



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL PETITION NO. 588 OF 2017

In the matter of the Constitution of Kenya, Articles

2 (6), 19(2), 22, 23, 27, 47, 56, 165 and 258

and

In the matter of the Treaty for the Establishment of the

East African Community, Articles 5, 9, 48 and 49

and

In the matter of the East African Legislative Assembly Rules of Procedure

and

In the matter of the East African Legislative Assembly Elections Act, 2011

and

In the matter of the East African Legislative Assembly Elections

(Elections of Members of the Assembly) Rules, 2017

and

In the matter of The Constitution of Kenya (Protection of Fundamental

Rights and Freedoms) Practice and Procedure Rules, 2013

and

In the matter of Election of Members to the East African Legislative Assembly

BETWEEN

Yasser Ali Sheikh.....Petitioner

versus

Amani National Congress (ANC),

Forum for Restoration of Democracy-Kenya, (FORD-K)

Orange Democratic Movement (ODM)-Kenya

Wiper Democratic Movement-Kenya (WDM-K,

Jointly as the National Supper

Alliance (NASA) Coalition.....1stRespondent

Speaker of the National Assembly.....2ndRespondent

Speaker of the Senate.....3rdRespondent

RULING

1. The petitioner is a male adult of sound mind and a resident of Mombasa County and a Member of the Forum for restoration of Democracy-Kenya (FORD-Kenya), one of the registered Political Parties in Kenya, an affiliate member of the first Respondent herein, the National Super Alliance (NASA), a coalition of opposition parties. Its other members are the Orange Democratic Movement (ODM), Wiper Democratic Movement (Wiper), and the Amani National Congress (ANC).

2. The second Respondent and third Respondents respectively are the Speakers of the National Assembly and the Senate and the Returning Officers in respect to Elections of Members to the East African legislative Assembly (EALA).

The facts

3. The Petitioner avers that upon the expiry of the term of the EALA Assembly on **4th** June 2017, Parliament passed a resolution on **8th** November 2017 establishing a Select Committee on the Election of Members to the Assembly. Subsequently, the respective Clerks of the two houses pursuant to a resolution of the joint committee of **15th** November 2017 placed advertisements in the Kenya Gazette and daily newspapers inviting applications from interested qualified persons.

4. The Petitioner avers that the joint parliamentary committee on **15th** November 2017 recommended that only Jubilee Party and NASA under the Parliamentary Standing Orders were eligible to nominate candidates to EALA based on their respective numerical strength in Parliament translating to **4.60** slots (5 slots) for Jubilee and **3.50** slots (**4**) slots for NASA. He averred that a party or coalition of parties entitled to nominate candidates for election as Members of EALA is required to submit three times their entitlement, hence, the Jubilee Party and NASA were required to submit **15** and **12** names respectively for nomination.

5. He avers that on **30th** November 2017, NASA forwarded a list of **12** names to the Clerk of the National Assembly but his name was missing from the list. He further avers that all the **12** names were from ANC, ODM and WIPER and that FORD-K was excluded in the decision making process leading to the nominations of the **12** candidates. Also, he avers that FORD-K was not consulted or afforded an opportunity to lobby for its preferred candidates.

6. He also avers that the nomination process by NASA contravened the provisions of Rule **8 (3)** of EALA Election Rules which compels all parties to conduct transparent and democratic nominations and that the process was opaque, unfair and a violation of Article **47** of the Constitution. He also cites absence of consultations, violation of principles of equality, violation of the coalition agreement, discrimination and a violation of Article **56** of the constitution. As a consequence thereof, he prays for orders of *Certiorari* to

quash the said nominations and *Mandamus* compelling the Respondents to conduct fresh nomination.

Second Respondents Preliminary Objection

7. The second Respondent objected to this court's jurisdiction stating that:- **(i)** *the Petition is essentially a nomination exercise undertaken by NASA on EALA elections; (ii) that this court lacks jurisdiction to hear and determine the dispute by dint of the provisions of Article 88 (4) of the Constitution, Section 74 (1) of the Elections Act[1] and Section 39 of the Political Parties Act; [2] (iii) that the Petitioner did not exhaust the laid down dispute resolution mechanism; (iv) that Article 12 of the Coalition agreement dated 22th February 2017 between the NASA coalition parties establishes the Dispute Arbitration Panel with exclusive jurisdiction to hear and determine disputes between the NASA coalition parties.*

