



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE 795 OF 2007**

**DR. MARK ODONGO OGUTU .....PLAINTIFF**

**V E R S U S**

**1. ELECTORAL COMMISSION OF KENYA**

**2. DICK OMONDI ANYANGA .....DEFENDANTS**

**R U L I N G**

The Plaintiff and the 2<sup>nd</sup> Defendant are politicians. They both vied for nomination by the Orange Democratic Movement Party (hereinafter called ODM) in its primary elections recently conducted to stand for election as Member of Parliament for Nyatike Constituency in the forthcoming General Elections. The Plaintiff says in his pleadings that he was the candidate validly nominated to vie for that parliamentary seat on the ODM ticket, and was duly issued with the necessary nomination certificate. He says further, that “owing to the confusion and irregularities which marred the ODM nominations, the 2<sup>nd</sup> Defendant was irregularly but inadvertently” issued with an ODM nomination certificate for the same parliamentary seat. However, ODM took the necessary remedial measures by revoking the 2<sup>nd</sup> Defendant’s nomination certificate and duly so informed the 1<sup>st</sup> Defendant. Despite this the 1<sup>st</sup> Defendant cleared the 2<sup>nd</sup> Defendant, and refused to clear the Plaintiff, to vie for the Nyatike parliamentary seat on the ODM ticket.

The 1<sup>st</sup> Defendant was established under section 41 of the Constitution. It is the constitutional body charged, under section 42A of the Constitution, with the responsibility of:-

- (a) the registration of voters and the maintenance and revision of the register of voters;
- (b) directing and supervising the Presidential, National Assembly and local government elections;
- (c) promoting free and fair elections;
- (d) promoting voter education throughout Kenya; and
- (e) such other functions as may be prescribed by law.

By his plaint dated 26<sup>th</sup> November, 2007 the Plaintiff sought the following main reliefs:-

- (a) A declaration that the 2<sup>nd</sup> Defendant is not qualified to be elected as a member of the National Assembly by virtue of his not being validly nominated by a political party, as his nomination was not certified to the Electoral Commission of Kenya by ODM as required by law.
- (b) A declaration that any election in which the 2<sup>nd</sup> Defendant participates as a candidate is null and void.
- (c) A declaration that it was wrongful and unlawful for the 1<sup>st</sup> Defendant to refuse to accept the Plaintiff's ODM nomination certificate and other documents evidencing his qualification to be elected as a Member of Parliament for Nyatike Constituency and to clear him as a candidate for that seat in the General Elections scheduled for 27<sup>th</sup> December, 2007.
- (d) An injunction restraining the 1<sup>st</sup> Defendant from making and/or proceeding with plans to conduct National Assembly elections for the Nyatike Constituency with the 2<sup>nd</sup> Defendant as one of the candidates.
- (e) A mandatory injunction to compel the 1<sup>st</sup> Defendant to remove the name of the 2<sup>nd</sup> Defendant as the ODM parliamentary Candidate for Nyatike Constituency, and to clear the Plaintiff as the candidate validly nominated by ODM to vie for the seat.

The Defendants duly entered appearance and filed separate defences. The thrust of the 1<sup>st</sup> Defendant's defence is that it denies receiving any notice invalidating the 2<sup>nd</sup> Defendant's ODM nomination certificate and that it conducted its affairs in accordance with information availed to it by participating political parties; it had no interest in determining who the candidates of any particular party would be. It further pleaded that the suit was unfounded in law and fact and misconceived, and denied the court's jurisdiction to hear and determine it. It gave notice of its intention to raise a preliminary objection on that issue.

The 2<sup>nd</sup> Defendant denied the allegation by the Plaintiff that the Plaintiff was the candidate duly nominated by ODM; on the contrary he pleaded that he was the one validly nominated and duly issued with the ODM nomination certificate for the Nyatike Constituency. He denied that any confusion or irregularity marred the ODM primary election for that constituency. He was therefore properly cleared by the 1<sup>st</sup> Defendant to vie for that seat on the ODM ticket. Like the 1<sup>st</sup> Defendant, he denied the jurisdiction of the court to hear and determine the suit and similarly gave notice of his intention to challenge the suit upon this ground at the earliest opportunity.

Together with the plaint the Plaintiff filed an application by chamber summons dated 26<sup>th</sup> November, 2007. He sought two main orders:-

1. A mandatory injunction to compel the 1<sup>st</sup> Defendant, pending hearing and determination of the suit, to receive the nomination certificate and other election documents of the Plaintiff **“for processing and to clear the Plaintiff by ensuring that his name is included in the list of parliamentary candidates for Nyatike Constituency in the forthcoming General Elections”**.
2. That pending hearing and determination of the suit, the Defendants be restrained from:-
  - (i) Processing the final list of individuals who have been cleared by the 1<sup>st</sup> Defendant as validly nominated candidates to vie for the Nyatike Parliamentary seat in the National Assembly election scheduled for 27<sup>th</sup> December, 2007.
  - (ii) Printing out ballot papers with respect to Nyatike Constituency.
  - (iii) Conducting the National Assembly elections with respect to Nyatike Constituency.

