



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 100 OF 2012**

**ALFRED OBUYA OBENGO**

**STEPHEN NJOROGE NGANGA.....PLAINTIFFS**

**-VERSUS-**

**THE NATIONAL CHAIRMAN NATIONAL**

**NURSES ASSOCIATION OF KENYA**

**THE CHAIRPERSON ELECTORAL COMMITTEE..... DEFENDANTS**

**RULING**

**INTRODUCTION**

1. On 11th October 2012, the National Nurses Association of Kenya (hereinafter “**NNAK**”) held its elections. The Plaintiffs unsuccessfully vied for the positions of Vice-Secretary and First National Chairman respectively. They claim that the election was not conducted openly, fairly and procedurally. The Plaintiffs filed this suit on 15th October 2012 seeking an injunction to restrain the Defendants from conducting the affairs of NNAK until proper elections are held. They also want the elections held on 11th October 2012 declared as illegal and null and void.
2. Alongside the Complaint, the Plaintiffs filed a Notice of Motion dated 12th October 2012 in which they seek an order to restrain the Defendants from assuming or taking over and/or conducting the affairs of the National Executive Office of NNAK pending hearing and determination of the suit. They also prayed that a caretaker committee be formed to take care of the office of NNAK pending hearing of the suit.
3. The Defendants filed a Notice of Preliminary Objection to the Plaintiffs' Notice of Motion on 29th October 2012. The Preliminary Objection is on the grounds reproduced as follows:
  - i. **That the suit herein is premature for reason that under Article 16 (v) of the National Nurses Association of Kenya by-laws the Plaintiffs were obliged to first lodge their petition with the National Election Commission within a prescribed period an action which they never took prior to filing of the suit herein.**
  - ii. **That the prayers being sought in the said Application have been overtaken by events for reason that the change of Officers of the National Nurses Association of Kenya has since**

**been effected.**

4. It is the Defendants' said Notice of Preliminary Objection that is the subject of this Ruling. On 13th August 2013, the court directed that both parties file written submissions on the Preliminary Objection. Both parties have filed their written submissions.

## **THE ARGUMENTS**

### **The Defendants' Arguments**

5. The Defendants argue that under **Article 16 (v)** of NNAK's by-laws, a party who is aggrieved by the elections of 11th October 2012 was bound to procedurally lodge their complaints in the form of a petition with the National Election Commission within a period of 21 days. **Article 16 B (v)** of NNAK's by-laws provides for one of the duties of the National Election Committee as follows:

**“Handle election petitions as there maybe eventual if in receipt of written complaints within 21 days”**

6. The Defendants argue that since the Plaintiffs failed to lodge their complaints with the Election Commission as required by the said Article 16 (v) before moving this court, this suit is premature. That the Plaintiffs' Notice of Motion is therefore pegged on an incompetent suit and the same should be struck out.
7. Further, the Defendants argue that since the officers who were elected on 11th October 2012 have assumed office, the Plaintiffs' application for injunction has been overtaken by events.

### **The Plaintiffs' Arguments**

8. The Plaintiffs are opposed to the Preliminary Objection. They argue that a preliminary objection should be based purely on points of law. That the second ground of the Preliminary Objection about the Plaintiffs' application being overtaken by events is not based on pure point of law.
9. On the first ground of the Preliminary Objection, the Plaintiffs argue that since the suit was served upon the 2nd Defendant, the Chairperson of the Electoral Committee within 21 days, the Plaintiffs complied with **Article 16(v)** of the NNAK's by-laws.
10. The Plaintiffs further argue that the Preliminary Objection is based on the by-laws that are not superior to the Constitution. That the Kenyan Constitution gives express and inherent rights to citizens to go to court for redress.

## **THE ISSUES FOR DETERMINATION**

11. The second ground of Preliminary Objection, in my view, is not a ground upon which a preliminary objection may be founded. It is trite law that preliminary objection should be based on pure points of law. In the case of **Moses Wanjala Lukoye –Vs- Benard Alfred Wekesa Sambu & 3 Others [2013] eKLR**, F. Gikonyo, J. held as follows:

**“The legal delimitations for a preliminary objection were set a long time ago in the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A 696. The principle (preliminary objection) is not in dispute and I do not think anything novel could be said about it. It has been and continues to be quoted and reinforced by the superior courts including the Court of Appeal, and recently by the Supreme Court. I did not, therefore, understand why Mr Onsando wanted to re-invent the wheel. Nonetheless, I shall restate the principle for purposes of clarity.**

**As per Law J.A:**

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”*

As per Sir Charles Newbold P:

*“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.”*

As per our own J.B. Ojwang J (as he then was) in a simple and clear manner in the case of *Oraro v Mbajja* [2005] e KLR that:

*“I think the principle is abundantly clear. A ‘preliminary objection’, correctly understood is now well identified as, and declared to be the 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 preliminary objection, and 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. I am in agreement...that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”* (emphasis mine).

12. The Defendants' argument that the prayers sought by the Plaintiffs have been overtaken by events because the persons elected have assumed office is, in my view, an *assertion that bears factual aspects and calls for proof by adducing evidence. In other words, witnesses may have to be called or evidence adduced to prove the fact that the officers have assumed office and this court cannot make an assumption without evidence in that regard. The second ground accordingly fails the test of preliminary objection.*
13. Although not expressly stated in the Notice of Preliminary Objection, what I hear the Defendants to be saying is that this court lacks jurisdiction to hear and determine the suit as filed. The Defendants' argument, as I understand it, is that by providing that a party aggrieved by electoral process should file a petition with National Election Committee within 21 days, Article 16 (v) of the NNAK by-laws ousts the jurisdiction of this court to hear and determine any suit that touches on the elections of NNAK. Put differently, the Defendants' argument is that it is the National Election Committee that is bestowed with the mandate to hear and determine disputes regarding NNAK's elections (which should be filed within 21 days as election petitions) and thus this court lacks such jurisdiction. In my considered view, therefore, the issue for the court's determination is whether, by giving the National Election Committee mandate to handle election petitions, Article 16 (v) of NNAK's by-laws ousts the jurisdiction of this court to hear and determine complaints emanating from NNAK's elections.

