



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NUMBER 4 OF 2020

BETWEEN

HON. DAVID PKEU KAPELISWA.....1ST PETITIONER

HON. EVANSON PKEMEI LOMADUNY.....2ND PETITIONER

AND

THE SPEAKER WEST POKOT COUNTY ASSEMBLY.....1ST RESPONDENT

MAJORITY LEADER WEST POKOT COUNTY ASSEMBLY.....2ND RESPONDENT

CHIEF WHIP MAJORITY WEST POKOT COUNTY ASSEMBLY.....3RD RESPONDENT

KENYA AFRICANT NATIONAL UNION (KANU).....INTERESTED PARTY

RULING

Introduction

1. The Petitioner, through the firm of D. N. Onyancha & Co. Advocates, filed their petition on 13h May 2020 in which they made the following prayers:-

a. Declaration that the 1st Respondent's inaction or action not to declare the 1st and 2nd Petitioners lawfully elected as leader of majority and chief whip of West Pokot County Assembly respectively is ultra vires, unlawful and/or null and void.

b. Declaration that the 2nd and 3rd Respondents were lawfully removed from their positions as leader of majority and chief whip majority respectively in the West Pokot County Assembly.

c. Declaration that the 1st and 2nd Petitioners were lawfully elected as leader of majority and chief whip majority in the West Pokot County Assembly and the 1st respondent be ordered to declare them as so elected.

d. 1st, 2nd and 3rd Respondents be condemned to pay cross of this petition.

2. Contemporaneously filed with the petition was a Notice of Motion dated 12th May 2020, the same date of the petition. The petitioner's/applicants prayed for orders:-

a. THAT the matter/petition filed herein be certified as urgent and be heard on priority basis.

b. THAT the Honourable court to (sic) give such other orders/directions as it shall deem just so as to fast-track the determination/conclusion of the matter herein.

3. The Notice of Motion is premised on 5 grounds appearing on the face thereof and an affidavit sworn by DAVID PKEU KAPELISWA, the 1st Petitioner in this case. The 5 grounds are as follows:-

- a. THAT the petition is of great public interest specifically of the West Pokot Citizenry/electorate of West Pokot County.
- b. THAT the petition touches o the operation/running of the West Pokot County Assembly, more specifically on tis sessions and proceedings.
- c. THAT there is a lot of tension and anxiety among the members of the West Pokot County Assembly due to the refusal and/or failure of the 1st respondent(speaker) to communicate/declare the said leadership changes in the Assembly.
- d. THAT on 30.4.2020 the 1st respondent adjourned the Assembly proceedings/session to 11th June 2020 due to chaotic and/disturbance scenes in and out of the Assembly.
- e. THAT the County Assembly, I am apprehensive (sic) is likely to turn more chaotic and violent when it reconvenes on 11th June 2020 unless this petition is heard and determined on priority basis and urgently.

Preliminary Objections

4. Upon service of the petition upon the Respondents, the 2nd and 3rd Respondents, through their advocates M/S Y. Jeruto & Co. filed a Notice of Preliminary Objection dated 20th May 2020. The preliminary objection is against the entire suit on the ground that this Honourable court has no jurisdiction in view of the mandatory provisions **of sections 39 and 40 of the Political Parties Act No. 11 of 2011**, which vests jurisdiction of hearing and determining disputes in the **Political Parties Disputes Tribunal** as the dispute herein is a political dispute that concerns members and their political party.

5. A second preliminary objected dated 2nd June 2020, was filed on 3rd June by M/S Gordon Ogola, Kipkoech & Co. Advocates on behalf of the Interested Party who was admitted into the proceedings by an order of this honorable court dated 26th June 2020. The Interested Party's preliminary objection against the Petitioners' entire suit is premised on the following 8 grounds:-

