



REPUBLIC OF KENYA

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

Civil Case 784 of 2007

JARED MARIGA AROKO 1ST PLAINTIFF/APPLICANT

OCHIENG MAURICE ORWARU..... 2ND PLAINTIFF/APPLICANT

VERSUS

RICHARD KWACH 1ST DEFENDANT/RESPONDENT

JOSEPHINE KULUO 2ND DEFENDANT/RESPONDENT

FRANK KWENGA 3RD DEFENDANT/RESPONDENT

SARAH MOHAMMED4TH DEFENDANT/RESPONDENT

JOSEPH O. MAGWANGA5TH DEFENDANT/RESPONDENT

THE ELECTORAL COMMISSION OF KENYA ...6TH DEFENDANT/RESPONDENT

RULING

Grievances or disputes arising from Intra Party elections or nominations or selections (Party-Primaries) exercise for parliamentary aspirants to qualify under section 34 (d) of the current Constitution of Kenya to be elected as members of the National Assembly: ?

(a) Whether a Court, other than an election court, has no jurisdiction to entertain the suit;

(b) Whether proceedings in court should be instituted by a Plaint or by a Petition

The 6th Defendant's Notice of Preliminary objection to the suit and Application dated 21st of November 2007 was brought to my attention at the time I was to begin hearing the Plaintiffs/Applicants Chamber summons (the aforementioned Application) dated 21st November 2007. The Notice of Preliminary Objection is dated 23rd November 2007 and filed same day. Mr. Kyalo- Mbobu representing the 6th Defendant and Mr. Odera Obar representing the Plaintiffs told me they were ready to argue the Preliminary Objection and as a result I heard them on this day of the Nationwide Nominations for Parliamentary Elections scheduled for 27th December 2007. The Plaintiffs are the Applicants in the Chamber Summons while the

Defendants are Respondents in the said Chamber Summons.

According to what has been brought to my attention, the Plaintiffs are registered voters in Kasipul Kabondo constituency and are members of the Orange Democratic Movement Party herein after referred to as the party. Commencing on 16th November 2007 the party carried out countrywide elections or selections or nominations (Party Primaries) for Parliamentary aspirants. The said nominations of candidates, like election of the officials of the party, are subject to the Party's Constitution and Rules and Procedure which have not been exhibited in these proceedings so far.

The Plaintiffs/Applicants participated in the said election/nomination process starting 16th November 2007 in Kasipul Kabondo Constituency and they lost. They claim that they lost because the nomination exercise was conducted in absolute disregard to irregularities and was therefore characterized with numerous irregularities. They therefore lament that despite those irregularities, the Party Returning Officer, the National Election Board of the Party (i.e. 1st to 4th Defendants) purported to issue the Certificate of Nomination to the 5th Defendant/Respondent, Joseph O. Magwanga, who is therefore scheduled to present that nomination certificate to The Electoral Commission of Kenya, the 6th Defendant/Respondent, to-day 23rd November 2007.

The suit herein and the chamber summons are therefore intended to restrain the 6th Defendant from recognizing the 5th Defendant as the Parliamentary aspirant for Kasipul Kabondo Constituency specifically in relation to the nomination certificate issued by the 1st to 4th Defendants following the Parliamentary Candidates nomination process conducted on the 16th November 2007; and to compel the 1st to 4th Defendant repeat the exercise.

The 6th Defendant has however, come with the Preliminary Objection that this court has no jurisdiction to entertain a suit to challenge the results of the nomination exercise held at Kasipul Kabondo Constituency on 16th November 2007 as presently drawn, partly because this court has not been duly gazetted an "Election Court" as required by provisions of the National Assembly and Presidential Elections Act (Cap. 7 Laws of Kenya) as read with The Presidential And Parliamentary Elections Rules; and partly because this suit herein is filed by way of a plaint instead of being brought by way of a Petition.

The Plaintiff's counsel does not agree that this court does not have jurisdiction as submitted by the 6th Defendant's Counsel and argues that this is an Intra-Party Affair known as "nomination" and not an "election" where the court has to be gazetted and proceedings be commenced by way of a Petition. That is why the 6th Defendant is not, by law, required to organize and supervise party nominations.

Lack of sufficient time does not allow me to say much from what was drawn to my attention and will briefly look at some of the authorities cited and may perhaps follow that up by a brief comment thereafter.

