



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Case 54 of 2007**

**CLLR. JOSEPH C. MWITA & 3 OTHERS .....PLAINTIFF**

**VERSUS**

**HON. UHURU KENYATTA & 6 OTHERS ..... DEFENDANT**

**RULING**

The plaintiffs/applicants are all members of a society known as Kenya African National Union, hereinafter referred to as “KANU.”

By a plaint filed in court on 12<sup>th</sup> March, 2007, the plaintiffs alleged that all the defendants/respondents were, prior to December, 2006, officials of KANU. KANU is a registered political party and all the applicants are elected councilors representing various electoral wards, having been duly nominated by the said party. The applicants stated that it was a legal requirement under the provisions of the Local Government Act Cap 265 Laws of Kenya that for a person to qualify to be elected as a councilor, the person must be a member of a political party taking part in elections and should be nominated by the political party in accordance with the constitution and rules of that particular party.

The applicants further stated that in December, 2006 or thereabout, the respondents terminated their membership in KANU by publicly declaring their membership to another political party known as Orange Democratic Movement of Kenya, hereinafter referred to as “**ODM-K**”. That notwithstanding, the respondents continued to hold themselves out as members and officials of KANU, the applicants argued.

Further, the respondents were attempting to merge the assets and affairs of KANU with those of Liberal

Democratic Party (LDP) and Labour Party of Kenya (LPK) without the consent of KANU in order to strengthen and build on ODM-K which was contrary to KANU's constitution, the applicants added. The applicants contended that if KANU was to merge with those other parties to form ODM-K, in terms of their party constitution, KANU would be extinguished and the applicants would lose all their legal rights and privileges in KANU.

The applicants sought several reliefs which ***included*** the following:

- (a) A declaration that KANU is an independent society and the applicants are members of the said society entitled to all the rights and privileges granted to them under the party's constitution.
- (b) A declaration that the acts of the respondents in negotiating a merger of KANU, LDP and LPK so as to strengthen ODM-K is contrary to the constitution of KANU.
- (c) A perpetual injunction to restrain the respondents from holding themselves out as members of/or officials of KANU or negotiating a merger with LDP or LPK or any other party for purposes of strengthening or building on ODM-K.

Pending the hearing and determination of the said suit, the applicants filed a Chamber Summons under XXXIX rules 1 and 2 of the Civil Procedure Rules and prayed for a temporary injunction to restrain the respondents from holding themselves out as members and/or officials of KANU or transacting the affairs of KANU or dealing with the property of the party. They also sought a temporary injunction to restrain the respondents from negotiating a merger with any other political party as stated hereinabove. The applicants further sought a mandatory injunction to compel the respondents to deliver to KANU or themselves all the property and assets of the party in their possession.

The said Chamber Summons was supported by an affidavit sworn by the first applicant. He annexed to his affidavit a copy of the KANU constitution. He stated that under Article 9 of the said constitution, a member could terminate his membership of the party by making a public declaration to that effect. However, it is Article 4 Section 9 of KANU Constitution that provides for termination of membership and not Article 9. There was exhibited a bundle of newspaper cutting which were intended to show that:

- (a) the respondents had since 2006 or thereabout publicly declared that they belonged to ODM-K,
- (b) That the fifth respondent held himself out as the chairman of ODM-K.

(c) That the first and second respondents had declared that they were seeking to be nominated as presidential candidates by ODM-K.

The respondents entered appearance under protest and together with the memorandum of appearance filed a chamber summons under section 6 of the Arbitration Act, 1995, Act No. 4 of 1995 and rule 2 of the Arbitration rules, 1997. They sought a stay of all the proceedings in the applicants' suit pending arbitration as stipulation by Article 23 of the KANU constitution. The application was made on the grounds that by virtue of Article 23, any dispute or differences arising out of the conduct of any party matter had to be referred to arbitration and a member could resort to a court of law only after the machinery established by the arbitration clause aforesaid had been exhausted.

The respondents also pointed out that there was another case filed in *Nairobi High Court, HCCC NO 1159 of 2006, Livingstone K. Obuga vs Hon. Uhuru Kenyatta and 3 others* (hereinafter referred to as "*the Nairobi Case*") wherein the court had ordered a stay of proceedings and referred the dispute to arbitration. In the Nairobi case, the plaintiffs sought among other prayers, a declaration that the defendants' purported merger with ODM-K contravened the KANU constitution.

