



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

Miscellaneous Civil Application 1028 of 2006

REPUBLICAPPLICANT

-Versus-

**THE SPEAKER OF THE NATIONAL ASSEMBLY
HON. FRANCIS OLE KAPARO.....1ST RESPONDENT**

**DEPUTY REGISTRAR, HIGH COURT OF KENYA MOMBASA –
MR. R. KITHINJI.....2ND RESPONDENT
CHAIRMAN, ELECTORAL COMMISSION OF KENYA –
MR. S.M. KIVUITU.....3RD RESPONDENT**

AND

HON. HARRISON GARAMA KOMBEEX-PARTE APPLICANT

AND

JULIUS DARAKA MBUZI.....INTERESTED PARTY

**Coram: Before Hon. Justice L. Njagi
 Court clerk – Jason
 Mr. Gikandi for Ex-parte –
 Applicant/Respondent**

RULING

The application before the court is brought by way of a chamber summons dated 9th November, 2006, and expressed to be made under Order LIII rules 1,2 and 3 of the Civil Procedure Rules; Sections 3A and 63 of the Civil Procedure Act, Cap 21 of the Laws of Kenya and all other enabling provisions; Sections 1,18, 23, 30 and 31 of the National Assembly and Presidential Act, Cap 7; Section 44 of the Constitution; and section 3 of the Appellate Jurisdiction Act, Cap 9 of the Laws of Kenya.

The applicant seeks from the court the following orders-

1. THAT this matter be certified urgent.
2. THAT this Court be pleased to grant leave to the *Ex-parte* Applicant to apply for orders of prohibition and certiorari as follows-

(a) An order of *certiorari* to bring into this court the decision of the 2nd respondent contained in certificate issued on 3rd November, 2006, whereby the said 2nd respondent has certified that the election of the *Ex-parte* applicant as the Magarini Member of Parliament for the term 2003-2007 has been nullified.

Further an order of *certiorari* to issue directed upon the 1st respondent's decision dated 7th November, 2006 to the effect that the 3rd Respondent declaring the said Magarini Parliamentary seat as vacant and to have the said 2 decisions quashed (sic)

That an order of prohibition to prohibit and stop the 1st and 3rd Respondents from proceeding to declare the Magarini Parliamentary seat as vacant and from holding any by-election for the said constituency pursuant to the decisions referred to in (a) above.

3. THAT the grant of the said leave to operate as a stay of any further acts by the Respondents in taking any steps to either declare the Magarini Parliamentary seat as vacant or holding any by-election thereon. Further, that the grant of leave do operate as a stay against the Respondents interfering with the *Ex-parte* Applicants conduct of his Parliamentary duties as the Magarini Member of Parliament.

The application is supported by the annexed affidavit of Honourable **HARRISON GARAMA KOMBE**, and is predicated on the following grounds-

- (i) During the general elections that were conducted by the 3rd Respondent in December, 2002, the *Ex-parte* Applicant was declared as a member of Parliament of Magarini Constituency.
- (ii) The Interested Party petitioned the Election Court through Election petition No. 1 of 2003 (Mombasa) and prayed for the nullification of the results aforesaid
- (iii) The Chief Justice duly gazetted the Honorable Lady Justice Khaminwa as the Election Petition Court to hear and determine the said petition.
- (iv) On 10th February, 2003, the Election Court determined the said petition and nullified the said results.
- (v) The *Ex-parte* applicant filed an appeal to the Court of Appeal as allowed by section 23(4) of Cap 7 of the Laws of Kenya. This is Civil Appeal No. 52 of 2006.
- (vi) The said appeal is yet to be heard and determined by the said court.
- (vii) That the Election Court judge has not yet issued any certificate as required by Section 30 and 31 of the National Assembly and Presidential Elections Act.
- (viii) The 2nd Respondent has issued a certificate of the determination of Election Petition No. 1 of 2003. As a Deputy Registrar of the High Court, the 2nd Respondent has no legal power to issue such a certificate. The 2nd Respondent has acted ultra vires and the certificate issued is outrightly illegal and invalid.
- (ix) That acting on the basis of (viii) above, the 1st Respondent is now in the process of directing the 3rd Respondent to take steps to conduct a by-election for Magaini Constituency.
- (x) That the *Ex-parte* Applicant's Appeal is still pending in the Court of Appeal. In law, Election Petition No. 1 of 2003 (Mombasa) has not been concluded. It will only be concluded when the appeal is fully heard and determined. Accordingly, no certificate can be issued until the appeal process is conducted.
- (xi) The 1st Respondent has not ascertained the status of the matter as required of him by Section 18 of Cap.7, for as long as the appeal pends it cannot be said the Magarini Parliamentary seat is vacant.
- (xii) That judicial review orders as prayed for should be issued as the justice of the case calls for such order to be issued.
- (xiii) That it is necessary that there be a stay of any further acts by the 2nd and 3rd Respondents

towards declaring the Magarini seat as vacant. The intended by-election should also be stayed. The *Ex-parte* Applicant should also be accorded the full rights of Member of Parliament and a stay order is absolutely necessary.

At the hearing of this application, Mr. Gikandi appeared for the Applicant. He told the court that M/s Mustisya Bosire & Company, Advocates, had filed a Notice of appointment of Advocates for the interested party, along with grounds of opposition.

In his view, Mr. Mustisya had no right of audience at this stage. Mr. Mutisya stated that the matter had been filed at Malindi and argued that there was no prejudice in his addressing the court even through the matter was at the *ex-parte* stage. In reply, Mr. Gikandi insisted that he was entitled to proceed *ex-parte*. The court ruled that playing it strictly by the rules, and bearing in mind Order LIII rule 1(1), an application for leave to apply for judicial review should be made *ex-parte*, and therefore the applicant would be heard *ex-parte*.

