



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. E 015 OF 2021

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 1, 10, (1) &(2) 19 (1) 20(1) 21(1) 22 (1) 23, 25, 28 47 48 50 (1) 75 (1) 118, 159, 165 232 AND 258 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF RULES 20 AND 21 OF THE CONSTITUTION OF KENYA SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT 2015 IN THE MATTER OF: SECTION 12 OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT ON THE FUNDAMENTAL RIGHTS OF THE PETITIONERS

AND IN THE MATTER OF THE CONSTITUTION OF KENYA PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES

BETWEEN

HON. JANE WAMBUI GATAL.....1ST PETITIONER

HON. BETTY KINYA KIAMBATI.....2ND PETITIONER

HON. ELIAS MUREGA JULIUS.....3RD PETITIONER

HON. PETER MUTUMA RINGINE.....4TH PETITIONER

HON. MOSES KINYUA TURIBU.....5TH PETITIONER

HON. GEORGE MUTHURI.....6TH PETITIONER

HON. ISAIAH KIRIMI KANYARU ITIRITHIA.....7TH PETITIONER

MARTIN MUTHURI MWORIA.....8TH PETITIONER

AND

KENYA PATRIOTS PARTY1ST RESPONDENT

REGISTRAR OF POLITICAL PARTIES.....2ND RESPONDENT

VERSUS

RULING

1. This petition seeks, in the main, to challenge and overturn the decision by the 1st respondent from removing the petitioner from its members list and from the committee of the Meru county assembly and other positions in the Assembly held by them by virtue of their membership to the 1st respondent.
2. The factual foundation of the dispute as disclosed in the petition is that the 1st respondent has severed and closed all links with its members countrywide by collapsing all institutional structures including leadership and payments of party subscription dues. However, in a surprise move, the petitioners received a communication from the 1st respondent through the office of the interested party directing their removal from the 1st respondent membership, membership list of committees in the county Assembly and any other position they hold on account of their membership in the 1st defendant and an eventual removal from being members of the County Assembly.
3. The move is seen by the petitioners as abrupt and hastened in that prior to the said communication, no summons had been served upon them nor was any disciplinary proceedings taken against them to merit the very drastic steps of removal.
4. It is therefore contended that the decision was reached without affording to the petitioners the right to defend selves, in violation of the principles of natural justice, the fair administrative actions Action the Political parties Act and the 1st respondent own constitution hence the same is unconstitutional, unlawful and subject to being declared so, so that the prospects of irreparable loss and damages is obviated from visiting the petitioners.
5. When served the 1st respondent filed a notice of preliminary objection based on the principles of exhaustion and ripeness. It is contended that the pre-court litigation procedures enacted under section 40 of the Political Parties Act and Clause q,t and u of the 1st Respondent's constitution have not been pursued and exhausted before lodging the petition which is therefore premature and deserves being struck out.
6. The preliminary Objection was directed to be canvassed by way of written submission pursuant to which direction the petitioners, the 1st respondent and the interested party filed written submissions. The interested party filed submissions on 21st September 2021, 20th September, 2021 and 13th July 2021 respectively. The 2nd respondent had not filed its submissions by the time of preparation of this ruling.
7. The only issue that stands for determination in preliminary objection is whether the court has the requisite jurisdiction to entertain, hear and determine the petition on the basis that the petitioners are yet to exhaust the dispute resolution mechanism under the political parties Act and the 1st respondent own constitution. While the 1st respondent and the interested party support the preliminary objection and urge that the petition be dismissed, the petitioner resists the objection and relies on Article 22 (1) of the constitution and asserts that there exist a fundamental right on them to access the court and claim that their rights have been violated, infringed or threatened. The petitioner then cited to court the decision in **Wilfrida Arnodah Itolondo Vs board of Trustees of Kempatita university Staff retirement benefit scheme (2014) Eklr** where it was decided that as the nominations rules that were sought to be declared unconstitutional it was not within the jurisdiction of the