



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILINMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 380 OF 2016**

**IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21 (1), 22 (1), 23 (1) & 165 (3) (A), (B), (D), (I), (II), 27 (1), (2), (4), (5), 28, 32 (1), 38 (1), 40 (2) (A) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10, 33, 36, 38 (1), 40 (2) (A), 47, 50 AND 73 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE SOCIETIES ACT, ACT 108**

**AND**

**IN THE MATTER OF: SECTIONS 28, 30 (30 (10), THE POLITICAL PARTIES ACT, 2007, AND THE POLITICAL PARTIES ACT, 2011**

**AND**

**IN THE MATTER OF: THE DISTRIBUTION OF POLITICAL PARTIES FUNDS FOLLOWING THE GENERAL ELECTIONS HELD ON 27TH DECEMBER 2007.**

**BETWEEN**

**NATIONAL RAINBOW COALITION (NARK KENYA).....PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (I.E.B.C.).....1STRESPONDENT**

**THE REGISTRAR OF POLITICAL PARTIES (RPP).....2NDRESPONDENT**

**THE HON. ATTORNEY GENERAL (A.G).....3RD  
RESPONDENT**

**PARTY OF NATIONAL UNITY (PNU).....4TH  
RESPONDENT**

### **RULING**

1. The uncontested factual background of this case is that the Party of National Unity was formed by an alliance of political parties in August 2007 among them the petitioner herein. The various parties were then registered under the Societies Act but on 1st July 2008, the Political Parties Act which introduced the concept of corporate membership came into force and pursuant to section 44 of the said act the hitherto existing political parties migrated to the Political Parties Act. The act introduced the Political Parties Fund administered by the Registrar of Political Parties.

2. In a meeting held on 9th November 2009, a resolution was passed which sought to direct the Registrar to allocate the 80% due to the PNU Alliance on a 60 %-40% basis with Party of National Unity taking 60% and the other affiliates among them the petitioner herein the balance of 40%.

3. However, the petitioner herein, dissatisfied by the said resolution, instituted Misc App No. 693 of 2009 in which the court decreed inter alia that the said funds be distributed in accordance with the provisions of section 30 of the Political Parties Act. (It should be noted that at the time of filing the said case in court, the Political Parties Dispute Tribunal had not yet been established). Notwithstanding the said court decision, by a letter dated 20th January 2011, the Registrar of Political Parties distributed the said funds on the basis of votes contributions sourced from the nominee parties named in the Kenya Gazette.

4. The petitioner challenged the above decision by Registrars' at the Political Parties Disputes Tribunal in Political Parties case number 1 of 2011 where the Tribunal inter alia directed the Registrar of political parties to establish which parties contributed to the PNU effort and ascertain which parties are entitled to benefit from the funds. The petitioner also filed appeal no. 2 of 2012 in which it was ordered that none of the funds set aside from the Political Parties Fund for distribution among the parties in question may be distributed until either the coalition partners agree in writing or the apparent conflict in the facts and the law is resolved taking into consideration the directions given by the tribunal in the above tribunal decision rendered on 3rd May 2011.

5. The petitioner now cites violations of constitutional rights among them protection against arbitrariness, equality, inequitable treatment. The petitioner alleges that the first, second and third respondents wrongfully made payments to the fourth Respondent which it claims amounts to unjust enrichments. The petitioner claims a sum of Ksh. 137, 439, 839, 09 in addition to the other reliefs sought in the petition.

#### **Preliminary objection**

6. On 28th February 2017, the fourth Respondent filed a notice of preliminary objection stating:- (a) that this matter is res judicata having been determined in the above mentioned cases; (b) that this court lacks jurisdiction to entertain this matter by dint of section 40 (1) (f) of the Political Parties Act, (c) that the petition lacks precision.

#### **Courts directions**

7. On 28th February 2017, I directed that the hearing of the above preliminary objection be determined first and fixed the same for hearing in the presence of all the parties on 16th May 2017. On the said date, counsels for the petitioner and the first and second Respondents were not ready on grounds that they had just been served with submissions on the preliminary objection by the counsel for the fourth Respondent. I allowed an adjournment and directed the parties to file their submissions and fixed a date for highlighting on 17th July 2017.

