



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Petition 60 of 2008

**IN THE MATTER OF SECTION 33, 70, 82, AND 84 OF THE CONSTITUTION OF KENYA
AND THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND THE
PROTECTION OF THE FUNDAMENTAL RIGHTS OF THE INDIVIDUAL) HIGH COURT
PRACTICE AND PROCEDURE RULES, 2006.**

**IN THE MATTER OF NATIONAL ASSEMBLY & PRESIDENTIAL ELECTIONS ACT
CHAPTER 7, LAWS OF KENYA AND THE INTER PARTY PARLIAMENTARY GROUP
AGREEMENT, 1997.**

AND

**IN THE MATTER OF ALLOCATION OF PARLIAMENTARY NOMINATIONS SLOTS BY
THE ELECTORAL COMMISSION OF KENYA AND THE INTENDED NOMINATION OF
TWO MEMBERS OF PARLIAMENT BY ORANGE DEMOCRATIC MOVEMENT – KENYA.**

BETWEEN

**PAUL KIBOGI MUIITE, REGINA MUNGARA, JAMES WAKABA. (SUING AS CHAIRMAN
SECRETARY GENERAL & TREASURER OF THE SAFINA POLITICAL PARTY)
..... APPLICANT**

VERSUS

**ELECTORAL COMMISSION OF KENYA.....1ST
RESPONDENT**

**ATTORNEY GENERAL2ND
RESPONDENT**

**DANIEL MAANZO, ABRAHAM CHEPKONGA, AND LILIAN ALUNGA, (JOINED AS
CHAIRMAN,**

**SECRETARY GENERAL & TREASURER OF ORANGE DEMOCRATICE MOVEMENT OF
KENYA..... 1ST INTERESTED PARTY**

R U L I N G

In this matter a Petition was filed on 20th February 2008 by **PAUL KIBUGI MUIITE, REGINA MUNG'ARA, JAMES WAKABA (SUING AS CHAIRMAN, SECRETARY GENERAL & TREASURER OF SAFINA POLITICAL PARTY)**. The respondents were named as **ELECTORAL**

COMMISSION OF KENYA and ATTORNEY GENERAL. In addition **DANIEL MAANZO, ABRAHAM CHEPKONGA, and LILIAN ALUNGA (JOINED AS CHAIRIMAN, SECRETARY GENERAL; and TREASURER OF ORANGE DEMOCRATIC MOVEMENT PARTY OF KENYA PARTY** were named as **1ST INTERESTED PARTY**. The Petition was filed under section 33, 70, 82 and 84 of the Constitution of Kenya, and sections 17 of the National Assembly & Presidential Elections Act, Chapter 7 of the Laws of Kenya, section 3 of the Judicature Act, Chapter 8 of the Laws of Kenya, and the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006.

On the same 20th February 2008, a Chamber Summons dated 20/2/2008 between the same parties above, was filed under the provisions of section 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, and all other enabling provisions of the Law. This Chamber Summons was filed under certificate of urgency. Both the Petition and Chamber Summons were filed by M/s Lumumba, Mumma & Kaluma advocates, on behalf of their clients.

The Chamber Summons came before me on 21st February 2008, and I certified it as urgent and on submissions of counsel for the applicants and in accordance with the court's discretion under rule 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, I decided to hear the Chamber Summons application ex-parte.

The substantive prayers sought in the Chamber Summons application were –

Ø The Honourable Court be pleased to issue conservatory order staying implementation of the decision of the 1st Respondent conveyed to the applicant vide the letter dated 12th January, 2008 purporting to deny the applicant the right to nominate a member of Parliament and/or allocating the Appellant's nomination entitlement to Orange Democratic Movement – Kenya, the Interested Party herein, pending inter parties hearing and determination of this application.

Ø The Honourable Court be pleased to grant conservatory orders staying nomination of two members of Parliament to the 10th Parliament by Orange Democratic Movement – Kenya, the Interested Party herein pending the inter partes hearing and determination of this Application.

Ø The Honourable Court be pleased to issue a conservatory order staying implementation of the decision of the 1st Respondent conveyed to the Applicant vide letter dated 12th January, 2008 purporting to deny the applicant the right to nominate a member of Parliament and/or allocating the Applicant's nomination entitlement to Orange Democratic Movement – Kenya, the Interested Party herein, pending the hearing and determination of the Petition herein.

Ø The Honourable Court be pleased to grant conservatory orders staying the nomination of two members of Parliament to the 10th Parliament by Orange Democratic Movement – Kenya, the Interested Party herein, pending the hearing and determination of the Petition herein.

There are several grounds to the application, to be exact 37 grounds. The application is also supported by the affidavit of **REGINA MUNG'ARA** sworn on 20th February 2008. In addition, counsel for the applicants filed **SKELETON ARGUMENT NOTES FOR CONSERVATORY ORDERS**, in which

reliance was made on provisions of law, including the Constitution of Kenya, and several decisions of the court.