dispute resolution procedure under the retirement Benefit Act. In addition it was argued that the jurisdiction to declare where a right of fundamental freedom has been violated, denied or infringed lies with the high court and not the mechanism under the political parties Act. The decision in **Jaset Interprises Ltd Vs National Transport and Safety authority (2017) eKLR** as cited for the proposition that the issuance of orders of mandamus, prohibition and certiorari are the preserve of the High court and incapable of issuance by the courts and Tribunals below the High court. To petitioner, such orders are issued as tools of supervision under Article 165 (6) of the constitution. It was therefore submitted that the political parties tribunal has no mandate to give the relief sought in this matter.
8. In further support of the said propositions, the petitioners cited to court the decision in **Ford Kenya Vs Office of the Registrar of Political parties, Ann N. Nderitu (2020) eKLR** and thus urged that the preliminary objection be dismissed because only the High court has the power to grant the orders sought.
9. For the 1st respondent position was taken that there is no constitutional question to be determined herein that as disclosed at paragraphs 7,8 and 9 of the petition, the complaint is that the decision was made prior to disciplinary process and thus procedurally in violation of the parties constitution, political parties Act and Fair administration Action Act. The 1st respondent thus cited the decision in **Ephrahim Mwangi Maina Vs Attorney General and 2 others (2013) eKLR** where the court upheld a preliminary objection on the basis that where there were exist clear statutory procedures provided, the same should be followed before a party approaches the court with a petition. **Kenya tea & coffee Company Vs Shikara ltd (2015)** was cited for the position that the very wide jurisdiction granted to court under article 165 (6) does not foresee and encourage the exercise thereof where parties demonstrate the intention to avoid the mechanisms and process provided by law and convert such issues into constitutional issues when it is not.
10. The 1st respondent in addition cited the decision in **Republic vs Registrar of political parties (2017) eKLR, Eliud Wafula Maelo Vs Ministry of Agriculture (2016) Geoffrey Muriithi Wachira Vs speaker, Tharaka Nithi County Assembly (2020) eKLR, Rich Production Ltd vs Kenya Pipeline Company Ltd (2014) eKLR George Osotsi Vs Amani National Congress Party (2019) eKLR and Musalia Mudavi Vs Angela Gathoni Wambura (2019) eKLR** for the proposition of law that where there exist an alternative dispute resolution mechanism provided by law or the party's constitution as a first port of call, that must be resorted to as it ousts or postpone the jurisdiction of the court to deal with the matter prior to the forum handling the matter. It was therefore submitted the provisions of such statutes creating dispute resolution mechanisms does not conflict with the court's jurisdiction but are to compliment same. The High court is not constricted to only look at the provisions of the constitution but all other laws because the court retains its powers by way of appeal or supervision but not the right to usurp the jurisdiction of the body created to deal with the issue primarily. On such reasons, they sought the objection be upheld and the petition struck out.

11. For the interested party, the position taken is in support of the 1st respondent that the petition is not ripe for determination before the court prior to exhaustion of the procedures provided under the political parties Act and that under the constitution of the 1st respondent. It is underscored that the dispute is between members and their political party hence subject to the jurisdiction of the political parties Tribunal and cites the decision in **Dominic Ndonye Maithya Vs Machakos County Assembly speaker (2017) eKLR, Linus Kamunyo Machira Vs Speaker Embu County assembly Majority leader (2016) eKLR and Keiru John Wambui Vs Jubilee Party 2021 Eklr** where the court held that the dispute between a party and its member (s) are internal affairs of a party over which the court has no jurisdiction, discloses no violation of a right, the court only reserves the supervisory jurisdiction by way of ensuring that the law and the process is adhered to. It was further held that blanket allegation of outright illegality against the party did not afford to the party member a *carte blanche* to avoid and circumvent the internal dispute resolution by the party.