- a. **THAT this Honourable court lacks the requisite jurisdiction to determine the application and petition which is centered on a political question which is not justiciable in a court of law but dealt with as contemplated by the Political Parties Act No. 11 of 2011 which at section 39 establishes the Political Parties Disputes Tribunal (PPDT) while section 40 vests it with jurisdiction to entertain disputes emanating from the Political Parties in Kenya.**
- b. **THAT the Political Parties Disputes Tribunal (PPDT) is the only statutorily established forum with the mandate to solve disputes between a Political Party and its members.**
- c. **THAT the Political Parties Disputes Tribunal only handles/hears and /or determines a dispute between a Political Party and its members under section 40 of the Political Parties Act only after the dispute has been heard and determined by the Internal Political Party Dispute Resolution mechanism.**
- d. **THAT it is only after exhausting the internal party dispute resolution mechanism and the Political Parties Disputes Tribunal that appeals from the decisions of the PPDT lie in the High Court without which the High Court lack(s) jurisdiction.**
- e. **THAT according to Article 169(2) of the Constitution, Parliament is empowered to enact legislation conferring jurisdiction, functions sand powers on the courts established under clause (1) which clause establishes subordinate courts. Under Article 169(1)(d) subordinate courts are magistrate's courts, Kadhi's courts, courts martial and any other court or local tribunal as may be established by an Act of Parliament, which includes the Political Parties [Disputes]Tribunal established as required by Article 162(2) of the Constitution.**
- f. **THAT the Political Parties [Disputes] Tribunal is established pursuant to section 39 of the Political Parties Act. Pursuant to Article 169(2) the jurisdiction functions and powers of the subordinate court are conferred by the respective Acts of Parliament establishing the particular subordinate court and this Honourable Court cannot arrogate to itself jurisdiction that is statutorily established for another forum.**
- g. **THAT the Petitioner's Petition of Appeal (sic) is a non-starter, it is purely an abuse of the process of the court owing to the lack of jurisdiction by this Honourable Court to entertain the matter.**
- h. **THAT it is not the allegations in [the] Petition by the Petitioners that vest this Honourable Court with jurisdiction to determine matters that are forbidden by the Constitution.**

6. The 2nd and 3rd Respondents, as well as the Interested Party pray that the petition herein together with the Notice of Motion both dated 12th May 2020 be dismissed with costs.

Directions

7. Counsel for the Petitioners and for the Respondents appeared before this honourable court on 20th May 2020 and agreed to canvass the Preliminary Objections first and to do so by way of written submissions. Though counsel for the Petitioners had requested the court to hear and determine the preliminary objection alongside, the petition this court was of the view, and as held in the case of **Owners of the Motor**

Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, that jurisdiction being everything in the performance of the work of a court concerning matters filed before it the preliminary objections had to be taken first.

8. The relevant submissions including those of the Interested Party have all been filed and are on record.

Background

9. The Petitioner's suit, filed on 13th May 2020, brought by way of petition is expressed to be brought under **Articles 1,2,3,4,10,19-23, 27-28,47,159, 174-176 and 185 of the Constitution of Kenya**. The suit is also premised on the provisions of the **County Governments Act of 2012**, the **Constitution of Kenya (Supervisory Jurisdiction)** and **(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** as well as the **West Pokot County Assembly Standing Orders, paragraphs 17(1)(2)(4)(5) and (6)**. The Petitioners' grievance is that despite communication from KANU dated 28th April 2020 effecting certain changes within the leadership of the County Assembly, where KANU is the majority party, the 1st respondent refused/declined to effect/allow the leadership changes as communicated to her, and instead the 1st respondent imported into the leadership changes extraneous matter/issues, which are not considerations under the law and/or standing orders. The Petitioners contend that the 1st respondent's refusal to allow the leaderships changes as authorized by the largest party's elected members of the county (MCA) is a total violation/breach of the constitution, law and the standing orders of West Pokot County Assembly.

10. The Petitioners also contend that in failing and/or refusing to effect/allow the changes, the 1st respondent abdicated her duty/responsibility of Speaker of the County Assembly hence these proceedings.

11. The Petitioners also allege that on 27th April 2020, all the 14 KANU MCA's met and resolved to remove the 2nd and 3rd Respondents from their respective positions and elected the 1st and 2nd Petitioners into those positions of majority leader and majority chief whip. According to the Petitioners, these changes were communicated to the 1st respondent for action vide the letter dated 28th April, 2020.

