REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL MISCELLANEOUS APPLICATION NO 184 OF 2002

REPUBLIC.....APPLICANT

AND

SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

SULEIMAN SHAKAMBO.....2ND RESPONDENT

***EX-PARTE* JUSUF MAHMOUD ABOUBAKAR**

JUDGMENT OF THE COURT

Five applicants, namely Jusuf Mahmoud Aboubakar who is described as the Secretary General of Shirikisho Party of Kenya, Nassir Issa, Vice Chairman of the same party, Mwakio Ndau, the Treasurer of the same party, Peter Ziro, described as Secretary for Legal Affairs, and Anania Mwaboza, described as Secretary for Information and Publicity of Shirikisho Party filed the original notice of motion on 11th June 2002 against the Speaker of the National Assembly of Kenya and honourable Suleiman Shakambo. The same application was with leave of the Court amended and he amended notice of motion is seeking two main orders and costs.

The main orders it is seeking are as follows:

> "1. That an order of *mandamus* against the Speaker of National Assembly of Kenya compelling him to declare the Likoni parliamentary seat currently held by Hon Suleiman Shakombo, the 2nd respondent herein vacant.
>
> 2. That an order of prohibition against Hon Shakombo, the 2nd respondent herein prohibiting him from continuing to occupy the Likoni parliamentary seat after his defection to a party other than his sponsoring party and from holding himself out as a member of parliament on a Shirikisho ticket."

As we have stated hereinabove, the third order sought was order for costs. We do not apologise for any mistakes in the contents of the same application whether spelling mistakes or such omissions as render the sentences comprised in prayer 1 and prayer 2 incomplete in each case for we have reproduced the two prayers as they are in the application.

The amended application is supported by statement filed with the original notice of motion and affidavit of Yusuf Mahmoud Aboubakar sworn on 17th June 2002.

In the statement the applicants state what we may briefly summarise that the 2nd respondent Suleiman Shakombo was elected a Member of Parliament in the 1997 National Assembly and Presidential Elections

to represent Likoni parliamentary seat. He used party symbols and party colours during the said elections. He also used the goodwill of the party and general support the party had created for itself in the Likoni constituency and using the same he won the elections, he being the only member of Parliament elected on the Shirikisho Party of Kenya ticket and he remained the only member of Parliament on the Shirikisho party in Parliament. Shirikisho party stands for *Majimbo* or federal system of government as its main policy and that makes it different from other parties. On 29th day of April, 2002, the 2nd respondent formally and in broad daylight defected to the ruling party Kenya African National Union (KANU). The said defection took place at KANU headquarters in Nairobi and was shown in electronic media throughout the country. It was also reported widely in the print media on 30th April 2002. The said defection was not sanctioned by the party officials and was an embarrassment to the party and electorate in the constituency. Prior to his defection the 2nd respondents had issued a press statement which was published in the Sunday Standard on 28th April 2002, confirming his plan to defect to KANU; that at the end of the same ceremony of defection, a life membership card of KANU was handed over to the second respondent. The effect of the same defection means the second respondent has resigned from the Shirikisho party which sponsored him and so the 1st respondent should now declare the seat vacant so that another person may be elected to represent the constituency. Further, the second respondent is no longer associating with the sponsoring party and has refused to defend his seat in the sponsoring party. He was expelled from the same party after the same defection. As the 2nd respondent was the only member of Shirikisho party in Parliament his defection to another party has denied the Shirikisho party its only voice in the parliament thus causing suffering to the constituents who elected him; that the 1st respondent has failed, refused and or ignored to declare the seat vacant. The applicants state further that the 1st respondent has a statutory duty to declare the seat vacant and in failing to do so, he has breached the said duty bestowed upon him by the Kenyan public. First respondent has failed to exercise his discretion in favour of declaring the said seat vacant. They ended the same statement by saying that the current status of the second respondent as a member of parliament is inconsistent with the spirit and provisions of the constitution of the Republic of Kenya and the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya and the Speaker must be forced to act by the Court to avoid making a mockery out of the electorate and membership of the Shirikisho Party of Kenya.

The supporting affidavit is short and merely states that leave to file the notice of motion was granted on the 31st May 2002 by this court and annexes the copies of the statement accompanying the application for leave and a copy of the first affidavit accompanying the application for leave and second copy of the affidavit.

