REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala, SCJJ.)

PETITION NUMBER 28 OF 2014

-BETWEEN-

PENINAH NADAKO KILISWA..... PETITIONER

-AND-

1. THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISION (IEBC).....

2. FORD KENYA.....

3. EDITH WERE SHITANDI.....

RESPONDENTS

(Being an Appeal from the Judgment, Decree and/or Order of the Court of Appeal at Nairobi in Civil Appeal No. 201 of 2013 (Kariuki, M'Inoti and Mohammed JJA), dated 20th day of June 2014)

RULING

A. INTRODUCTION

[1] This Ruling arises from a preliminary objection raised by the 1st respondent against the petitioner's appeal filed on 30th July, 2014. The substantive matter before the Court is an appeal against the Judgment of the Court of Appeal (*Kariuki, M'Inoti* and *Mohammed JJA*) sitting in Nairobi, delivered on 20th June, 2014.

[2] Aggrieved by the said Judgment, the petitioner moves this Court, seeking the following Orders :

(i) that the Judgment in Civil Appeal No. 201 of 2013 be set aside;

(ii) that this Court do order the revocation and annulment of the election of the 3rd respondent;

(iii) that this Court do quash the gazettement of the 3rd respondent as the 2nd respondent's nominee for Bungoma County Assembly;

(iv) that this Court do issue an Order of Mandamus compelling 1st respondent to gazette the petitioner/appellant as 2nd respondent's ***bona fide*** *gender-factor candidate to the Bungoma County Assembly;*

(v) that this Court may see it fit to grant any other Order in the interests of justice;

(vi) that this Court may grant costs of this petition as well as costs in the Appellate Court and the High Court, as against the respondents.

[3] In response to the petition, the 1st respondent filed the instant notice of preliminary objection dated 6th October, 2014 thus prefaced:

> *"TAKE NOTICE that the 1st respondent will at the earliest opportunity raise a preliminary objection on the point of law that this Honourable Court lacks jurisdiction to hear and determine the petition herein."*

This preliminary objection was canvassed before this Court on 10th March, 2015.

B. BACKGROUND

[4] This appeal emanates from a complaint lodged by the appellant, before the Dispute Resolution Committee of the IEBC, claiming that her name had been erroneously removed, as the gender top-up nominee on the Ford Kenya party-list for Bungoma County, being replaced with that of the third respondent. In a Ruling delivered on 7th June, 2013 the Committee dismissed her complaint, on the ground that no evidence had been adduced in support of the allegations made.

[5] The appellant challenged the Committee's decision before the High Court, by way of Judicial Review. She contested the proceedings and decision of the Committee on the basis that these had overlooked the evidence placed before it, and failed to give reasons for the decision arrived at – thus detracting from the principle of fair and impartial hearing. She sought the following Orders:

> *(i) that leave do issue to the applicant to apply for the Orders of Certiorari and Prohibition to issue against the 1st respondent herein, in relation to the gazetting of 2nd respondent's name as the Ford*

Kenya Party's Bungoma County gender top-up nominee, as contained in its published list of 21st of May, 2013 which list was made against express provisions of the Elections Act 2011, as the said 2nd respondent is not a member of the Ford Kenya Party;

(ii) that leave be granted to the applicant to apply for an Order of Certiorari to remove into the High Court and quash the decision of the 1st respondent announced through a press statement dated 7th June, 2013 relating to gender top-up complaints from Bungoma County;

(iii) that leave be granted to the applicant to apply for an Order of Mandamus, compelling the 1st respondent to publish the applicant's name as the Ford Kenya Party's gender top-up nominee for Bungoma County;

(iv) that the grant of leave to apply for Orders of Certiorari, Prohibition and Mandamus do operate as a stay of the decision of the 1st respondent contained in the press statement dated 7th June, 2013, until the hearing and determination of the judicial review proceedings, or until further orders of the Court;

(v) that the costs of the application be provided for.

[6] In a decision delivered on 12 July, 2013 the High Court dismissed the appellant's case, holding that *the composition of party-lists and the ranking of names in such lists is an internal matter to be dealt with by the political parties*; and that *the Committee had arrived at its decision after considering the evidence before it, and had given its reasons for reaching that decision.*

[7] The appellant, thereafter, moved the Court of Appeal, raising the following issues:

(i) grave misdirection in law;

(ii) failing to analyse the evidence;

(iii) contrast between original party-list and amended party-list;

(iv) party membership;

(v) failure to consider material evidence; and

(vi) non-compliance with the law.