12. The Petitioners also acknowledged that despite the letter of 28th April 2020, there was an objection letter dated 27th April 2020. The gist of the said letter is that the alleged leadership changes were not supported since the party leadership was not involved and that the changes were effected in blatant breach of the KANU party Constitution. A copy of the said letter is annexed to the Petitioner's pleadings.

1st Respondent's Submissions

13. Following the directions taken on 20th May 2020, the parties filed and exchanged their written submissions. The 1st Respondents' submissions are dated 4th June 2020 but filed on 11th June 2020. The 1st respondent contends that having failed to exhaust the internal machinery provided under the Political Parties Act, under which is established the Political Parties Disputes Tribunal, the Petitioners have no business coming to this court for orders touching on a matter that is of an internal nature of the majority political party within West Pokot County Assembly. The 1st respondent has supported her submissions with a number of authorities. The court will refer to some of these in due course. In essence, the 1st respondent contends that this Honourable court lacks the jurisdiction to hear and determine the Petitioners' suit as well as their Notice of Motion. An earlier and similar copy of the 1st respondent's submissions was filed on 5th June 2020.

2nd and 3rd Respondents' Submissions

14. The 2nd and 3rd Respondents' submissions are dated 29th May and were filed on the same date. They object to the Petitioners' case proceeding before this honourable court on grounds, *inter alia*, that the dispute herein is a dispute among members of KANU and the party itself and as such the same should be processed through the party machinery and only come to this honourable court on appeal. Reliance was placed on **sections 39 and 40(2) of the Political Parties Act No. 11 of 2011** and relevant decided cases. The 2nd and 3rd Respondents urged this honourable court to find and hold that it has no jurisdiction to entertain the Petitioners' suit and to dismiss it by allowing the preliminary objection.

The Interested Party's Submissions

15. The Interested Party filed its submissions dated 16th June 2020 on the same date. The Interested Party objects to the Petitioners' suit on account of **sections 39 and 40 of the Political Parties Act, no. 11 of 2011**, arguing that under the said provisions, a dispute such as the present one should be heard and determined by the **Political Parties Disputes Tribunal** and not the High Court to which appeals from the **Political Parties Disputes Tribunal** are to be referred for determination.

16. The Interested Party also contends that the dispute at hand is a political question which this court should be reluctant to entertain. The Interested Party cited many authorities in support of its objection. The court will refer to some of these later on in this ruling.

The Petitioners' Submissions

17. These submissions, filed on 8th June 2020 are in response to all the respondent's and Interested Party's submissions. The Petitioners contend that the impugned changes of leadership in the County Assembly do not constitute an electoral question as alleged by the Respondents and the Interested Party, neither is the 1st respondent a member of any political party. The Petitioners further contend that the provisions of **sections 39 and 40 of the Political Parties Act no. 11 of 2011** are not applicable to this suit. The Petitioners urge this honorable court to make a finding that the preliminary objections are not meritorious and to dismiss the same. The Petitioners relied on a number of authorities to assist the court in reaching its decision on the question before it.

1st Respondent's Reply to Petitioners' Submissions

18. In her reply to the Petitioners' submissions, the 1st respondent reiterates that the Petitioners' dispute is one that is contemplated under **section 40 of the Political Parties Act** since it is a dispute between members of a political party and their party, and further that contrary to the Petitioners' submissions the mandate of the Political Parties Disputes Tribunal is not limited to electoral disputes. The 1st respondent also distinguishes some of the authorities relied upon by the Petitioners' in contending that the Political Parties Disputes Tribunal is not the forum for their dispute.

2nd and 3rd respondent's supplementary submissions

19. The 2nd and 3rd Respondents submit that their preliminary objection should and ought to succeed because it is on a pure point of law as the facts giving rise to the dispute in hand are not contested, and that in any event, the law does not permit this honourable court to hear and determine the Petitioners' case.

Petitioners' reply to the 1st respondent's submissions

20. The Petitioners contend that the Political Parties Dispute Tribunal handles matters/disputes arising out of Political Parties Primaries/Nominations and disputes between political parties as more clearly set out under **section 40(1) of the Political Parties Act**. The Petitioners contend further that contrary to the submissions of the 1st respondent, the Political Parties Act does not provide for disputes, if any, arising out of leadership changes in County Assemblies to be heard and determined by the 9. The Petitioners further argue that the **County Governments Act** does not make provisions for referring disputes over changes of posts in the County assembly to the **Political Parties Disputes Tribunal**. Finally, the Petitioners argue that the dispute herein is not between members of a party and its party, especially because the 1st respondent is speaker of the County assembly and not a member of KANU party.

