



Ombayo v Bushuru & 3 others (Constitutional Petition E008 of 2022) [2022] KEHC 10930 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E008 OF 2022**

PJO OTIENO, J

MAY 20, 2022

**IN THE MATTER OF SECTION 28A OF THE POLITICAL PARTIES
(AMENDMENT) ACT, 2022**

AND

**IN THE MATTER OF ACTUAL BREACH OR CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 2, 3, 10,
22, 23, 47, 165, 232, 258, 260 OF THE CONSTITUTION OF KENYA**

2010

AND

**IN THE MATTER OF JURISDICTION OF THE HIGH COURT OF KENYA
UNDER ARTICLE 165(3) (D) (II) OF THE CONSTITUTION OF KENYA**

2010

BETWEEN

MOSES MIRIKAU OMBAYO PETITIONER

AND

HABIL NANJENDO BUSHURU 1ST RESPONDENT

REGISTRAR OF POLITICAL PARTIES 2ND RESPONDENT

AMANI NATIONAL CONGRESS 3RD RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 4TH RESPONDENT**



RULING

1. The principal prayers in the Petition target and seek to nullify the nomination of the 1st Respondent by the 3rd Respondent to vie for the elective post of the Member of Parliament for Butere Constituency, for the General elections scheduled for the August 9, 2022, for being unconstitutional and untenable and offensive to the provisions of articles 10, 27, 47, 232(1) of the Constitution and section 28A of the Political Parties Act hence certiorari is sought to quash that nomination and a prohibition to bar gazettelement of the 1st Respondent's name by the 4th Respondent.
2. The grounds upon which the petition is premised are that; the 1st Respondent was at all times a life member of the Orange Democratic Movement Party since the year 2007 and was alleged to have joined the 3rd Respondent on the March 26, 2022 the same day he addressed a political rally, for Orange Democratic Movement, at about 2.00 p.m., when the deadline for the 3rd Respondent to present party lists was midnight on the same day. The Petitioner therefore contends that being a life member, the 1st Respondent was belatedly allowed to join the 3rd Respondent at the prejudice of the Petitioner and the entire Butere Constituents.
3. At the time of filing the Petition, the Petitioner contemporaneously filed an application for conservatory orders to safeguard the substratum of the Petitioner pending its determination.
4. When served with the pleadings, the 1st Respondent filed a Replying Affidavit and Notice of Preliminary Objection asserting that the court lacks the jurisdiction to entertain the petition and the application while contending that he indeed resigned from the said Orange Democratic Party on March 26, 2021 and joined the 3rd Respondent a fact that was duly confirmed by the 2nd Respondent's records.
5. For the 2nd Respondent, a Notice of Preliminary Objection was filed at the same time with submissions. The position taken by that Respondent was that the court's jurisdiction was ousted by the provisions of article 169 (1)(d) of the Constitution as read with section 40 of the Political Parties Act as consistently interpreted by the courts. The same position was taken by the 3rd Respondent who equally file a Preliminary Objection contesting the jurisdiction of the court together with a list of authorities.
6. For the 4th Respondent, instead of Notice of Preliminary Objection, Grounds of Opposition was filed and the jurisdiction of the court challenged and the matter termed an abuse of the court process. Those papers were however filed after the matter had been argued and on the eve of the date set for ruling.
7. When the matter came up for interpartes hearing, parties agreed that there being objections challenging jurisdiction of the court, the Court would take submissions by the parties on the same and makes a determination of the points of objection before delving into the merits of the petition.
8. For the 1st, 2nd and 3rd Respondents the common position taken by the three advocates who addressed the court was that, the matter, as far as it challenges the nomination process by a political party, the 3rd Respondent, was prematurely brought before the court and affronted the principle of exhaustion in that sections 40 and 41 of the Political Parties Act, established a statutory manner of dealing with disputes over nomination by political parties to be handled by the Political Parties Disputes Tribunal and that the court's mandate is only on appeal from such determinations. To those parties, even the very wide jurisdiction of the High Court under Article 165 was delayed pending exhaustion of the mechanism provided by the Political Parties Act. They cited to court Kennedy Kariithi Gachenge & others v United Democratic Alliance & others Nairobi, Constitutional Petition No. E163 of 2022



wherein it was held that; “unless a petition demonstrates that there is an exception to the doctrine of exhaustion, the doctrine becomes a complete bar to the jurisdiction of the court and that all disputes arising out of party nominations are covered by Section 40 (1) of the Act.” The decision in *Rich Productions Kenya Ltd v Kenya Pipeline Company & Another* [2014]eKLR was cited for the proposition of the law that the court will not exercise its jurisdiction under Article 165 in circumstances where the parties before the court seek to avoid mechanisms and process provided by the law.