The respondents' application was supported by an affidavit sworn by Uhuru Muigai Kenyatta. He reiterated that the applicants' suit had been filed in breach of the said Article 23 of the KANU constitution and therefore it was an abuse of the court process, in light of the provisions of the of the Arbitration Act, 1995 and Act No. 4 of 1995.

The applicants filed grounds of objection, a replying affidavit and a notice of preliminary objection to the respondents' application. Mr. Kiplenge for the applicants chose to argue the preliminary objection together with his reply to the respondents' application.

Mr. Katwa for the respondents submitted that contrary to what the applicant had alleged of the respondents, the latter were still members of KANU and referred to the affidavits sworn by Uhuru Kenyatta. All the parties were therefore bound by the provisions of Article 23 of the KANU constitution, he submitted. Apart from the said Nairobi case, there was also *Nairobi High Court Misc. Civil Suit No.*

*747 of 2006, Hon, Uhuru M. Kenyatta & others vs. Registrar of Societies and others in* which the issue of the relationship between KANU and ODM-K had been raised and which matter was to be heard by a three judge bench on 22<sup>nd</sup>, 23 and 24<sup>th</sup> May, 2007. He therefore urged the court to allow the respondents' application.

Mr. Kiplenge responded by stating that Article 23 of KANU constitution could not apply since the respondents were not members of the party. The first and the second respondents were ODM-K Presidential candidates whereas the fifth respondent was the chairman of ODM-K. He further submitted that Article 23 section 4 of the KANU constitution provided that it was the National Chairman of the party who was mandated to establish the arbitration panel and in this case, if Uhuru Kenyatta, the current National chairman, were to proceed to do so, he would be a judge in his own case. He added that the applicants were breaching not only the KANU constitution but also the Local Government Act Cap 265 and the societies Act, Cap 108.

Regarding the Nairobi Case, Mr. Kiplenge submitted that the case was referred to arbitration because the plaintiff therein admitted that the defendants were members of KANU, which was not the case herein. Counsel further contended that there was no provision in the KANU constitution that allowed the party to have corporate status vide which it could join with another political party. He cited Article 35 of the party's constitution which provided for merger with any other political party but not a "Swallow up" of KANU by ODM-K, as Mr. Kiplenge termed it.

In response, Mr. Katwa cited the provisions of Article 5 of the party's constitution which creates the National Delegates Conference (hereinafter "NDC") as the supreme organ which charts the course for the party. Minutes of the NDC held on 27<sup>th</sup> November, 2006 at Kasarani sports centre, Nairobi, which was attended by 3621 delegates revealed that the NDC resolved that:

- (a) KANU, having participated in the formation of ODM-K made KANU a major stakeholder in the movement.
- (b) KANU, being a corporate entry joins ODM-K as a corporate member.

(c) The National Governing Council Mandates the National Executive Council (NEC) to spearhead and manage the relationship between KANU and ODM-K.

The minutes of the National Delegates Conference were annexed to a supplementary affidavit sworn by Uhuru Kenyatta. Mr. Katwa added that the NDC, having resolved an issue, other members of the party were bound by the resolution. He emphasised that the above resolutions did not refer to a “merger” or a “swallow up” of KANU by ODM-K and that KANU still retained its identity.

The respondents’ counsel also cited Article No. 3 of the party constitution that allows KANU to work with other parties. He said that the actions that were being undertaken by the respondents were in full conformity with the KANU constitution and urged the court to refer the matter to arbitration.

Having carefully considered all the rival arguments as hereinabove summarised, let me start the process of resolving the issue raised by the parties herein by making this pertinent observation: that, although the applicants’ contention is that the respondents had terminated their membership in KANU, which was denied by the respondent, it was evident that both sides sought to rely on the provisions of the party’s constitution as the basis of their respective positions. Consequently, I will considerably refer to the KANU constitution in determining this application.

The preamble to the constitution provides *inter alia*, that KANU is formed as a political party for political mobilization of the board masses of people. One of its aims and objectives is **“to compete with other political parties obtaining in the country using any lawful means for the purpose of winning elections and forming the Government.”**

Article 3 (14) provides that the party shall:-

**“Co-operate and collaborate or otherwise liaise or work with any local, national regional or international organization or institution, whether it be governmental or non-governmental, in promotion and strengthening of the party, its interests, aims and objectives.”**

In my view, the mode of KANU’s co-operation and collaboration with other organisations can only be set, defined and implemented by the party’s decision making organs as outlined by its constitution.