Applicable Law, Legal Principles and Evidence

(a) Preliminary Objection

21. The law pertaining to preliminary objections is well captured by all the parties herein. In the famous **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, the Court of Appeal for Eastern Africa, stated (Law JA) in part that**

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Sir Charles Newbold President of the Court in the Mukisa case went on to state that a preliminary objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." (Page 710).

22. It is the considered view of this honourable court that the objections raised by the Respondents and the Interested Party fall within the definition of a preliminary objection as defined in the **Mukisa Case (above)**. The Respondents' and the Interested Party are questioning the jurisdiction of this honourable court to hear and determine the Petitioners' suit.

Jurisdiction of this Court

23. The Interested Party has referred the court to the case of **Phoenix of E.A Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR** in which the court defined what jurisdiction is:-

"It is a truism, jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?"

2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae"

24. In the earlier case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** it was held:-

"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 draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

25. On her part, the 1st respondent relied on the case of **Owners and Masters of the Motor Vessel "Joey" versus Steve B [2007] eKLR** for definition of the term jurisdiction, in which the Court of Appeal stated, in part,

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

26. I fully concur with what the courts have said above with regard to the issue of jurisdiction.

27. In the present suit, the 2nd and 3rd Respondents did not make any specific submissions on the question of jurisdiction, but as seen from the above cited authorities, the 1st respondent and the Interested Party did justice to the issue.

28. It is because of the critical part played by jurisdiction in the work of a court that this court overruled counsel for the Petitioners when he suggested at time of taking directions that the issue of jurisdiction could be determined simultaneously with the issues raised in the petition. Such an approach would, if the court eventually finds it has no jurisdiction to hear and determine the petition, amount to a waste of judicial time.

Issues for Determination

29. The main issue to be determined by this Honourable court is whether the preliminary objections raised by the Respondents and the Interested Party respectively have merit. In other words, does this court have the jurisdiction to hear and determine the suit as filed or does it not?

30. In the summary of submissions, I have pointed out that both the Respondents and the Interested Party have submitted that this court does not have the jurisdiction to do so, while the Petitioners hold the contrary view.

Analysis and Determination

31. The gist of the submissions in support of the preliminary objections is that the Petitioners suit before this court is a non-starter because of the doctrine of exhaustion. The 1st respondent placed reliance on ***Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR*** in contending that

“A Court’s jurisdiction flows from either the Constitution or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..... It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.”

32. The 1st respondent submits that this court must be guided by the principle of alternative dispute resolution in the interpretation of its mandate under ***Articles 165(3) and 159(1)(c)***, so that the court does not have to plunge its head and feet into a matter that could be heard and determined before a different forum. See the case of ***Orie Rogo Manduli v Catherine Mukite Nobwola & 3 others [2013] eKLR*** cited by the 1st respondent in her submissions as well as ***Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728***. In the case, the court observed in part,

“it is however important for this court to highlight the fact that it is not itself omnipotent. It has its limits whose origin is the principle of maintaining constitutional balance. It is itself a creature of the constitution and therefore its jurisdiction can also be limited by the Constitution”

33. It is on the basis of the above that the Respondents as well as the Interested Party submit that the Petitioners’ suit is bad in law as it offends the doctrine of exhaustion because of the statutory provisions in ***Political Parties Act, No. 11 of 2011***. In this regard, the 1st respondent placed reliance on the case of ***Godfrey Osotsi vs Amani National Congress Party [2019]*** regarding the constitutional rationale and basis for the doctrine of exhaustion as expounded in ***Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others***. In the latter case, the Court of Appeal had this to say on the matter:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora 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 a 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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

34. The arguments on the doctrine of exhaustion by all the 3 Respondents and the Interested Party are anchored in the provisions of ***sections 39 and 40 of the Political Parties Act*** under which is established the ***Political Parties Disputes Tribunal***. The Petitioners have passionately argued in their submissions that these provisions do not cover their case which is now before this court.