9. The counsel for the Respondents then stressed the point that even though the principle of exhaustion has exceptions as reiterated in the decision of *Jamlic Muriithi Mwenda v the Law Society of Kenya* [2022]eKLR, such exceptions to the rule were not present here or there had not been sought the interpretation of the various constitutional provisions cited by the Petitioner. The three Counsel therefore urged the court to respect the jurisdiction given to other organs to resolved party nomination disputes and not to usurp that jurisdiction by striking out the petition and the application filed with it.
10. For the petitioner, the position taken was that even though the doctrine of exhaustion would demand that the matter is dealt with through the procedure and process established under section 40 and 41 of the *Political Parties Act*, the principle of exhaustion has known exceptions and is not a total bar to jurisdiction as contended by the Respondents. He cited and relied on the decision in *Republic v IEBC Exparte, NASA* on the proposition that the doctrine would not apply in the exceptional circumstances like where strict application of the doctrine would not serve the values enshrined in the Constitution and where there is sought interpretation of the Constitution in vergin areas where an important value of the Constitution is at stake. To the Petitioner, the jurisdiction of the court under article 165(3) and (6) of the Constitution is unlimited in both civil and criminal matters. He then added that the 1st Respondent having been a life member of another party, his resignation demanded an acknowledgment before his membership could cease and that in this case there was haste by the 1st and 3rd Respondents. The Petitioner therefore urged the court to dismiss the Preliminary Objection as not having been improperly taken and to allow the petition proceed on the merits.
11. Having heard the petition on one side and the 1st – 3rd Respondents on the opposing side, I discern the issue for determination to be whether the petition, when brought had skipped the forum designed by law to resolve Political Parties nomination disputes and if so, whether there was an exceptional circumstances that justified avoiding that forum in preference to the court.
12. While the jurisdiction given to the High Court is expressed to be unlimited when it comes to matters of interpretation of the Constitution, that jurisdiction is not exclusive but shared with other courts and even Tribunals properly established and clothed with jurisdiction to handle a specific genre of disputes.
13. For disputes regarding political parties affairs including the mandate to nominate candidates for elective positions, Parliament has legislated the *Political Parties Act* and created a 'Tribunal'¹ whose mandate and jurisdiction is, inter alia, resolution of disputes arising out of party nominations. That statute must at all times be recognized to be the realization and observance by parliament of the obligation for Parliament under article 92 to enact a legislation to provide for among other things management, functions and regulation of political parties.
14. The Petitioner does not deny the existence, capacity, suitability and mandate of Political Parties Disputes Tribunal to deal with his dispute which he equally recognizes to be a party nomination dispute. His point comes out to be that Section 40 (1) does not oust the unlimited jurisdiction of the court and that the acknowledged and respected doctrine of exhaustion is not a total bar to jurisdiction because it has its known exceptions. In the entire submissions however no demonstration was made

¹ Section 40 (1) *Political Parties Act*



how and why the known exceptions apply to this matter. He did not alleged unsuitability or lack of capacity on the Tribunal to deal with the disputes pleaded and was content to assert that the doctrine has exceptions. With such a position, we go back to the dictates and application of the doctrine of exhaustion.

15. It is not a novel doctrine, was applicable in Kenya well before the Constitution 2010² and has continued to apply. I see a trend in legislation where many a statute create tribunals, seen as most appropriate to resolve a particular class of disputes, owing to expected expertise and need for fast disposal of such disputes. That should never be viewed as chipping or taking away the mandate and jurisdiction of the court to resolve disputes but must be viewed as a strategy to expedite dispute resolution as a constitutional principle.
16. The Kenya law therefore is trite that where there is legally established dispute resolution mechanism outside courts, the same must be exhausted before the parties invoke the jurisdiction of the court so that the values in article 159 is respected and upheld. That is the binding learning from the Court of Appeal in *Geoffrey Muthiga Kabiru & 2 others v Samuel Minga Henry & 1756 others* [2015]eKLR and *Kenya Ports Authority v William Odhiambo Ramogi & others* [2019]eKLR just to mention a few. Here the sole issue, without more, for determination is whether the 1st Respondent was duly nominated by the 3rd Respondent having resigned from the previous party on the same day.
17. That is an issue that is best suited to be dealt with and determined by the Political Parties Disputes Tribunal before it is escalated to the High Court. I therefore find and hold that the petition when filed, was prematurely filed before this court and in violation of the law and avoidance of the statutory designated forum. For being premature, it is improperly before the Court and is thus struck out.
18. On costs, I consider the petition to have carried some public interest in the manner our political parties undertake their affairs. It was not a personal frolic. On that score it is ordered that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 20TH DAY OF MAY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Petitioner in person

Shikolia for the 2nd and 3rd Respondents

Malalah for the 1st Respondent

Court Assistant: Kulubi

² *Speaker of National Assembly –vs- Karume* [1992] KLR 21

