



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG’U J

CONSTITUTIONAL PETITIONNO 13 OF 2020

IN THE MATTER OF ARTICLES 1(1), (2), (3) & (4), 2(10 2)(5) & (6), 3(1),10,20,21,22,23,27(1) & (2), 28, 43(1), 47, 50, 177, 232 (1), (I) & 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 4 OF THE FAIR ADMINISTRATIVE ACTION ACT 2015 AND IN THE MATTER OF STANDING ORDERS NO. 1, 44, 47, 49, 50, 91, 104, 105, 106, 107, 152, 153, 154, 155, 156, 157, 168, 174, 185, 186, 191 & 192 OF THE STANDING ORDERS OF COUNTY ASSEMBLY OF KISII

CLARE MORAA OBINO1ST PETITIONER

MARGARET BONARERI ATINA2ND PETITIONER

JOYCE KWAMBOKA OMBASA.....3RD PETITIONER

VERSUS

CHIEF WHIP, MAJORITY PARTY.....1ST RESPONDENT

CHIEF WHIP, MINORITY PARTY.....2ND RESPONDENT

THE COUNTY ASSEMBLY SERVICE.....3RD RESPONDENT

BOARD OF KISII COUNTY ASSEMBLY.....4TH RESPONDENT

THE COUNTY ASSEMBLY OF KISII.....5TH RESPONDENT

THE HON.SPEAKER KISII COUNTY ASSEMBLY..... 6TH RESPONDENT

THE CLERK OF COUNTY ASSEMBLY OF KISII7TH RESPONDENT

RULING

1. This Ruling is on the preliminary objection dated 11th September 2020 by the respondents. The objection is on the jurisdiction of this court to deal with the Notice of Motion application dated 27th August 2020 against the respondents in which the petitioners sought the following orders;

1. The Instant Application be certified as urgent and same be heard on priority basis.

2. PENDING the hearing of this Application inter-partes, there be an interim conservatory order restraining and/or prohibiting the Respondents from implementing the decision of discharging and/or de-whipping the Applicants/Petitioners from the respective Committees made on 30th July, 2020.

3. THAT PENDING the hearing of this Application interpartes, there be an interim conservatory order restraining and/or prohibiting the Respondents, their agents, servants from barring the Petitioners/Applicants from chairing and attending their Committee functions of their respecting Committees.

4. THAT PENDING the hearing and determination of this Petition, there be conservatory order restraining and/or prohibiting the Respondents from implementing the decision of discharging and/or de-whipping the Applicants/Petitioners from the respective Committees made on 30th July, 2020.

5. THAT in the alternative, PENDING the hearing and determination of this Petition herein, there be conservatory order restraining and/or prohibiting the Respondents, their agents, servants from barring the Petitioners/Applicants from chairing and attending their Committee functions of their respecting Committees.

6. THAT the Honourable Court be pleased to grant such other or further relief as may deem fit in the circumstances.

7. THAT the costs of this proceedings be borne by the Respondents.”

2. The petitioners are members of the 4th respondent having been nominated by Orange Democratic Party (ODM), People’s Democratic Party (PDP), and Jubilee Party to represent women in Kisii County in the 3rd Respondent’s Assembly. The petitioners were then appointed to various committees. The petitioners advanced that the 1st and 2nd respondents issued notice to the 5th respondent discharging the petitioners contrary to standing order No. 157. The 1st and 2nd respondents having failed to notify the petitioners of its decision, the petitioners were made aware of the decision during a plenary of the 4th respondent chaired by the 5th respondent on 30th July, 2020 that they had discharged from the Committees. The Communication by the 5th Respondent became the resolution of the 4th Respondent, effectively discharging the Petitioners from the said Committees. The petitioners contend that *the decision by the Respondents is improper, unfair and unjustified curtailment of representative rights of the Petitioners.*

3. Respondent’s filed a preliminary objection on the following grounds.

1. THAT jurisdiction for the Application and the entire petition lies with the Political Parties Dispute Tribunal in accordance with Section 40 of the Political Parties Act.

2. THAT the application and the entire petition offends the principle of separation of powers.

3. THAT the application and the entire petition infracts the court’s jurisdiction on the Doctrine of exhaustion.

4. The Respondents submitted that this Honorable Court has no jurisdiction to determine the issues in the application and the appropriate forum seized with jurisdiction is the Political Parties Dispute Tribunal (PPDT). The respondents cited the case **Stephen Asura Ochieng v Orange Democratic Movement Petition No. 289 of 2011** where the court captured the reason behind the establishment of the Political Parties Tribunal as follows:

“The intention behind the establishment of the political parties Tribunal was to create a specialized body for the resolution of inter-party and intra-party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of Judicial power by Courts and Tribunals established under the Constitution and for the use of alternative dispute resolution mechanisms...”

5. They advanced that the power to discharge a member from a committee is vested in the political party that nominated such a member to a Select Committee by virtue of Standing Order No. 157 of the Kisii County Assembly Standing Orders, subject to written notice being received by the Speaker.

