



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 49 OF 2020

RAIA ATHMAN MKUNGU.....PETITIONER

VERSUS

KWALE COUNTY ASSEMBLY.....1ST RESPONDENT

THE COUNTY SPEAKER, KWALE COUNTY.....2ND RESPONDENT

HANIFA ABDI.....3RD RESPONDENT

JAMES DAWA.....4TH RESPONDENT

RULING

1. By Petition dated 21/7/2020 the petitioner sought orders that;

a) An order that the Petitioner be allowed to continue carrying out his duties as the Leader of the majority Coalition of Kwale County and be allowed to access his office and carry out his mandate and or duties as stated by law and standing orders.

b) A declaration that the process of removal of the Petitioner as the leader of Majority Coalition on the 1st July 2020 is null and void ab initio, unconstitutional.

c) An order that the 1st Respondent is unsuitable and unfit to continue serving as the speaker of the Narok County Assembly.

d) The costs of this Petition be borne by the respondents.

e) Any other relief this honourable Court may deem fit to grant.

2. Along with Petition, the Petitioner lodged a motion of even date seeking conservatory orders. The same pleadings were supported by petitioner's supporting Affidavit.

3. The Respondents in response to the Petition lodged a Preliminary Objection dated 28/7/2020, Grounds of Opposition dated 28/7/2020, and Replying Affidavits by sworn by and on behalf of the 2nd, 3rd, and 4th Respondent on 21/9/2020.

4. When the Petitioner's motion for conservatory orders came up for *inter-partes* hearing, Counsel for the Respondents urged this Court to dispense with the preliminary objection first. Therefore, this court directed that the Preliminary Objection and the Application for conservatory order be heard together.

5. The preliminary objection dated 28th July 2020 challenges the jurisdiction of this Court to entertain this Petition, and is as follows:

That this honourable Court lacks the requisite jurisdiction to hear/adjudicate and determine the Petition and the matters/ issues brought before it by virtue of and by dint of a plain reading of the relevant provisions of the political parties Act, 2011.

6. On the 29/7/2020, the Court directed the parties to file further or supplementary affidavits as may be necessary. Nevertheless, the Petitioner opted not to file a response to the Preliminary objection.

Submissions

7. **M/S Nyaga** Learned Counsel for the Respondent, on the preliminary objection, submitted that the Petitioner has not demonstrated to this Court that it attempted to exhaust the remedies provided under the Political Parties Act, as was held in the case of **Born Bob Maren v speaker Narok County Assembly 7 3 others [2015] eKLR**. Counsel submitted that the exemption from the doctrine of exhaustion is provide under Section 9(4) of the Fair Administrative Actions Act, and it is only in exceptional circumstances that mechanism under the political Parties Act 2011 may be by passed.

8. On the prayer for grant of conservatory orders, Counsel submitted that the Petitioner has not sufficiently proved that his right to a fair administrative action has been infringed since there is no evidence that he lodged a complaint to the Political Parties Tribunal and the complaint was not heard. Further, the Respondent stated that this Court was moved 21 days after the elections had been conducted, and that the Petitioner is an indolent litigant and as a result undeserving of the orders sought herein.

9. **Mr. Magolo** Learned Counsel for the Petitioner, on the preliminary objection, submitted that the dispute before this Court does not fall within the jurisdiction of the political Parties Dispute Tribunal for reasons that the dispute emanated from the speaker of the County assembly who is the 2nd Respondent. Further, Counsel submitted that this Court under Article 165(3) (b) has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened.

10. On the conservatory orders, Counsel submitted that it is trite law that if an adverse action is to be taken against the Petitioner then the Petitioner should be afforded an opportunity to be heard. Counsel submitted that in a bid to punish the Petitioner, the Speaker constituted an enquiry of the Petitioner's conduct without giving him adequate time to prepare himself for the inquiry.

Issues, Analysis and Determination

11. I have considered the arguments of both parties in this Application and the Preliminary Objection. The law is that where the jurisdiction of a court to hear a dispute before it is challenged, that court must determine that question at once, and should it hold the opinion that it lacks jurisdiction, it should down its tools. This position was laid down in the precedent setting case of **The Owners of Motor Vessel "LILLIANS" vs Caltex Oil Kenya Ltd [1989], KLR 1**, where *Nyarangi, J.A* said at page 14 –

“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 and 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. I have considered the points of law that have been raised in this Preliminary Objection. The issues raised are points of law which the Petitioner has failed to respond to. It is noteworthy that the issue raised by the Respondents pertaining to forum to adjudicate instant dispute, would require no evidence and if correct can dispose off this Petition.