The two respondents opposed the application. First respondent filed notice of preliminary objection, grounds of opposition and replying affidavit. Second respondent also filed notice of preliminary objection, grounds of opposition and replying affidavit. In his preliminary objection, the 1st respondent stated that the Court has no jurisdiction to hear or determine this matter or to grant any of the prayers sought in the said application and/or in the statement dated 28th May 2002; that the said application is brought by way of judicial review is wholly misconceived and/or incompetent in law as the reliefs sought therein may only be applied for by way of a petition and that the first respondent will also rely on the grounds as set out in the grounds of opposition filed. In the same grounds of opposition, the 1st respondent maintained that the application is wholly misconceived; that it has no legal basis and is without any merit; that no order of *mandamus* lies against the first respondent in law or otherwise; that the Court has no jurisdiction to grant any orders of *mandamus* against the 1st respondent; that there is an alternative remedy in the nature of a constitutional issue which the applicant can pursue and that the 1st respondent is absolutely privileged and immune from all proceedings of a civil and criminal nature. In a replying affidavit, the 1st respondent stated in brief that he had not received any notice from the 2nd respondent of his having resigned from the Shirikisho Party of Kenya; that he had not been shown any KANU certificate of membership relating to the same 2nd respondent or any evidence of the 2nd respondent having officially joined Kanu; and that as speaker of the National Assembly, the 1st respondent is not permitted to take cognizance of hearsay evidence and he is not in a position to decide on what constitutes a valid resignation if no written notice was served on him by the 2nd respondent of his intention to resign from Shirikisho Party of Kenya to join KANU or of his having done so, and that he did not know in what circumstances and when he is supposed to have had constructive knowledge of such resignation in the absence of a written notice being served upon him as required by the Constitution of

Kenya: that he believes no order of *mandamus* can lie to compel him to declare the second respondent's parliamentary seat in the Likoni constituency vacant. He ended his affidavit by pleading with the Court to determine all the issues raised in the matter so that all those concerned including himself (1st respondent) may be guided on the legal procedure to be followed in similar circumstances now and in the future.

The 2nd respondent, Suleiman Shakombo stated in his notice of preliminary objection that the Notice of Motion dated 11th June 2002 failed to comply with the correct form for the orders sought; that an order of *mandamus* under order 53 of Civil Procedure Rules takes its jurisdiction from section 9 of the Law Reform Act (Cap 26). The power to make rules donated by section 9 of that Act does not extend to oral amendments of a Notice of Motion; that since rules of procedure have been provided by Parliament pursuant to section 44(4) of the Kenya Constitution, the applicants cannot use the blanket provisions of order 53 to approach court for relief as an alternative procedure exits which must be complied with; and that he relief of *mandamus* is not available where there is a more appropriate remedy.

In the grounds of opposition, the 2nd respondent states that the application is fatally defective due to lack of correct form and is bad in law; that the applicants have not demonstrated any *locus standi* under section V of the Kenya Constitution: that the 2nd respondent never resigned from Shirikisho Party of Kenya and therefore section 40(a) of the Kenya Constitution does not apply; that section 44(4) of the Kenya constitution does not permit the applicants to utilize judicial review procedure to approach the High Court for these types of remedy and therefore the application is incurably defective and that the conjunction in time of a by-election and the national general elections means that the Electoral Commission of Kenya will have to be joined in these proceedings in order to advise of expenses, feasibility and logistics of having two elections for one constituency within the space of three months.

In his replying affidavit, the second respondent maintains in brief that the Notice of Motion is incurably defective as it is drafted in an incorrect form; that the applicants have no *locus standi* as there is no evidence of their rights having been infringed; that the application arises out of a political mischief; that he never resigned from Shirikisho Party of Kenya. He has never written any letter of resignation or attended any meetings where the agenda of his resignation was discussed, but that he was expelled from the same party as stated by the applicants. He contends that he never delivered any letter of resignation to the party in compliance with the party's constitution; that he was expelled without according him the right to defend himself as is required by the party's constitution; that he took some steps which were politically to benefit his constituents by cooperating with the ruling party but he never resigned from the party; that the applicants have not used the right procedure to approach the High Court. He ends the same affidavit by stating that as the general elections are to be held, it would be fair to have electoral commission joined in the proceedings so that the Court may know the feasibility and expenses that would be involved in a by-elections at this time when the general elections are so near.

