REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

PETITION NO. 4 OF 2020

ANN CAROLINE MUTHONI...1ST PETITIONER

ANASTASIO G. KABARIE..2ND PETITIONER

MARY NDOMO NDIRITU...3RD PETITIONER

KENNETH GATHITHI GATHERU...4TH PETITIONER

SIMON MUTHURI MUTHEE..5TH PETITIONER

STANLEY NGARU WAKIBIA...6TH PETITIONER

MARY WAMUYU WAMUI..7TH PETITIONER

-VERSUS-

MAJORITY LEADER, COUNTY ASSEMBLY OF NYERI..................1ST RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF NYERI.................................2ND RESPONDENT

THE HON. SPEAKER, COUNTY ASSEMBLY OF NYERI..................3RD RESPONDENT

AND

JUBILLEE PARTY..INTERESTED PARTY

RULING

By a petition dated 27 August 2020 the petitioners sought the following declarations:

> *"(a) A declaration does hereby issue that the resolution of the County Assembly of Nyeri on 25th August 2020 approving a list of County Assembly of Nyeri Committees as recommended by the Committee on Selection on Harmonisation of Sectoral and Select Committees of Assembly to the Extent that it de-whipped the petitioners in different committees of the House was unconstitutional, null and void.*
>
> *(b) A declaration does hereby issue that the petitioners have equal status and are entitled to equal opportunities, responsibilities and privileges including opportunities to participate in the County Assembly Committees.*
>
> *(c) A declaration that status quo ante be maintained pending the hearing of this petition on merit.*

(d) That costs be provided for."

Alongside the petition, the petitioners filed a motion, also dated 27 August 2020 under rules 20, 21, 23 and 24 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006. The prayers in the motion are couched in more or less similar terms as the reliefs sought in the petition; they are expressed as follows:

> ***"a) The application be certified urgent and be heard exparty (sic) for the first instance.***
>
> ***b) A declaration does hereby issue that the resolution of the County Assembly of Nyeri on 25th August 2020 de-whipped (sic) the petitioners from their committees of the House was unconstitutional, null and void.***
>
> ***c) A declaration does hereby issue that the petitioners have equal status and are entitled to equal opportunities, responsibilities and privileges including opportunities to participate in the County Assembly Committees without undue harassment.***
>
> ***d) A declaration that the status quo of Nyeri County Assembly as constituted before 25th August 2020 be maintained pending the hearing of this petition on merit."***

The application is said to be supported by "the annexed affidavit" but there is no "annexed affidavit" except the affidavit sworn by the 1st petitioner on 27 August 2020 in support of the petition.

In this affidavit supporting the petition, the deponent swears that on 25 August 2020 at the 2.30 PM sitting of the County Assembly of Nyeri, the 1st respondent moved an Order Paper under Standing Order 159 of the Assembly's standing orders allegedly purporting to approve members of the various committees of the House recommended by the 1st respondent.

The effect of the recommendation, according to the petitioners, was to de-whip the petitioners from their posts in various sectoral committees of the House. It is deposed that the move to de-whip was informed by the petitioners' quest for elections in the House Committees. In other words, their removal from various house committees was malicious.

The petitioners swore further that, ordinarily, the procedure to appoint members of the committees is done at the beginning of the term of the House and that it was their legitimate expectation that once appointed they would serve the full term of the County Assembly.

As a result of the removal of the petitioners from the committees it is deposed that

> ***"The petitioners have suffered shock and actual loss of expected allowances that come with these duties".***

In any event, it has been deposed, the new list of committee members was not 'distributed evenly' among the sub counties and is contrary to Standing Order 157 (3) which requires that each member is nominated to serve in at least one sectoral or select committee of the House. Again, the appointments made after the de-whipping of the petitioners are said to have breached Standing Order 158 (3) which restricts membership of the committees to two committees per member of the County Assembly.

The respondents filed a notice of preliminary objection dated 24 September 2020 in which they urged that since the petitioners are all members of Jubilee Party, the dispute is essentially between a political party and its members and therefore the right forum in which this dispute ought to be resolved is the Political Parties Tribunal established under section 39 of the Political Parties Act, 2011. Accordingly, the respondents urged that this Honourable Court has no jurisdiction to hear and determine the present dispute.

A further ground on which the jurisdiction of this Honourable Court is disputed is that the provisions of the County Assemblies (Powers and Privileges) Act, 2017, provide that the decisions of the County Assembly and its speaker are not liable to challenge in court.

It is therefore the respondents' case that the entire petition should be struck out *in limine.*

Besides the preliminary objection the respondents also filed a replying affidavit sworn on 2 October 2020 by Jenard N. Mwiggeh, the Clerk to the County Assembly of Nyeri.

Mwiggeh's affidavit is largely made up of matters of law which should not be the case because affidavits, by their very nature, are evidence and therefore they should be restricted to matters of fact.

Nonetheless, Mwiggeh does not dispute that on 25 August 2020 the County Assembly of Nyeri resolved to reconstitute the membership of various Sectoral committees and select committees. To this end, a motion was presented to the house by the 1st respondent who is the leader of majority party in Assembly, the Jubilee Party. The motion was debated, passed and implemented.

