



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT VOI

PETITION NO 6 OF 2017

STEPHEN MASAMO

MUTIE MOTA

ESTHER MUCHA

STEPHEN NDELEJAI ELBARIKI.....PETITIONERS

VERSUS

1. JUDITH PARENO (CHAIRLADY OF ELECTION ODM PARTY)

2. COUNTY RETURNING OFFICER ODM TAITA TAVETA

3. ODM PARTY.....RESPONDENTS

AND

JOHN MTUTA MRUTU

CHRISTOPHER MWAMBUU.....INTERESTED PARTY

RULING

1. This court has carefully listened to counsel for the Petitioners and the Interested Parties but in the absence of the Respondents and note that the Petitioners filed their present application dated 20th April 2017 on 21st April 2017 and Petition pursuant to the provisions of Articles 22 and 23 of the Constitution of Kenya, 2010. Indeed Article 22(1) of the Constitution of Kenya, 2010 provides that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

2. In Article 38 (3) (b) of the Constitution of Kenya, every adult person has the right, without unreasonable restrictions to vote by secret ballot in any election or referendum. The elections in a nomination exercise, in my mind of this court fall within this category.

3. Article 23(1) of the Constitution of Kenya stipulates that the High Court has jurisdiction in accordance with Article 165 (3) (b) of the Constitution to hear and determine applications for redress of a denial, violation or infringement of, or threat of, a right or fundamental freedom in the Bill of Rights.

4. Having said so, Article 82(1)(b) of the Constitution stipulates that Parliament shall enact legislation to provide for the nomination of candidates. This legislation includes the Elections Act and the Political Parties Act. Article 88 of the Constitution also provides that the Independent Electoral and Boundaries Commission (IEBC) has jurisdiction to monitor the compliance of legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

5. It is therefore clear from the Political Parties Act, Section 40(1)(fa) that the Political Parties Dispute Tribunal has the jurisdiction to hear and determine disputes arising out of party primaries. An appeal will then lie to this court on part of law and fact from the said Tribunal as stated in Section 41(2) of the Political Parties Act.

6. The Petitioners may be seeking orders to safeguard their rights as voters. However, the mechanism is properly provided. Any decision by this court will be premature as there is no evidence that the dispute has been heard and determined by the Political Parties Disputes Tribunal.

7. In addition, since the mechanisms for resolution of the dispute are provided in the 3rd Respondent's National Board and the dispute has already been referred to the National Board of the 3rd Respondent, this court's decision in respect of the dispute herein will infringe on the jurisdiction of other legal entities that have jurisdiction to hear and determine disputes. Indeed Articles 22, 23 or 165 (3) (b) of the Constitution of Kenya are not superior to Article 88 (4) (k) of the Constitution of Kenya which refers to legislation relating to nominations of candidates.

8. It is this court's view that it has no jurisdiction to hear and determine this dispute at present and must therefore down its tools. In the premises foregoing, I hereby decline to grant Prayer Nos (1) and (2) of the present application as was sought by the Petitioners and order that they direct their dispute to the appropriate legal entity for determination.

9. This court is aware that it has supervisory jurisdiction over the subordinate courts and over any persons, body or authority exercising a judicial or *quazi* – judicial function but not over a superior court as provided in Article 165 (6) of the Constitution.

10. Bearing in mind the principle that justice shall not be denied as there are timelines in the nomination exercise, a principle that is set down in Article 159(2) (b) of the Constitution and the fact that courts shall promote alternative forms of dispute resolution in accordance with Article 159(2)(c) of the Constitution, I hereby direct that the Notice of Motion application dated 20th April 2017 and filed on 21st April 2017 be transferred to the Political Parties Dispute Tribunal forthwith for its hearing and determination of the same.

11. The Petitioners and the Interested Parties are at liberty to proceed with the Petition dated 20th April 2017 and filed on 21st April 2017 in this court should they deem it fit to do so.

12. Orders accordingly.

DATED and DELIVERED at VOI this 24th day of APRIL 2017

J. KAMAU

JUDGE

In the presence of:-

Mwinzi – for Petitioners & Interested Parties

Josephat Mavu – Court Clerk