In his submissions, Mr. Gikandi referred to a certificate which he had received through a fax sent to him by the speaker of the National Assembly. It had an endorsement instructing the clerk of the National Assembly to act and prepare a writ. He submitted that if the writ was issued, elections would be ordered in Magarini constituency, and yet there was pending before the Court of Appeal Civil Appeal No. 52/2006 against the decision of the election court by which the 2002 elections in that constituency were nullified. In the face of that appeal, the finality of the decision of the election court was destroyed, and the outcome of the appellate process should be awaited. Counsel further submitted that the Deputy Registrar had no jurisdiction to issue a certificate of determination of the election petition, and that such a certificate can only be issued by the judge who heard and determined the election petition. In that context, the certificate issued by the Registrar was a nullity *ab initio*. He therefore urged the court to grant leave to the *ex-parte* applicant to apply for judicial review, and to direct that the grant of leave shall operate as a stay.

It is said that the longest journey starts with a first step. Having considered Mr. Gikandi's submissions, I take the view that the first step in this voyage is to determine whether this court is clothed with the necessary jurisdiction in respect of this matter. It cannot be gainsaid that the matter arises under the National Assembly and Presidential Elections Act. Should such a matter be referred to the High Court or to an election court? It is as clear as daylight that this matter touches upon an appeal from a decision of an election court, and partly a certificate of determination of an election petition. These are matters of an electoral nature, and logic dictated that any grievances arising out of issues connected with the National Assembly and Presidential Elections Act ought to be sorted out before the election court. I have combed through the authorities cited and relied on by the learned counsel for the *ex-parte* applicant. Unfortunately none of them addressed the point. The best authority on the point remains **KIPKALYA KIPRONO KONES v. KIMANI WANYOIKE & ORS.**, Civil Appeal No. 94 of 2005. In that case, the Court of Appeal reviewed previous cases on the matter and came out conclusively that election matters should be referred to the election court.

To recapitulate, this is an application for Judicial Review brought under, inter alia, Order LIII of the Civil procedure Rules. In the **KIPKALYA KONES CASE**(supra) the Court of Appeal referred to the case of **THE SPEAKER OF THE NATIONAL ASSEMBLY v. THE HON. JAMES NJENGA KARUME**, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] in which in a ruling dated 29th May, 1992, the same Court stated-

“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 and statutory provisions.”

In a later case **KIMANI WA NYOIKE v. THE ELECTORAL COMMISSION OF KENYA & ANOR.**, Civil Application No. NAI 213 OF 1995 [96/95 UR] the court concluded as follows-

“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’S Case. That view had full support in authority both local and foreign. In **RAPHAEL SAMSON KITHIKA MBONDO v. LUKA DAUDI GALGALO & PAUL JOSEPH NGEI**, Election Petition No. 16 of 1974 (unreported) it was alleged that Mr. Ngei and his supporters had in effect physically prevented Mr. Mbondo from presenting his nomination papers. Mr. Mbondo, however, did not go to the High Court by way of a plaint to compel the returning officer or anyone else to accept his papers. He waited until the results were published and then he filed an election petition. The election of Mr. Ngei was nullified and Mr. Ngei was found guilty of an election offence”.

The Court then continued as follows-

“..... What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the Court observed in KARUME’S Case....”

I trust that the Ex-parte applicant will extract a positive point or two from Ngei’s case. However, that is neither here nor there.

To come back to the point in issue, the *Ex-parte* Applicant seems to be apprehensive that his seat is likely to be declared vacant. Section 18 of the National Assembly and Presidential Elections Act mandates the speaker, if he has reason to believe that the seat of a member has become vacant, to investigate and if necessary consult the Attorney General. Only if he is so satisfied, will he declare the seat vacant. But if he is not so, satisfied, he is bound to refuse to declare. It should not be forgotten that the declaration by the Speaker that a seat held by a member has become vacant is itself amenable to challenge in the High Court through an election petition under section 19(1) (c) and (3). So, what is the farce.

In my humble view, the matters before this court are such as should be placed before the election court. While seeking to persuade the court that the registrar or deputy registrar has no locus to issue a certificate of determination of an election petition, he submitted, and this court agrees with him entirely, that Cap 7 does not have a definition of a registrar and that this matter is different from an ordinary civil suit in which the Civil Procedure Rules apply. Counsel conceded that order LVIII of the Civil Procedure Rules confers special powers on Registrars in ordinary civil matters. However, in his submission, this is a specialized regime where Civil Procedure Rules do not apply and that therefore the certificate issued by the deputy registrar was not valid.

Without pronouncing any considered verdict on the validity of the certificate issued by the registrar, I derive comfort in Mr. Gikandi’s submission and invite him to walk an extra step with me. For the same reason that Order XLVIII does not apply to this specialized regime, equally Order LIII does not apply. The matters now before this court are the preserve of the election court, in which special procedures relating to elections apply. That is where they properly belong, and that is where the *Ex-parte* Applicant should direct his attention, and arm himself with an appropriate petition.

For these reasons, I find that this court has no authority to entertain this matter as it is not seized of the requisite jurisdiction to do so. Jurisdiction is everything.

In **THE OWNERS OF THE MOTOR VESSEL “LILLIAN S v. CALTEX OIL (KENYA) LTD.**, Civil Appeal No. 50 of 1989, Nyarangi J.A. said of jurisdiction-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....”

I accordingly oblige. As this court is without jurisdiction, this application is in the wrong place, and it is accordingly struck out.

Dated and delivered at Mombasa this 17th day of November, 2006.

L.NJAGI
JUDGE