The Second Respondents' Advocates Submissions on the Preliminary Objection

8. **Mr. Mbarak** submitted that NASA was required to carry out nominations and submit 12 names to the presiding officers for purposes of EALA elections. He argued that even though the Petitioner was nominated by FORD-Kenya, he was not one of the candidates who were eventually nominated by NASA and that the nominations by NASA violated Article 4 of its coalition agreement. He argued that this court lacks jurisdiction by dint of Article 88 (1) of the Constitution, Section 74 (1) of the Elections Act[3] and Section 39 of the Political Parties Act[4] which requires the NASA coalition parties to subject their disputes to an internal dispute resolution mechanism. Counsel also cited Article 12 of the NASA coalition agreement which establishes a Dispute Arbitration Panel with mandate to hear and determine disputes between NASA coalition parties that cannot be settled by the organs established in the coalition agreement.

9. **Mr. Mbarak** cited *Mukisa Biscuit Co. Ltd vs West End Distributors Ltd*[5] and *Kalpana H. Rawal & 2 Others vs Judicial Service Commission & 3 Others*[6] and argued that a preliminary objection can be raised at any stage of the proceedings[7] and once raised it must be determined[8] and that a court's jurisdiction flows from the Constitution, legislation or both.[9] He insisted that the Petition alleges violation of constitutional rights, yet it is essentially a dispute between the Petitioner as a member of a Political Party or his Political Party and the NASA coalition, a dispute that falls within the jurisdiction of the NASA coalition's internal resolution mechanism, and thereafter, the Political Parties Disputes Tribunal.[10] He urged the court to take judicial notice of the fact that the nominations in question have long been concluded and the nominated persons duly sworn in office.[11]

10. Counsels for the second and third Respondents supported the preliminary objection and urged the court to uphold it.

Petitioners Advocates' Submissions

11. The Petitioners counsel argued that the dispute herein does not fall within the purview of provisions of law cited by **Mr. Mbarak**, but under this court's jurisdiction under Article 165 (3) (b), 22 and 23 of the Constitution. He argued that the Petition raises violation of Constitutional Rights, the right to access the court and violation of Article 27 (4) of the Constitution, hence, he argued, this Petition raises constitutional issues.[12] He argued that the right of access to courts can only be taken away by clear and unambiguous words of a statute[13] and that the provisions cited do not oust this court's jurisdiction. He argued that the objection does not meet the threshold to qualify as a preliminary objection as laid down in the case of *Mukisa Biscuit Co. Ltd vs West End Distributors Ltd*. [14]

Determination

12. It is an established jurisprudence that jurisdiction is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. It is also an established position that a trial without jurisdiction is a nullity. It is also uncontested that the importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this Court; *a fortiori* the Court *can suo motu* raise it. It is desirable that Preliminary Objection be raised early on the issue of jurisdiction; but

once it is apparent to any party that the Court may not have jurisdiction, it can be raised even *viva voce*. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs and to avoid a trial in nullity.^[15]

13. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*^[16] cited by both parties where the late **Justice Nyarangi** of the Court of Appeal held as follows:-

"I think 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 drops tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

14. **John Begg** in a treatise headed "*Words and Phrases Legally Defined*"^[17] put it bluntly when he addressed the question of jurisdiction in the following words:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. 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"

15. On the submission by the Petitioners counsel that the objection herein does not qualify to be a preliminary objection, *I find it necessary to define what constitutes a preliminary objection on a point of law*. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

16. Also, it may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. In this regard, the exposition by Law JA in *Mukisa Biscuit Manufacturers Ltd vs. Westend Distributors Ltd*^[18] is relevant. He stated:-

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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."

17. In the words of Sir Charles Newbold P at page 701, B:-

*"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. **The improper raising of preliminary objections does nothing but unnecessarily***

increase costs and, on occasion, confuse the issues, and this improper practice should stop.”(Emphasis added)

18. Also relevant is the decision by **Ojwang, J** (as he then was) where he expressed himself as follows:-
[\[19\]](#)

“...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 principle, 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 point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”(Emphasis added)

19. Thus, a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is **no** proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record. Guided by the foregoing authorities, I find that the objection premised on provisions of the statute relied upon meets the above tests, hence qualifies to be a preliminary objection.

