



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CONSTITUTIONAL PETITION NO. 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

2. EDWARD

OLUCHIRIPETITIONERS

3. MWACHANJE KILELU MWACHARO

4. PAUL CHEBII KIBET

- AND -

1. HONOURABLE UHURU

KENYATTARESPONDENTS

2. THE REGISTRAR OF POLITICAL PARTIES

RULING

A. INTRODUCTION

The main cause herein is a *Petition* dated and filed on **25th November, 2010**. The petition was filed together with an interlocutory application, by Chamber Summons. This application first came up before this Court *ex parte* on 25th November, 2010, and interim orders were granted on that occasion, pending *inter partes* hearing.

Service was duly effected upon the respondents; and there is on file an affidavit of service showing that the process-server, *Eddy Ahuga Lihasi*, on **11th March, 2011** and **14th March, 2011** respectively, served hearing notice upon the first and the second respondent, indicating **17th March, 2011** as the hearing date duly fixed by the Court. The hearing, therefore, proceeded as scheduled on **17th March, 2011** when the petitioners/applicants were represented by learned counsel, *Ms. Betty Mwenesi* holding brief for *Mr. S. M. Mwenesi*, while the respondents were unrepresented.

The application carries one main prayer, as follows:

“The status quo be conserved and pending the final determination of this case and to enable the Party to sort itself out through these proceedings or otherwise, the 2nd respondent, the Registrar of Political Parties, shall 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.”

B. THE BASIS OF THE APPLICATION

The applicants state the following grounds, as justifying the application:

(i) ***the petitioners are members of the Kenya African National Union, a political party;***

(ii) ***the Constitution of Kenya provides in Article 77 that a State Officer shall not hold office in a political party;***

(iii) the 1st respondent is a State Officer and also the National Chairman of the petitioners' political party who has failed, ignored or neglected to call or allow for the holding of the meetings of the party organs;

(iv) the 2nd respondent has written to the party and given 90 days' notice to cancel the registration of the party if it does not put its house in order;

(v) the petition herein is a step towards setting right the state of affairs in the Kenya African National Union;

(vi) the Kenya African National Union, which is the party of Kenya's independence, is due to celebrate 50 years of its existence, but this will not happen if its registration is cancelled;

(vii) the petition herein will make it possible to avert the threatened cancellation of the Party's registration;

(viii) a conservatory order will not prejudice the rights of any member of the party, but will enhance and protect the rights of the petitioners and of many members throughout the country.

The 1st petitioner swore a supporting affidavit dated **25th November, 2010**, making certain factual statements; he avers, for instance, that the Party's Constitution requires that there be annual meetings of the National Delegates Conference; that for upto two years now, the various Party organs have held no meetings; that the Registrar of Political Parties (2nd respondent) has written to 1st respondent issuing the notice of possible de-registration of the Party, but 1st respondent has taken no action; that the inaction of 1st respondent exposes the party to the risk of being de-registered, and on this account, the petitioners are asking for conservatory orders to save the party pending the hearing and determination of the petition.

C. THE EARLIER EX PARTE RULING:

EXPLAINING THE MAIN ISSUES

The context and rationale of this application were elaborated in the *ex parte* ruling, and the relevant passages may be set out here:

“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.

***“Learned counsel for the petitioners, Mr. Mwenesi has drawn the Court’s attention to a letter of 15th October, 2010 from the Registrar of Political Parties, addressed to all registered political parties. This is a letter of warning in respect of due compliance with the Political Parties Act, 2007, s. 26(1)(a). By that letter, it is required that all duly-registered Political Parties whose officials’ terms of office have expired, or in which there are vacancies, should organize for elections in accordance with the procedures set out in the respective party constitutions. Counsel submits that such elections would have to comply also with the terms of the Constitution of Kenya, 2010, which stipulates that no State Officer is to hold office in a political party.*”**

***“The petitioners have come to Court under the provisions of the Constitution of Kenya which relate to the implementation of that Constitution, founding their case in particular on the principle that their party, KANU, is an instrument of political expression, which is safeguarded under the Constitution”.*”**

D. SUBMISSIONS BY COUNSEL

Learned counsel ***Ms. Mwenesi*** appeared before the Court on the scheduled hearing date, and urged that 1st respondent, as a State Officer, is not allowed by law to hold office, as he does at the moment, as National Chairman of the Kenya African National Union; and besides, 1st respondent while holding the said office, has obstructed the process of change as required by law, through inhibiting the Party’s electoral process – thus, *“threatening the existence of the Party”*. Counsel urged that, whereas under the Constitution of Kenya, 2010 1st respondent, as a State Officer, is ineligible to hold office in the Party, he has continued, by virtue of the Party’s constitution, to hold the power to determine *“whether a meeting to fill his position in the Party shall be held”*. The petitioners, counsel urged, apprehend that 1st respondent’s failure to convene Party elections will lead to the de-registration of the Party.

In apprehension that their Party will indeed be deregistered, the Petitioners, by their application, have asked this Court to issue a *conservatory order*, restraining 2nd respondent from exercising her powers under s. 26 of the Political Parties Act, and deregistering the Kenya African National Union, pending the hearing of the petition.

E. ASSESSMENT AND ORDERS

The facts attending the petitioners’ application are clear enough, from the review conducted herein; and there will be no doubt that the apprehensions at the root of the petition are well-founded. The applicants’ prayer is that their vehicle of political expression, namely the Party, be saved in the short term, and an early opportunity be created for a full hearing of the petition, leading to final orders on the matter. This prayer is, in my opinion, justified, and consequently I will now make orders as follows:

(1) I hereby issue a conservatory order for maintenance of the status quo, pending the hearing and determination of the petition.

(2) The petition shall be listed for hearing on the basis of priority and, in any event, within 30 days of the date hereof.

(3) The costs shall abide the hearing and determination of the petition.

(4) These orders shall be served upon the respondents within five days of the date hereof.

DATED and DELIVERED at MOMBASA this 23rd day of May, 2011.

.....

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Petitioners/Applicants: *Ms. B. Mwenesi*