Dr. Lumumba, learned counsel for the applicants who appeared before me, also made submissions to highlight the skeleton argument notes. Counsel emphasized that the 1st respondent the Electorate Commission of Kenya (ECK) was empowered under section 33 of the Constitution to allocate nominations of Member of Parliament based on seats obtained in an election by a political party since 1997. Counsel argued that the formula for such allocation was first utilized in 1997 and it was clearly spelt under the Inter Parties Parliamentary Group (IPPG) agreement. Following the general election in 1997, the applicant won 5 seats and was allowed to nominate 1 member. In that 1997 election, all 210 members of Parliament were elected. In the present case however, elections in three constituencies were nullified. Counsel therefore argued that the applicant currently had stronger position for the nomination of a Member of Parliament, than in 1997.

However, on 12/1/2008, the ECK addressed the applicant saying that they were not entitled to any slot. While in 1997 a party which had 17 elected members of Parliament was allowed to nominate only 1 Member of Parliament, this time the Orange Democratic Movement Party of Kenya (ODM (K) with only 16 elected members was allowed by ECK to nominate 2 members. Counsel contended that the decision by ECK was precarious, discriminatory and contravened section 82(3) of the Constitution. Counsel contended that the decision of ECK was motivated by the applicant's political opinions.

Counsel relied on the skeleton arguments and submitted that the applicant had invoked the correct procedure in coming to court. Counsel argued that the application was not frivolous or vexatious. Counsel sought to rely on the case authorities cited, especially the case of **KENYA BUS SERVICES LTD. –VS- AG 2005 EA 111** on power of the court to issue conservatory orders.

Counsel also sought to rely on the case of **NEPTUNE CREDIT –VS- CHIEF MAGISTRATE (2005) e KLR** - that this court can issue such writs and make such orders as it may consider appropriate. Counsel also relied on the case of **CHRISTOPHER NDARATHI MURUNGARU –VS- KACC HCCC NO. 54 of 2006**.

Counsel emphasized that this was the first time a case of this nature had been filed. Counsel urged me to find that the case is so peculiar that conservancy orders should be issued, so that the ECK can come to court and demonstrate why on 13.1.2008 they thought ODM(K) was entitled to one nomination of **DANIEL MAANZO**, why two days later the ECK changed their minds and decided that the party was entitled to 2 slots, also to demonstrate who was entitled to the 2nd slot on 13/1/08; and finally to demonstrate why in 1997 the applicant was entitled to one slot, and in the current similar circumstances they were not entitled to any.

I have considered the Chamber Summons application, the submissions of counsel for the applicant, as well as the authorities cited. The cause before me was commenced by way of **PETITION** under the provisions of the Constitution. This Chamber Summons is a preliminary application to the main cause which has been brought to court by way of **PETITION**. What is sought in the Chamber Summons are conservatory orders. I have no doubt that this court has jurisdiction to grant conservatory orders in appropriate case sought under rule 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, which provide ?

“20. Notwithstanding anything contained in these Rules, a judge before whom a petition under rule 12 is presented may hear and determine an application for conservancy or interim orders.

21. An application under rule 20 shall be made by chamber summons supported by an affidavit and may be heard ex-parte”.

In my view, at this stage I am not required to delve into the merits or otherwise of the **PETITION**. I am fully in agreement with what was stated by my brother Hon. Justice Emukule in the case of **NEPTUNE**

CREDIT –VS- CHIEF MAGISTRATE (supra) when the learned Judge observed ?

“This does not mean that the CID or such other agencies are always right but where they are found not to be right or not to act in accord with the law, the rights of persons affected are always vindicated by either acquittals or where appropriate the tendering of a NOLLE PROSEQUI(S). At the tail end of such process, the person’s affected retain the right to vindicate their right through a further constitutional reference under s.84(1) of the Constitution and the court has at that stage a wide discretion to make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of sections 70 to 82 (inclusive) of the Constitution.”

The Judge went ahead to decline to issue any orders of stay sought in that application.

Do I issue the conservatory orders sought in our present application? In my view, issuing conservatory orders is issuing orders to preserve a status quo. As disclosed from documents filed, the status quo is that the applicant has already been told by ECK vide letter dated 12 January 2008, “RM3” annexed to the supporting affidavit, that they do not qualify for any slot. Also the letter of 15/1/2008 “RM4” that ODM (K) the interested party are entitled to two slots. What the applicant seeks as conservatory orders herein are actually not, in my view, conservatory orders as such. They are an attempt to stop nomination, which under section 33 of the Constitution, is a function of the President who is not a party to these proceedings. It is important to observe that the applicant has not disclosed in filed documents how far that process of nomination has gone since mid January 2008, when the letters from ECK were issued, taking into account that this application was filed only on 20/2/2008.

Secondly, I am aware that the same counsel for the applicant appeared before me in Misc. Application No. 14 of 2008 **PAUL KIBUGI MUIE & OTHERS –VS- ECK** this morning, 21/2/2008, and informed me that the names of proposed nominated members of Parliament have already been forwarded to the President by ECK. I cannot conserve actions by ECK in matters which are already in the hand of another office which has separate Constitutional and statutory functions.

In these circumstances I find no merits to justify the exercise of this court’s discretionary powers under rule 20. Therefore I decline to grant the conservatory orders sought in the Chamber Summons.

Dated and delivered at Nairobi 22nd day of February, 2008.

George Dulu

Judge

In the presence of ?

Dr. Lumumba for Applicant – Ms Oluoch holding brief

Mwangi – court clerk