20. It is common ground that a Court’s jurisdiction flows from either the Constitution or legislation or both. Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent .[\[20\]](#) Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[\[21\]](#)

21. The objection herein is premised on the assertion that the Petitioner is a member of FORD-Kenya Party, an affiliate member of NASA, a coalition of Political Parties. FORD-K is a signatory to the coalition agreement executed by the parties forming the coalition. It is argued that Article 12 of the coalition agreement establishes a Dispute Arbitration Panel with jurisdiction to adjudicate on all disputes amongst the coalition parties on matters that cannot be resolved by the organs of the coalition affecting the coalition parties as separate entity and its decisions are final and binding on all the parties. Appeals lie at the Political Parties Tribunal.

22 However, there are pertinent issues that the parties did not address in their submissions. My reading of Article 12 of the coalition agreement is that it contemplates disputes between the coalition partners and not a grievances by the individual members of the parties forming the coalition.

23. It is common ground that NASA is coalition of Political parties and not a coalition of individual persons. It is also common ground that FORD- Kenya is one of the Political Parties forming the NASSA coalition. It is not contested that the Petitioner is a Member of FORD-Kenya. The question that falls for determination is whether or not the Petitioner has the capacity to file this Petition. True, he has listed Article 22 of the Constitution as one of the legal foundations upon which his Petition is premised, but a clear reading of the Petition clearly shows that he is advancing personal interest having been aggrieved by the decision by NASA to omit his name from the nomination list.

24. Given the nature of his complaint and the circumstances the alleged complaint arose, a pertinent question of law which this court cannot ignore is whether, his complaint (if any) ought to have been raised by his party, as opposed to him personally. This is because at his personal or individual level, the Petitioner is not and cannot be a member of the NASA coalition which is a coalition of Political Parties. Also, at personal level, the Petitioner is not entitled to the nomination slot. It is trite that the slots are only available to the Political parties or coalition of parties and are allocated to the Political Parties or coalition of Political Parties on the basis of the Political parties or coalition of Political Parties numerical strengths in Parliament.

25. Upon allocation of slots, the party or coalition submits to the Speaker a list of individual names of its members for consideration and nomination. Significantly, individual members of the Party or coalition are not entitled to nomination slots at personal or individual level nor are they allowed to submit names at individual or personal level.

26. The conclusion is irresistible that only FORK-Kenya, by virtue of being a member of the NASA coalition has a legal right to challenge the nominations if at all it was aggrieved. Even then, FORD-Kenya would abide by the coalition agreement and subject the dispute to the provisions of Article 12 of the Coalition Agreement and the Political Parties Act[22] dispute resolution mechanism.

27. To the extent that this Petition is filed by the Petitioner seeking to assert his personal grievances, a right that is not legally vested on him in the first place, then, the Petition is a non-starter, bad in law, unsustainable, misguided and does not disclose a cause of action at all. The Petitioner lacks the legal ground upon which to stand on. On this ground alone, this Petition must fail for not disclosing a reasonable cause of action.

28. Differently put, this complaint (if any) ought to have been raised by FORK-Kenya and not by the Petitioner in person to advance his personal interest. As stated above, he was not entitled to the nomination as a person even if his name was the only name submitted by his party. The question here is the absence of a cause of action.

29. The above notwithstanding, even if I were to hold that this Petition has been filed by FORD-Kenya (which is not the case), or instituted under Article 22 on its behalf, there is also Article 12 of the coalition agreement cited above which provides for the dispute resolution mechanism, and Section 39 of the Political Parties Act[23] which establishes the Political Parties Dispute Tribunal and Section 40 (1) of the Act which provides for its jurisdiction as follows:-**40 (1) The Tribunal shall determine-**

(a) dispute 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;

(g) disputes arising out of party primaries.

30. It is established jurisprudence in this country that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.[24]The court of appeal[25] discussing the same subject reiterated as follows:-

“...This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes.” Speaker of the National Assembly v. Karume

31. In *Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others*[26]it was held that :-

“.....where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.”

32. It follows that even if FORD-Kenya were to complain, then it will have to abide by the provisions its

coalition agreement and Section 40 of the Political Parties Act.[27]

33. I am conscious of the fact that the right of access to courts is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable. This is the test the court should bear in mind when invited to decline jurisdiction.