6. They advanced that the issue of removal of the petitioners and other members of the County Assembly from membership of various committees is an internal matter for the County Assembly regulated and governed by the applicable Standing Orders and not amenable to the court’s jurisdiction. In support of their case they relied on the case of **Dominic Ndonge Maithya & 3 Others v Machakos County Assembly Speaker & 2 Others [2017] eKLR**, where the court held that;

“From the foregoing analysis and observations, it is the finding of this court that it has no jurisdiction to entertain the Petition as the Petitioner’s removal and or discharge from the committees were exclusively internal matters within the Machakos County Assembly. It is also the finding of this court that the removal of the Petitioners from the 1st Respondent’s committees did not amount to violation of their individual rights under the constitution because their membership for those committees was at the pleasure of their political parties through the leaders of majority and minority as well as the whip at the Machakos County Assembly.”

7. Finally they advanced that this court lacks jurisdiction by operation of the doctrine of exhaustion. They cited the case of **Geoffery Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others [2015] eKLR**, where the Court of Appeal stated that;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the court is invoked. Court ought to be a for a 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 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...”

8. The petitioners submitted that, the Notice of Motion is hinged on whether the process through which they were discharged from their various committees was constitutional and whether their rights were violated.

9. They argued that jurisdiction of the PPDT and the Internal Political Parties Dispute Resolution Mechanisms under the provisions of section 40 (1) (b) and (2) of the Political Parties Act, can only be triggered when a particular Political Party makes a decision that affects its members. However, in this case, the Political Parties that nominated the Petitioners to the various Committees and Assembly Leadership positions did not make the decisions to de-whip the Petitioners under Standing Order 157 of the Kisii County Assembly Standing Orders. The Standing Order 157 provides for the Political Party to give Notice of discharge of a member to the Speaker and not otherwise. In the circumstance, there was no dispute capable of triggering the jurisdiction of the Political Parties Internal Dispute Resolution Mechanisms or Political Parties Disputes Tribunal under section 40(1)(b) & (2) of the Political Parties Act.

ANALYSIS AND DETERMINATION

10. The Court in the case **Oraro vs. Mbaja (2005) I KLR 141** considered what constitutes a preliminary objections and held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence

13. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.”

11. The preliminary objection challenges the jurisdiction of this court and as the respondents have asserted that the dispute should be resolved in accordance to the provisions of the Political Parties Act. In the case of **the Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited (1989) KLR 1** Nyarangi JA famously stated:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

12. Section 40 of the **Political Parties Act No. 11 of 2011** provides that:

“(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.”**

13. In **Linus Kamunyo Muchina v Speaker Embu County Assembly Majority Leader – Embu County Assembly [2016] eKLR** the Court held that:

“Section 40 of the Political Parties Disputes Act empowers that tribunal to hear disputes in the first instance. Thereafter, this court may exercise supervisory jurisdiction over that tribunal in order to enforce the constitutionally guaranteed rights of an aggrieved party such as the current petitioner. It may do so upon its own motion (suasoponte) in terms of Article 165 (7) or upon application by an aggrieved party...It therefore follows that an aggrieved party or person who has a dispute that is contemplated in section 40 of the Political Parties Disputes Act must first file his complaint with that tribunal. By virtue of the mandatory provisions of section 40, such a party or person does not have direct access to the High Court. He has to exhaust the avenues provided for by the provisions of Section 41 of the Political Parties Disputes Act...**It therefore follows that the application for transfer to that tribunal is hereby allowed because it has first instance jurisdiction over the subject matter of this petition. The jurisdiction of the High court to enforce these fundamental rights including the threatened removal of the petitioner from office may only come into play after the petitioner has exhausted his avenues/remedies under the provisions of sections 40 and 41 of the Political Parties Disputes Act.”**

14. In **John Musakali v Speaker County of Bungoma & 4 others [2015] eKLR** the court held as follows;

“However the court is also alive to the fact that the same Constitution has created institutions which must be allowed to function and carry out their mandate, including the Political Parties Tribunal. The removal of the petitioner being a political process where members of his own coalition in the Assembly expressed their will to replace him, and although the petitioner says *section 40* of the Political Parties Act does not apply to him, the Political Parties Tribunal was established to deal with such disputes as the petitioner’s. All political parties and coalitions are required to have internal dispute resolution mechanisms in order to promote internal democracy. The political parties Tribunal would not function if courts were to assume jurisdiction and deal with matters meant for it. If that were to be the case, *Article 159(2)(c)* of the Constitution would not have any relevance in this country regarding alternative disputes resolution.”