At the hearing, parties agreed to address us on the entire case and the preliminary points were argued together with the substantial points. We were addressed at length on the entire application by the two learned counsels for the applicants who were jointly representing the applicants, and the counsel for the 1st respondent as well as the counsel for the 2nd respondent. We feel indebted to each of them for the able manner in which they presented their clients case and the able exposition of the law applicable to the issues before us.

The main points that were raised can be generally categorized into the technical aspects and the substantial aspects. In our minds, there were no discernible difficulties on the substance of the case before us. The applicants felt the question regarding the legal position of members of parliament who are elected into the parliament on one party ticket and once in parliament and during the continued existence of the same party which "sponsored" them into parliament, they declare themselves as having defected to another party without having resigned either membership of parliament or from the party which "sponsored" them into parliament is a matter which has acquired public notoriety and needs to be determined once and for all. The applicants claim that such members of parliament should be treated as having impliedly resigned from the parties on which tickets they went into the August House and so the 1st respondent should declare their seats vacant pursuant to section 18 of the National Assembly and Presidential Elections Act. It is thus the view of the applicants that the 1st respondent has a public duty to

do so once a person has stated and acted in a manner that shows he has resigned from his party and joined another party while his party is still existing and being a public duty imposed on the Speaker, if he fails to do so, the Court should by an order of *mandamus* order him to do so.

The 1st respondent, (Speaker of the National Assembly) states as follows in his affidavit sworn on 24th September 2002 at paragraphs 7,8 and 9:-

> "7. THAT I am also not in a position to decide on what constitutes a valid resignation if no written notice was served on me by the 2nd respondent of his intention to resign from the Shirikisho Party of Kenya to join KANU or of his having done so.
>
> 8. THAT I do not know in what circumstances and when am I supposed to have had constructive knowledge of such resignation in the absence of a written notice being served upon me as required by the Constitution of Kenya.
>
> 9. THAT I pray that this honourable court do determine all the issues raised in this matter so that all those concerned including myself may be guided on the legal procedure to be followed in similar circumstances now and in the future."

The second respondent does not comment on whether or not it is necessary to have some decision on the issue and rightly too because his stand is that he has not resigned from the party on which ticket he went to the Parliament but it is noteworthy that he needs the Electoral Commission of Kenya to be joined as a party as the general elections were so near that the Commission's input as to the expenses and the appropriateness of having two elections in the constituency within such a short space in time was necessary.

The main issues as we see them are first, having accepted that there is need to consider the legal position of such members of parliament as we have referred to hereinabove, is this application properly before us; that is; does the Notice of Motion dated 11th June 2002 and as amended on 19th September 2002 comply with the correct form for orders sought? secondly, are the orders sought , ie. order of *mandamus* and prohibition order available in law to the applicants as against the 1st respondent and the 2nd respondents respectively?

We have no difficulty in deciding the first issue. The amended Notice of Motion seems to us to be proper. It is clear to us that the objection was taken before the amendment and that that objection might have triggered the amendment. We say no more on that.

On the issue of whether the orders of *mandamus* and of prohibition are available to the applicants as against the respondents, it was Mr Khanna's submission that the order of *mandamus* is not available against the Speaker of the National Assembly because first the duty of declaration of a seat as vacant is not a public duty of the Speaker but rather it is an administrative duty, and that in any account there are available other alternatives. He also submitted that the Speaker was exercising discretionary powers and section 18 of the National Assembly and Presidential Elections Act chapter 7 requires the Speaker to take action only if there is cause to believe that the seat has become vacant. It is specific duty, (Mr Khanna contends) where powers given to the Speaker can be exercised administratively and that when exercising his duties under section 18 of the same Act, he is on a specific duty and not a public duty. He referred us to several authorities adding that the applicant must show he has demanded performance but as far as this case is concerned, although the applicants have certified what they call the facts, there are no supporting evidence to establish any of the factual allegations in the statement. There were other aspects of Mr Khanna's submissions which we will refer to in this ruling later.