In Richard Chirchir & Another –v- Henry R. Cheboiwo & Another, Civil Application No.253 of 1992, the court granted an injunction restraining a returning officer from publishing in the Kenya Gazette the purported results of an election, and although the point was taken that the only way to come to court under Cap 7 was through an election petition, the Court of Appeal composed of Gachuhi, Kwach and Cocker, JJ.A were apparently not much impressed by that argument and they proceeded to grant an injunction. That court had not attempted to determine the question of whether it was possible to go to the High Court by means other than through a Petition. That case had been filed by way of a plaint. That decision was made on 24th December 1992. It would be of interest to know how that decision was complied with by the affected Returning Officer or the Electoral Commission without offending provisions of Cap. 7. I was not privileged to have that information.

Some six months earlier Kwach and Cocker, JJ.A had been part of a three Judge bench in another case, The Speaker of The National Assembly V The Hon. James Njenga Karume, Civil Application No. 92 of 1992 where they stated as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear Constitutional provisions”.

That is not consistent with what was done in the Cheboiwo case and the Court of Appeal, Omolo, Tunoi and Shah JJ.A in the case of Kimani Wanyoike –vs- The Electoral Commission and Morris Kashero, Misc. Civil Suit No. 111 of 1995 held that the procedure for addressing grievances arising from elections is through an election petition and that that is exactly what the Court of Appeal was saying in Karume’s case. They said that that view had full support in authority, both local and foreign referring to the case of Raphael Samson Kithika Mbondo v Luka Daudi Galgalo And Paul Joseph Ngei, Election Petition No. 16 of 1974 where it had been alleged Mr. Ngei and his supporters had in effect physically prevented Mr. Mbondo from presenting his nomination papers. At that time Mr. Mbondo did not go to the High Court, either by plaint or by petition, to compel the returning officer or anyone else to accept his papers. Instead he waited until the results were published and then filed an election petition. The election of Mr. Ngei was nullified and Mr. Ngei was found guilty of an election offence.

The learned Judges in the case of Kimani Wanyoike correctly pointed out that where such a suit is by way of a plaint, the court would have no power to find a person guilty of an election offence and punish her or him. They held further, as it was also said in Karume case, that

“there are special procedures when it comes to matters of election and those procedures ought to be strictly followed.”

The Court of Appeal went on to observe that

“The procedure adopted by Peter Njuguna and James Githinji in going by way of a plaint to the Chief Magistrate was wholly contrary to law. It is clear to us that the nominations which were conducted by Ford-Asili on 15th August 1995 were carried out pursuant to the provisions of section 17 of the National Assembly and Presidential Elections Act. Accordingly, the nominations were matters covered squarely by that Act. The only court recognized by that Act is an ‘election court’ and section 2 of the Act defines an election court as meaning ‘the High Court in the exercise of the jurisdiction conferred upon it by section 44(1) of the Constitution.’”

That means the meaning of the “court” as defined in The National Assembly And Presidential Elections Act is different from the meaning of “Court” as defined in section 2 of the Civil Procedure Act Cap. 21, that is “*the High Court or a subordinate court acting in the exercise of its civil jurisdiction;*” and also different from the meaning in section 4 of the Penal Code Cap. 63 meaning “*a court of competent jurisdiction*”.

Facts in the Kimani Wanyoike case were that during party nomination held in Kipipiri Constituency for Parliamentary by-election he was nominated by Ford Asili Political Party to be its candidate in the election. The nomination done on 15th August, 1995. Some members of Kimani Wanyoike’s party were, for one reason or the other, unhappy with his nomination and so on 15th August 1995 two of them filed a suit in the Chief Magistrate’s Court, Nakuru seeking, among other orders,

“--- restraining the Ford Asili Secretary General and/or National Official of the Party from declaring the Defendant, KIMANI WANYOIKE as the party nominee Kipipiri Constituency Parliamentary elections.”

The Chief Magistrate granted the orders ex-parte. But when served with the orders, Kimani Wanyoike set out to have them set aside. He first filed an Ex-parte Originating Summons in the High Court Nyeri to have the Chief Magistrate's orders either nullified or be stayed. The Judge at Nyeri ordered the matter transferred to Nakuru High Court having granted a temporary stay up to 3.00 p.m. on that day of the nominations for the Parliamentary By-election. But after racing against time up to the nomination centre for Kipipiri Constituency, the Returning Officer rejected Kimani Wanyoike's nomination papers on the ground that the papers were presented late outside the stipulated time.