15. In **Dominic Ndonge Maithya & 3 Others v Machakos County Assembly Speaker & 2 Others (Supra)** the court also observed that courts will only intervene in the businesses of County Assemblies where there are clear constitutional violations of certain rights and liberties. The Court in **Dominic Ndonge Maithya & 3 Others v Machakos County Assembly Speaker & 2 Others (Supra)** further observed that;

“In order to establish whether this court has no jurisdiction to entertain this Petition, it is necessary to have a look at some of the provisions which guide the activities of the Respondents as submitted by their learned counsel. They are as follows:

i. Article 196(3) constitution

“Parliament shall enact legislation providing for the powers, privileges and immunities of County Assemblies, their committees and members.”

ii. Section 17 County Government Act 2012

“The National law regulating the powers and privileges to parliament shall, with the necessary modifications, apply to a County Assembly”.

iii. Section 12 of the Privileges’ Act provides:-

“No proceedings or decisions of the Assembly or the committee of Privileges acting in accordance with this Act shall be questioned in any court.”

iv Section 29 of the Privileges Act provides:-

“Neither the Speaker nor an officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or in speaker or such officers by or under this Act or the Standing Orders.”

v. Section 14 County Government Act provides:-

“County Assemblies to establish committees through the Assembly Standing Orders and constitute business transacted in the Assembly.....”

From the above provisions, it is clear that all County Assemblies enjoy some powers and privileges as well as immunities. The businesses of County Assemblies are usually transacted through their respective Standing Orders and are for all intents and purposes internal matters. The doctrine of separation of powers is quite essential in a democracy so that each arm of government is independent from the other. The courts will only intervene where there are clear constitutional violations of certain rights and liberties. The Petitioners herein have moved to this court alleging that their constitutional rights have been infringed or violated when the Respondents removed or discharged them from certain committees of the 1st Respondents. The Petitioners have averred that the actions of the Respondents was actuated by malice and calculated to deny them the opportunity to take part in an upcoming vetting of chief officers and also from raising issues of corruption involving the 2nd Respondent. It must be pointed out that the Petitioners had initially been selected by their majority and minority leaders and the whip on the basis of party strengths and once they occupied the position of committee members they were deemed to remain there at the beck and call of their parties and were to take care of issues and policies, germane to their sponsoring parties. It seems the Petitioners fell afoul with their parties and were thus removed and or discharged from those committees. My view of the Petitioners complaint is that the Respondents actions were an internal matter which does not warrant this court to interfere.

16. I agree with the holding in **Dominic Ndonge Maithya & 3 others v Machakos County Assembly Speaker & 2 Others (Supra)** and find that the Respondents actions were an internal matter which does not warrant this courts interference. The dispute squarely falls within the *Internal Political Parties Dispute Resolution Mechanisms and PPDT by virtue of section 40 (1) and (2) of the Political Parties Act.*

17. Although the applicants have argued that the decisions were not made by their respective parties, the decision to discharge them from the said committees was communicated by the 1st and 2nd respondents who are considered to have communicated the decision of the political parties to speaker of the county assembly. The dispute is thus one contemplated under **section 40 of the Political Parties Act.**

18. In the case of Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others (2019) eKLR the Court was emphatic that:

“In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute”.

19. Internal Political Parties Dispute Resolution Mechanisms and PPDT provided for under **section 40 (1) and (2)** of the **Political Parties Act** ought to have been the first port of call for resolution of the dispute in line with the decision in **Geoffrey Muthinja Kabiru & Another vs Samuel Munga Henry and 1756 Others (supra)**.

The petitioners herein ought to have exhausted the existing dispute resolution mechanism before invoking the jurisdiction of the court.

20. This position is distinguishable from the decision of this court in **Hon. Daniel Apepo & Another vs The Speaker County Assembly – Kisii County and Another, the County assembly Service Board – interested party HC Kisii Petition No. 18 of 2020.**

At paragraph 25, 26 and 27 of that ruling the court stated;

“25. On analyzing the authorities referred to by the respondents’ counsel I found them to be inapplicable to the present case as the disputes in those matters concerned the removal by political parties of members from positions of Leader of Majority and Leader of Minority in various County Assemblies.

26. The respondents in this case are not political parties within the meaning of the Political Parties Act. Evidently, the issues raised by the petitioners do not concern political parties or members of political parties and are therefore not within the jurisdiction of the Political Parties Disputes Tribunal as contended by the respondents.

27. The petitioners are contesting their removal from the Board by the respondents in violation of their constitutional right to a fair hearing before adverse action was taken against them. This right is enshrined in **Article 47 (2)** of the **Constitution** which provides:

“(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

That scenario does not obtain in the present proceedings where it is the Leaders of Majority and Minority political parties who initiated the removal of the petitioners placing the dispute squarely in the pervue of the Internal Disputes Resolution Mechanism and PPDT provided for under **Section 40** of the **Political Parties Act**.

21. In conclusion, I find that the applicants ought to have had the matter ventilated before the Political Parties Disputes Tribunal upon exhausting the internal dispute resolution mechanisms before filing this instant application before the court. In the circumstance, I allow the preliminary objection and strike out the notice of motion dated 27th August 2020.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF APRIL 2021

A. K. NDUNG’U

JUDGE