



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 107 OF 2012

ANDREW OKIYA OMTATAH OKOITI1ST PETITIONER

EMMA GETRUDE MBURA.....2ND PETITIONER

WYCLIFE GISEBE NYAKINA3RD PETITIONER

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES 2ND RESPONDENT

CONSOLIDATED WITH

PETITION NO 361 OF 2012

ANDREW OKIYA OMTATAH OKOITI PETITIONER

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES 3RD RESPONDENT

THE ETHICS AND ANTI-CORRUPTION

COMMISSION.....4TH RESPONDENT

JUDGMENT

Introduction

1. This judgment pertains to High Court Petitions Nos. 107 of 2012 and 361 of 2012. Both petitions related to the legislation providing for the registration of political parties, the Political Parties Act, 2011, which was enacted pursuant to the provisions of Article 92 of the Constitution.
2. In Petition No. 107 of 2012, the petitioners, who describe themselves as the interim officials of the Justice and Development Party, challenge the constitutionality of various provisions of the Political Parties Act, 2011. They allege, among other things, that the provisions of section 7 and 51 of the Act are unconstitutional in that they limit the petitioners' right to political participation guaranteed under Article 38 of the Constitution. They are unhappy with the requirements that a political party can only be registered if it has a minimum of 1000 members in at least 24 counties, and should have representation from youth and minorities.
3. In High Court Petition No. 361 of 2012 which was filed in Court on 22nd August 2012, the petitioner, who is also the 1st petitioner in Petition No. 107 of 2012, sought, among others, orders to bar political parties registered under the provisions of the Political Parties Act from participating in the general elections scheduled for 4th March 2013. The grounds on which the petition is founded are that the parties had been registered on the basis of fraudulent members' lists which had been generated from the money transfer service, M-pesa. He also sought orders to have the Ethics and Anti-Corruption Commission investigate the matter.

3. Procedural History

4. The petitioners in Petition No. 107 of 2012 filed the petition in Kakamega in March 2012. On 21st March 2012, the Presiding Judge in Kakamega transferred the file to the Constitutional and Human Rights Division, observing that the political party involved has its registered office in Nairobi, all the other parties are based in Nairobi, and there was no good reason for filing the matter in Kakamega.
5. When the matter came up before Majanja J on 28th March 2012, Counsel for the Petitioners sought interim orders to stop the application of the transitional clauses in section 7 and 51 of the Political Parties Act, alleging that they were in breach of the Constitution and that the petitioners will suffer irreparable harm.
6. Counsel for the 1st respondent, Mr. Bitta, pointed out that there was another matter dealing with the same issues as were raised by the petition, being Petition No. 290 of 2011, which was scheduled for hearing on 28th May 2012 and in which a similar application had been made and denied.
7. The Court denied the application for conservatory orders and directed that the matter be mentioned before me, together with Petition No. 290 of 2011, on 23rd April 2012. On that date, I directed that the two petition be heard together on 28th May 2012.
8. By an application filed under Certificate of Urgency on 26th April 2012, the petitioners revisited their application for interim conservatory orders. They sought orders to restrain the Registrar of Political Parties from deregistering the **Justice and Development Party** at whose behest the petition and application had been brought. They argued that their application was urgent as the Political Parties Act 2011, whose constitutionality they were challenging, was in force and was likely to lead to the deregistration of those parties which will not have complied with the provisions at Section 51 which requires that parties should have complied with Section 7 on registration of members, opening of offices in 24 counties, and fees for registration of parties, among other things.
9. The petitioners contended further that they had made all attempts to comply with the Act, but that most of its members could not meet the vetting requirements of the Registrar of Political Parties. Upon consideration of the submissions of Counsel, the Court declined to issue the restraining orders, observing that inability to comply with the requirements of a law was not sufficient to

render that law unconstitutional, and declined to issue the interim orders sought.

