



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

Constitutional Petition 17 of 2010

**IN THE MATTER OF ARTICLE 258 OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF ARTICLE 77 AND PART 3 OF CHAPTER SEVEN OF THE  
CONSTITUTION OF KENYA**

**-AND-**

**IN THE MATTER OF ARTICLE 165 (3) OF THE CONSTITUTION OF KENYA**

**-AND-**

**IN THE MATTER OF A PETITION FOR THE ENFORCEMENT OF THE CONSTITUTION OF  
KENYA OWING TO A REAL AND THREATENED CONTRAVENTION**

**-AND-**

**IN THE MATTER OF A PETITION**

**-BETWEEN-**

**1. ABDULRAHMAN AHMED**

**ABDALLA.....PETITIONERS**

**2. EDWARD OLUCHIRI**

**3. MWACHANJE KILELU MWACHARO**

**4. PAUL CHEBII KIBET**

**-AND-**

**1. HONOURABLE UHURU**

**KENYATTA.....RESPONDENTS**

## 2. THE REGISTRAR OF POLITICAL PARTIES

### JUDGMENT

This petition prays for the following declarations:

- (a) Declaration that the 1<sup>st</sup> Respondent as a state officer is disqualified from holding the office of National Chairman of the Kenya African National Union or any other office in the political party.**
- (b) Declaration that section 77 of the Constitution of Kenya is in force and is mandatory that a state officer shall not hold office in a political party.**
- (c) A conservatory order that pending the final determination of this case and to enable the party sort itself out through these proceedings and otherwise, the 2<sup>nd</sup> Respondent, the Registrar of Political Parties, do refrain from exercising her powers under Section 26 of the Political Parties Act, 2007 to cancel the registration of the Kenya African National Union as a political party.**
- (d) Declaration that the Secretary General of the Kenya African National Union has power to ensure that meetings of the National Governing Council, the National Executive Committee and the National Delegates Conference of the Kenya African National Union take place as prescribed by the Constitution of the Kenya African National Union 2008 and for purposes of securing the rule of law pending the election of new National Officials to replace any who are disqualified under Article 77 of the constitution of Kenya and for filling any other vacancies, the Secretary General shall liaise with such Vice-Chairman as is available and properly in office to ensure the relevant meetings are held.**

It is important to bear in mind these prayers, as we consider this judgment, because we are of the view that the petitioners in making submissions before us urged certain orders which are not apparent in this petition. Prayer (c) was granted at the interlocutory stage on 23<sup>rd</sup> May 2011. That prayer therefore is not before us for determination. The court on that day in issuing conservatory orders for maintenance of status quo pending the determination of this petition had this to say in its ruling of 23<sup>rd</sup> May 2011.

***“This application opens an important new chapter in the operation of the Constitution of Kenya, 2010 which was promulgated on 27th August, 2010. Even as public attention has mainly been focused on the formal institutions of governance and on their operations in the implementation of the Constitution [of Kenya], there has been concern, now expressed in the instant application, about the functioning of the political organization which [paves the way towards] the electoral process [in respect of] two main organs of the [Constitutional order], namely the Legislature and the Executive.*”**

***“The dynamics of the electoral process is a subject governed by political parties. The applicants are concerned with the political party known as Kenya African National Union (KANU), and the extent to which it is currently complying with the law put in place under the new Constitution [of Kenya]. The petitioners apprehend that KANU may cease to play its intended political role, if it fails to comply with the law and is, in consequence, deregistered.”***