Both Defendants filed replying affidavits in opposition to the application. They also filed notices of preliminary objection to the application. The 1<sup>st</sup> Defendant's notice is dated 29<sup>th</sup> November, 2007. It sets out the following grounds:-

1. That the Plaintiff's suit is brought under the wrong procedure.
2. That the suit is unmaintainable and a non-starter.
3. That the court has no jurisdiction to entertain the application.

The 2<sup>nd</sup> Defendant's notice is dated 30<sup>th</sup> November, 2007 and sets out the following grounds:-

1. That the application (and indeed the entire suit) as instituted or taken out is bad in law, incurably defective, incompetent and a flagrant abuse of the process of the court.
2. That the Plaintiff's grievances in the application and in the main suit are against ODM and its relevant organs, namely the National Election Board and the Returning Officer for Nyatike Constituency, none of whom has been joined as a party in the suit; thus the application and the suit are incompetent and unsustainable.
3. That the application and the suit lack merit.

I have considered the submissions of the learned counsels appearing, including the authorities cited. Mr. Musyoka Annan for the 1<sup>st</sup> Defendant (with Mr. Mulekyo) addressed the court on jurisdiction. Mr. Odhiambo for the 2<sup>nd</sup> Defendant (with Mr. Okonjo) addressed the other grounds raised in the notices of preliminary objection. Mr. Arwa appeared for the Plaintiff.

The lack of merit of the application and the suit cannot be raised as a preliminary objection, and the 2<sup>nd</sup> Defendant's learned counsels did not, wisely if I may say so, argue this ground. The ground that the application and the suit are incompetent and unsustainable for non-joinder of necessary parties can also be quickly disposed of. Order I, rule 10 of the Civil Procedure Rules (the Rules) gives the court a wide discretion to order that the name of any person who ought to have been joined in the suit, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. In any event, under rule 9 of the same order,

**“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”**

That settles this ground which is not well-taken at all. The 2<sup>nd</sup> Defendant's learned counsel however quoted the decision of a learned judge of this court in support of this ground of objection. This is the case of **ANYANG' NYONG'O & OTHERS –Vs- THE GOVERNMENT OF KENYA, NAIROBI MISC. CIVIL APPLICATION NO. 1078 OF 2007** (Unreported). It was an application under sections 8 and 9 of the Law Reform Act, Cap. 26 and Order 53, rule 1 of the Rules for leave to bring judicial review proceedings for various orders of certiorari, mandamus and prohibition. In refusing to grant leave, the court (Nyamu, J) held, *inter alia*, that the application had been brought against the wrong parties; since the right parties had not been sued the claim was **“hollow and grossly incompetent”** as no valid order can issue against parties not before the court. The court's view was that the Permanent Secretary to the Treasury (who is a corporation under statute with perpetual succession and power to sue and be sued) and Telkom Kenya Ltd. should have been sued instead of the Government through the Minister of Finance.

This holding by the learned judge was made within the strict confines of public law litigation as delineated by the Law Reform Act and Order 53 of the Rules. He did not hold that all suits where necessary parties are not joined are incompetent by that reason and liable to be struck out. As a matter of

fact there was no suit before my learned brother capable of being struck out, and he did not strike out any suit. What was before him was an application for leave to bring judicial review proceedings. He declined to grant the leave sought and dismissed the application. The case is clearly distinguishable from the present one. The only serious issue raised in the notices of preliminary objection is that of jurisdiction. Mr. Musyoka Annan submitted as follows. What is challenged by this suit is the outcome of an electoral process, namely the acceptance by the 1<sup>st</sup> Defendant of the 2<sup>nd</sup> Defendant's nomination papers. The electoral process commenced with the Speaker of the National Assembly issuing writs under section 13 of the National Assembly and Presidential Elections Act, Cap. 7 addressed to the returning officer of each parliamentary constituency in Kenya to the effect that the parliamentary seats of those constituencies are now vacant. This was after the due dissolution of Parliament by the President of the Republic.

Mr. Annan further submitted that once that electoral process has commenced, any challenge to the outcome of any part of the process is governed by section 44(1) of the Constitution as read with section 19 of Cap. 7 aforesaid, especially subsection (3) thereof. Any such challenge must be by way of petition. What is before the court is not a petition. Further, an election petition must be heard by an election court duly constituted. This court has not been duly constituted as an election court.

