



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**PETITION NO 220 OF 2011**

**HONOURABLE ENG. EPHRAHIM MWANGI MAINA .....PETITIONER**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL & 2 OTHERS ..... RESPONDENTS**

**JUDGMENT**

**Introduction**

1. In the petition dated 28<sup>th</sup> October 2011, the petitioner challenges the constitutionality of the decision by his party, the Safina Party, to expel him from membership of the party. He contended that the decision was likely to lead to his loss of his Parliamentary seat as the Member of Parliament for Mathira.

2. The petition was brought under certificate of urgency on 28<sup>th</sup> October 2011 and interim orders restraining the Safina Party from expelling the petitioner from the party were issued. Directions with regard to the hearing were issued on 2<sup>nd</sup> November 2011 and the hearing of the Preliminary Objection commenced on the 13<sup>th</sup> of March 2012. However, following applications for adjournment sought by the petitioner and thereafter by all the parties, the hearing was not concluded until 6<sup>th</sup> November 2012.

3. In their response to the petition, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents raised preliminary objections dated 23<sup>rd</sup> January 2012 and 2<sup>nd</sup> November 2011 respectively questioning the jurisdiction of the court to hear and determine the matter. This ruling pertains to that objection which was canvassed at length before me on diverse dates between 14<sup>th</sup> March 2012 and 6<sup>th</sup> November 2012.

**Submissions by the Respondents**

4. The basis of the objection to the jurisdiction of this court to hear the matter by the 2<sup>nd</sup> respondent as presented by Mr. Muhoro for the 2<sup>nd</sup> respondent is that the petitioner should not have sought redress from this court; that he should have exhausted the dispute resolution mechanism set out in the party constitution; that with the coming into force of the Political Parties Act on 1<sup>st</sup> November 2011, the petitioner was required to exhaust the dispute resolution mechanism set out in the Act before seeking redress from the court. They contended that section 40 of the Act allowed the petitioner to challenge the decision of his party before the Political Parties Disputes Tribunal.

5. The 2<sup>nd</sup> respondent further contended that the petitioner and the 3<sup>rd</sup> respondent had not

exhausted the dispute resolution mechanism set out in the party constitution and under the Political Parties Act; that the petitioner could only seek redress from this court by way of appeal under the provisions of Section 41(2) where the petitioner is dissatisfied with the decision of the Political Parties Tribunal on points of law and fact; that the court has no original jurisdiction at this juncture to hear disputes between a member and his political party as that jurisdiction has been conferred on the Political Parties Tribunal. Mr. Muhoro therefore urged the court to dismiss the petition as it was premature and pre-emptive.

6. Mr. Nowrojee for the 3<sup>rd</sup> respondent supported the position taken by Mr. Muhoro with regard to the jurisdiction of the court. He submitted that the petitioner had failed to follow the procedure prescribed by law for the determination of disputes between a member and his party; that where statute prescribes a particular procedure and forums for determination of disputes, a party must exhaust these procedures before seeking recourse in the High Court.

7. He argued that the party's own constitution clearly provided the manner in which a dispute between a member and his party would be determined. As the petitioner was a member of the party, he was bound by the provisions of the party constitution which provided for arbitration of disputes between the party and members. The petitioner had indicated that the arbitration process provided for in the party constitution had not been followed, and no reason had been advanced for not following the requirements of the party constitution.

8. Mr. Nowrojee submitted further that a party aggrieved by the decision made in the arbitration process had recourse to an appeal to the Registrar of Political Parties, and from there to the Political Parties Tribunal. He supported the contention by the 2<sup>nd</sup> respondent that the petitioner could only come before the High Court by way of appeal from the decision of the Political Parties Tribunal, not by way of a petition alleging violation of constitutional rights; that if he was not satisfied by the decision of the High Court, he had a right of further appeal to the Court of Appeal and the Supreme Court.

9. Mr. Nowrojee contended that the only reason that this petition had been filed before this court instead of the petitioner pursuing the processes available to him under the party constitution and the Political Parties Act was because he could get a conservatory order from the High Court; that he had shown no interest in pursuing the matter, and he asked that the petition be dismissed with costs to the respondents.

10. Ms. Munyi for the 3<sup>rd</sup> respondent submitted that the matter before the court was between the petitioner and the 3<sup>rd</sup> respondent, and that the Attorney General had no contribution on the issue. She however associated herself with the submissions of counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the preliminary objection and asked that the petition be dismissed with costs.

### **Submissions by the Petitioner**

11. The position taken by the petitioner is that the law applicable to this matter is the 2007 Political Parties Act if the Act had not been repealed or if it had saved the cause of action. Mr. C.N. Kihara for the petitioner submitted that the genesis of the petition was the decision of the 3<sup>rd</sup> respondent made on 11<sup>th</sup> October 2011 relating to the conduct of the petitioner between July and August 2011. He contended that the Act that was applicable to the matter was the Political Parties Act 2007, which commenced in June, 2008, and not the 2011 Act, as the petitioner had become a member when the 2007 Act was in force.