As a result of that, Kimani Wanyoike filed a suit also by plaint in the High Court in which he sought mandatory injunction against the Electoral Commission and the Returning Officer. In that suit he filed an application for mandatory injunction against the two defendants to restrain them; pending the hearing and determination of the main suit, FROM FURTHER REFUSAL TO ACCEPT THE APPLICANT'S NOMINATION PAPERS FOR THE KIPIPIRI PARLIAMENTARY ELECTION.

That application having been dismissed by the High Court, Kimani Wanyoike appealed to the Court of Appeal where he went on pressing for the injunction in similar terms pending hearing of the appeal.

The Court of Appeal concluded:

“The Applicant has not shown to us that the procedure he has adopted in coming to the court is correct and on that score we are also not satisfied that his appeal is arguable. Nor are we not satisfied that in the end the Applicant will be without a remedy. As we have said, he can always file a petition after the election is concluded. The fact that election petitions take long to determine cannot be legal justification for not following the clear provision contained in the constitution and the National Assembly and Presidential Elections Act”.

With due respect, I think what the Court of Appeal said in the case of Kimani Wanyoike is the correct law as opposed to what that court said in the case of Cheboiwo and though the bench in each case consisted of three Judges, I think the reasoning in Kimani Wanyoike's case leading to the departure from Cheboiwo's case is sound. The National Assembly And Presidential Elections Act together with its rules form a complete regime of substantive law and procedural law and in addition to the Court of Appeal's remarks concerning order LIII (53) of the Civil Procedure Rules and relating to matters of election generally referred to earlier, I would like to add that should it be found appropriate to rely on provisions of other laws outside The National Assembly And Presidential Elections Act as read together with its rules, the provisions of that Act and its rules must all the time be remembered so that any orders obtained are orders executable without offending provisions of that Act and its rules; without leading, for example, to a conflict of laws or to a situation where the legal effect is to have a particular political party in a particular constituency or in the country as the case may be, have no Parliamentary or Presidential Candidate in a Parliamentary or Presidential election. Courts should not be used to bring such drastic results instead of voters themselves doing it through the ballot box. In other words, courts should not be willing to be used to stifle democracy.

Otherwise, to my mind, the present law is clear and there should be no conflict as I find it to be as follows starting with the Constitution of Kenya.

Under section 34(d) of the current Constitution of Kenya, nomination of a person by a political party in the manner prescribed by or under an Act of Parliament forms one of the four qualifications that person must have in order to be qualified, at the date of his nomination by the Electoral Commission, to be elected as a member of the National Assembly. The other three qualifications are, citizenship, registration as a voter and being able to read and speak the Swahili and English languages unless for some valid reason that last qualification is relaxed or modified.

The Act of Parliament referred to is The National Assembly And Presidential Elections Act and the provisions under which the Electoral Commission sets the process of party nominations in motion is section 13(3), (b) of The National Assembly And Presidential Elections Act, also referred to as the Act, and Regulations 8(3) and 14 of the Presidential and Parliamentary Elections Regulations. Under those provisions, the Electoral Commission gives notice of the intended election of members of the National Assembly in every constituency adding, as it did during the current election process, that:

“Each political party wishing to participate in the election must finalize the nomination of its candidates and submit a complete list of nominated candidates for the elections to the Electoral Commission of Kenya five days before the nomination.

Each political party wishing to participate in the election must finalize the nomination of its candidates on or before 16th November, 2007.

The days for nomination for the Parliamentary election will be 23rd and 24th November, 2007 and nomination papers may be delivered by candidates to the Returning Officer whose jurisdiction the Constituency falls ----

If the Parliamentary election is contested, the poll will take place on the 27th December 2007.”

The time table looks like that and parties and their respective candidates have, by law, to adhere to and adopt that time table bearing in mind the rest of provisions under Part IV of the Act as well as Part IV of The Presidential And Parliamentary Elections Regulations governing the conduct of the National elections from the day of the nomination thereon. Although under section 17A of the Act;

“The Electoral Commission shall have the overall conduct of elections under this Act and shall give general directions and exercise supervision and control thereof and take the necessary measures to ensure that the elections are transparent, free and fair”;

and under section 42A (b) and (c) of the Constitution of Kenya, the Electoral Commission is responsible for directing and supervising the Presidential, National Assembly and local government elections; promoting free and fair elections; presently I am not aware whether The Electoral Commission has the power to determine disputes arising from party nominations between competing candidates within party or between a candidate and his party officials in a manner a court would do where there is no agreement.