Mr. Annan also relied on section 41(9) of the Constitution, submitting that in the performance of its duties the 1<sup>st</sup> Defendant shall not be at the direction of any person or authority. By accepting the nomination papers of the 2<sup>nd</sup> Defendant the 1<sup>st</sup> Defendant did nothing more than its due constitutional functions. It did not act *ultra vires* its powers nor in excess of its jurisdiction. It did what it was supposed to do. Having done so, it cannot now be directed by any person or authority, including this court, to do anything else.

Mr. Annan also relied on the case of **KIPKALYA K. KONES –vs- THE ELECTORAL COMMISSION OF KENYA, COURT OF APPEAL AT NAIROBI, CIVIL APPEAL NO. 94 OF 2005** (Unreported) for the proposition that the 1<sup>st</sup> Defendant cannot be stopped from completing the process of nomination or elections. He also cited another Court of Appeal decision, **THE SPEAKER OF THE NATIONAL ASSEMBLY –vs- JAMES NJENGA KARUME, NAIROBI CIVIL APPLICATION NO. NAI 92 OF 1992** (Unreported) to support his submission that only by way of election petition could the plaintiff properly litigate his grievances set out in the present suit. Mr. Odhiambo for the 2<sup>nd</sup> Defendant submitted as follows. The proceedings before court have been brought under section 19 of the Civil Procedure Act, Cap. 21 and Order 7 of the Civil Procedure Rules. Section 3 of Cap. 21 provides that where another statute reserves special jurisdiction and powers, Cap. 21 has no application. Cap. 7 reserves such special jurisdiction and powers regarding electoral disputes. Cap. 21 thus has no application here, and the Plaintiff should wait to bring his grievances by way of an election petition under Cap. 7.

Mr. Arwa for the Plaintiff responded as follows. Section 60 of the Constitution donates to this court unlimited original jurisdiction. The only issue is whether that jurisdiction has been ousted by any statute. Such other statute must confer a specific jurisdiction and procedure. No authority was cited for the proposition that the electoral process commences with the issuance of writs by the Speaker. There is nothing in section 13 of Cap. 7 to support that general proposition.

Mr. Arwa also did not agree with the submission that after the electoral process has commenced any aspect thereof can only be challenged by petition. The process is wider than nominations, or indeed the elections themselves. It includes things like review of electoral boundaries, registration of voters, compilation of voter registers, receipt of nomination papers and, ultimately, conduct of the elections themselves. Mistakes can be made in regard to any of these specific aspects of the electoral process. To say that correction of any error concerning any of these aspects must await completion of the elections must be backed by a clear statutory provision to that effect. Cap. 7 has no such provision.

Mr. Arwa further submitted that the dispute now before the court does not concern any election as none has taken place. Nor is it a dispute over the nomination of any candidate. The Plaintiff's complaint is that he was not cleared by the 1<sup>st</sup> Defendant to vie for the Nyatike Constituency parliamentary seat on the

ODM ticket, yet he was the one validly nominated by that party. The dispute is therefore not covered by election petition under Cap. 7. In any case, section 19 of Cap. 7 does not cover disputes over nomination of parliamentary candidates. The Plaintiff's complaint being in regard to the 1<sup>st</sup> Defendant's conduct, the **KIPKALYA K. KONES** case, which was a dispute over nomination of Members of Parliament by political parties, is distinguishable.

Mr. Arwa finally submitted that taking directions from another person or authority means taking directions as to how to exercise one's functions. The court is not precluded from declaring that the law has not been followed in performing one's functions. It would not thereby be directing the 1<sup>st</sup> Defendant on how to exercise its functions.

I have considered these serious submissions on jurisdiction. Section 3 of Cap. 21 provides:-

**“3. In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.”**

In the context of the issue at hand, that is, the jurisdiction, or lack of it, of this court to hear and determine this suit, this provision simply means that where a special jurisdiction has been conferred and a special procedure prescribed by or under any other law for the time being in force, then that special jurisdiction and procedure must be invoked, and, in the absence of any specific provision to the contrary, nothing in Cap. 21 shall limit or otherwise affect such special jurisdiction or procedure.

Section 13 of Cap. 7 opens with the words, **“For the purposes of a parliamentary election .....**” That section deals with the issue of writs by the Speaker of the National Assembly (to be transmitted to the returning officer of the constituency concerned) to the effect that the parliamentary seat of that constituency has become vacant. The Speaker issues writs either consequent upon dissolution of the National Assembly (in which case all parliamentary seats are declared vacant) or where a vacancy arises from any other cause. The writs are delivered to the Electoral Commission which transmits them to the returning officers concerned. The Commission also causes to be published in the Gazette a notice in the prescribed form specifying the day or days upon which each political party shall nominate candidates to contest parliamentary elections, the day for presentation of nomination papers to the Electoral Commission, and the day or days on which the poll shall be taken. Clearly, the electoral process, as far as parliamentary elections are concerned, starts with the issuance of writs by the Speaker. The nomination of candidates by the political parties, the presentation of nomination papers by candidates to the Electoral Commission and the conduct of the actual poll are all part and parcel of that electoral process. The process, having started with the issuance of writs, terminates with the declaration of winners after the poll.