8. On 17th July 2017, counsel for the petitioner asked for time to file their submissions. I allowed them to file their submissions by close of business on 18th July 2017. A mention date was fixed for 16th October 2017. However, on the said date, the petitioners counsel had not complied, hence I proceeded to reserve a date for a ruling on the preliminary objection on the basis of the submissions filed by the other parties.

9. Counsel for the Hon. Attorney General did not file submissions, maintaining that the issues raised in this case do not touch on the AG and asked for the Attorney General to be released from the proceedings. Upon evaluating the entire case, I wholly agree that the Hon, Attorney General was wrongfully enjoined in these proceedings, that the petition does not disclose a case against the Hon. Attorney General nor does the petitioner seek any relief against the Hon. Attorney General.

#### Fourth Respondents Advocates Submissions

10. Counsel for the fourth Respondent argued three grounds, namely:- (a) that this suit is res judicata, having been determined in three previous cases, namely, High Court, Misc App No. 693 of 2009, Political parties Dispute Tribunal No. 1 of 2011 and Political Parties Tribunal No. 2 of 2012; (b) the petition lack specificity; (c) this court lacks jurisdiction by dint of section 40 (1) (f) of the Political Parties Act.

11. On res judicata, counsel argued that on or about 9th November 2009, a meeting involving all those who formed the Party of National Unity resolved the manner in which the party's funds would be distributed. The petitioner herein, dissatisfied with the agreed mode of distribution filed HC Misc App No. 693 of 2009. On 9th November 2010 Justice Rawal (as she then was) ordered that the funds be distributed in accordance with section 30 of the Political Parties Act. (This suit was filed prior the establishment of the Political Parties Dispute Tribunal).

12. The petitioner herein filed appeal number 1 of 2011 before the Political Parties Dispute Tribunal challenging the registrars decision on distribution and later filed appeal number 2 of 2012 before the same tribunal. Decisions rendered in the said cases are part of the petitioners documents. Notwithstanding the foregoing, the petitioner has also filed this petition on the same issues touching on distribution of the said funds.

13. Counsel cited *E. T. vs A.G & Another* where it was held that the court ought to be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court, the test being whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.

14. On the question of jurisdiction, counsel cited sections 39 and 40 (1) (2) of the Political Parties Act and submitted that the correct forum for this dispute is the Political Parties Dispute Tribunal nor has the petitioner taken steps to enforce the decision rendered in Appeal No. 2 of 2012. Counsel cited *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*, *Born Bob Maren vs Speaker Narok County Assembly & 3 Others*.

15. Counsel also submitted that the petitioner has not pleaded with precision the alleged violation of constitutional rights and insisted that this suit is frivolous.

#### Second Respondents Advocates Submissions

16. Counsel supported the submissions by the fourth Respondents' counsel and reiterated that the Political Parties Act provides a clear mechanism for challenging decisions by the second Respondent and that where the law sets out a procedure to be followed for the redress of any particular grievance, the procedure must be strictly followed. Also, where it is possible to decide a case without reaching a constitutional issue, that should be done. He urged the court to invoke the principle of constitutional avoidance.

#### First Respondents Counsels submissions

17. Counsel also cited sections 39 and 40 of the Political Parties Act and submitted that this court has no jurisdiction to hear this matter and also maintained that the issues raised in this case are res judicata.

#### Definition of a preliminary objection

18. 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. In *Dismas Wambola vs Cabinet Secretary, Treasury & Others* I observed that 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.

19. Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd* said:-  
"...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."

20. 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)

21. Useful guidance can be obtained from the decision in *Omondi vs. National Bank of Kenya Ltd & Others* where it was held that:-  
"The objection as to the legal competence of the Plaintiffs to sue.....and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion."

22. Also relevant is the decision by Ojwang, J (as he then was) where he expressed himself as follows:-  
"..... 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)

23. 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. As stated earlier, the facts in this case are not contested.

24. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. In my view, the question of res judicata and jurisdiction are pure points of law and can only be answered by applying the relevant legal principles.

25. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.