That situation makes it necessary for some of those disputes to go to court and the law has therefore provided for a special court which section 44(1) of the current Constitution of Kenya refers to as the “High Court” while the National Assembly And Presidential Elections Act in section 2 gives it a distinction by naming it an “Election Court”. That is the High Court in the exercise of the jurisdiction conferred upon it by section 44(1) of the Constitution of Kenya stating as follows:

“The High Court shall have jurisdiction to hear and determine any question whether:-

- (a) a person has been validly elected as a member of the National Assembly; or*
- (b) the seat in the National Assembly of a member thereof has become vacant.”*

Subsection (2) is clear that

“An application to the High Court for the determination of a question under subsection (1)(a) may be made by any person who was entitled to vote in the election to which the application relates, or by the Attorney General.”

The jurisdiction granted to the High Court in Section 44(1)(a) of the Constitution of Kenya concerning the validity of an election of a member of the National Assembly is the jurisdiction found in the provisions of the National Assembly and Presidential Elections Act so that the High Court exercises that jurisdiction only after an election has taken place and the person against whom the complaint is made has been elected as a member of the National Assembly.

While on the one hand that situation is bad because a voter who feels offended during party nominations may find waiting upto the outcome of the elections of the National Assembly too long and may even think it too late, on the other hand that situation is good because it allows any person who is a voter, not necessarily a candidate, to challenge the validity of the election results and grounds for challenging such an election may include what happened during party nominations (Party – Primaries)

The first case I can think of is PAUL NGEI's case where the incident complained of took place during the National or Parliamentary election nominations, and not party, nominations, during those days of *defacto* one party State different from the type of party nominations witnessed in to-day's *dejure* multipartism. Then came the KIMANI WANYOIKE case and the instant case each concerning nominations within a political party (Party – Primaries) before the nomination day for Parliamentary election and therefore the voter intending to challenge the validity of a person elected as a member of the National Assembly has to be patient for such cases to be subsequently handled by "election courts" as defined in section 2 of The National Assembly And Presidential Elections Act.

It is good that when the Electoral Commission sets an election process in motion, that motion is set to run within specific time limits from the beginning up to the end as required by The National Assembly and Presidential Elections Act. That is one of the reasons why the people complaining against the nomination of Kimani Wanyoike by Ford Asili party, for example, found it difficult to get appropriate legal redress before the election was held and the results published; and even Kimani Wanyoike himself did not come out better than his opponents as that competition intra-party in the end seems to have made Ford-Asili miss the opportunity to field a candidate in that Kipipiri parliamentary by-election. That Act does not allow sufficient time or space within which to institute, prosecute and determine a suit in court challenging nomination or any other related action without offending provisions of the Act and that is the position even if at that stage the High Court, when not an election court, is by chance taken to have jurisdiction to entertain and determine such cases. The lawful practicability of such a case within the strict schedule of the election process once set in motion is just not there under the present law in Kenya bearing in mind the principle that the rule of law mustn't bend to expediency and what I said earlier that Courts should not be used to stifle democracy.

In the circumstances, it is still useful to ask the question: how far should courts extend the rule in Kimani Wanyoike's case to party nomination disputes? The following is what the Court of Appeal said in the same Kimani Wanyoike's case as if answering that question:

"It is clear to us that the nominations which were conducted by Ford-Asili on 15th August 1995 were carried out pursuant to the provisions of section 17 of the National Assembly and Presidential Elections Act. Accordingly, the nominations were matters covered squarely by the Act. The only court recognized by that Act is an "election court" and section 2 of the Act defines an election court as meaning "the High Court in the exercise of the jurisdiction conferred upon it by section 44(1) of the Constitution."

The court added:

"We think the procedure for addressing grievances arising from elections is through an election petition and that is exactly what the court was saying in Karume case."

That is the answer from the Court of Appeal and political parties, their officials and their

members better be alive to that answer in order to avoid running hopelessly from place to place as majority hope-step some without enough energy to jump, during party nominations for elections to the National Assembly.

They ought to read carefully section 17 of The National Assembly and Presidential Elections Act to see what they can do to get redress, cheaply, fairly and quickly, before and within the time limit allowed-in their respective parties without going to a court of law.