Section 44(1) of the Constitution donates to the High Court jurisdiction to hear and determine any question whether, *inter alia*, a person has been validly elected as a member of the National Assembly. Under subsection (4) of that section Parliament may make provision with respect to the circumstances and manner in which, the time within which and the conditions upon which, this jurisdiction may be invoked, and the powers, practice and procedure of the High Court in relation thereto. And indeed Parliament has made such provision under Part VI (which covers sections 19 to 31) of Cap. 7. Under section 19(1) thereof, an application to hear and determine a question whether a person has been validly elected as President, or whether a person has been validly elected as a member of the National Assembly, or whether the seat in the National Assembly of a member thereof has become vacant, shall be made by way of petition. Under subsection (2) of the same section;

**“(2) A petition to determine the question whether a person has been validly nominated for election as President, or was validly elected as President, or, being a person elected President, was validly elected as a member of the National Assembly, shall be heard by a court consisting of three judges.”**

Under subsection (3) a petition other than a petition under subsection (2) shall be heard by an election court consisting of one judge. For its full meaning and effect, subsection (3) must be read together with

subsection (2). Going by the wording of subsection (2), a question whether a person has been validly nominated for election as a Member of Parliament can be raised in an election petition when challenging his or her election.

It is clear to me therefore, that a special jurisdiction has been conferred and a special procedure prescribed under Cap. 7 to deal with all issues pertaining to parliamentary elections, including nomination of candidates. That special jurisdiction is conferred to an election court duly constituted, consisting of one judge of the High Court. The special procedure is a petition. No ordinary suit under provisions of the Civil Procedure Act and the Rules made hereunder can thus be brought to challenge any aspect of a parliamentary electoral process. In the case of **THE SPEAKER OF THE NATIONAL ASSEMBLY – vs- JAMES NJENGA KARUME (supra)** the Court of Appeal said:-

**“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.....”**

And in the case of **KIMANI WANYOIKE –vs- THE ELECTORAL COMMISSION & ANOTHER, COURT OF APPEAL AT NAIROBI, CIVIL APPLICATION NO. NAI. 213 of 1995 (96/95 UR)** (Unreported) the same court said:-

**“We think the procedure for addressing grievances arising from elections is through an election petition....”**

The Plaintiff’s grievance in this suit is essentially that while he was the one validly nominated by ODM to vie for the Nyatike parliamentary seat, the Electoral Commission failed to accept his nomination papers and instead accepted those of the 2<sup>nd</sup> Defendant who had not been validly nominated. The 2<sup>nd</sup> Defendant’s stand on the other hand is that he was the one validly nominated by ODM. The dispute therefore is, as between the Plaintiff and the 2<sup>nd</sup> Defendant, Who was validly nominated to vie for the Nyatike parliamentary seat on the ODM ticket? It is a dispute that should be addressed to an election court by way of petition should the 2<sup>nd</sup> Defendant be eventually declared the winner of the parliamentary election for that constituency. This is not an election court duly constituted, and there is no petition before the court. The suit (and hence the application) is clearly incompetent and court, in any case, has no jurisdiction to hear it.

Even if the court had jurisdiction to hear and determine the suit, it is unlikely that it would issue interlocutory orders as sought. In the case of **KIPKALYA K. KONES –vs- THE ELECTORAL COMMISSION OF KENYA & OTHERS (supra)** the Court of Appeal said:-

**“In filing either their plaint or the judicial review process now under consideration, the clear intention of the parties aggrieved by the action of the Commission was to stop (it) from proceeding with the process of nominating the Appellant. If the Commission can be stopped from completing the process of nomination, it can also be stopped from completing the process of elections. That cannot be allowed because if it were allowed, the country may well end up having no members in the National Assembly..... It is to be remembered that neither the Constitution nor the National Assembly and Presidential Elections Act, makes provision for interim reliefs such as injunctions, orders of stay and so on during the hearing of an election petition....”**

I need say no more.

In the event, I will uphold the preliminary objection. The application by chamber summons dated 26<sup>th</sup> November, 2007 is incompetent and not properly before the court. Furthermore, the court has no jurisdiction to hear it. The application is hereby struck out with costs to the Defendant. I make that particular order because the preliminary objections were raised only in respect to the application. But having held as I have regarding the suit itself, no useful purpose will be served by letting it stand. The suit is clearly incompetent procedurally, and in any event the court has no jurisdiction to hear it. It is hereby struck out, also with costs to the Defendants. Those will be the orders of the court.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER, 2007**