Whether the plea of res judicata succeeds in this case

26. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

27. As Somervell L.J. stated res judicata covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

28. It is quite clear that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. For a defense of res judicata to succeed, the court must be satisfied that not only are the parties the same, but the issues raised are unquestionably similar.

29. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuit between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.

30. The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgments involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of this case.'

31. It is evidently clear that the core dispute in this petition touches on the distribution of political parties funds which was the issue before the High Court and the Political Parties Disputes Tribunal in the above cited cases. The said cases were determined as per judgements attached in the petitioners documents. On this ground, I am persuaded that the plea of res judicata raised in this case succeeds.

On the issue of jurisdiction

32. Jurisdiction is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. 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.

33. The locus classicus decision in Kenya on jurisdiction is the celebrated case of Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

34. John Beecroft in a treatise headed “Words and Phrases Legally Defined” states the following about jurisdiction:-

“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”

35. The fourth Respondents objection which is supported by the first and second respondents is premised on the clear provisions of section 40 (1) of the Political Parties Act reproduced below:-

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; (fa) disputes arising out of party primaries.

36. 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 . Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.

37. In the words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-  
“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

38. Whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed. The court of appeal 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 (supra)

39. In *Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others* 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."

40. In my view, this dispute falls under the categories listed in section 40 (a) to (c) of the Political Parties Act. Clearly, it is a dispute between political parties to the extent that it involves several parties who were members of Party of National Unity. Evidently, it is a dispute between corporate members of a political party and the Party of Nation Unity. It also qualifies as a dispute between members of a political party. The crux of the dispute is distribution of funds allocated to the Party of National Unity under the Political Parties Fund.

41. The proper form for this dispute is the Political Parties Disputes Tribunal. I am conscious of the fact that the right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised 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.

42. Talking about powerful considerations, 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.

43. 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.

44. It is my view that the existence of such clear statutory provisions/framework for resolving disputes under the Political Parties Act infers that such processes and forums should take precedence.

45. 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.

46. It is plain to me that the Political Parties Act 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). On this ground alone I decline to assume jurisdiction and entertain this matter.

Does the petition lack precision?

47. To start with, I am not persuaded that the petition raises any constitutional issues at all. Distribution of funds which is the crux of the claim to me does not raise constitutional issues.

48. It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. This court ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies.

49. In *John Harun Mwau vs Peter Gastrol & 3 Others* the court made the following observation:-  
"Courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it.....It is an established practice that where a matter can be disposed of without recourse to the constitution, the constitution should not be involved at all."

50. I find backing in the above cited provisions of the law, the cited cases and also in the decision

rendered in *Boniface Mwangi vs Resident Magistrates Court, Milimani & 2 Others* where it was held that to convert every issue into a constitutional issue is to undermine the importance of the process. Also relevant is the decision rendered in *Peter Ochara Anam & 3 Others vs CDFB & 3 Others* where it was held that the constitution was not meant to replace statutes that provide remedies to those concerned. Consequently, I find that the preliminary objection succeeds.

51. It has been stated in numerous decisions of this court that violations of fundamental rights must be pleaded with specificity and clarity. The petitioner cites arbitrariness, equality, inequitable treatment. No details have been cited to support even in the slightest manner the alleged violations.

5 The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court where Vickery J said this of the principles of good pleading:- "In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. ... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced. Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary. Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination. (Emphasis supplied)

53. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.

54. There are numerous decisions of the high court and the court of appeal restating the fact that violations of constitutional rights must be pleaded with precision and clarity. It is not enough to recite the provisions of the constitution or mention words like arbitrariness, equality, inequitable treatment. The facts and circumstances giving rise to the alleged violations must be pleaded and particulars provided with sufficient clarity.

#### Disposition

55. In view of my above findings, I find that this case is *res judicata*. I find that the objection on jurisdiction succeeds. Further, I am satisfied that this petition does not raise constitutional issues and that the petition lacks specificity and clarity.

56. Accordingly, I am constrained to uphold the preliminary objection. I dismiss this petition with no orders as costs. Orders accordingly.

**Signed, Delivered, Dated at Nairobi this 18th day of October 2017**

**John  
Judge**

**M.**

**Mativo**