13. The Jurisdiction of the High Court is derived from **Article 165(3)** of the **Constitution** and a proper reading of that Article shows that the court has a very wide jurisdiction. It also has jurisdiction to hear all disputes including Jurisdiction to hear and determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated infringed, or threatened. The only Limitation the Constitution imposes is found in *Sub-Article (5)* where it says:-

a) The High Court shall not have jurisdiction to hear matters reserved for the exclusive jurisdiction of the Supreme Court under this Constitution.

b) Falling within the jurisdiction of the courts contemplated in Article 162(2) The limitation is on matters reserved for the Environment and Land Court, and Employment and Labour Relations court. Except in those cases, the High Court has jurisdiction to hear and determine all other disputes unless expressly excluded by statute.

14. Under **Article 159(2)(c)** of the **Constitution** the resolutions of disputes through other dispute resolution mechanisms is provided for and there is now the Political Parties Tribunal established under section 39 of **The Political Parties Act (No.11) of 2011**. **Section 40(1)** of the Act provides-

“40(1). (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 the Act.”

Sub section (2) thereof provides:-

“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.”

15. Under **Section 41** thereof, the Tribunal is obligated to determine any dispute before it expeditiously, and in any case, within a period not exceeding three months from the date the dispute is lodged and Under **Sub-section (2) of Section 40**, an Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court. In a nutshell, the foregoing constitutes the procedure anticipated in law for dealing with political disputes.

16. Looking at the Affidavit in support of the Petition and submissions by Counsel, and authorities cited, it is not in dispute that the dispute herein is political, as it relates to a member of a political party and the decision of the members of the political party to remove the Petitioner from the position as the leader of majority of the Nasa Coalition in the Kwale County Assembly and replace him with the 4th Respondent, even though the Petitioner alleges that the 2nd Respondent had an axe to grind with him and that his right to a fair administrative guaranteed under Article 47(2) of the Constitution was violated since he was not given a chance to defend himself. Further, a perusal of prayers (a), (b) and (c) in the Petition appears to have one aim, which is to ensure that the Petitioner retains his position as the Majority Party Leader.

17. It is noteworthy that tribunals would not function if courts were to assume jurisdiction and deal with matters meant for tribunals. If that were to be the case, **Article 159(2) (c)** of the Constitution would not have any relevance regarding alternative disputes resolution. The intention behind the establishment of the Political Parties Tribunal is captured in the case of **Stephen Asura Ochieng vs Orange Democratic Movement Petition No. 289 of 2011**, where the Court said:-

“The intention behind the establishment of the political parties Tribunal was to create a specialised 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 ...”

18. In this Court’s view, the removal of the petitioner was done by members of his NASA coalition under Standing Orders of the 1st Respondent, which is a political process. Once elected leader of majority in the 1st respondent, the petitioner was bestowed with a political trust by his own coalition members. Therefore, if the members of his coalition in the 1st Respondent thought he had lost that trust, they could exercise their right under standing orders and replace him. This is an internal process that is permitted by rules of procedure within the 1st Respondent. All political parties and coalitions are required to have internal dispute resolution mechanisms in order to promote internal democracy.

19. From the foregoing, the Petitioner’s redress in this matter lies, firstly, with his party’s internal mechanisms and in the second instance, with the Political Parties Dispute Tribunal. That is the essence of Section 40 of the Political Parties Act. I therefore decline to assume jurisdiction in respect of this dispute. In light of all the foregoing, this court finds merit in the Preliminary Objection herein and upholds the same thus making the following orders:

i. The Preliminary Objection is allowed and the petition and motion herein are hereby struck out.

ii. Parties to bear their costs.

Dated, Signed and Delivered at Mombasa this 17th day of December, 2020.

E.K. OGOLA

JUDGE

Judgment delivered in chambers via MS Teams in the presence of:

Mr. Magolo for Petitioner

M/S Nyego for Respondents

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.