At this juncture, it is imperative that I consider the issue whether the respondents are members of the party or not. The applicants' contention is that in December, 2006 or thereabout, the respondents terminated their membership by publicly declaring their membership cuttings to buttress that argument. The respondents denied that allegation and stated that they were still active members of the party, KANU. The first respondent deposed that he was the party's National Chairman.

Article 4 section 9 (a) of the party constitution states that any member may terminate his party membership at any time either by making a public declaration to that effect or by giving written notice or verbal notice to any party office nearest to him. I carefully perused the aforesaid newspaper cuttings and whereas in law such cuttings cannot amount to authoritative source of Information unless the information therein is verified as correct by the persons who the reports are attributed to, there was nothing to suggest that any of the respondents had terminated their membership of KANU. In their quoted public declarations as reported by various newspapers, none of them had stated that he had ceased being a member of KANU. What the newspaper cuttings explicitly demonstrated was that most of respondents had strong links with ODM-K while they remained as members of KANU, a situation which I cannot term as being expressly contrary to the KANU constitution. I therefore hold that the respondents are bona fide members of KANU.

Having made the above decision, it follows therefore that both the applicants and the respondents are bound by the provisions of the party's constitution. Article 11 section 3 established the NDC as the supreme organ of the party. The NDC, at the conference that was held on 27<sup>th</sup> November, 2006 passed some resolutions, the relevant ones have already been stated hereinabove. The NDC, having unanimously passed the aforesaid resolutions, the applicants, who have not been shown to be members of that supreme organ, cannot validly challenge those resolutions unless it has been demonstrated that the NDC was held contrary to the party's constitution or that the resolutions passed were *ultra vires* the party's constitution or that there was breach of the principles of natural justice in holding the NDC and passing of the resolutions arrived thereat. None of the above was shown by the applicants. Ordinarily, where a party's constitution provides for arbitration as

the agreed move of settling disputes that may arise among its members in relation to the party activities, courts will be reluctant to come in to solve such disputes except in situations where principles of natural justice have been or are likely to be violated or where there is a serious breach of the constitution. In **TANUI & 4 OTHERS VS. BIRECH & 11 OTHERS** [1991] KLR 510 the Court of Appeal held as follows:-

***“While it is not the business of the High Court or this court to involve itself in the day to day running of institutions such as churches, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and this court would not only be entitled to but under a duty to compel it, either, by injunction or otherwise, to obey its constitution.”***

See also **PATEL VS. DHANJI** [1975] E.A. 301”

Article 23 section 1 of the KANU constitution provides as follows:-

***“No member, as a condition-precedent for membership of the party, shall resort to a court of law for the resolution of any dispute arising out of the conduct of any party matter, issue or affairs, unless the machinery here established has been exhausted.”***

Sections 3 and 4 provide for establishment of arbitration panels and the composition thereof. Although section 4 gives the power of establishing the arbitration panels to the National chairman, he does so in consultation with the NEC but no panel can hear a dispute unless the parties to the dispute agree to its composition.

In the Nairobi case, Visram J. established that the dispute therein related to the right of the applicants to commit KANU to merge with ODM-K without the authority of NDC and he referred the matter to arbitration.

In this matter, the applicants have argued that their constitutional right of enjoyment of freedom of assembly and association as guaranteed by section 80 of the Constitution of Kenya has been breached by the respondents. They have also argued that in order to be qualified to be elected as councilors of a local authority, each has to be a member a political party in accordance with the constitution or rules of that

political party. Although these are seemingly weighty legal issues, they all stem from the applicants' dissatisfaction with KANU's association with ODM-K and if that central issue is resolved, the other related issues will dissipate.

I am of the considered view that all the applicants' grievances can be resolved by way of an arbitration in accordance with the KANU constitution. The first respondent will not be a judge in his own case since the applicants have a right to approve the arbitration panel. I therefore over rule the applicants' preliminary objection and stay the proceedings herein pending arbitration as stipulated by Article 23 of the KANU constitution. The first respondent as the National chairman of KANU in consultation with the National Executive Council (NEC) should, within 30 days from the date hereof, establish an arbitration panel to deal with the issues raised by the applicants herein. Each party shall bear its own costs.

DATED, SIGNED & DELIVERED at Nakuru this 19<sup>th</sup> day of April, 2007

**D. MUSINGA**

**JUDGE**