REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Civ. Appli. 7 of 2008

THE REPUBLIC OF KENYA……..…… APPLICANT

V E R S U S

THE ATTORNEY GENERAL…….....…….…..……...….1ST APPLICANT

THE CLERK – NATIONAL ASSEMBLY ……..…….…….....…….. 2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA……...……..…….. 3RD RESPONDENT

THE PAY MASTER GENERAL……...……..……..4TH RESPONDENT

THE REGISTRAR GENERAL…….……5TH RESPONDENT

AND

EDWARD KINGS ONYANCHA MAINA……...…… THE SUBJECT APPLYING

R U L I N G

Before me is a Chamber Summons dated 12th January, 2008, filed by the ex-parte applicant EDWARD KINGS ONYANCHA MAINA in person. The application is purported to be brought under Order LIII rules 1,2,3 and 7 (2) of the Civil Procedure Rules. It seeks leave to file Judicial Review proceedings, for certiorari and mandamus and prohibition regarding gazettement of members of Parliament under Legal Notice No. 12615 of 30/12/2007, with respect to Orange Democratic Movement (ODM) elected members of Parliament, as well as declaration that Presidential, Parliamentary and civil candidates under the Orange Democratic Movement (ODM) breached the provisions of the Constitution and other statutory provisions. It also seeks for orders that the leave, if granted, do operate as a stay against execution of Legal Notice number 12615 of 2007.

Several grounds were listed on the face of the application. The application was filed with a statutory STATEMENT and a verifying affidavit.

When the matter came before Hon. Justice Nyamu, the Judge ordered that the application be served and heard inter-parties. It was therefore served. Upon service, the Attorney-General appeared for 1st, 2nd and 4th respondents. Mr. Kipkogei entered appearance for the 3rd respondent, the Electoral Commission of Kenya. The Counsel for the respondents who entered appearance, filed objections to the application.

At the hearing of the application, the objections were raised in the hearing of the Chamber Summons.

The applicant was in person. He submitted that he wanted to be granted leave to have Legal Notice No. 12615, dated, 30/12/2008, brought to this court and quashed, and that the leave, if granted, do operate as a stay of the Legal Notice, in particular the relevant serial numbers in the Legal Notice quoted in the Chamber Summons. The applicant argued that the gazettement of the Legal Notice meant that members of societies *(political parties*) became Members of Parliament and were entitled to get emoluments from the Government, which should be stopped with regard to those members to whom his complaints related.

The applicant further argued that he had received threats from January to the end of February, 2008 from people who wanted him to move out of Nakuru and thus cease to farm in Nakuru. He had been living in fear and a curfew was imposed, which curtailed his movements. He submitted that he had made a report to the police, though he did not have a copy of the police abstract for the report. He submitted that on 17/1/2008 he had to be escorted by police to travel to Kitale. He therefore wanted Hon. Nyongo, Akongo, Wanyande, Gumbe and Aloo, whom he thought caused the situation which had affected him after the election of 2007, prevented from earning money from the Consolidated Fund.

The applicant emphasized that the application was brought under Order 53 of the Civil Procedure Rules. He stated that this was an ex-parte application, which should have been heard ex-parte. He stated also that he had filed a list of authorities.

Mr. Maina Kirori for the 1st, 2nd, 4th & 5th respondents submitted that they had filed a preliminary objection. Counsel submitted that the application was fatally defective as it did not comply with the requirements under Order 53 rules 1 and 2 of the Civil Procedure Rules in that the applicant did not serve prior notice on the Registrar as required by the law. Therefore the applicant had no locus standi. Counsel also argued that the application was headed wrongly, as the REPUBLIC should have been named as the applicant. The application also did not relate to the special provisions under Section 8 and 9 of the Law Reform Act (Cap. 26), but to matter related to the Constitution, and Societies Act.

Counsel relied on five cases on which they had filed a list of authorities, especially the case of *NJUGUNA –VS- MINISTER FOR AGRICULTURE [2000] IEA 179 (CAK*) which determined the test for granting leave. Counsel submitted that the applicant had no arguable case. In addition, the reliefs sought could not possibly be granted. On stay, Counsel argued, it could be granted as implementation had already taken place. Counsel also submitted that the application was supported by the affidavit of a stranger, which meant that the application was incompetent. Counsel added that this case should be disposed of at this stage as the applicant did not have a locus standi. He did not have sufficient interest to sue or sustain the case.

Mr. Kipkogei for the 3rd respondent (*Electoral Commission of Kenya*) supported the sentiments of Mr. Kirori. Counsel added that their preliminary objection dated 12/2/2008 raised similar issues.

