



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL PETITION 2 OF 2016

HON. LINUS KAMUNYO MUCHINA.....PETITIONER/APPLICANT

VERSUS

**THE SPEAKER EMBU COUNTY ASSEMBLY MAJORITY LEADER – EMBU COUNTY
ASSEMBLY....RESPONDENTS**

RULING

1. The respondents have raised a preliminary objection to the petition on the basis that this 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 vest jurisdiction of hearing and determining disputes in the Political Parties Disputes Tribunal. The subject matter is a dispute between members of the Jubilee Coalition and their respective parties.
2. The Petitioner/Applicant has filed this petition alleging that his fundamental rights to continue serving as Chief Whip of the Embu County Assembly are being threatened by the respondents. According to him the respondents are in the process of removing him from his office.
3. The matter was brought under certificate of urgency dated 11th February 2016. He has state that the respondents had written a letter and/or an internal memo dated 18th January 2016 informing him of their intended decision to debar him from acting as a Chief Whip of the Embu County Assembly. The petitioner has also stated that in his capacity as Jubilee coalition majority chief whip in the Embu County Assembly he has an unreserved duty and all responsibilities of the coalition Chief Whip, which the respondents have no mandate to interfere. Finally, he says that he is apprehensive that the respondents will proceed to replace him with an already legally removed Chief Whip at the expense of the petitioner. And it is for this reason that he seeks a temporary injunction and/or a conservatory order to stop the intended removal.
4. This application is supported by a supporting affidavit dated 11th February 2016. In his supporting affidavit, the petitioner has deponed that he was appointed the majority chief whip through a legitimate process, which was conducted in accordance with the standing orders of the Embu County Assembly. According to him, he has been discharging his functions from 2014 without any quarrel. It is his further affidavit evidence that the speaker has supported the former Chief Whip, which he says is a misconception of the rules of the House of the Embu County Assembly. And as a result, he has assumed a partisan position which he says is contrary to the standing orders, the rules of natural justice and the Constitution.
5. Furthermore, the petitioner asserts that the speaker has concentrated on witch hunting in an attempt to have him removed as a Chief Whip for his own extraneous reasons and selfish political agendas. These

are the main evidentiary grounds upon which he seeks a temporary injunction and/or a conservatory order to restrain the respondents from removing him from his office as a Chief Whip.

6. When the matter came up for hearing on 24th February 2016, the respondents had on the same date filed the preliminary objection referred to above. Mr Mungai for the petitioner applied for the transfer of this petition to the Political Parties Disputes Tribunal, in response to the preliminary objection. According to him, the reason for transfer is that sections 39 and 40 of the Political Parties Act No. 11 of 2011 have vested jurisdiction in that tribunal to hear disputes between members and their political parties. He submitted that the dispute which is the subject matter of this petition is a dispute between the petitioner and his political party.

7. In response to the application for transfer, Mr Njenga for the respondents submitted that they had filed the above preliminary objection, which is based on jurisdictional grounds. In view of the transfer application made by Mr Mungai, Mr Njenga did not object to the petitioner's application.

8. In view of the preliminary objection and the application for transfer by Mr Mungai, I had to satisfy myself that the preliminary objection and the intended transfer are sound in law.

9. The main issue raised by the preliminary objection is whether this court has jurisdiction to entertain and determine this dispute. The petitioner in his notice of motion had indicated that he brought his petition under Article 23 of the Constitution, Rules 19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and Procedure, 2013. According to him, his right to serve as a Chief Whip was being threatened by the respondents to remove him from that office. It is for that reason that he sought injunctive relief to stop his intended removal.

10. 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 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.

11. It is clear from the provisions of Article 165 (3) (b) and (b) and (6) that the High Court has supervisory jurisdiction over subordinate courts and tribunals such as the Political Parties Disputes Tribunal which is established under section 39 of the Political Parties Act (Cap 7B) Laws of Kenya. This supervisory jurisdiction is in addition to original jurisdiction referred to above. The issue then arises as to whether or not section 40 of the Political Parties Act is in conflict with the supervisory powers of the High Court. If it is, then those provisions are null and void by virtue of the constitutional supremacist provisions of Article 2 (1) and (4) of the 2010 Constitution of Kenya. The supremacist provision of the 2010 Constitution were also enshrined in the Independence Constitution of 1963 and had been judicially approved by the High Court in **Okunda v. R (1970) EA 453**.

12. According to the provisions of **section 40 of the Political Parties Disputes Act**, the jurisdiction of that tribunal is as follows:

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.

13. In view of the provisions of Article 165 (6) this court has supervisory jurisdiction over the Political Parties Disputes Tribunal. Section 40 of the Political Parties Disputes Act empowers that tribunal to hear disputes in the first instance. Thereafter, this court may exercise supervisory jurisdiction over that tribunal in order to enforce the constitutionally guaranteed rights of an aggrieved party such as the current petitioner. It may do so upon its own motion (*sua sponte*) in terms of Article 165 (7) or upon application by an aggrieved party.

14. It therefore follows that an aggrieved party or person who has a dispute that is contemplated in sections 40 of the Political Parties Disputes Act must first file his complaint with that tribunal. By virtue of the mandatory provisions of section 40, such a party or person does not have direct access to the High Court. He has to exhaust the avenues provided for by the provisions of section 41 of the Political Parties Disputes Act.

15. Once such a procedure is followed, it becomes clear that there is no conflict between the provisions of section 40 of the Political Parties Disputes Act and those of Articles 165 (3) (a) and (b) and (6) of the 2010 Constitution. And by virtue of the supremacist provision in Article 2 of the 2010 Constitution, the provisions of section 40 and 41 of the Political Parties Disputes Act cannot oust (or take away) the jurisdiction of the High Court. The reason being that the High Court has got a Kenya wide territorial jurisdiction and subject matter jurisdiction given to it by the Constitution in Article 165 (3) (a). It follows from these provisions that no statute can remove the jurisdiction of the High Court in that regard. I must also point out that if the applicant had sought a judicial review order of mandamus, certiorari or prohibition in terms of Article 23 (3) (f) of the 2010 Constitution, the High Court will be bound to exercise its original jurisdiction. And in doing so the jurisdiction of the Political Parties Disputes will be ousted, because it lacks the jurisdiction to grant those orders.

16. It therefore follows that the application for transfer to that tribunal is hereby allowed because it has first instance jurisdiction over the subject matter of this petition. The jurisdiction of the High Court to enforce those fundamental rights including the threatened removal of the petitioner from office may only come into play after the petitioner has exhausted his avenues/remedies under the provisions of sections 40 and 41 of the Political Parties Disputes Act.

17. This petition is hereby ordered transferred to the Political Parties Disputes Tribunal. The issue of costs does not arise because it was not argued and I therefore make no order in that regard.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 29th day of February **2016**

In the presence of Mr. Mungai for the Petitioner and Mr. Njenga for the Respondents

Court clerk Njue

J.M. BWONWONGA

JUDGE

29.02.16