The petitioners are life members of the political party known as Kenya African National Union (KANU). The 1<sup>st</sup> respondent is sued as the National Chairman of KANU and also as the Deputy Prime Minister and Minister for Finance in the government of the Republic of Kenya. The affidavits of the petitioners were to the effect that the 1<sup>st</sup> respondent had failed to call for the KANU annual meetings that is, the party's National Delegates Conference. That the last of such meeting was held in the year 2008. That the 1<sup>st</sup> respondent is disqualified to hold the office of the National Chairman of KANU by virtue of Article 77 (2) of the Constitution of Kenya 2010. The deponents also expressed fear that if the 1<sup>st</sup> respondent does not call for the annual meeting of KANU the party will fail to comply with the provisions of the Political Parties Act Cap 11. In that regard, they referred to the notice served by the Registrar of Political Parties addressed to all the political parties dated 15<sup>th</sup> October 2010. That notice is in the following terms:

To all Registered Political Parties

Dear Sirs/Madams

**NOTICE UNDER SECTION 26 (1) (a) AND SECTION 15 OF POLITICAL PARTIES ACT, 2007**

Pursuant to section 26(1) (a) of the Political Parties Act, 2007 and clause 12 of the schedule to the Act the Registrar of Political Parties hereby directs that all fully registered political parties:-

- i. Whose officials' term of office have expired should; and/or
- ii. Which have vacant seats in their governing bodies;

Should organize for elections as per the procedures provided for by their constitutions

Further, all political parties should adhere to the provisions of section 15 of the Act prohibiting public officers from holding office in a political party.

Yours faithfully,

Lucy K. Ndungu (Mrs)

**Registrar of Political Parties**

In further affidavit sworn by the 1<sup>st</sup> petitioner dated 15<sup>th</sup> June 2011, he deponed that the state officers, who had taken the oath of office, had sworn to protect the Constitution and that accordingly, they should not be in breach of it. He alleged that the 1<sup>st</sup> respondent has contravened Article 77 (2) of the Constitution by holding a political party post whilst he is a state officer.

The 1<sup>st</sup> respondent though served did not file an appearance nor reply to the petition. He did not attend any of the hearings of the petition.

The 2<sup>nd</sup> Respondent Lucy Ndungu confirmed through her replying affidavit that she had written the notice reproduced above in this judgment. She further deponed that section 12 of Cap 11 prohibits a public officer holding office of a political party. The 2<sup>nd</sup> respondent further deponed that this dispute should have been filed before the Political Parties Dispute Tribunal as provided under Section 40 of Cap 11.

The petitioner's counsel by his submissions went beyond the declarations that are sought by the petitioners in this petition. The learned counsel for the petitioner invited us to consider whether the Constitution of KANU is in conformity with the Constitution of Kenya. That was not a prayer before us. As one will observe from the prayers in the petition, the petitioners sought declaration that the 1<sup>st</sup> respondent who is a state officer was not qualified to hold a political party post and for declaration that the secretary general of KANU has power to ensure that KANU holds its National Delegates Conference. It is for that reason that we shall not delve into the arena of finding out if the Constitution of KANU breaches the Constitution of Kenya. We decline to so find because it is in the public domain that KANU has recently presented its documents to the Registrar of Political Parties for the purpose of being registered under Cap 11. The court was not informed in presenting their documents to the Registrar of Political Parties whether KANU had presented an amended Constitution or not. We however would state that any political party in Kenya is required to comply with the requirements of Article 91 of the Constitution. That Article provides as follows:

***“(1) Every political party shall –***

- (a) Have a national character as prescribed by an Act of Parliament;**
  - (b) Have a democratically elected governing body;**
  - (c) Promote and uphold national unity;**
  - (d) Abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party;**
  - (e) Respect the right of all persons to participate in the political process, including minorities and marginalized groups;**
  - (f) Respect and promote human rights and fundamental freedoms, and gender equality and equity;**
  - (g) Promote the objects and principles of this Constitution and the rule of law; and**
  - (h) Subscribe to and observe the code of conduct for political parties.**
- (2) A political party shall not –**
- (a) Be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis;**
  - (b) Engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person;**
  - (c) Establish or maintain a paramilitary force, militia or similar organization;**
  - (d) Engage in bribery or other forms of corruption; or**
  - (e) Except as is provided under this Chapter or by an Act of Parliament, accept or use public resources to promote its interests or its candidates in elections.”**

