



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

Petition 49 of 2007

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 60(1) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF SECTIONS 1A,3,15,17,23,30 AND 46 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF SECTION 9 OF ACT NO. 2 OF 2000; NAMELY, THE TREATY FOR
THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY ACT, 2000 OF THE LAWS
OF KENYA**

AND

**IN THE MATTER OF ARTICLE 150 OF THE SCHEDULE TO THE TREATY ESTABLISHING
THE EAST AFRICAN COMMUNITY, ACT 2000**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 77(9) OF THE CONSTITUTION OF KENYA**

BETWEEN

- 1. PROF. PETER ANYANG' NYONG'O Suing as an official of the
Orange Democratic Movement-Kenya 1st Petitioner**
- 2. ABRAHAM KIBET CHEPKONGA Suing as an Official of the
Democratic Movement-Kenya 2nd Petitioner**
- 3. FIDELIS MUEKE NGULI Suing as the Secretary General**

- of the National Rainbow Coalition (NARC) Claimant..... 3rd Petitioner
4. HON. JOSEPH KAMOTHO Suing as an Official of the
Liberal Democratic Party (LDP) 4th Petitioner
5. MUMBI NGARU Suing as an official of the
Liberal Democratic Party..... 5th Petitioner
6. MR. GEORGE NYAMWEYA Suing as the Secretary General of the
Democratic Party of Kenya (DP)..... 6th Petitioner
7. HON. JOHN MUNYES Suing as Secretary General of the Forum
for Restoration of Democracy in Kenya (FORD-KENYA) ...7th Petitioner
8. DR. PAUL SAOKE..... 8th Petitioner
9. HON. GILBERT OCHIENG MBEO.....9th Petitioner
10. YVONNE KHAMATI.....10th
Petitioner
11. HON. ROSE WARUHIU.....11th
Petitioner

AND

THE HONOURABLE ATTORNEY GENERAL.....1st Respondent

THE MINISTER FOR FOREIGN AFFAIRS..... 2nd Respondent

RULING

I have given serious thought to the oral submissions of the learned lead Counsel Mr Kanjwang touching on the two prayers in the application dated 31st January 2003 and filed by way of Chamber Summons.

The prayers are:

- (1) That this application be certified urgent and be heard immediately or as the court may deem fit
- (2) That this application be heard ex-parte in the first instance.

The reasons touching on urgency have been very ably set out in the certificate of urgency dated 31st January 2007.

The applicants contend that unless the matter is heard and the orders given the substance of their claim will be rendered nugatory and academic in that the actual claims in the Petition are targatted at some Amendments to the Treaty for the Establishment of East African Community and also Act No 2 of 2000 and in particular s 9 of the Kenya Act upon which the targatted amendments are based. The Applicants case is grounded on s 23, 30, 46 and 60 of the Constitution which express the principle of separation of powers between the Executive, the Legislature and the Judiciary respectively.

In addition the subject matter of the application relates to the right of “fair hearing” as set out in s 77(9) of the Constitution – as it impacts on Court of Justice for East African EACJ Ref 1/2006 at Arusha.

The threat as they put is that Kenya has already deposited the required instruments under the Treaty in the Arusha Secretariat of the Community and the two Partner States, namely Uganda and Tanzania could do the same any time now thereby rendering the claims nugatory and academic. In Kenya the Attorney General could any time start the process of Gazettment and the laying of the Amendments in the National Assembly.

The Court has considered the arguments raised on behalf of the Applicants. On the first issue of urgency the threat to deposit the instruments by the two Partner States – including the consequent possibility that the Hon. Attorney General of Kenya could thereafter start the process of gazettment and subsequent laying of the amendments before the National Assembly, the Court is of the view that the applicant have established the urgency and for this reason I do certify the application as urgent.

Turning to the second issue of hearing the application for conservatory orders ex-parte I have considered the arguments advanced. The tentative observations of the court are:

- (i) the issue of the jurisdiction of this Court in injuncting matters touching on the Treaty loom large and is highly arguable
- (ii) it is obvious to the court on a prima facie basis that the “right of hearing” which is being asserted in this court relates to EACJ Ref 1/2006 which is currently going on in Arusha. It is therefore quite arguable which court is to safeguard the right of hearing – the EACJ or Municipal Court such as this Court – this invites service arguments in law
- (iii) this court is prima facie helpless in stopping the ... deposit by the two Partner states Uganda/Tanzania – again another serious jurisdictional issue
- (iv) The substance of the claim revolves on a Treaty and prima facie the applicable law must be international law – in this regard it is tentatively noted that the Kenya Constitution is silent on the question of Treaties and except where those Treaties are in conflict with the Constitution the issue of ratification or amendment is substantially the role of the Executive – because ... the agreements are between Partner States.

Here again there is a serious jurisdictional issue for argument – see case of No 90 Manduli V National Council of NGOs and Anyang’ Nyong’o.

- (v) Finally even if the court were to give interim or conservatory orders at this stage ex-parte this could lead to a serious jurisdictional conflict in view of the matter currently before the EAC of Justice. The need to avoid any possible conflict is a major factor in the exercise of my discretion.

Taking the above into consideration I decline to hear the matter ex-parte and therefore the second prayer is refused.

The upshot is that the court directs that application be served on the Respondents before the close of the day to-day for hearing on a date to be appointed now after consulting the convenience of counsel.

Chamber Summons dated 31st January 2007 of to be heard on 28th February 2007 at 9.00 a.m.

DATED and delivered at Nairobi this 2nd day of February 2007.

J.G. NYAMU

JUDGE