#### **ANALYSIS/ DETERMINATION**

14. **Article 1 C (i)** of NNAK's Constitution describes it as a society exempted from registration by the Registrar of Societies under the Societies Act, Cap. 108 of the Laws of Kenya (hereinafter “the Societies Act”). **Section 9** of the Societies Act provides that every society shall be registered or exempted from registration by the Registrar of Societies under the Act. NNAK therefore is a society formed under and regulated by the provisions of the Societies Act.
15. **Section 19** of the Societies Act provides that the constitution or rules of every registered society or exempted society, formed after the commencement of the Act shall provide for all the matters specified in the Schedule to the Act. The sections of the Schedule that are relevant to this case are; **section 7** of the Schedule which provides for the composition of committees of the society, the terms of office of members of such committees and the methods of their election, appointment,

dismissal and suspension; and **section 8** which provides for the authority for and the method of filling vacancies on committees. By making provision in its Constitution and by-laws on office bearers, how the offices are filled (through elections) and that any disputes regarding elections are to be determined by the National Election Committee, NNAK acted in accordance with section 19 of the Societies Act.

16. In my view, members of the NNAK are bound by the provisions of the society's constitution, rules and by-laws. However, despite being made pursuant to section 19 of the Societies Act, the society's constitution, rules and by-laws are not in themselves Acts of Parliament. They are not even subsidiary legislation promulgated under the provisions of the Societies Act or any other statute. In my view, they are only made to govern the affairs of the society and to regulate dealings between the members. Although binding on members, they do not have statutory force and cannot bind persons or institutions outside the society. Can the hands of this court therefore be tied by the NNAK's constitution, rules and by-laws which are not themselves Acts of Parliament or even subsidiary legislation? To put it differently, can the jurisdiction of this court be ousted by the society's constitution, rules and by-laws?

17. To answer that question, I wish to rely on the Court of Appeal decision in the case of **Peter Gichuki King'ara –Vs- Independent Electoral And Boundaries Commission & 2 others [2013] eKLR** (“the Peter Gichuki King'ara Case”), the Court of Appeal held as follows:

**“The *Election Petition Rules* are rules of procedure and the question whether rules of procedure can confer jurisdiction must be answered. The issue for determination is whether the jurisdiction of the Court of Appeal or any other court for that matter can be created, established, limited or governed by a subsidiary legislation more particularly a regulation and rules of procedure made by the Rules Committee.**

**Jurisdiction is specified either by the Constitution or Statute. In *Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011*, the Supreme Court delivered itself as follows on the issue of jurisdiction:-**

**“A court’s jurisdiction flows from either the Constitution or legislation or both.”**

**It is our considered view that a subsidiary legislation or rules of procedure or a rule made by the Rules Committee cannot confer, create, establish, limit or subtract the jurisdiction of any court of law or tribunal as established by the Constitution or Statute. Rule 35 of the *Election Petition Rules* is a subsidiary legislation which is contained within the Rules of Procedure for the conduct and trial of Election Petitions. We hold that Rule 35 of the *Election Petition Rules*, being a subsidiary legislation within procedural rules, is not a jurisdictional rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine Election Petitions. We further hold that Rule 35 of the *Election Petition Rules* cannot limit the jurisdiction of the Court of Appeal as granted under Article 164 (3) of the Constitution and as operationalized by Section 85A of the *Elections Act*. A subsidiary legislation cannot expand, add to or reduce the jurisdiction of any court as spelt out in the Constitution or by Statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the Constitution or Statute. A rule cannot limit the jurisdiction of a court of law.”**

18. The High Court has unlimited original jurisdiction in criminal and civil matters by virtue of **Article 165 (3) (a)** of the Constitution of Kenya, 2010. That jurisdiction, as was rightly held by the Court of Appeal in the **Peter Gichuki King'ara Case**, cannot be limited by subsidiary legislation or rules of procedure or a rule made by the Rules Committee. If subsidiary legislation or rules of procedure cannot limit the jurisdiction of the High Court, can the rules or by-laws made by a society limit the High Court's jurisdiction? The answer, in my view, is an emphatic no. As I

have already observed, the constitution, by-laws and rules of NNAK only regulate the affairs of that society. In my view, the same cannot be used to limit jurisdiction of this court which is expressly donated by the Constitution.

### **CONCLUSION**

19. The Defendants' claim that this court cannot hear and determine the suit because the Plaintiffs did not comply with NNAK's by laws has no legal basis. The High Court's unlimited jurisdiction over civil and criminal matters is derived from the Constitution and the same can only be limited by the Constitution or by statute passed in accordance with the Constitution. The preliminary objection must therefore fail. It is dismissed with costs and the Plaintiffs' Notice of Motion Application dated 12th October 2012 shall proceed for hearing on merit.

**DATED and DELIVERED at MOMBASA this 20<sup>TH</sup> day of MARCH, 2014.**

**MARY KASANGO**

**JUDGE**