 1 KLR 577**, and submitted that inviting the Court to interfere with the decision of a political party beats the rational of separation of powers as was held in the case of **John Musakali v Speaker County of Bungoma & 4 Others (supra)**. To further buttress his argument, counsel cited the cases of **Julius Masiva Obuga v Orange Democratic Party & 6 Others; Kenya African National Union & Another (Interested Parties) (2019) eKLR** and **Beatrice Kedeveresia Elachi v Nairobi City County Assembly Service Board & Another (2019) eKLR** for the proposition that courts need to safeguard the autonomous exercise of their respective jurisdiction and recognize the principle of checks and balance.

22. On leave to institute judicial review proceedings, counsel cited the case of **Mohamed Shahid Moughal v National Land Commission & 4 Others (2018) eKLR** where the court in making a determination reaffirmed the position in **Republic v County Council of Kwale & Another Ex-parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** where Waki J (as he then was) provided the parameters for granting leave. Further, that this position was also highlighted by the court in **Republic v Kenya Revenue Authority, Commissioner Ex-parte Keycorp Real Advisory Limited (2019) eKLR**. Therefore, that the chamber summons application having been brought without exhausting internal dispute resolution mechanism, offends Article 159 of the Constitution and section 9 of the Fair Administrative Actions Act. As such, counsel argued that the parameters for grant of leave have not been satisfied.

23. The 4th and 5th Respondents advocates on record likewise filed written submissions dated 29th October, 2020 in support of the Preliminary Objections, and in opposition of the application for leave. On jurisdiction, counsel cited the Court of Appeal in **Owners of Motor Vessel "Lilan S" v Caltex Kenya (supra)**. Counsel also relied on various provisions of law including Articles 47(3) and 159(2) of the Constitution, section 12 of the County Governments Act, sections 39 and 40 of the Political Parties Act, and section 9(2) and (3) of the Fair Administrative Actions Act, for the proposition that this court does not have jurisdiction. It was argued that the *ex parte* Applicant has not demonstrated to the court inadequacy of the dispute resolution mechanism nor has he demonstrated their exhaustion. Furthermore, counsel submitted that couching the application under judicial review proceedings does not exclude the dispute from the purview of Section 40(3) of the Act.

24. To that end, counsel cited the Court of Appeal case of **Speaker of the National Assembly v Njenga Karume (1992) eKLR** where the court stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. He also submitted that the rationale of the 'exhaustion doctrine' was considered by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others (supra)**. Counsel also cited the case of **Godfrey Paul Okutoyi v Habil Olaka & Central Bank of Kenya (2015) eKLR** where the court issued a caution in determining suits framed as constitutional petitions where there are alternative dispute resolution mechanisms. Counsel also relied on the case of **Taib Investment Limited v Fahim Said & 5 Others (2016) eKLR** it was noted that where a suit raises specific issues which are supposed to be dealt with by a specific Tribunal or body established by law, then the matter must be commenced in the Tribunal or body so established before an appeal can be lodged in this court or the High Court as the case may be.

25. To further buttress his argument, counsel cited the Court of Appeal case in **Gabriel Bukachi Chapia v Orange Democratic Movement (supra)**. Counsel also cited the Employment and Labour Relations Court in **Clerk, Nairobi City County Assembly v The Speaker Nairobi City County Assembly & Another; Orange Democratic Party & 4 Others (Interested Parties) (supra)** and the Court of Appeal in **Mutanga Tea & Coffee Company limited vs Shikara Limited & Municipal Council of Mombasa (2015) eKLR** for a similar proposition. Indeed, counsel argued that the issues raised in the application relate to a political process thus non-justiciable before this Court and capable of adjudication by alternative dispute resolution mechanism.

26. In conclusion, counsel submitted that crafting the application as a judicial review application and citing constitutional provisions does not elevate the dispute to one of judicial review warranting intervention of this Court, and ousting the applicability of Section 40(3) of the Act. To that end, counsel cited the case of **COD & Another v Nairobi City Water & Sewerage Company Limited (2015) eKLR** where the court held that the Constitution cannot be used as general substitute for normal procedures. He also relied on the case of **Johnstone Ogechi vs The National Police Service (2017) eKLR** where the court held that moving the court by way of a constitutional petition will not render statutory provisions inapplicable.

The Determination

27. Before determining the issues raised in the instant application and preliminary objections, it is necessary to clarify the circumstances in which a preliminary objection may be raised. The purpose and nature of a preliminary objection was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the 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."

28. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary

objection cannot be raised if what is sought is the exercise of judicial discretion.

On Jurisdiction

29. The main preliminary issue raised by the Respondents is that there is an internal dispute resolution mechanism under sections 40 and 41 of the Political Parties Act that the *ex parte* Applicant has not exhausted, hence this Court is divested of jurisdiction to hear the instant application. The *ex parte* Applicant's position is that the dispute resolution mechanisms under sections 40 and 41 of the Political Parties Act are not applicable to this dispute herein, and cannot oust this Court's jurisdiction granted under the Constitution.

30. I am guided by the decision in **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1** when dealing with the issue raised about this Court's jurisdiction. Nyarangi JA (as he then was) held as follows in this regard:

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

31. The Court of Appeal proceeded to define jurisdiction and its source as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

32. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts, and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. It is notable that in the present proceedings, this Court is being asked to review the lawfulness of the Respondent's actions and decisions, in exercise of its supervisory jurisdiction. In addition, Article 47 of the Constitution and the Fair Administrative Act also confer jurisdiction to this Court to review administrative actions made by the Respondent.