The 2nd respondent's counsel Mr Brayant did maintain on the orders sought for prohibition against the 2nd respondent that under our political system parties do not control the Members of Parliament elected on the same parties tickets; and that if that were to be believed, then it would mean that party officials can expel a member of parliament at will and cause a by-election any time and that would be putting the powers into the wrong hands. He submitted that there is nothing like resigning by conduct as the

constitution of the Shirikisho Party of Kenya clearly provides that resignation must be in writing. He referred us to section 40 of the Constitution of Kenya and said that section says that a member who resigns from his party when the party is a parliamentary party vacates his seat but section 44(4) provides the procedure and maintained that the applicants, should have applied to the Court for a declaration that the seat is vacant and referred us to other legal provisions. He ended by saying that the orders sought are not available when there are alternative remedies.

In reply to the same contentions, Mr Mungatana did admit that the effect of their prayers were to declare the Likoni seat vacant. He maintained that the evidence that was there prior to the filing of these proceedings was so glaringly open such that the Speaker should have reasons to believe that the seat was vacant. He should have called for evidence as is required by section 18 of Chapter 7 Laws of Kenya and as that evidence was later presented into the court, he should have gone ahead and proceeded under section 18. According to Mr Mungatana, the Speaker has no discretion on the matter. It is a statutory mandatory duty. Section 34 lays down the qualification of becoming a Member of Parliament and it is a fundamental requirement that one must be a member of a party. If he resigns from the same party, then he should lose his seat. He submitted that whereas the test as to whether one has resigned should be objective it should however include conduct that glaringly shows that a member has left the party that sponsored him into the parliament. When such reports reach the Speaker, he should investigate them. According to him, Speaker's duty is a public duty. Speaker's immunity would only be there when he is conducting parliamentary proceedings as is defined in the Act, Chapter 6, but when he is declaring a seat vacant, then he is not conducting proceedings in parliament and he is not immune.

It is not in dispute that at the relevant time when this matter was filed into the court and when it was heard on 23rd and 24th October 2002, the 2nd respondent Suleiman Shakombo was a Member of Parliament representing Likoni constituency in the Parliament. It is also not in dispute that the party on which ticket he went to parliament was Shirikisho Party of Kenya.

It is not disputed that at the relevant time that party was as a parliamentary party. There is a dispute as to whether he resigned from the same party or not during the time when the same Parliament had not been dissolved. It is however, not in dispute that he never tendered any written resignation from the same party by the time this application was filed, and thus when we say there is dispute as to whether he resigned from the party that sponsored him or not, what we mean is whether by conduct one can say he had resigned or not. The applicants maintain that by conduct he resigned whereas he maintains that the party's constitution is clear and one cannot construe conduct to mean resignation. According to the constitution of the party, the resignation has to be in writing. These are matters of facts and law and will affect our consideration of the entire case in deciding our consideration as to the issue as to whether the orders of *mandamus* and of prohibition are available to the applicants or not.

Section 40 of the Constitution of Kenya states as follows:

> "40. A member of the National Assembly who, having stood at his election as an elected member with the support of or as a supporter of a political party, or having accepted appointment as a nominated member as a supporter of a political party, either;-
> (a) resigns from the same party at a time when that party is a parliamentary party; or;
> (b) having, after the dissolution of that party, been a member of another parliamentary party, resigns from that other party at a time when that other party is a parliamentary party.

Shall vacate his seat forthwith unless in the meantime that party of which he was last or member has ceased to exist as a parliamentary party or he has resigned his seat.

Provided that this subsection shall not apply to any member who is elected as Speaker.

The applicants maintain as we have stated that the 2nd respondent having by implication resigned from Shirikisho Party of Kenya which sponsored him into the Parliament while the same party was still a parliamentary party fell into this category and therefore the Speaker, First respondent should have proceeded under section 18 of the National Assembly and Presidential Elections Act Chapter 7 to declare

the Likoni parliamentary seat then held by Hon Suleiman Shakombo the 2nd respondent vacant, and as the Speaker did not do so and it was a public duty he should be compelled to do so by an order of *mandamus* and 2nd respondent should be prohibited from holding himself as a member of parliament on Shirikisho ticket. They have proceeded by way of judicial review as there are no procedural rules made under section 44(b) (4) of the Constitution.