[8] Upholding the decision of the High Court, the Appellate Court perceived the appellant's complaint as one comprising "challenges of findings of facts" represented as a judicial review matter. The Court remarked the nature and scope of a proper Judicial Review cause, as follows:

> ***"Turning to the appeal before us, it is axiomatic that in an application for judicial review, the High Court is not concerned with the merits of the impugned decision of an inferior tribunal; the Court is merely concerned with the tribunal's decision-making process, to ensure that it has not acted without or in excess of jurisdiction, and that it has observed the rules of natural justice. A long line of decisions from this Court [has consistently affirmed] that position."***

[9] As to whether the Committee had disregarded evidence before it, the Court of Appeal concluded that, from the record, there was a Ford Kenya party membership card No 875842 in the name of the third respondent, issued on 18th January, 2013. Furthermore, Dr. David Eseli Simiyu, the Ford Kenya Secretary-General had deposed by affidavit that the 3rd respondent was a member of the party, and that she was included in the party-list. Dr. Simiyu

besides, averred that a letter which the appellant relies on to show that she is the Ford Kenya nominee, is not genuine.

SUBMISSIONS

(a) 1st Respondent

[10] Learned counsel, Mr. Omollo for the 1st respondent, submitted that the preliminary objection dated 6th November, 2014 relates to the jurisdiction of this Court to hear the appeal before it. He urged that while the petition is brought under Article 163(4)(a) of the Constitution, it entailed no question of constitutional application or interpretation before the superior courts, as the matter emanates from a decision of the Committee of the IEBC – and hence, no proper cause in law was disclosed.

[11] Counsel submitted that on the face of the petition, not a single constitutional provision was cited as having been violated. He cited ***Malcolm Bell v. Daniel Toroitich Arap Moi & Another***, *SC App No 4 of 2012*, in urging that the jurisdiction of the Supreme Court under Article 163(4)(a) of the Constitution is not to be invoked merely for the purpose of rectifying an error in a matter of settled law.

[12] Counsel urged that the decision of the Committee had been made pursuant to the party-list submitted to it, and that this was not a constitutional issue;

and also that the petitioner had not represented that any provisions of either the Elections Act, or the Political Parties Act are inconsistent with the Constitution. Counsel submitted that the nub of the petition was that this Court should return a finding that the petitioner was the lawful nominee of Ford Kenya for Bungoma County Assembly, as pleaded by her.

[13] Learned counsel submitted that the relief the appellant seeks cannot be granted by this Court, just as they could not be by the High Court or the Court of Appeal. He urged that the issues raised by the appellant do not correctly invoke this Court's appellate jurisdiction, and that they are nothing more than a collateral attack by the appellant, and a plain attempt to usurp jurisdiction.

[14] Citing this Court's decision in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others*** *[2014] eKLR,* counsel submitted that only the trial Court may draw factual conclusions, and an appellate Court should treat with deference the trial Judge's findings on record. Counsel submitted that the Court of Appeal was right in finding that the appeal had no merit, and that the reliefs sought were unavailable.

(b) 3rd Respondent

[15] Learned counsel Mr Wena, for the 3rd respondent, supported the preliminary objection. He submitted that the Court in judicial review, looks not at the facts, its jurisdiction being limited to issues of legality, propriety, and constitutionality, and reasonableness. The question before the Committee, counsel urged, was a purely factual one – whether the petitioner *is* to be nominated. The reliefs being sought, it was urged, are in the nature of factual findings, and this Court cannot grant them. In the alternative, learned counsel urged that appellant should have sought leave under Article 163(4)(b) of the Constitution, as the sole route of appeal (on grounds that the question raised issues of great public importance.)

(c) Appellant

[16] Learned counsel Mr. Ndettoh, for the appellant, submitted that the appeal was lodged as of right, and did not require certification. He urged that whereas the preliminary objection rested on the Constitution's category of "interpretation", the more relevant basis of claim is the "application of the Constitution", under *Article 163 (4) (a).* Counsel invoked the Constitution yet again, urging that the petitioner's constitutional right to a fair hearing under article 50(1) of the Constitution had been violated, and that the petitioner was not given a chance to be heard.

[17] Counsel submitted that the respondents had failed to indicate what prejudice they stood to suffer, should the matter be admitted to hearing. The thrust of his case was that the preliminary objection is merely an endeavour to present unwarranted barriers to her access to justice.

[18] He urged the Court to live up to the objectives specified in Section 3 of the Supreme Court Act 2011: to assert the supremacy of the Constitution and the sovereignty of the people of Kenya, and ensure access to justice. Learned counsel apprehended failure of justice, if the petition of appeal was not heard.

(d) 1st Respondent again

[19] In response to the assertion that the respondents stood to suffer no prejudice, it was urged that the trite law be upheld: that jurisdiction is everything and, where it is not properly invoked, proceedings terminate, irrespective of the prospect of ensuing prejudice.