12. He submitted that the Political Parties Tribunal under the 2011 Act did not have jurisdiction in the dispute between the petitioner and the 3<sup>rd</sup> respondent as the 2011 Act came into force on 1<sup>st</sup> November, 2011 when the petition had already been filed. He argued that if one already had a dispute before 31<sup>st</sup> October 2011 and believed that it fell within the jurisdiction of the Tribunal, one would have filed it before the Tribunal, but if one did not file it before the Tribunal, the Tribunal would have no jurisdiction.

13. Mr. Kihara contended that the 2007 Act had limited jurisdiction and did not allow appeals from the decision of the Tribunal. It was also unconstitutional because Section 123(8) of the former Constitution gave the High Court unfettered jurisdiction to review the decisions of inferior Tribunals yet the Act limited this; that under the provisions of Article 50 of the Constitution of Kenya 2010 on the right of a party to be heard by a fair tribunal the forum provided to hear disputes must be independent, impartial and appropriate. He argued that the Political Parties Tribunal established under the 2011 Act has no jurisdiction to determine this dispute as the reliefs that the petitioner seeks are declarations on the fundamental rights and freedoms under the Constitution as various of his rights under the Constitution had been violated, and further, that various provisions of the Political Parties Act 2007 were unconstitutional and inconsistent with the provisions of the National Accord and Reconciliation Act 2008.

14. The petitioner also contended that his grievance with regard to the decision to expel him from the party could only be brought before the High Court as it was the only one with appropriate jurisdiction by way of the Bill of Rights or under other mechanisms under the new or the former Constitution.

15. Dr. Stephen Njiru who appeared alongside Mr. Kihara for the petitioner submitted that contrary to the submissions by the respondents, there was a proper constitutional petition before the court, and that the Political Parties Tribunal was not the proper forum to determine constitutional matters.

16. He submitted that Article 165 of the Constitution vested in the High Court jurisdiction to hear matters on violation of the Bill of Rights or on interpretation of the Constitution; that the petitioner was alleging that his constitutional rights have been violated and questions the provisions of the Political Parties Act 2007 and the rules of Safina Party; and that under Articles 22 and 258 of the Constitution, any party could institute proceedings alleging violation of fundamental rights.

17. He submitted, further, that Article 22(3)(d)(e) limits rules and technicalities, and that the power to grant conservatory orders and declarations is vested in the court. He contended that this petition was seeking that the rules of the 3<sup>rd</sup> respondent be declared unconstitutional; that as a political party, it was required under Article 91 of the Constitution to observe the Constitution. He argued that the petition raised fundamental constitutional issues that cannot be properly determined by the Political Parties Tribunal and he asked the Court to dismiss the preliminary objection.

## **Determination**

18. The respondents have urged the court to dismiss this petition on the basis that it is premature and pre-emptive as the court has no jurisdiction to determine the issues raised; that the High Court only has appellate jurisdiction where a party is dissatisfied with a decision of the Political Parties Act. Further, they argue that the petitioner had an obligation to exhaust internal party mechanisms, then file an appeal before the Registrar of Political Parties, if dissatisfied with the decision at the party level, a further appeal before the Political Parties Tribunal, and only if dissatisfied with the decision of the Tribunal could he approach the High Court on appeal.

19. On his part, the petitioner urges the court to dismiss the preliminary objection as he is properly before the court. The Political Parties Tribunal established under the Political Parties Act, 2011, does not have jurisdiction to hear the matter as he joined the 3<sup>rd</sup> respondent when the Political Parties Act, 2007, was in force, that certain provisions of that Act are unconstitutional, and that the Act as well as the 3<sup>rd</sup> respondent's constitution violate his constitutional rights.

20. I have read the pleadings of the parties and the affidavits in support. What emerges is that the petitioner is a member of the 3<sup>rd</sup> respondent and was elected a Member of Parliament for Mathira Constituency in 2007 on a Safina Political Party ticket. Safina Party was then working with and supporting the Party of National Unity (PNU). In October, 2011, he was subjected to disciplinary proceedings by the 3<sup>rd</sup> respondent, found guilty and expelled from the Safina Political Party membership. The basis of the expulsion was that he was in breach of the Safina Party Constitution, Code of Conduct and the Political Parties Act.

21. The petitioner alleges at Paragraph 26 of his supporting affidavit that the actions of the 3<sup>rd</sup> respondent violate the appeal and arbitration process of the party; that no decision had been made by the National Executive Committee of the party (NEC), the only organ mandated to expel a member and only after a fair hearing. He alleges that the 3<sup>rd</sup> respondent's actions in expelling him were arbitrary, unreasonable, and disproportionate to the accusations made against him, and that they were in bad faith.

22. The petitioner seeks declarations that certain provisions of the Political Parties Act, 2007 are unconstitutional as violating his fundamental rights and freedoms under the Constitution. The 2007 Act was, however, repealed by section 50 of the Political Parties Act, Act No.11 of 2011.