Counsel further submitted that if prayer 3 of the application was granted, it would be unconstitutional, as it would contravene section 44 of the Constitution. Counsel contended that the election of a member of Parliament could only be challenged through an election petition. The Law Reform Act could not override the Constitution.

Secondly, Counsel argued, that the orders sought were meant to be effected against parties to the proceedings who were not parties, which would contravene the cardinal principles of natural justice, which was the basis upon which Judicial Review orders were granted.

Lastly, Counsel argued, if the orders sought were granted, they would create a clash between the three arms of Government. The orders would mean that the Speaker would have to declare vacancies in the National Assembly, to which the court did not have jurisdiction unless in an election petition.

In response, to Counsel's submissions, the applicant submitted that the case of NJUGUNA (supra) did not apply to these proceedings, as it was decided after leave was granted. On locus standi, the applicant

submitted that he had locus standi, as his life was threatened. The applicant also submitted that Notice to the Registrar was filed as required by law, and that he had named the correct parties in the Chamber Summons. He also contended that he had not come to court by way of petition, therefore section 44 of the Constitution did not apply. On the issue of an arguable case, he submitted that he had suffered injury and prejudice as he was denied the constitutional right of association, and his taxes were affected in terms of section 99 of the Constitution. On the issue of a stranger filing an affidavit, he submitted that the affidavit being challenged was sworn by GRACE KEMUNTO who suffered similarly like himself.

I have considered the application, documents filed, submissions of the parties who appeared before me, as well as the authorities cited.

An applicant for leave to file Judicial Review Proceedings is required to show, on the face of it, that he or she has a sufficient interest in the matter in issue, and that he has a prima facie arguable case. In this regard, the decision of the Court of Appeal in the case of *NJUGUNA –VS- MINISTER FOR AGRICULTURE [200] IEA 179 (CAK*) is applicable. In that case Omolo, Shah, and O'kubasu JJA held-

"*The test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application. As the High Court had gone beyond its limited jurisdiction at the stage of application for leave to institute judicial review proceedings and considered the merits of the case, its order would be reversed and as the Applicants have demonstrated that they had an arguable case, leave would be granted."*

In our present case, having considered the facts before me, I do not see any possibility of the applicant being granted the orders sought.

Firstly, the applicant appears to be complaining about breach of Constitutional rights, such as freedom of association and movement. Those rights are provided for under Sections 80 and 81 of the Constitution. They fall under Chapter 5 of the Constitution which protects fundamental rights and freedoms of the individuals. This application has not brought under the applicable constitutional provisions, and therefore cannot succeed. Secondly, the respondents named do not appear to be the ones who were said to have prevented the alleged freedom of association or movement of the applicant. None of the persons who were alleged to have contravened to rights of the applicant's rights are named as parties. The applicant cannot claim to have a prima facie arguable case against strangers, when the people whom he claims contravened his rights are known by him and he has not chosen to join any of them. On that ground also the application cannot succeed.

The third reason why this application will not succeed is that the applicant appears to be challenging the gazetted results of an election of Members of the National Assembly. Such election results cannot be subject to Judicial Review proceedings. Under Section 44 of the Constitution and section 19 of the National Assembly and Presidential Elections Act, *(Cap. 7)* a challenge to the election of a Member of the National Assembly, can only be made to the High Court by way of an election petition. Section 19(1) of the National Assembly and Presidential Elections Act (Cap. 7), in particular, provides-

19(1) An application to the High Court under the

Constitution to hear and determine a question whether –

(a) a persons has been validly elected as President; or

(b) a person has been validly elected as a member of the National Assembly; or

(c) the seat in the National Assembly of a member thereof has become vacant, shall be made by way of petition.

This is an application which has the effect of seeking to declare some members of the National Assembly

not validly elected, but not brought by way of a petition. This court has no jurisdiction to hear and determine the same in accordance with the above provisions of the law, as it was not brought by way of a petition. On this reason also the application will not succeed.

I find that this application does not disclose a prima facie arguable case, is vexatious, and an attempt to abuse the court process. There is no likelihood that the orders sought will be granted by the court, if leave is granted. I will therefore dismiss the application with costs.

Consequently, and for the above reasons, I find no merits in the application and dismiss the same, and award costs to the respondents.

Dated and delivered at Nairobi this 12th day of June, 2008.

GEORGE DULU

JUDGE.

In the presence of-

Applicant in person

Mr. Kirori for 1st and 4th respondents

Mr. Kipkogei for 3rd respondent M/s Keli holding brief.

Mwangi Court Clerk