35. While ***section 39 of the Political Parties Act*** establishes the ***Political Parties Disputes Tribunal***, ***section 40*** thereof sets out the jurisdiction of the Tribunal. The Tribunal (***PPDT***) is thus empowered to determine the following disputes:-

“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.”

36. From the above, the PPDT is the second tier in the process of dispute resolution between and among members and their political parties or as provided under **section 40(1) (d)(e) and (f)**.

37. In making their point that the Petitioners case falls under **section 40(1) of the Political Parties the Act**, 2nd and 3rd Respondents placed their reliance on the persuasive authority in the case of **Linus Kamunyo Muchina v Speaker Embu County Assembly Majority Leader – Embu County Assembly [2016] eKLR** where the Court gave the rationale in the following words:-

“Under Article 23 (1) of the 2010 Constitution of Kenya, the High Court is vested with jurisdiction to enforce the Bill of Rights. It is authorized “to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”. In exercise of its powers, the court is required to act in accordance with Article 165 (3) of the 2010 Constitution of Kenya. The jurisdiction under Article 165 (3) (b) is “to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened”. It is clear that this provision gives the High Court original jurisdiction in those matters that are set out in that article. In exercise of its powers under Article 165 (3) the High Court acts as a court of first instance. Furthermore, under Article 165 (6), the High Court “has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court”.

It is also clear that **Article 165 (6) of the Constitution** gives to the High Court supervisory jurisdiction to review decisions of the subordinate tribunals among them the **PPDT**. As it was further held in **Linus Kamunyo Case** (above) that **section 40 of the Political Parties Act** empowers the **PPDT** to hear disputes in the first instance.

38. The supplementary question that arises here is whether the Respondents and the Interested Party have demonstrated that the dispute filed by the Petitioners in this matter is one that should be heard by the PPDT or even dealt with by the internal dispute resolution mechanisms within the KANU party. The Petitioners contend that it is not so. They argue first that changes of leadership in the assembly are not an electoral process that should be subjected to the electoral process. Second, they contend that **section 40(1) of the Political Parties Act** does not provide that any dispute arising out of the County Assembly Leadership changes be referred to and handled by the **PPDT**. That if it were so, the drafters of the **Political Parties Act, 2011** would have had no problem saying so. The Petitioners also contend that the objections raised are premature. The Petitioners rely on the Court of Appeal decision in **Nairobi HCCA NO. 168 of 2017 Gabriel Bukachi vs Orange Democratic Movement (ODM) [2017] eKLR**, where it was stated at paragraph 28 of the judgment thus:-

“28. In effect the PPDT (Political Parties Disputes Tribunal) should not entertain disputes between a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition parties unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanism.”

39. At this stage I am compelled to say that what the Court of Appeal was saying in the above cited case is what is provided for **under section 40(2) of the Political Parties Act**. That such disputes will go to the PPDT only after they have been filtered through the internal political party dispute resolution mechanism. The court did not say, in my considered view that political questions between political parties, or between a member of a political party and the political party, or disputes between political parties or disputes between coalition of parties cannot be heard by the **PPDT**. The hearing of such disputes by the **PPDT** is conditional upon the disputants exhausting the internal political party dispute resolution mechanism.

40. The Respondents and the Interested Party therefore argue, that because the Petitioners case has not been sifted through the internal party dispute resolution mechanism, it cannot and should not be determined by this court. The 2nd and 3rd Respondents rely on **Isaiah Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others [2016] eKLR** where Lenaola J (as he then was) stated:-

““I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights...”

41. A supplementary question that would unlock the difference of opinion between the Petitioners on the one hand and the Respondents and the Interested Party on the other hand as to whether this court has jurisdiction or not is whether the dispute by the Petitioners constitutes a political question. The objectors say it is. The Interested Party submits that this dispute constitutes a political question, the legality of which the court should be reluctant to entertain. The Interested Party further submits that this case is a matter concerning the internal affairs of KANU on whose ticket both the Petitioners and the 2nd and 3rd Respondents found their way into the West Pokot County Assembly, and that as such this political question is not for this court to decide. The Interested Party sought help from international court decisions one of which is **Baker vs Carr 369 US 186 (1962) at pp 210 – 211** where Brennan J spoke about the nature of a political question in the following words:-

“We have said that “in determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.”

