



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Constitutional Petition 95 of 2013

WILLIAM KABOGO GITAU.....PETITIONER

VERSUS

JAMES KARANJA NYORO.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....2ND RESPONDENT

RULING

1. By a Chamber Summons dated **8th February 2013** and filed in Court on **11th February 2013**, the Petitioner moved this Court for the following orders:-

- 1) This Application be certified urgent and heard *ex-parte*.
- 2) The 1st Respondent, by himself, servants, agents, supporters or otherwise however be restrained from printing out, publishing in local dailies and on his website (www.nyoro4kiambu.co.ke), circulating, affixing campaign materials, posters, billboards and vehicles brandings for the office of Governor of Kiambu County, which bear the names, colours and symbols of TNA and Jubilee Coalition, pending the *inter-partes* hearing of this application, this petition or until further orders of the Court.
- 3) The 1st Respondent, by himself, servants, agents, supporters or otherwise however be directed to remove and destroy all campaign materials, posters, billboards and vehicles brandings for the office of Governor of Kiambu County, which bear the names, colours and symbols of TNA and jubilee Coalition, pending the *inter-partes* hearing of this application, this Petition or until further orders of the Court.
- 4) The costs of this application be provided for.

2. The Court heard the application *ex-parte* on 11th February 2013 and granted prayer No. 2 pending *inter-partes* hearing of the said application.

3. However, before the application came up for *inter-partes* hearing, the 1st Respondent filed a Chamber Summons dated **14th February 2013** seeking to set aside the above *ex-parte* orders given on 11th February 2013. The Court did not grant any *ex-parte* orders and directed that the application be served upon the Respondents in time for hearing *inter-partes* on 15th February 2013.

4. The 1st respondent also swore a **Replying affidavit** on **14th February 2013** in opposition to the Petitioner's application dated 8th February 2013.

5. In his supporting affidavit, the petitioner avers that Narc is not a member of Jubilee coalition since the pre-election agreement founding Jubilee Coalition was signed on 3rd December 2012 between TNA and URP. Therefore, it is the Petitioner's position that the 1st Respondent does not have any right to the use of the Colours and symbols of TNA and Jubilee Coalition in his campaign materials for the office of Governor of Kiambu County.

6. The petitioner further avers that the electorate in Kiambu County have been deceived and misled to believe that he is not vying for the office of Governor of Kiambu and/or that TNA and Jubilee's nominated candidate for the office is the 1st Respondent and not him. It is also averred by the Petitioner that the 1st Respondent has committed and continues to commit election offences contrary to **Sections 63 (1) and 67 (1) (m) of the Elections Act** by printing out and circulating campaign posters and materials in his name, with the names, colours and symbols of TNA and Jubilee coalition.

7. In his Replying Affidavit sworn on **14th February 2013**, the 1st Respondent maintains that NARC is a member of the Jubilee Coalition by virtue of a coalition agreement entered into amongst TNA, URP and NARC on 23rd December 2012. The 1st Respondent depones that by including the Honourable Uhuru Kenyatta and Jubilee in his promotional materials he is merely carrying out his obligation and right as a member of the jubilee family to campaign for the Jubilee coalition.

8. The parties appeared before me on 15th February 2013 to argue their respective applications. Mr. Havi and M/s Ngania appeared for the Petitioner while Messrs Regeru and Thuo appeared for the 1st Respondent. Mr. Kimani Muhoro was present for the 2nd Respondent.

9. I have considered the respective applications as well as the affidavits both in support and opposition to the applications. I have also considered the oral submissions made by Counsel for the respective parties and the authorities filed in Court. Having done so, I take the following view of the matter.

10. The Petitioner's main contention is that NARC is not a member of the Jubilee Coalition and as such the 1st Respondent has no right to use the symbols and colours of TNA and Jubilee Coalition. According to the 1st Respondent, under Clause 3.1 and 3.2 the founding partners of the Jubilee Coalition intended to bring on board other parties to the coalition and provided for such an eventuality. The said clause provides thus:-

“3.1 in the spirit of national reconciliation, unity and inclusiveness, the parties (hereinafter referred to as “the coalition partners”) will do their utmost to actively embrace and reach out to other political parties with shared values and objectives with a view to having those political parties as partners in the coalition.

