



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 87 OF 2014

BETWEEN

PAUL PARTOIRE OLE KAIKA PETITIONER

AND

ORANGE DEMOCRATIC MOVEMENT RESPONDENT

RULING

1. The matter before the Court is a petition dated 26th February 2014 accompanied by a Chamber Summons of the same date. The Chamber summons seeks the following reliefs;

[2] Pending hearing of this application inter-parte the Honourable Court be pleased to grant an interim conservatory order of injunction restraining the respondents either by itself, its agents, servants, employees, and or purported delegates from conducting the party election scheduled for 28th February 2014.

[3] The Honourable Court be pleased to grant an order of Temporary conservatory order of injunction restraining the respondent either by itself, its agents, servants, purported delegates and or employees from conducting any party election pending the hearing and determination of this petition.

2. The petition which forms the substratum of the suit is filed by a member of the Orange Democratic Movement, a registered political party. It concerns the National Delegates Conference to be held on 28th February 2014.
3. The petitioner is concerned about the irregularities in the process of election and in particular the fact that as a party member he applied and paid for nomination for election as a national official for the Post of Deputy Secretary General of the Party yet his name has been omitted from the returned application forms for persons eligible for nomination. He also raises complaints about the manner in which delegates have been selected to vote at the said elections which he avers is contrary to the party constitution and violate his political rights protected under the Constitution.
4. What the matter came up for directions today, 27th February 2014, I directed the counsel for the petitioner, Mr Muganda assisted by Mr Anyega, to show cause why this matter should not be struck out in light of **section 39** and **40** of the **Political Parties Act , Act No. 11 of 2011** (“the Act”). **Section 39** of the Act established the Political Parties Tribunal while **section 40** sets out its

jurisdiction 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.*

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

5. Mr Muganda submits that the matter before the Court is a petition for the enforcement of fundamental rights and freedoms brought under **Article 22** of the Constitution to protect political rights of the petitioner guaranteed under **Article 38** hence it is a matter strictly within the jurisdiction of the High Court. Since the matter was one of enforcement of fundamental rights, he further submits that the Tribunal could not deal with the same.
6. Mr Muganda also sought to persuade the court that, in any event, the petitioner had invoked the internal procedures of the Party as he wrote to the party a letter dated 21st February 2014 in which he complained to the party about the election and sought relief but the Party did not, to date, respond to the letter. He submits from the bar that he tried to approach the Political Parties Tribunal but was informed that it could not raise a quorum this week to hear the matter hence the petitioner had no option but to seek this Court's relief to protect his fundamental rights and freedoms. Counsel urges the court to be guided by the provisions of the Constitution in the matter particularly **Articles 19, 20 and 21** of the Constitution.
7. Counsel for the ODM, Mr Makori left the issue to the Court for determination as he had not had sufficient time to seek instructions on the matter.
8. It is correct that the petition herein seeks to protect the petitioner's fundamental rights and freedoms under **Article 38** but these rights do not exist in a vacuum. The rights are given practical effect by Parliament in legislation made pursuant to its duty to observe, respect, protect, promote, protect and fulfil fundamental rights and freedoms.
9. The law relating to political parties finds firm footing in the Constitution where Parliament is empowered by **Article 92** to enact legislation for, inter alia, "*matters necessary for the management of political parties.*" This includes the manner in which disputes party disputes are to be settled. This framework is part of the entire scheme of laws among them the ***Elections Act, 2011*** and others that regulate political conduct. It can hardly be said therefore that regulation of political conduct by statute, of itself, violates **Article 38** but rather gives effect to its provisions.
10. This means that the invocation of a dispute resolution procedure is not inconsistent with the right of access to the court guaranteed and in **Article 22**. The dispute resolution process provided is also consistent with the provisions of **Article 159(2)(c)** of the Constitution which obliges the courts to promote alternative dispute resolution. It is against this background that our Courts have established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used. This principle has been emphasized time and again

in a long line of cases; *The Speaker of The National Assembly v The Hon James Njenga Karume*, Civil Application No 92 of 1992 (Unreported), *Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others*, (2008) 3 KLR (EP) 291, *Wanyoike vs Electoral Commission of Kenya (No. 2)* (2008) 2 KLR (EP) 43, *Francis Gitau Parsimei v National Alliance Party and Another Nairobi Petition No. 356 of 2012* [2012]eKLR. In relation to the respondent's election the same principle was upheld in *Stephen Asura Ochieng' and Others v Orange Democratic Movement and Others Nairobi Petition No. 288 of 2011* (Unreported).

11. In my view therefore, this case being one between a member and a political party falls strictly within the jurisdiction of the *Political Parties Tribunal* under **section 40(1)(b)** of the Act. The entertainment of such complaints by the Court is the exception rather than the rule even when such a dispute is couched as a case concerning enforcement of fundamental rights, it is one that is in reality a party dispute and as I have stated, it is the political rights that are given effect by the statute made pursuant to the Constitution.

12. Mr Muganda alluded to the fact that the Tribunal lacked a *quorum* to hear the matter. This may present some difficulty but no complaint has been filed before the Tribunal to enable Court consider whether to issue some form of interim relief pending action by the Tribunal. There may well be exceptional cases where the Court is entitled to intervene but I am afraid this case is not one of them.

13. I am satisfied that this is a proper case to decline exercise of the Court's jurisdiction in light of **section 40** of the *Political Parties Act*. I therefore down tools with the result that the petition is hereby struck out. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 27th February 2014.

D.S.MAJANJA

JUDGE

Mr Muganda with him Mr Anyega instructed by Sagana, Biriq and Company Advocates for the petitioner.

Mr Makori instructed by J. M. Rioba and Rioba Advocates for the respondent.