Section 44 of the Constitution of Kenya states as follows:

> "44. (1) 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.
>
> (2) 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.
>
> (3) An application to the High Court for the determination of a question under subsection (1) (b) may be made.
> (a) Where the Speaker has declared that the seat in the National Assembly of a member has by reason of a provision of this constitution become vacant, by that member; or
> (b) In any other case by a person who is registered as a voter in elections of elected members of the assembly or by the Attorney General.
>
> (4) Parliament may make provisions with respect to
> (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and
> (b) the powers, practice and procedure of the High Court in relation to the application."

It seems to us clear that the matter before us (in so far as the applicants claim that the 2nd respondent resigned from Shirikisho Party of Kenya which was the party with which support he was elected into the Parliament) falls under section 40 of the Constitution and should have been brought to court constitutionally under the procedures spelt out under section 44 (1) (b) and section 44(3) (b). The rules under which such an application can be made have not been put in place but we feel one would proceed in the same way matters under section 84 of the Constitution were being brought to court for a long time before the rules were made. However, what is important to note is that even under section 44(b) of the constitution, the High Court could only determine whether the seat in the National Assembly of a member thereof has become vacant. We feel after the High Court determines that aspect and if it determines that the seat has become vacant and after the same determination has been communicated to the Speaker, then the Speaker would under section 18 of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya have reason to believe that the seat in the National Assembly of a member thereof has become vacant and may call for such evidence on the matter as he thinks necessary and thereafter declare the seat to have become vacant. We think the Speaker was required under section 18 of the same Act to call for such evidence as he thinks necessary because section 40 of the Constitution provides only one way in which the seat can be vacant. There are other ways in which a seat can be vacant such as where a member fails to attend a number of sittings. What is important, however, is that it is the High Court that hears and determines any question as to whether the seat is vacant or not under section 40 and not the Speaker. In our mind, this would mean that whoever feels that a Member of Parliament who went to Parliament with the support of a party has resigned from that party and is caught up by the provisions of section 40 of the Constitution, should initiate an action in the High Court and let the High Court determine the same before the Speaker is involved. If the High Court after investigations comes to a conclusion that indeed such a member has resigned from the party (whether in writing or by implication) then the order or judgment of the High Court will be placed before the Speaker who will then proceed under section 18 of the National Assembly and Presidential Elections Act and declare the seat vacant. We do not think the Speaker himself whether under his public duty or administrative duty would go out of his way and initiate investigations based on what he has seen in the media (print or electronic) assuming he

has seen any to satisfy himself that the seat has fallen vacant. He would in such a case be a witness as well as judge in the same case. That would not be proper.

We, therefore find that in this case, it was the duty of the applicants if they felt the 2nd respondent had resigned constructively from his party while the same party was still a parliamentary party and was caught up by the provisions of section 40 of the Constitution to initiate action in the High Court to seek a determination to that effect. Having obtained the same then they would have forwarded it to the Speaker and having so forwarded it if the Speaker refused to act under section 18 of the National Assembly and Presidential Elections Act Chapter 7, then they would take such other action as was taken here which may also depend on other legal factors. It is thus our finding that this action of application by way of judicial review against the Speaker was not in law the proper procedure.

Further, and notwithstanding the above we also do agree that the provisions of section 18 of the National Assembly and Presidential Elections Act, give the Speaker discretionary powers.

The section states as follows:

> "If the Speaker has reason to believe that the seat in the National Assembly of a member thereof has become vacant, he shall call for such evidence on the matter as he thinks necessary and may consult the Attorney General and shall thereafter:
> (a) If he is satisfied that the seat has become vacant declare that the seat has become vacant, and publish notice of the same declaration in the Gazette or if he is not so satisfied, refuse so to declare."

Those powers are clearly discretionary and are administrative in nature. They are different from the powers he exercises when conducting parliamentary sessions in the House.

In the celebrated case of *Kenya National Examinations Council v Republic,* Court of Appeal Civil Appeal No 266 of 1996, the Court of Appeal exhaustively discussed the circumstances under which an order of *mandamus* will issue and quoted *Halsbury's Laws of England* 4th Edition Volume 1 and page 111 paragraph 89 and 90.

At paragraph 90 of the same volume, it is stated as follows:

> "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way."