For the purpose of this ruling the most important part of section 17 is subsection (1) which states as follows:

“(1) A person shall be deemed to be nominated by a political party for elections as a member of the National Assembly for the purpose of paragraph (d) of section 34 of the Constitution if he is selected in the manner provided for in the Constitution or rules of the political party concerned relating to members of that party who wish to contest parliamentary elections and, subject to subsection (4) the party certifies the selection to the Electoral Commission.”

Subsection (4) concerns the name of the person a political party gives the Electoral Commission, being the person the party has authorized to certify to the Commission persons from that Political party selected under subsection (1) above. What is important is subsection (1) as set out above. It refers also to section 34(d) of the Constitution of Kenya, which I started with to look at provisions of the Constitution of Kenya and those of the National Assembly and Presidential Elections Act relating to party nominations or selections for parliamentary elections.

Back to section 17(1) of the Act, it says that a person deemed to be nominated by a political party for election as a member of the National Assembly has to be

“selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest parliamentary elections ----”

Emphasis are mine to show that the section is talking about “the Constitution or rules of the Political party concerned” so that whether Kenya is having Liberal or strict Democracy, there is need for each Political party to put its house in order so that intra-party grievances or disputes are contained within each party.

Let each political party have an efficient internal dispute resolution mechanism within a good party constitution and rules regulating, among other things, intra-party nominations/selections for presidential, parliamentary and civic elections and resultant grievances, disputes and disagreements, allowing sufficient time for dispute resolution within the party and well before the date to be set or already set for nominations for presidential and parliamentary elections conducted by the Electoral Commission of Kenya under section 42A of the Constitution of Kenya, section 13(3) (b) of the National Assembly and Presidential Elections Act and Regulations 8(3) and 14 of the Presidential and Parliamentary Elections Regulations. That party constitution and or rules should be strictly observed by all members of the party who should be registered and identifiable disciplined members used to strong and strict sanctions against those of them who disobey the Party Constitution and rules which may also provide for quick arbitration clauses and also provide for professional management of party funds and auditing of party activities ending into transparency and accountability.

While saying the above, of course I am aware there may also be need to review the National Assembly and Presidential Elections Act and its rules to, among other things, give more powers to the Electoral Commission and also allow political parties ample time like six months, to do and complete, up to and including disputes resolution, their respective intra-party nominations or selections for Presidential and Parliamentary elections before the date for nominations set by the Electoral Commission of Kenya pursuant to section 42A of the Constitution of Kenya as read with section 13(3)(b) of the National Assembly And Presidential

Elections Act and Regulations 8(3) and 14 of the Presidential And Parliamentary Elections Regulations.

But my aim here is to show that an aggrieved member of a political party which is properly and efficiently organized and managing its intra-party affairs can have redress within his party, conveniently, quickly, cheaply, quietly and amicably as he avoids having to wait for a court of law which, under the present law, becomes properly available to him only after the outcome of the election the aggrieved member wanted to participate in. In that respect, "*SIASA YA TUMBO*", the mother of "*a deadened political plutocracy*", instead of "*Government for the people*", will not do, as in the former, Kenya will have to live with the type of chaos this suit is the product of; yet Kenya needs the presence of strong, chaotic and disciplined, consistent, transparent, trustworthy, principled and ideologically distinct political parties, managing a "*Government for the people*" or "*Government for social justice*".

It seems to me therefore, that to day for a case emanating from a dispute in selections or nominations between members of a political party or between such a member and officials of the party, (Party- Primaries) to be in a court of law, other than an "election court", safely and lawfully, that suit has to be instituted, prosecuted and determined before the Electoral Commission of Kenya sets the process of the anticipated presidential and parliamentary elections in motion under the Commission's powers aforementioned.

To conclude, from what I have said above, bearing in mind the case authorities cited especially the case of Kimani Wanyoike which I find to have facts similar to the facts before me in this suit, I do hereby uphold the 6th Defendant's/Respondent's Notice of Preliminary Objection dated 23rd November 2007 and do dismiss the entire Plaintiff's suit herein together with the Chamber Summons dated 21st November, 2007 with costs to the 6th Defendant/Respondent.

Dated and delivered at Nairobi this 23rd day of November, 2007.

J.M. KHAMONI

JUDGE

Present

Mr. Odera Obar for the Plaintiffs

Mr. Kyalo for the 6th Defendant

Mr. Buoro – court clerk