The 2<sup>nd</sup> respondent raised preliminary objection which was argued in the substantive hearing. The objection is dated 31<sup>st</sup> May, 2011. It was in the following terms:

- “1. The Honourable High Court has no jurisdiction conferred on it by the Constitution and the Political Parties Act No. 10 of 2007 to entertain the petition over matters affecting political parties.
2. The petition is incompetent for want of compliance with the political parties Act No. 10 of 2007 especially when the 2<sup>nd</sup> Respondent is acting under the powers given by the Political Parties Act No. 10 of 2007.
3. No suit lies against the commission and the Registrar of Political Parties [Act No. 10 of 2007] when they are acting under the powers donated by the Act.
4. The Tribunal created Under Act No. 10 of 2007 has horizontal powers with that of the High Court in matters authorized to be reviewed by the Tribunal.
5. The jurisdiction of the High Court under Act No. 10 of 2007 is limited to winding up proceedings affecting political parties.
6. The petition is incompetent for non joinder of proper parties who would be affected by the decision of the High Court.

DATED at Mombasa this 31<sup>st</sup> day of May, 2011

The 2<sup>nd</sup> respondent did not advance in her submissions in support of objection number 3 and 6. We shall therefore assume that those objections were abandoned. In the issues identified for determination we shall consider the objections numbers 1, 2, 4 and 5. The issues for determination in this matter as we see them are three.

- ***Does this court have jurisdiction to entertain this matter?***
- ***Is the 1<sup>st</sup> respondent disqualified from holding political party post?***
- ***Does the Secretary General of KANU have power to convene a meeting of the National Governing Council, or; The National Executive Committee and The National Delegates conference under the KANU Constitution?***

Article 2 of the Constitution pronounces the supremacy of the Constitution over all other laws. It states under Sub- Article (1);

***“This constitution is the supreme law of the republic and binds all persons and all state organ at both levels of government.”***

That supremacy clause can be equated to the one in the American Constitution. In discussing that supremacy, the court in the case **MARBURY –VS- MADISON 5 US (CR) 137 [1803]** stated that the Constitution:

***“.....is either a superior or paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts; on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void”***

Article 165 (1) provides the High Court with Unlimited Original Jurisdiction in Criminal and Civil Matters. That being so, and because of the supremacy of the Constitution, no other law can limit that jurisdiction except for the Limitations to that jurisdiction which are found in that Constitution. It is with this in mind that we consider the first issue identified. Section 40 of Cap 11 sets out the jurisdiction of the Political Parties Tribunal. That section provides as follows:

***“40. (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 € unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”**

That section and that Act cannot take away the jurisdiction given to the High Court. The 2<sup>nd</sup> respondent was therefore wrong to object to this court hearing this matter. This court has jurisdiction to hear this matter. The fact that the tribunal for Political Parties has jurisdiction as seen above does not detract the High court’s jurisdiction. In any case the petitioners by this petition seek declarations of whether the constitution has been breached by the 1<sup>st</sup> respondent. The objection of the 2<sup>nd</sup> respondent is dismissed.

On the 2<sup>nd</sup> issue, it is worth repeating that the 1<sup>st</sup> respondent is a Deputy prime minister of the Government of Kenya. He is or at least was at the time when this matter was argued before us the National Chairman of the political party KANU. Article 77 (2) of the Constitution provides:

**“Any appointed state officer shall not hold office in a political party.”**

Section 12 of Cap 11 also has similar restriction but with modification. That section provides:

**“12. (1) A public officer shall not-**

- (a) Be eligible to be a founding member of a political party;**
  - (b) Be eligible to hold office in a political party;**
  - (c) Engage in political activity that may compromise or be seen to compromise the political neutrality of that person’s office; or**
  - (d) Publicly indicate support for or opposition to any political party or candidate in an election.**
- (2) Subsection (1) shall not apply to the President, Deputy President, a Member of Parliament, Governor, Deputy Governor or a member of a county assembly.**
- (3) Until after the first elections under the Constitution, subsection (2) shall apply to the Prime Minister.” (underlining ours)**

Who is a State Officer? The answer is to be found in the definition Article of the Constitution. Article 260 defines a state officer as one who holds the following offices amongst others:

- President;
- Deputy President;
- Cabinet Secretary;
- Member of Parliament;
- Judges & Magistrates;
- Members of a Commission to which Chapter 15 applies;
- Member of County Assembly, governor or deputy governor of a county or other member of the executive committee of a county government;
- Attorney General;
- Director of Public Prosecution.

Under Schedule 6 of the Constitution which suspends part of the Articles in the Constitution, it is clear that Article 77 (2) and its provisions are operative and are not suspended. It would follow that a state officer cannot hold a political party position because it is outlawed by the Constitution. In the preamble of the Constitution the people of Kenya proudly adopted, enacted and gave themselves the Constitution. Sovereign power as stated in Article 1(1) belongs to the people of Kenya. That Article also provides that the said sovereign power shall be exercised only in accordance with this Constitution. It shall also be exercised either directly or through the democratically elected representatives (see Article 1(2)). The democratically elected representatives by enacting Section 12(2) of Cap 11 acted contrary to the sovereign rule and power of the people of Kenya expressed in Article 77(2). It is for that reason we categorically state that the 1<sup>st</sup> respondent in holding the position of National Chairman of KANU whilst he is a state officer is in breach of the Constitution which Constitution by the oath he took when he was appointed in that position he undertook to be faithful and committed to it. The oath he took is to be found in the third schedule and in part is in the following terms:

***“.....that I will bear true faith and allegiance to the people and the Republic of Kenya; that I will obey, respect, uphold, preserve, protect and defend this Constitution of the Republic of Kenya; and I will faithfully and conscientiously discharge the duties of a member of parliament. (So help me God).”***

The 1<sup>st</sup> respondent and, dare we say, many other state officers, just as the 1<sup>st</sup> respondent have broken their allegiance with the people of Kenya and their commitment to the Constitution which the people of Kenya adopted and enacted for themselves. By holding both the post of a state officer and the position of National Chairman of KANU, the 1<sup>st</sup> respondent has failed to protect the Constitution. We therefore declare that the 1<sup>st</sup> respondent is disqualified from holding office of National Chairman of KANU or from holding any other Political Party Post whilst he is a state officer.

From our interrogation of the KANU Constitution, we find that the obligation to call or convene the National Delegates Conference falls on the National Chairman. Under Article 7 (2) of the KANU Constitution, it is the National Chairman who can direct the general secretary of the party to convene such a meeting. It follows that the secretary general can only convene such a meeting of KANU as directed. We are therefore unable to declare as sought that the Secretary General can call for such meetings.

In summary we make the following orders:

- 1. The 2<sup>nd</sup> respondent's preliminary objection dated 31<sup>st</sup> May, 2011 is dismissed with no orders as to costs.***
- 2. We declare that the 1<sup>st</sup> respondent as a state officer is disqualified from holding a political party post.***
- 3. We declare that the Secretary General of the Kenya African National Union (KANU) has no power under the Constitution of Kenya African National Union to call for a National Governing council, National Executive Committee or National Delegates Conference other than as directed by the National Chairman of Kenya African National Union.***
- 4. The 1<sup>st</sup> respondent shall pay the costs of the Petitioners and the 2<sup>nd</sup> respondent.***

**DATED and DELIVERED at MOMBASA this 17<sup>th</sup> day of September, 2012.**

**MARY KASANGO**

**E. MURIITHI**

**G. NZIOKA**

**JUDGE**

**JUDGE**

**JUDGE**