C. ISSUE FOR DETERMINATION

[20] The single issue that emerges for determination by this Court is: *whether the appeal raises any issue involving the interpretation or application of the Constitution, as contemplated under Article 163(4)(a) of the Constitution, so as to activate this Court's jurisdiction.*

ANALYSIS

[21] The crux of the respondents' argument is that the appeal raises no constitutional issues, does not qualify as an "appeal as of right", and fails to engage this Court's jurisdiction. The appellant, by contrast, submits that the appeal is premised upon Article 163(4) (a) of the Constitution, and squarely raises issues involving the *application* of the Constitution.

[22] The petitioner urges that the decision of the Committee was contrary to the rules of natural justice, and that the High Court should have held this to be a breach of her constitutional rights – through denial of fair hearing, and failure to provide reasons for decision. And the petitioner urges that the Court of Appeal fell into the same error, by upholding the High Court's finding. Such a generalized scenario is urged to raise issues involving the "application of the Constitution" and which are on that account, appealable to the Supreme Court.

[23] So it is necessary for this Court to return to the issue of its *jurisdiction,* especially as it relates to judicial-review matters coming up on appeal, in terms of Article 163(4)(a) of the Constitution.

[24] The special character of judicial review as a category of dispute resolution was remarked in a High Court decision, I***n Re Bivac International SA (Bureau Varitas)*** [2005] 2 EA. 42 (as p.47, *Nyamu, J*) thus:

"[Judicial review] has become the most powerful enforcer of constitutionalism, one of the greatest providers of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness."

[25] In ***Municipal Council of Mombasa v. Republic & Umoja Consultants Ltd,*** *Civil Appeal No. 185 of 2001,* the Court of Appeal set out the parameters of judicial review when it held as follows:

"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."

[26] It is also incumbent upon the applicant to make out a case for judicial review on the facts of the relevant matter. As stated in the Ugandan High

Court case of ***Pastoli v. Kabale District Local Government Council and Others*** *[2008] 2 EA 300-301,*

*"**In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety....***

"Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.

"Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....

"Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere [to] and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision ...."

[27] The foregoing elements quite clearly, will manifest themselves in varying forms and degrees, in differing cases; and in any given case, their presence or absence to whatever extent, will be an *evidential question*.

[28] The well-recognised principle in such cases, is that the Court's target in judicial review, is *always no more than the process which conveyed the ultimate decision arrived at.* It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence, an applicant making a case for judicial review has to show that the decision in question was *illegal, irrational or procedurally defective.*

[29] Such being the long-standing state of public law, a reflection upon it alongside the terms of the Constitution of Kenya, 2010 is apposite. *When does an application for judicial review have a bearing on this Court's jurisdiction in terms of Article 163(4) (a)?* This Article stipulates that the relevant matter is to involve "the application or interpretation of the Constitution," to attract the Supreme Court's jurisdiction.

[30] In ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others,*** *S.C. Petition No. 2B of 2014; [2014] eKLR* ***[Munya 2]*** the guiding principles for bringing a matter under Article 163(4) (a) were set out by this Court, thus:

(i) a Court's jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;

(ii) the chain of Courts in the constitutional set-up have the professional competence to adjudicate upon disputes coming up before them, and only cardinal issues of law or jurisprudential moment, deserve the further input of the Supreme Court;

(iii) the lower Court's determination of the issue on appeal must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;

(iv) an appeal within the ambit of Article 163(4)(a) is to be one founded on cogent issues of constitutional controversy;

(v) with regard to election petitions, the Elections Act and the prescribed Regulations are normative derivatives of the Constitution, and in interpreting them, a Court of law cannot disengage from the Constitution.

[31] In an earlier decision, ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others,*** *Supreme Court Petition No. 2 of 2012; [2012] eKLR,* this Court found that the petitioner, "*had not rationalized the transmutation of the issue*

[in contention] from an ordinary subject of leave-to-appeal, to a meritorious theme involving the interpretation or application of the Constitution – such that it becomes, as of right, a matter falling within the appellate jurisdiction of the Supreme Court." This principle was further endorsed in ***Naomi Wangechi Gitonga & 3 Others v IEBC & 4 Others***, *Supreme Court Civil Application No. 2 of 2014; [2014] eKLR.*

[32] In ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another***, *Supreme Court Petition No. 3 of 2012; [2012] eKLR*, this Court held (at paragraph 27) that merely alleging that a question of constitutional interpretation or application is involved, without more, does not automatically bring an appeal within the ambit of Article 163(4)(a) of the Constitution. It was thus stated:

> ***"This Article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court."***