It is deposed that the decision to nominate and approve members to the committees of the county assembly is a political decision made by political parties depending on their interests and agenda in the assembly.

Directions were taken to the effect that both the preliminary objection and the petitioners' motion be heard simultaneously; this was, of course, on the understanding that if the preliminary objection is overruled, the court would proceed to determine the motion but if it was to be upheld, there would be no need to consider the application any further.

Considering that the preliminary objection questions the jurisdiction of this Honourable Court, it is inevitable that it ought to be disposed of first.

The contention that the petitioners and the 1st respondent are members of the same party has not been disputed. It is also not in dispute that the decision to substitute the petitioners in various committees with other members of the County Assembly of Nyeri but who, apparently, share the same political party as the petitioners was also a party decision that was presented in the House by the party's representative who, as noted, is also the leader of the majority party.

Among the reasons given by the petitioners in their affidavit in support of the petition why they were aggrieved by the 1 st respondent's or their party's decision are as follows:

> ***"24. That at the bottom of all this re allocation and de whipping of the petitioners is aimed at maliciously marginalizing them with respect to blocking them from legitimate expectations of emoluments and benefits.***
>
> ***25. That the re allocation of the committees is also aimed at benefitting the respondents and their allies and favourites with emoluments and benefits that accrue from the membership of these sectoral committees."***

The petitioners could be right that their removal from the House committees was ill-motivated but being a decision taken by the party that sponsored them to the Assembly, I am persuaded by the respondents' arguments that the petitioners' contentions would constitute the sort of dispute that the Political Parties Tribunal is established under section 39 of the Political Parties Act, 2011. Section 40. (1) of that Act states as follows:

> ***40. (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.***
>
> ***(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. (Emphasis added).***

To the extent that the decision to de-whip the petitioners from the committees was initiated or is assumed to have been initiated by their party, their dispute would fall under section 40. (1)(b) but it may also fall under subsection (1) (a) considering the allegations the petitioners have raised against the members of the Assembly who replaced them in the respective committees and who share the same party as the petitioners.

Whatever the case, the appropriate forum where this dispute ought to have been lodged was the Political Parties Tribunal subject, of course, to the provisions of section 40 (2) of the Political Parties Act.

It has been held 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. (See **Speaker of the National Assembly v James Njenga Karume (1992) eKLR**).

This does not in any way suggest an ouster of jurisdiction of this Honourable Court to determine a dispute on a violation of the Constitution or a threat to such a violation; it simply means that unless there are exceptional circumstances that would make it impossible for a party to adopt a course prescribed by the Constitution or an Act of Parliament, there is no reason why that procedure should not be followed.

In **Anisminic Ltd v The Foreign Compensation Commission and Another (1969) 1 All ER 208 Lord Reid held as follows on the question of ouster provisions:**

> ***"It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly--meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court. Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history."***

While referring to the specific question as to whether the court was precluded from interrogating 'a determination' by an ouster clause when, on its face, the purported determination was a nullity, the learned judge continued:

> ***"No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity.***

> ***If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others; if that were intended it would be easy to say so." (see page 245-246).***

So, if it was to be demonstrated that the County Assembly of Nyeri County or any of the respondents in these petition have clearly violated the constitution or they have threatened to or have made a resolution that is unambiguously in violation of the provision of the Constitution, this Court will not hesitate to intervene to protect the Constitution.

In the instant case, the petitioners have avoided the course prescribed by the Political Parties Act to address their grievances; no particular reason has been given why they have omitted to follow the prescribed procedure. In the absence of any reason why they chose to invoke the jurisdiction of this Honourable Court instead of first exhausting the mechanisms prescribed by the Act to resolve their dispute, their application and, indeed, the entire petition would be misconceived.

One additional decision that I am persuaded to adopt in the determination of the preliminary objection is that of the **Kemrajh Harrikissoon versus The Attorney General of Trinidad & Tobago, Privy Council Appeal No. 40 of 1977** where the Judicial Committee of the Privy Council decried the misuse of the provision of the Constitution on enforcement of fundamental rights and freedoms with specific reference to section 6 of the Constitution of Trinidad and Tobago which would be equivalent to Article 22 (1) of our Constitution and which accords every person the right to institute court proceedings where it is alleged that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

The privy council underscored the importance of such provision of the constitution and warned against misusing it to institute ordinary suits. The Privy Council noted as follows:

> ***"The notion that whenever there is a failure by an organ of government or public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom." (Page 1-2)***

The Constitution of Trinidad and Tobago may not necessarily match our own Constitution but the principle enunciated by the Privy Council on the invocation of the provisions of the Constitution to enforce fundamental rights and freedoms is relevant to our circumstances. Litigants must be discouraged from invoking the provisions of article 22 of the Constitution willy-nilly when their disputes ought to be resolved in the ordinary way otherwise through the means prescribed by the Constitution or by an Act of Parliament.

For the reasons I have given, I uphold the respondents' preliminary objection and strike out the petitioners' petition. It is struck out with costs.

SIGNED, DATED AND DELIVERED ON 12TH JANUARY 2022

NGAAH JAIRUS

JUDGE