10. When the matter came up on 28th of May 2012 when it was scheduled for hearing together with Petition No. 290 of 2011, Counsel for the petitioners sought to have the matter adjourned for a period of 14 days to enable the petitioners file an application to have the matter heard by a different judge, which application the Court granted. The petitioners then filed their application dated 13th June 2012 which was then set down for hearing on 17th July 2012.
11. However, when the application came up for hearing on 17th July 2012, Counsel for the petitioners applied to withdraw the petitioners' application dated 13th June 2012. He also sought leave to amend the petition. Both orders were duly granted and the matter scheduled for further directions on 19th September 2012. On that day, Counsel for the respondent applied to have Petition No. 107 of 2011 consolidated with Petition No. 361 of 2011. Mr. Omtatah, who was present in Court, indicated, in the absence of his Counsel in petition No. 107 of 2012, that he had no objection to the consolidation of the petitions. An order was therefore made for the consolidation of the two matters.
12. The matter did not thereafter proceed to hearing for various reasons, including the absence of Counsel for the petitioners on several dates when the matter was scheduled for mention, and the engagement of Counsel for the other parties in the election petitions that followed the 2013 general elections. The petitions were eventually heard on the 27th of January 2014.
13. At the hearing, submissions were made for the petitioner by Mr. Nguring'a, Mr. Mohamed for the Attorney General, and Ms. Omuko for the 2nd respondent and judgment was reserved for the 7th of March 2014. None of the parties addressed the Court on the prayers sought in Petition No. 361 of 2011.
14. Upon perusal of the Court record in the course of writing the judgment, the Court observed the omission with regard to Petition No. 361 of 2012 and caused the matter to be mentioned on 5th February 2014. At the mention, the petitioner in Petition No. 361 of 2012, indicated that the petitioners had filed joint submissions on both petitions and asked the Court to render judgment on the basis of the submissions. Ms. Omuko expressed similar sentiments on behalf of the 2nd respondent and on behalf of Mr. Gumbo for the respondent in Petition No. 361 of 2012. Mr. Mohamed indicated that he had no instructions with regard to the said petition. This judgment therefore relates to the issues raised in both petitions.

Petition No 107 of 2012

The Petitioners' Case

15. The petitioners filed several affidavits sworn on diverse dates by the interim officials of the Justice and Development Party, namely **Andrew Okiya Omtatah Okoiti, Emma Gertrude Mbura, and Wycliffe Gisebe Nyakina**. They also filed an affidavit sworn by **Bonaventure Andrew Omuse** sworn on 15th June 2012.
16. The case for the petitioners as presented by Mr. Nguring'a is that the Political Parties Act, notably section 7(2)(a) is unconstitutional because its requirement that for a political party to be duly registered, it must have at least 1000 members in at least 24 counties is unreasonable as it violates Article 24 and 27 of the Constitution and means that only those with financial muscle can do recruitment on such a scale.
17. The petitioners also impugn the provisions of section 7(2)(b) of the Act on the basis that the section gives minorities and particular groups of persons veto powers in the formation of political parties by insisting that they must be represented in the formation of political parties. He

contended that membership in political parties is voluntary while this section appears to force minorities to join political parties.

18. The petitioners were also unhappy with section 7(2)(f)(iii) which requires that political parties have branches in more than half of the counties. They contended that this requirement is financially involving and can only be achieved by political parties or individuals financially able to meet the cost involved.
19. The petitioners also challenged the current registration fees for a political party. They contended that the fees of Kshs100,000/- and Kshs500,000/- for part and full registration are exorbitant, raise the bar too high, and are the highest globally. It was also the petitioners' contention that the Political Parties Act is incompatible with best international practices on membership and registration fees.
20. According to the petitioners, the Act also discriminates against the youth as it requires that a member of a party ought to be a registered voter yet youths who have obtained identity cards cannot join political parties.
21. Counsel also contended that the Act is also unconstitutional to the extent that it does not provide for county-based political parties. According to Mr. Nguring'a, the sovereign power of the people is to be exercised at the county and national level; that the constitution at Article 91(1)(a) declares that every political party shall have a national character; that the Act had misconstrued 'character' to mean 'presence'; that 'national character' as framed in the constitution especially at Article 10 means the total values norms and customs – which the people of Kenya want, but not presence, and that county based political parties should be allowed.
22. The petitioners also challenge section 29 of the Act as unconstitutional on the basis that it requires that a political party should print its financial statement in 3 newspapers of national character. Mr. Nguring'a contended that the requirement is out of step with the ICT age and a party can publish its statement on its website. Counsel asked the Court to take judicial notice of the cost of publishing in a commercial paper.
23. Mr. Nguring'a also set out in his oral and written submissions various other grounds of dissatisfaction with the provisions of the Political Parties Act: that the Act is an incoherent piece of legislation in that section 2 interprets a branch to mean any devolved unit while section 7 and 17 state that a devolved unit of a party shall be at the county level; that there is a contradiction between section 3(2) which provides that membership is for Kenyans over 18 years while sections 7 limits membership to registered voters. He asks that the provisions of the Act be declared unconstitutional and those political parties which were denied registration on the basis of the Act be granted registration.