33. Therefore, this is a case where this Court ordinarily has jurisdiction, and this Court's constitutional jurisdiction cannot be divested by statutory provisions, but can only be limited in certain respects. Put another way, the availability of an alternative statutory remedy does not affect the Court's jurisdiction to entertain a claim for judicial review, but is a material consideration in the exercise of the Court's discretion to grant the relief sought.

34. The main reason for this limitation is that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised. In addition, the Court is also granted discretion under section 9(4) of the Fair Administrative Action Act to exempt an applicant from such alternative dispute resolution mechanisms in exceptional circumstances. As a result, the availability of an alternative remedy cannot be raised as a preliminary point of law to challenge this Court's jurisdiction for these reasons.

35. The relevant questions that requires to be asked in such cases is not a jurisdictional one, but whether in the circumstances of a case, this Court ought to defer to alternative statutory dispute resolution mechanisms, or whether there are any valid grounds demonstrated that allow an applicant to by-pass the alternative statutory dispute resolution mechanism. This is the main issue that shall be considered next, in relation to the issue of whether leave should be granted to the Applicant to commence judicial review proceedings.

On Leave.

36. The applicable law for leave to commence judicial review proceedings, namely *Order 53 Rule 1* of the Civil Procedure Rules. The main reason for the leave as explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996**, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

37. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn *et al* at paragraph 26.05 as follows:

- (1) whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;**
- (2) whether the claimant has capacity to bring a claim for judicial review;**
- (3) whether the claimant has a sufficient interest to bring a claim for judicial review;**

(4) whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and whether it is appropriate to bring it by that procedure;

(5) whether the claim is otherwise an abuse of process;

(6) whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;

(7) whether the claim has been brought promptly;

(8) whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion.

38. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and one that does not weigh against the exercise of the Court's discretion. This is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Some of the grounds that may influence the exercise of the Court's discretion in this regard with respect to the exercise of public duties are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

39. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in **Sharma vs Brown Antoine (2007) 1 WLR 780**, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success.

40. In the present application, the main issue urged by the parties for and against the grant of leave is that of the availability of an adequate alternative remedy to the *ex parte* Applicant. The Respondents contend that such an alternative remedy is provided for in sections 40 and 41 of the Political Parties Act. Section 40 which provide as follows as regards the jurisdiction of the PPDT:

“(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) disputes between coalition partners; and

(f) appeals from decisions of the Registrar under this Act; (fa) disputes arising out of party primaries.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

41. Section 41 on the other hand provides for the manner of determination of disputes by the PPDT as follows:

41. Determination of disputes

(1) The Tribunal shall determine any dispute before it expeditiously, but in any case shall determine a dispute within a period of three months from the date the dispute is lodged.

(2) An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.

(3) A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court. (3A) The Chief Justice may, in consultation with the Tribunal, prescribe regulations for determination of disputes under this section.

(4) The Tribunal shall apply the rules of evidence and procedure under the Evidence Act (Cap. 80) and the Civil Procedure Act (Cap. 75), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.”

42. The provisions of section 9(2) (3) and (4) of the Fair Administrative Action also provide as follows in this regard:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

43. It is trite that under section 9(2) (3) and (4) of the Fair Administrative Action Act, one ought to exhaust all internal mechanisms and alternative dispute resolution mechanisms before moving this Court for judicial review proceedings. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was initially stated in Speaker of National Assembly vs Karume (supra) in the following words:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

44. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra) as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

45. The Court is also granted discretion to exempt an applicant from such mechanisms in exceptional circumstance under section 9(4) of the Fair Administrative Action Act. The exceptional circumstances arise where the alternative mechanisms would not serve the values enshrined in the Constitution or law, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons.

46. The *ex parte* Applicant urges that the dispute herein has moved from the purview of the PPDT for two reasons. Firstly, that the dispute now involves the gazettelement of the 5th Respondent, and the orders he seeks in this regard are only attainable before this Court. Secondly, that the PPDT rendered itself on the dispute before it on 10th November 2020, and found that it has no jurisdiction. The *ex parte* Applicant did not annex a copy of the decision of the PPDT.

47. This Court is handicapped in making a decision as to whether the *ex parte* Applicant has met the threshold of an arguable case, in the absence of the ruling by the PPDT in Complaint No 15 of 2020 on the dispute that was before it and the reasons for finding that it had no jurisdiction. This is for the reasons that under section 40 (2) of the Political Parties Act, one of the ways the PPDT can only be divested of jurisdiction is where the dispute has not been heard and determined by the internal political party dispute resolution mechanisms. Secondly, under section 41(2) of the said Act, a party dissatisfied with the decision of the PPDT is required to appeal therefrom.

The Disposition

48. Arising from the foregoing reasons, this Court is of the view that the issues of the availability of an alternative remedy and leave to commence judicial review proceedings still need to be interrogated further by the parties. I accordingly direct and order as follows:

I. The 1st, 2nd, 3rd and 4th Respondents’ Notices of Preliminary Objection dated 14th September, 2020, 9th October 2020, and 17th September, 2020 respectively are hereby dismissed with no order as to costs.

II. The *ex parte* Applicant is granted leave to file and serve all the Respondents with a supplementary affidavit in support of its Chamber Summons dated 4th September 2020, annexing the ruling of the Political Parties Dispute Tribunal delivered on 10th November, 2020 in Complaint Number 15 of 2020, within fourteen (14) days of today’s date.

III. The Respondents are granted leave to file and serve replying affidavits thereto within fourteen (14) days of service of the *ex parte* Applicant’s supplementary affidavit.

IV. A hearing date of the *ex parte* Applicant’s Chamber Summons application dated 4th September 2020 shall be given by the Judge seized of this matter.

49. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE 2021

J. NGAAH

JUDGE