



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CONSTITUTIONAL PETITION NO 597 OF 2014

FRANCIS MUTUKUPETITIONER

VERSUS

WIPER DEMOCRATIC MOVEMENT – KENYA1ST RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL3RD RESPONDENT

RULING

1. The petitioner, then the Majority Leader in the Makueni County Assembly, filed his petition dated 10th November 2014 in which he alleged violation of his constitutional rights by the respondents following the Wiper Democratic Movement Party’s decision to de-whip him from his position as Majority Leader.
2. By its Notice of Preliminary Objection dated 24th November 2014, the 1st respondent objected to the jurisdiction of the Court to hear the petition in the following terms:
 - i. ***That the court lacks the jurisdiction to entertain the application and the petition.***
 - ii. ***The petition and application is defective and bad in law, frivolous vexatious and an abuse of court process.***
 - iii. ***Petition be dismissed with costs.***
3. The basis of the objection is that there is already a mechanism provided by law which the petitioner should have followed before approaching this Court. The objection was canvassed before me on 9th December 2014.
4. In his submissions on behalf of the 1st respondent, Mr. Oluoch argued that Section 40 of the Political Parties Act sets up the Political Parties Tribunal, while Section 40(1)(b) specifically provides that the Tribunal shall settle disputes between a political party and members of a political party.
5. He submitted that the dispute before the Court is a dispute between a party and a member in relation to question of discipline and failure to implement party policies communicated to him. Counsel relied on the decision in **Owners of Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd [1989]KLR 1** on the importance of jurisdiction and submitted that if there is a tribunal with jurisdiction the party should go there first.

6. It was also Counsel's submission that Section 40(1) contemplates that the first recourse of a party dissatisfied with the decision of his political party should be to the Tribunal, and an aggrieved party can appeal on points of law to the High Court. He submitted further that where there is a clear mechanism and structure and hierarchy, an aggrieved party should start down and go up the hierarchy. In his view, the jurisdiction of the Political Parties Tribunal is not ousted because issues of breaches of the constitution are raised.
7. Counsel relied on the decision in **Migori Judicial Review Application No. 1 of 2014 – R -vs- County Assembly of Migori & 4 Others ex parte Johnson Omolo Owiro** on the question whether this petition touches on political question and whether the Court should interfere with political matters. He distinguished the case of **Rose Wangui Mambo -vs- Limuru Country Club & 17 Others High Court Petition No 160 of 2013** and submitted that it does not aid the petitioner as the 1st respondent is not a private members' club but a public body funded by the tax payer. Mr. Oluoch submitted that the party has a constitution with an elaborate mechanism for dispute resolution that accords with the Constitution and rules of natural justice. He therefore prayed that the petition be struck out with costs.
8. Mr. Makolwal for the 2nd respondent supported the 1st respondent's Preliminary Objection. He submitted that the principle set by Courts in this jurisdiction is that where the Constitution establishes a dispute resolution procedure, that procedure must be followed. It was his submission that the Constitution provided for enactment of the Political Parties Act which establishes the Political Parties Tribunal to hear disputes involving members of political parties and their parties.
9. In his view, the word 'disputes' used in the Act was not confined to a particular class of disputes, but that all disputes must go to the Tribunal. He urged the Court to consider who the parties were, not the dispute, and to be guided by the provisions of Section 11 of the Civil Procedure Act which is clear that disputes should be instituted in the Court of the lowest grade competent to try it. He posed the question whether this is the Court with the lowest jurisdiction to hear disputes between a party and a member of the party. In his view, if disputes of this kind are brought before this Court, then the Political Parties Tribunal will lose meaning and will have no work to do. He also urged the Court to strike out the petition.
10. In his response on behalf of the petitioner, Mr. Mulei argued that the reason the petitioner had approached the Court was because he had already been de-whipped as majority leader by the Party, and there was a decision by the Party's National Executive Council that he ceases to act for it as Majority Leader. This decision was already communicated to the Speaker, and the petitioner had been summoned to appear before the disciplinary committee of the Party.
11. According to Mr. Mulei, Section 40(2) of the Political Parties Act ousts the jurisdiction of the Tribunal from a matter unless it has been heard by the internal dispute resolution mechanism of the party. In this case, according to the petitioner, he has been summoned by the internal party mechanism, but he has approached this Court because he feels threatened by the party dispute resolution mechanism. He argues that it is the party mechanism which is the aggressor, and he cannot wait until the aggressor violates his rights before coming to Court.
12. Counsel submitted further that Article 165(3)(b) gives this Court jurisdiction to hear and determine whether a right or fundamental freedom has been violated or threatened, which, in his view, the Tribunal cannot do. It is the petitioner's case that there are specific rights or freedoms that the petitioner has cited and only this Court can determine whether they have been threatened. Mr. Mulei submitted that the internal dispute resolution mechanism cannot be insulated when it threatens to violate rights.
13. Counsel contended that a party who is threatened can come to Court as the Court has jurisdiction to hear all matters except those for which specialized Courts have been established under Article 162. He relied on the decision in the case of **Rose Wangui Mambo -vs- Limuru County Club and Migori JR 1 of 2014** cited above.