[33] It follows that for an appeal to lie to this Court, in a matter originated under *judicial review*, the issues have to *fall under the canopy of Article 163(4)(a).* As judicial review is concerned with *process,* but for a case where the process

is contested as being unlawful, irrational or procedurally unfair – elements falling within the purview of the rule of law (a constitutional principle) – the matter cannot lie to the Supreme Court. Hence in appealing to the Supreme Court in a matter originated before the High Court by way of Judicial Review, the party concerned should comply with certain principles, as follows:

(i) not all Judicial Review matters are appealable to the Supreme Court, as of right;

(ii) it is open to the party concerned to move the Court on appeal under Article 163(4)(b) of the Constitution, in which case, the normal certification process applies;

(iii) where such an appeal comes under Article 163(4)(a), the petitioner is to identify the particular(s) of constitutional character that was canvassed at both the High Court and the Court of Appeal;

(iv) the party concerned should demonstrate that the superior Courts had misdirected themselves in relation to prescribed constitutional principles, and either granted, or failed to grant Judicial Review remedies, the resulting decisions standing out as illegal, irrational, and/or unprocedural, hence unconstitutional.

[34] Consequently, this Court is by no means an open forum for all cases from the Court of Appeal, on judicial review matters. Each appeal is to be considered on its merits on a case-to-case basis. As remarked by this Court in ***Lawrence Nduttu*** and ***Naomi Wangechi,*** only those causes bearing a real constitutional issue can be heard by this Court; and a bare claim that a

matter raises issues of interpretation or application of the Constitution does not suffice.

[35] It was claimed that the Committee had disregarded the factual evidence presented, and had rendered a decision without giving reasons. The issue of fact-finding before primary trial Courts, and the position of appellate Courts in relation to such facts, has drawn this Court's attention in the past. In the **Outa** case, we thus remarked:

> ***"Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand."***

[36] Factual findings by the trial Court are to be accorded due regard, as that Court had access to the necessary oral and written evidence – alongside the special facility of testing and ascertaining the same, through examination, cross-examination and re-examination. This principle is well pronounced in

cases where a Dispute Resolution Committee is the creature of statute, comprising specialists who are considerably knowledgeable in election matters. Equally relevant is the principle that the opinion of the Court ought not to be substituted for that of *the duly-mandated administrative body, with the statutory authority to determine the matter in question.* The law thus recognises that this Court, as the apex Court, stands not in good stead to evaluate evidence, and to make factual findings. And so in respect of such fact-material, there would be no basis for invoking this Court's appellate jurisdiction under article 163(4) (a) of the Constitution.

[37] Therefore, we would attribute no fault to the Court of Appeal in its finding thus:

> ***"Before the High Court and before this Court, the appellant has insisted that the Committee, in dismissing her claim, merely held, without any reasons, that*** *'All other complaints hereby stand dismissed.'* ***With due respect, we think that the appellant has been less than candid. The determination of the Committee dated 7th June, 2013 has a concluding part, in respect of which the appellant has maintained studious silence. That part reads:***
>
> > *'Conclusion*
> > *The detailed reasoned judgement of the Dispute Resolution Committee will be available at the IEBC headquarters and the website on Tuesday, 11th [June?]2013.'*

The appellant has not averred that the Committee did not give the reasons for its decision as promised in the above part of its decision; she has relied only on the part of the decision announcing dismissal of her claim, without disclosing that she was informed to collect the detailed reasons for the dismissal later. To rely on the portion of the decision dismissing the claim and asserting that no reasons were given for the dismissal while omitting to speak to the part of the decision that provided for availability of the detailed reasons is, to say the least, disingenuous. We agree with the High Court that even on this ground, there was no merit in the appellant's application for judicial review"

[38] Our analysis of the position in this matter, in the context of cogent principles drawn from the Constitution and from case law, brings us to the conclusion that the 1st respondent's preliminary objection has distinct merit. The petition of appeal lodged before this Curt is not for hearing.

F. ORDERS

[39] Accordingly, we make Orders as follows:

(1) The 1st respondent's Preliminary Objection is upheld.

(2) The petition herein is struck out.

(3) The petitioner shall pay costs of the respondent.

DATED and **DELIVERED** at **NAIROBI** this ***16th*** day of ***April*** 2015.

……..	……..
Hon. Lady Justice K. H. Rawal	**Hon. Justice (Dr.) P. K. Tunoi**
DEPUTY CHIEF JUSTICE/V-P	**JUSTICE OF THE SUPREME COURT**
……..	……
Hon. Mr. Justice M. Ibrahim	**Hon. Justice (Prof) J. B. Ojwang**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

……..
Hon. Justice (Dr.) S. C. Wanjala
JUSTICE OF THE SUPREME COURT

I certify that this is a true
copy of the original

DEPUTY REGISTRAR
SUPREME COURT OF KENYA