23. The issue for determination is whether there are dispute resolution mechanism provided in the law which a party in the position of the petitioner is required to follow before coming to this court. If there are, is such a party entitled to by-pass those provisions and come directly to the High Court on the allegation that his fundamental rights have been violated?

24. As correctly argued by the respondents in reliance on the Court of Appeal decision in **Kipkalya Kones -v- HC Misc Civil Application No 129 of 2003**, citing the case of **Chirchir -v- Cheboiwo** and **Speaker of the National Assembly -v- Njenga Karume (2008) IKLR (EP) 425**, where there are special procedures provided, they should be followed. This proposition has also been followed in several other decisions of this court – see, for instance, **Alphonse Mwangemi Munga & 10 Others -v- African Safari Club Ltd Petition No 564 of 2004**.

25. In the case now before me, there exists specific legal processes for determining disputes between the petitioner and the 3<sup>rd</sup> respondent. First, the constitution of the 3<sup>rd</sup> respondent, to which the petitioner subscribes to and is therefore bound by, provides the manner in which disputes arising within the party are to be determined. Article 19 thereof provides as follows:

***'Subject to any written law, disputes concerning the interpretation of this Constitution or any disputes involving members of the Party or between the Party and its members or any dispute concerning any matters relating to Party affairs or to the management of the party shall be adjudicated upon through arbitration***

***(b) For the avoidance of doubt, no member shall institute any court proceeding unless the member has first invoked and exhausted the arbitration process provided herein.*** (Emphasis added).

26. As a member of the 3<sup>rd</sup> respondent, the petitioner is bound by the provisions of its constitution, specifically Article 19 thereof, which is couched in mandatory terms. He acknowledges this when he alleges at paragraph 26 of his affidavit that the 3<sup>rd</sup> respondent acted in breach of the appeal and arbitration process of the party. That being the case, he had no basis for filing this matter before this court, for if he was dissatisfied with the decision of the party or the failure to follow the process set out under its constitution, his remedy lay in an appeal to the Registrar of Political Parties and from there to the Political Parties Tribunal.

27. Both the 2007 and the 2011 Political Parties Acts provide very clear procedures to be followed when a dispute arises between a political party and its members. Section 5 of the 2007 Act established the **Political Parties Disputes Tribunal** while section 6 sets out the purpose of the Tribunal as being to determine

***'disputes between the members of a political party; disputes between political parties forming a coalition; or appeals from decisions of the registrar.'***

28. The 2011 Political Parties Act contains similar provisions. It provides at Section 40 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.*

29. Section 40(2) is explicit with regard to the circumstances under which the jurisdiction of the Political Parties Tribunal can be invoked when it provides as follows:

***(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)

30. The petitioner has not followed the procedure set out in his party’s constitution for resolution of disputes. In his response to the preliminary objection by the respondents, he does not address himself to this issue. He argues that the matters in dispute should have been dealt with under the 2007 Act. However, even if this argument were to be accepted, it does not assist the petitioner: he still has an obligation to follow the party’s dispute resolution mechanism.

31. This court has had occasion to determine disputes similar to this one where the parties sought to evade the provisions of the law with regard to intra party disputes. In **George Okode & Others-v-Orange Democratic Movement & Others Petition No. 294 of 2011**, Majanja, J, 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.’***

32. Similarly, in declining to issue an injunction in **Stephen Asura Ochieng & Others –v-Orange Democratic Movement and Others Petition No. 288 of 2011**, I held as follows at paragraph 12 and 13 of my ruling of 14<sup>th</sup> December 2011:

***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.***

33. The petitioner was under an obligation to exhaust the dispute resolution mechanism in the party constitution. If aggrieved by the decision at the party level, or if the party refused to activate the party

mechanism, its option was to seek recourse before the Political Parties Tribunal. Its argument that the Tribunal does not have jurisdiction because the petitioner joined the 3<sup>rd</sup> respondent in 2007 when the 2007 Act was in force is of no assistance, that Act having been repealed by the 2011 Act.

34. For the above reasons, the preliminary objection by the respondents succeeds. This court has no jurisdiction to hear and determine this petition. It is hereby dismissed with costs to the respondents.

**DATED at NAIROBI this 21<sup>st</sup> day of January 2013**

**MUMBI  
JUDGE**

**NGUGI**

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of January 2013**

**D.  
JUDGE**

**S.**

**MAJANJA**

**C.N. Kihara & Dr. Stephen Njiru instructed by the firm of C. N. Kihara & Co. Advocates for the Petitioner**

**Ms. Munyi instructed by the State Law Office for the 1<sup>st</sup> Respondent**

**Mr. Kimani Muhoro instructed by the firm of Kimani Muhoro & Co. Advocates for the 2<sup>nd</sup> Respondent**

**Mr. Nowrojee, Ms. Ireri & Mr. Kouna instructed by the firm of Kouna & Co. Advocates for the 3<sup>rd</sup> Respondent.**