14. Mr. Mulei further argued that even if the process of removal of a majority leader is the preserve of the Political Party, it cannot be in violation of rights and outside the jurisdiction of the Court. The petitioner therefore prayed that the Court dismisses the Preliminary Objection and allows the petition to proceed.
15. In his submissions in reply, Mr. Oluoch argued that even though the Constitution in Article 165 vests jurisdiction in the High Court to determine questions alleging violations of fundamental rights, it does not say that the High Court has exclusive jurisdiction. It was his submission that the word “dispute” does not exclude questions touching on fundamental rights and freedoms. Further, it was his case that the Court cannot be moved on the basis of fears, which is what the petitioner had submitted had brought him before the Court. Counsel reiterated that Article 33 of the Wiper Party’s constitution has a dispute resolution mechanism that has not been invoked.
16. In his reply, Mr. Makolwal submitted that the petitioner had not demonstrated what prejudice he would suffer if he went before the Political Parties Tribunal.

Determination

17. It is not in dispute that the petitioner is a member of the Wiper Democratic Movement Party. He deposes in his affidavit in support of his petition that he is a fully paid up member of the Wiper Democratic Movement of Kenya Party and duly elected as the Member of County Assembly representing Nzau, Kilili, Kalamba Ward in Makueni County. The petitioner states that he was also elected by the Party as the Party’s Majority leader in the Makueni County Assembly.
18. With regard to the events that precipitated the present dispute, the petitioner states that he voted conscientiously for the impeachment of the Governor of Makueni County. He had, however, received a letter from the 1st respondent asking him to cause the motion for the impeachment of the Governor to be held in abeyance. He claims that it would have been impossible for him to execute the wishes of the party as the mover of the motion was not from his party. The petitioner states, however, that he voted in exercise of his fundamental right to belief and opinion, but that he received a letter dated 13th October 2014 from the party accusing him of disloyalty and disrespect to the Party by allegedly rallying members of the Party in the Makueni County Assembly to proceed with the motion for the removal of the Governor. He avers that he was required to show cause why disciplinary action should not be taken against him by the Party, and to make his representations to the Party by 21st October 2014.
19. He alleges that he was subsequently de-whipped by the Party as the Majority Leader in Makueni County Assembly; that he was never called upon to defend himself, and that the decision was in contravention of the 1st respondent’s Constitution on disciplinary procedures which call for a disciplinary committee to sit and deliberate on matters such as this. He makes various other averments with regard to the conduct of the Party leadership which are not relevant for the purpose of this ruling, and states that the Party’s disciplinary proceedings are being conducted in an arbitrary, capricious, malicious and oppressive manner in a well-orchestrated, premeditated and pre-determined scheme to remove him in pursuance of ill-spite, vengeance and self-interest.
20. The issue before me is whether this Court is the proper forum for the hearing and determination of this petition. The respondents argue that it is not as there is a mechanism provided in law for the resolution of inter party and intra party disputes. The petitioner contends that this is the only forum with the mandate to determine the question of whether a right or fundamental freedom has been violated or threatened with violation.
21. It is not disputed that the 1st respondent has a dispute resolution mechanism provided for under Article 33 of its Constitution. There is also no dispute that the Political Parties Act has set up a Tribunal with the jurisdiction to hear and determine disputes arising between a party and its members, or between members of a political party. Section 40 provides as follows:

(1) The Tribunal shall determine

(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.