42. Further, both the Respondents and the Interested Party also relied on the case of **Born Bob Maren v Speaker Narok County Assembly & 3 others [2015] eKLR** where the court held, *inter alia*:-

“Although the positions of the Majority and Minority Party Leaders are created under section 10 of the County Governments Act, it is the Standing Orders which provide for the process of election and removal of the Majority and Minority Party Leaders by the party members. The process is clearly a matter involving the internal affairs of a political party as the Petitioner has conceded in his submissions. His further submissions that the matter ceases to be such once the party decision is communicated to the County Assembly is difficult to accept for the following reason.

The Minority or Majority Party Leader comes into office through an election which is an expression of the wishes, of his party. Equally he remains in office at the pleasure of his party. As Majanja J. succinctly stated in Republic –Versus- County Assembly of Migori & 4 others Ex parte Johnson Omollo Owiro:

“The election of the Majority Leader is a prerogative of the members of the party or coalition having the Majority in the Assembly.....His position is in the hands of the Party or coalition.....”.

43. In the instant case, I hold the firm view that the real combatants in this case are the Petitioners on the one hand and the 2nd and 3rd Respondents on the other hand. It is conceded by the Petitioners that all of them got into the County Assembly on KANU tickets, the party with the majority in the West Pokot County Assembly. The Petitioner’s entry into the County Assembly preceded their elevation to the positions of majority leader and chief whip. Without their party, none of them would have tested the trappings of power of those positions. Their case thus falls squarely within the provisions of **section 40(1)(a) and (b)**.

44. It is clear from the various decisions cited by the Respondents and the Interested Party, and in particular the case of **Born Bob Maren Case** (above) that the election of the majority leader and the chief whip is a prerogative of the members of West Pokot County Assembly and in particular **Standing Order Number 17** which falls under the heading “COUNTY ASSEMBLY POLITICAL LEADERSHIP.” The positions are firmly held in the hands of the members who are ready to give them to whomsoever they choose and also take the positions away any time they see fit. The speaker of the assembly in my view, is a convenient bridge by which the combatants herein intended to get at each other’s throats. The speaker does not choose who becomes majority leader or chief whip. The choice lies with the party members. It is as clear as daylight that the officers over which the Petitioners’ and the 2nd and 3rd Respondents are fighting constitute the political leadership of West Pokot County Assembly.

45. As stated by the judge in **Born Bob Maren Case (above)**, I wish to echo those words in making a finding that the Petitioners suit is not for this court because they failed to observe the doctrine of exhaustion. The Petitioners have also misapprehended the provisions of **section 40(2) of the Political Parties Act, No. 11 of 2011**. The learned judge said, and I wholly concur with the view:-

“I too find that the questions relating to the process and the decision by the Minority Party to remove the Petitioner from the position of the leader of Minority Party and to replace him with the 3rd Respondent is a political matter involving the internal affairs of the Minority Party or parties. The minutes of the meeting of 9/9/14 demonstrate this fact starkly. Parliament, in recognition that such disputes will occur within political parties, has provided a mechanism for dealing with them. Hence the provisions of Sections 39 and 40 of the Political Parties Act. Section 39 provides for the establishment of the Political Parties Disputes Tribunal while Section 40 sets out its jurisdiction.”

Conclusion

46. For all the reasons given hereinabove, this court finds merit in the preliminary objections by the 1st, 2nd and 3rd Respondents as well as that of the Interested Party. The objections are upheld. In this regard, the 1st and 2nd Petitioners petition dated 12th May 2020 together with the Notice of Motion of even date be and is hereby dismissed with costs to the 1st, 2nd and 3rd Respondents as well as to the Interested Party.

47. Orders accordingly-

Ruling delivered, dated and signed in open court at 5th day of August 2020

RUTH N. SITATI

JUDGE

In the presence of

Mr. D. Onyancha – present for applicants

M/S Endo absent for the 1st respondent

M/S Jeruto absent for 2nd and 3rd respondents

Mr. Ogola absent for the interested party

W. Juma – Court Assistant