3.2 Any such party may join this coalition on such terms as shall be agreed upon by the coalition partners and the joining party or parties either through a pre-election or a post-election agreement“

11. A Co-operation Agreement was entered into amongst TNA, URP and NARC on 23rd December, 2012 thereby incorporating NARC as a member of the Jubilee Coalition. Whether the said coalition was valid or not is a matter to be discharged at the office of the Registrar of Political Parties. I will therefore not delve into the same. Nevertheless, for the purposes of this ruling I will proceed on the basis that NARC is a member of the Jubilee coalition, which appears to me to be a matter of public knowledge. This is also on the basis that the said party entered into a 'Co-operation Agreement' duly executed by the relevant parties to be part of the Jubilee Coalition. Furthermore, the manifesto as launched by the Jubilee coalition acknowledges NARC as a member of the said coalition. I therefore find no reason to interfere with the status quo at this stage.

12. Having found so, the 1st Respondent is entitled to campaign for his gubernatorial bid as well as Honourable Uhuru Muigai Kenyatta's presidential bid under the Jubilee Coalition. Therefore it is

arguably correct for the 1st Respondent to include Honourable Uhuru Kenyatta and Jubilee in his campaign materials.

13. However, to do so, I do not find it necessary for the 1st Respondent to include the words “TNA” and its symbol in his campaign materials. It is common knowledge that honourable Uhuru is vying for presidency under the Jubilee Coalition and that he is a member of TNA. The 1st Respondent’s action of including the words “TNA” and its symbol in his campaign materials could in all honesty mislead the voters. It should be clear from the campaign materials used by the 1st Respondent that he is not only a member of the Jubilee family but a Candidate contesting for Governorship under NARC. Regulation 9 of the Elections (General) Regulations 2012 and in particular sub rule (3) states that each party in a coalition of political parties shall use its own symbol. NARC has its symbol. So does TNA and URP. Each party should restrict themselves to their symbols even as they all claim a portion of the Coalition’s presidential candidate Honourable Uhuru Kenyatta.

14. As for the Colours, I am of the view that a member of the Jubilee family can use colours of any party under the said coalition. The trends from the political scene have been to the effect that candidates of a certain coalition embrace the colours of member parties in their campaign materials to represent the Coalition. In fact the Jubilee manifesto has a combination of colours representing the respective parties under the said coalition. In that case it would not be strange for a candidate to use all these colours in their posters and campaign materials. Counsel for the 2nd Respondent also submitted that coalition parties amongst themselves were using the said colours graciously and liberally. Therefore, I would be reluctant to restrain the 1st Respondent from use of the Jubilee colours.

15. Under **Article 38 (2) & (3) of the Constitution**, the Petitioner is entitled to political rights to a free, fair election and to be a candidate for public office within a political party of which he is a member. The 1st Respondent is also equally entitled to the said rights. Therefore in determining the respective applications it is pertinent to balance the constitutional rights of both the Petitioner and the 1st Respondent.

16. At this point, especially when it’s almost less than two weeks to the general elections, it is my considered view that it would be unfair to grant orders that would paralyse the 1st Respondent’s campaigns. On the other hand, there is no indication that the Petitioner will be seriously prejudiced if the 1st Respondent’s campaigns were to continue. It is clear that both parties/candidates have the right and freedom to campaign and it is up to them to do so in an efficient manner within the law that will ensure that they reach out to their supporters with correct information.

17. The 1st Respondent has argued that the dispute herein goes to the very root of the relationship among parties to the Jubilee Coalition and as such, the dispute ought to be referred to the Coalition dispute Resolution Council in the first instance as expressly provided for in clauses 8.1, 8.2 and 8.3 of the Coalition Agreement. I agree with the said position.

18. To begin with, the parties need to address any disputes with the internal coalition dispute resolution mechanism. In the event that they are not satisfied, there is the Political Parties Dispute Tribunal, established under section 39 of the Political Parties Act which has the mandate to resolve disputes between coalition partners.[1] It has been held time and again that where the Constitution and or Statute establish a dispute resolution procedure, then that procedure must be used. See: *Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 others, (2008) 3 KLR (EP) 291 and the recent decision in Francis Gitau Parsimei & Others vs National Alliance Party and Others 356 of 2012 (unreported).*

19. In light of the foregoing, I am inclined to discharge the *ex-parte* orders of 11th February 2013 which I hereby do and give the following orders:-

a) That the first Respondent should forthwith not use campaign materials which bear the symbol

and name of TNA save to the extent that this order shall not affect what is already in circulation.

b) That the Parties herein exhaust the alternative dispute mechanisms being the Coalition Dispute Resolution Mechanism and the Political Parties Dispute tribunal before invoking the jurisdiction of the High Court.

c) Each Party to bear own costs of the applications.

DATED, READ AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2013

E. K. O. OGOLA
JUDGE

Present:

Havi for the Petitioner

Thuo H/B for Regeru for the 1st Respondent

Muhoro for the 2nd Respondent

Teresia – court clerk

[1] The jurisdiction of the Tribunal is found under Section 40 of the Act.