22. With regard to the circumstances under which the jurisdiction of the Tribunal will be invoked, Section 40(2) is explicit:

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b) (c) or (d) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms. (Emphasis added)

23. In the present case, the petitioner wishes to by-pass two dispute resolution processes provided by law on the basis that he is apprehensive that his constitutional rights and freedoms will be violated.

24. The law is clear with regard to circumstances such as are now before me, and courts have expressed themselves quite succinctly on this point: where there are specialised procedures provided by law or the Constitution for the resolution of disputes they should be followed. See in this regard the case of **Kones -vs- Republic & Another ex parte Kimani wa Nyoike & 4 Others (2008)3 KLR (EP); Speaker of the National Assembly -vs- Njenga Karume (2008) IKLR (EP) 425 and Alphonse Mwangemi Munga & 10 Others -vs- African Safari Club Ltd Petition No 564 of 2004.**

25. With regard to the specialised procedure provided for the resolution of political party disputes, Majanja J, in the case of **George Okode & Others -vs- Orange Democratic Movement & Others Petition No. 294 of 2011**, in directing the parties to present their grievances before the Political Parties Tribunal, observed as follows:

“I have considered this matter and it deals with political party activities. There is now a Political Parties Tribunal established under the Political Parties Act that is intended to resolve such issues. This is in line with Article 159 of the Constitution which provides that judicial power vests in Courts and Tribunals. It is therefore not inconsistent with Article 22 of the Constitution to refer such a matter to a body constituted for that purpose.”

26. This Court took a similar stand in declining to issue an injunction in the case of **Stephen Asura Ochieng & Others -vs- Orange Democratic Movement and Others Petition No. 288 of 2011**. In that case, the Court held as follows:

“[12.] To my mind, 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....”

[13.] To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the

internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners' grievance and the parties involved."

27.As for the rationale for requiring that political disputes are heard within the mechanism established under the provisions of the Political Parties Act, Majanja J had this to say in the case of **Francis Gitau Parsimei -vs- National Alliance Party and Another Nairobi Petition No. 356 of 2012 [2012] eKLR.**

"[4.] At the core is whether this court should intervene to stop the electoral process so that a party who claims that his or her rights have been infringed can agitate his rights before the court. To determine this issue, the Constitution must be read a whole. On the one hand there is the Bill of Rights which protects, inter alia, the political rights of the petitioners. These rights are enforceable under the provisions of Article 22. Article 22 offers the petitioners direct access to the High Court to enforce fundamental rights and freedoms. There is also Article 258 which entitles any person to move the court where the Constitution is contravened or is threatened with contravention. The petitioners have exercised the option to invoke these provisions to move the court.

[5.] On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for under the provisions of Chapter Seven of the Constitution titled, "Representation of the People." These provisions are operationalized by the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 and the Political Parties Act, 2011. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions." (Emphasis added)

28.The circumstances of this case dictate that this Court, despite its wide jurisdiction under the Constitution, does not assume such jurisdiction. The dispute is clearly a dispute that falls within the mandate of the institutions in which the Political Parties Act vests jurisdiction. It involves a member of a political party and his political party. That party has an internal dispute resolution mechanism. The law requires that the said mechanism be exhausted; that a party dissatisfied with the outcome of the internal party dispute resolution process takes his grievance to the Political Parties Tribunal, and if unhappy with the outcome, has a right of appeal to the High Court. It would be to undermine and defeat the mechanisms and institutions provided by law, which are underpinned by the Constitution, to hold otherwise.

29.For these reasons, the 1st respondent's preliminary objection succeeds. This petition is therefore struck out, but with orders that each party bears its own costs.

Dated, Delivered and Signed at Nairobi this 12th day of March 2015

MUMBI NGUGI

JUDGE

Mr. Mulei instructed by the firm of O. N Makau & Mulei & Co. Advocates for the petitioner

Mr. Olouch instructed by the firm of A. T. Oluoch & Company Advocates for the 1st respondent

Mr. Makolwal instructed by the State Law Office for the 2nd respondent