The 1st Respondent's Case

24. In response, Counsel for the Attorney General, Mr. Mohamed, in reliance on the Grounds of Opposition dated 18th September 2012 and written submissions dated 12th April 2013, submitted that the objects and purpose of the Political Parties Act was to regulate political parties at national level. It was his submission that declaring the Act unconstitutional will create anarchy at national level as the petitioners do not propose a solution to declaring the Act unconstitutional.
25. Mr. Mohamed submitted that section 3(2) of the Act does not operate independently of the Act; that one must fulfil other conditions in the law in order to become a member of a political party, and there is therefore no inconsistency with other sections.
26. Counsel took the view that permitting parties to operate at County level would lead to chaos as parties will be formed on the basis of ethnicity and tribalism. It was the respondent's case that the requirement for publication was in line with the constitutional requirements for publication, and

there was no unconstitutionality disclosed by the petition.

The 2nd Respondent's Case

27. Ms. Omuko for the 2nd respondent submitted that the provisions of the Political Parties Act comply with the Constitution; that section 7(2)(b) provides that membership of parties should reflect, among others, regional and ethnic diversity gender and representation of minorities; and that this provision accords with Article 91(1)(e) and (f) which requires political parties to respect the rights of all persons to participate, including marginalized and minority groups.
28. Counsel submitted further that the Constitution requires political parties to be of national character at Article 91(1)(a); Article 91(2) prohibits religious, ethnic, or regional based parties; while section 7 of the Act, which requires inclusion of minorities, is in accord with Article 27(6) on the taking of legislative, policy and other measures for the inclusion of minorities and in order to redress disadvantages suffered by individuals and to ensure representation of minorities in governance in accordance with Article 56. It was the 2nd respondent's case that this petition was unfounded and should be dismissed with costs.

Determination

Petition No 107 of 2012

29. In their amended petition dated 18th July 2012, the petitioners seek a large number of orders which cannot conveniently be reproduced in this judgment. The gist of the petition, however, is an attack on the Political Parties Act, particularly section 7 thereof. It is alleged on behalf of the petitioners that the provisions of this section as well as section 51 are unconstitutional for imposing certain conditions for a party to be registered under the Act.
30. As indicated in the procedural history of this matter, this petition was scheduled for hearing on 28th May 2012 together with Petition No. 290 of 2011 which raised the same issues. On that date however, Counsel for the petitioner asked for time to file an application for the petition to be heard by another judge, an application he later withdrew.
31. This Court heard **Petition No. 290 of 2011-Party of Independent Candidates of Kenya vs Attorney General and 2 Others** - on 12th July 2012 and delivered judgment on 28th September 2012.
32. At paragraph 27, 28 and 29 of the said judgment, I stated as follows with regard to the provisions of the Political Parties Act which were impugned in that petition:

“[27]. Given the provisions of Article 91 of the Constitution and the clear legislative intent in enacting the Act, I agree with the respondents that the impugned provisions of the Act, while limiting to some extent the rights guaranteed under Articles 36 and 38, do not violate the provisions of the Constitution on the right to association and political participation. The provisions of Section 7(a) and (f) are an expression of the legislature's intent in meeting the requirements of Article 91 and 92 of the Constitution. They are an expression of the desire of Kenyans to have parties that are national in outlook and that do not cater only for limited regional and sectarian interests.

[28.] In this regard, the argument that the cost of establishing offices and recruiting members is beyond the financial ability of the youth and marginalised groups cannot hold: the Constitution clearly does not contemplate a situation in which a political party will be formed solely by the youth and marginalised groups. The requirement at Article 91 that 'Every political party shall have a national character

as prescribed by an Act of Parliament’, ‘promote and uphold national unity,’ ‘respect the right of all persons to participate in the political process, including minorities and marginalised groups’ and ‘respect and promote human rights and fundamental freedoms, and gender equality and equity’ presupposes, in my view, a party that is inclusive of all, that recruits nationally, has youth, the elderly, women, persons with disabilities and minority groups among its members.