12. The decision in **John Musakali Vs Speaker county of Bungoma (2015) eKLR** was cited for the proposition that the court must give regard to the fact that the constitution has created other bodies besides the court to determine disputes and such bodies ought to be allowed to operate and carry out functions for such bodies like the political Parties Tribunal Risks being rendered dysfunctional if the court was to usurp its functions and assume dealings with the matters meant for its jurisdiction. The decision in **Chaurembo Mumba Vs Maurice Munyau (2019) eKLR** was cited for the forceful proposition that even where a superior court had the jurisdiction to determine a profound question 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 statute(s). The interested party, urged as the 1st respondent did, that the petition be dismissed with costs to them.

ANALYSIS AND DETERMINATION

13. The disputed pleaded here cannot be taken or mistaken for anything beyond the dispute between a political party and its members. The architecture of our constitution regarding adjudication of disputes has forcefully underpinned the alternative dispute resolution which cascades levels of dispute resolution with the courts being the last bastion after other levels have done their bits. The rationale for such architecture is the appreciation that dispute resolution at certain levels may require special tool and expertise besides the rules to be employed to assist with the realization of the law.

14. Tools like specialization in particular fields or customs and practices of other fields thus become handy in dispute resolution and the same need not be brought to court in the first instance for justice to be met. Such disputes can be taken to where specialization or trade uses lie and are best practiced for sieving. This is desirable, if not for seeking and employing expertise, for the purpose of sieving and narrowing down of the extent of the dispute.

15. I see that to have been the goal and intention of the legislature when enacting section 40f of the Political Parties Act and creating a tribunal to deal with the political internal disputes that are known to bedevil our political parties and space. I thus get persuasion in the decision in **Stephen Asura Ochieng Vs ODM (2011) eKLR** where the court said and observed -:

“... the establishment of the Political Parties Tribunal was to create a specialized body for a resolution of inter party and intra-party disputes. The creation of the tribunal was in the line with the provisions of Article 159 of the constitution which provide for the exercise of Judicial power by courts and Tribunal established under the constitution and for the use of an alternative dispute resolution mechanism.”

16. The need to have intra and inter-party political disputes by the tribunal prior to intervention of the court can thus not be gainsaid.

17. I am in no doubt that the dispute as pleaded in the petition is first and foremost the need to resolve the dispute between the petitioners and their parties, the 1st respondent. It is an intra-party dispute that ought to be dealt with first by the party in accordance with its constitution whereafter, the political party dispute tribunal thereby exhausting the otherwise effective statutory alternative dispute resolution avenue before coming to court.

18. Indeed one can go to the tribunal get a favourable decision and use that as basis to establish an infringement of rights. I take the view that nothing stops the tribunal where there exist the evidence to find that the party constitution, the political parties Act and even that dictates of the constitution was not complied with or indeed violated. Finding of non-compliance with the law including the failure to have fidelity to the provisions of the constitution must be factual and facts remain facts before any tribunal and quasi- judicial tribunal properly directing itself.

19. In all, I do find that the petition was an attempt at circumventing the clearly laid down law on how to tackle and handle intra-party political disputes. To allow it proceed here would be a clear disregard of the duty of the court to protect and promote alternative dispute resolution within the party and political sphere and an abrogation of the demand upon the petitioners and the court under section 40 of the political parties act giving the tribunal the priority to handle such disputes. This court, as creature of the constitution, must allow other legally created organs also drawing their mandate and existence from the constitution to execute their mandate and to grow. The court guards itself from the outlook of any attempt to usurp the mandate of the political Parties tribunal so as to make it inoperative. The court chooses that the tribunal be allowed to execute its mandate and not be seen to usurp such jurisdiction.

20. The upshot is that the preliminary objection is well taken. I find it wholly merited and do allow it with the consequence that petition dated 28th June 2021 is struck out with costs for having been brought before exhausting the statutory availed procedures before a designated tribunal

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF DECEMBER 2021

PATRICK J.O OTIENO

JUDGE