34. Talking about powerful considerations, it is trite that a Petitioner cannot approach the court asserting a right that has not been vested upon him by the law like in the present case. Where that happens, the court will be entitled to exercise its inherent jurisdiction and strike out the matter *in limine* to safe guard abuse of the court process and improper use of judicial time. Further, the above statutory provisions require no elaboration. **Where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, parties should resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.**[28]

35. Clearly, there are elaborate statutory provisions that the law has put in place to determine cases of this nature. To me, this is a powerful consideration to guide the court before invoking its wide powers under Article 165 of the constitution. In my view, on the face of the above clear provisions, the invitation to this court to invoke its immense jurisdiction under article 165 (3) of the constitution is not appropriate.

36. It is my view that the existence of such clear statutory provisions/framework for resolving disputes under the Political Parties internal dispute resolution mechanism and the Political Parties Act[29] infers that such processes and forums should take precedence. Regrettably, in spite of the plethora of judicial pronouncements on the subject, the Constitutional and Human Rights Division continues to be frequently visited with matters where there are clearly laid down constitutionally and statutory mechanisms of resolving the disputes at hand and where there are institutions statutorily even constitutionally established and specifically charged with the responsibility to deal with the grievances.

37. It is plain to me that the Political Parties Act[30] envisage the process of determining disputes specified under section 40 of the act to be resolved at the Political Parties Tribunal established under section 39 of the Act and appeals against its decisions lie in the High Court under section 41 (2).

38. It is common ground that the nominations in question were concluded and the successful persons sworn and assumed offices. The Petitioner seeks drastic orders of *certiorari* and *mandamus* which have the effect of divesting the said persons their positions. The affected persons are not parties to this Petition. The court would be failing in its duty in the administration of justice if it does not point out this serious anomaly and address its mind on the subject in this ruling.

39. A court of law cannot issue orders which will affect persons who are not parties to the case. Such a scenario amount to granting orders affecting other persons without giving them the benefit of a hearing. It is an established principle that a person becomes a necessary party if he is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. A person or an authority affected by a court order must have a legal right or right in law to defend or assail.

40. The Supreme Court of India put it succinctly:-[31] "*No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles ... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail...*"

41. In view of my analysis and conclusions enumerated above, I find and hold that the preliminary objection by the second Respondent herein is merited. Accordingly, I uphold the objection and decline to assume jurisdiction and entertain this matter. Consequently, I dismiss this Petition with no orders as to cost.

Orders accordingly.

Signed, Dated and Delivered at Nairobi this 19th day of April 2018

John M. Mativo

Judge

[1] Act No. 24 of 2011

[2] Act No.11 of 2011

[3] Supra

[4] Supra

[5] {1969}

[6] {2016}eKLR

[7] Counsel cited Madan J in Official Receiver vs Sukhdev {1970}EA 243

[8] Counsel cited Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited {1989}1KLR

[9] Counsel relied on Samuel K. Macharia vs Kenya Commercial Bank & 2 Others {2011}

[10] Counsel cited Isaiah Gichu Ndirangu & 2 Others vs IEBC & 4 Others {2016}eKLR and Dr.Lilian Goco vs Joseph Mboya Nyamuthe 7 Others (NBICivil Appeal No. 135 of 2017)

[11] Counsel cited Section 60 of the Evidence Act, Cap 80,Laws of Kenya

[12] Citing Peter Mungai Ngengi vs Mama Ngina Kenyatta & Another {2015}eKLR

[13] Tononoka Steels Limited vs Eastern and South Africa Trade Development Bank, Civil Appeal No. 255 of 1998 and Davis & Another vs Mistry {1973}EA 463

[14] Supra

[15] Belgore J.S.C. See Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd, (1992) 5 NWLR (Pt. 244) 675 at 693

[16] {1989} KLR 1

[17] Volume 3:1-N, at Page 113

[18] {1969} E.A 696 AT PAGE 700

[19] **Oraro vs. Mbaja [2005] 1 KLR 141**

[20] The Supreme Court in the matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported)

[21] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[22] Act No. 11 of 2011

[23] Act No. 11 of 2011

[24] Speaker of the National Assembly vs Karume. {2008} 1KLR 425

[25] In the case of **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another {2015}eKLR**

[26] {2008} 3 KLR (ER) 296).

[27] Act No. 11 of 2011

[28] See Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others {2008} 3 KLR (ER) 296).

[29] Act No.S 10 OF 2011

[30] Act No. 10 of 2011

[31]In J.S. Yadav vs State of U.P. & Anr {2011} 6 SCC 570, Paragraph **31**