[29.]The provisions of the Act with regard to membership from and branch offices in all counties appear to me to be reasonable means, in the circumstances, of achieving the objects of the Constitution with regard to party politics. While one has the freedom of association and political participation as provided under Article 36 and 38, one must enjoy these rights, in so far as they relate to membership of a political party, within the parameters set by the Act, which are themselves ordained by the Constitution. The provisions cannot be read in isolation but must be read together with the rest of the Constitution and interpreted within its aims, object and purpose. They must also be read within the context of Kenya and the prevailing socio-political circumstances that informed the provisions in the Constitution.”

- 33.The decision of the Court in that matter has never been appealed from, and I have not heard anything in the submissions made before me in the present matter that would require a change in the above reasoning. More importantly, to find differently in this matter would in effect be to sit on appeal on my own decision.
- 34.The petitioners have also made various arguments against the Political Parties Act: that it is incoherent and contains contradictions; and they seek various declarations, including that a political party should have a minimum of 20 members instead of the 1000 required under the Act.
- 35.The response to this line of argument is fairly simple. First, the Act represents the will of the people as expressed through their chosen representatives. For the Court to make declarations with respect to its provisions, the petitioner must show in what way it violates the Constitution, or interferes with their rights. This Court examined in depth and at length the provisions of the Political Parties Act, particularly with respect to registration of political parties and the conditions that the Act imposes therefore, and found no inconsistency with the Constitution. There is nothing in the arguments and submissions now before me that would lead to a different conclusion.

Petition No. 361 of 2013

- 36.As observed earlier, this petition relates to the alleged fraudulent registration of political parties and sought orders directed at stopping the political parties from participating in the 2013 elections.
- 37.It will be observed, first, that this petition was not prosecuted till long after the March 4th 2013 general elections were over. Consequently, the issues that the petitioner raises with regard to the participation of the 51 political parties has long been overtaken by events. This Court cannot now engage in what would be a purely academic exercise.
- 38.Secondly, the petitioner sought orders that would have significant adverse consequences for the political parties in question, but did not serve them so that they can present their side of the matter before the Court. It goes without saying that it would be in breach of all the tenets of justice and a violation of the constitutional right to be heard were the Court to make orders against a party who has not been heard.
- 39.Thirdly, the allegations made in relation to the registration of political parties are matters that fall for adjudication by the Political Parties Tribunal established under section 39 of the Act. Section 40(f) gives the Tribunal jurisdiction to hear appeals from decisions of the Registrar of Political Parties made under the Act.

40. At the core of this petition is dissatisfaction with the decisions made by the Registrar of Political Parties to register the 51 political parties which the petitioner deems to have been improperly registered. Any decision made by the Registrar is subject to challenge before the Tribunal, and the petitioner should not have by-passed the procedure provided by law to come to this Court. As Majanja J observed in **George Okode & Others vs Orange Democratic Movement & Others Petition No. 294 of 2011** when he directed the parties in that matter to present their grievances before the Political Parties Tribunal:

‘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.’

41. Should there still be any issues subsisting with regard to the registration of political parties, such issues should be raised before the Tribunal. Further, should there be any evidence, as alleged by the petitioners, that the parties were fraudulently registered, then he should present such evidence to the appropriate authorities to investigate. There is no evidence before this Court that the Ethics and Anti-Corruption Commission or the Police were furnished with the evidence of fraud and failed or declined to investigate the matters. There is therefore no basis for asking the Court to make orders directed at them, particularly when they were not parties to the petition.

42. There is therefore no merit in this petition also, and for the foregoing reasons, the consolidated petitions are hereby dismissed. There shall however be no order as to costs.

Dated, Delivered and Signed at Nairobi this 16th day of May, 2014

Mumbi Ngugi

Judge

Mr. Nguring’ a instructed by the firm of Andrew Okiya Omtatah Okoiti for the Petitioners

Mr. Mohamed, Litigation Counsel, instructed by the State Law Office for the 1st Respondent

Ms. Omuko instructed by the firm of Gumbo & Co. Associates for the 2nd Respondent