Here, section 18 of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya makes it clear that the Speaker shall call evidence only if he has reasons to believe that the seat has become vacant and even after calling that evidence, he would only declare the seat vacant if he is satisfied that the seat has become vacant and if he is not satisfied then he can refused to so declare. Yet the application is seeking that an order be issued to compel the Speaker to declare Likoni parliamentary seat vacant. To do so would ignore the statutory requirements that he has to first have reasons to believe the seat has become vacant and that after he has the same reason he would call for evidence on the matter and then he has to be satisfied that the seat has become vacant and only thereafter would he declare the seat vacant. The Court cannot compel him to do so for to do so would clearly interfere with Speaker's discretion on the matter and would scuttle all the other procedures the Speaker needs to go through before he can take action to declare the seat vacant. On that ground also, we feel this application which is seeking to issue orders of *mandamus* that would interfere with the discretionary powers of the 1st respondent cannot be properly before us and it does not lie.

Thirdly, and in any case, what makes the Speaker believe that the seat has become vacant? And specifically in the case before us where the 2nd respondent did not resign in writing and did not serve

Speaker with written notice, what would make the Speaker believe that the seat had become vacant? We do agree with the sentiments spelt out in the 1st respondent's affidavit at paragraph 6 where he says:

> "6. THAT as the Speaker of the National Assembly, I am not permitted to take cognissance of hearsay evidence."

We do agree that sometimes the activities of a member could amount to constructive resignation from the party that sponsored him into the parliament although in this case, Mr Khanna is right that no tangible evidence was availed that the 2nd respondent had received another party's membership card or that the 2nd respondent had actually constructively left the sponsoring party except allegations in the statement which were not varied by tangible evidence. However, if that were the case, is there evidence that the Speaker was made aware of the same and that a demand was made upon the Speaker to carry out his duty to declare the seat vacant. We have no evidence that that was done. We have no evidence that evidence was presented to the Speaker together with a demand by the applicants specifying that the applicants' rights were being violated by the non action on the part of the Speaker upon the same evidence. The Court of Appeal in quoting the case of *R v Dunsheath, Ex parte Meridith* [1950] 2 All ER 741 stated as follows in the *Prabhulal Gulabchand Shah v The Attorney General and Erastus Gathondu Miano*, CA No 24 of 1985:

> "*Mandamus* is neither a writ of course nor a writ of right, but it will be granted if the duty affects the rights of an individual, provided there is not more appropriate remedy. The person or authority to whom it is issued must be either under a statutory duty or legal duty to do something or not to do something; the duty itself being of an imperative nature."

In this case, the applicants have not shown that they had brought to the attention of the 1st respondent that their rights were being violated and that they had demanded that an action be taken by the 1st respondent to carry out his duty which was of an imperative nature to remedy the situation and the same 1st respondent had refused to do so. In other words, the applicants have not shown that they had demanded performance.

From what we have stated above, it will be clear that on points of law, the orders of *mandamus* could not be available. That in effect means that prohibition could not issue as the seat could not be declared vacant by 1st respondent. However, assuming that the above points of law did not exist what would amount to resignation from a party on which support a Member of Parliament has been elected to the parliament for the purposes of section 40 of the Constitution? We have stated in passing hereinabove that there could be resignation by conduct or constructive resignation but we feel that we need to comment on this aspect of the case further.

Section 40 of the Constitution which we have reproduced hereinabove says clearly that the Member of the National Assembly should have resigned from the party in order that he may vacate his seat under that provision. It does not state that such resignation has to be in writing although the general understanding is that such resignation would be in writing so as to amount to a resignation. We feel however, that before one concludes that it must be in writing, one has to look at the constitution of the relevant sponsoring party to see what according to that party amounts to a resignation. We say so because the member has to resign "from that party" and so in our mind what would amount to resignation from that party will depend on the provisions of the constitution of that party. For example, if according to that party's constitution, certain conducts amount to resignation then if the member commits such conducts, then he would be considered to have resigned from that party. Further, one cannot ignore certain conducts that in general, would be viewed as acts that even though a Member of Parliament was elected with the support of a party, he has ceased for all practical purposes to be a member of that party. For example, if after his election to parliament with the support of that party he registers himself as a member of another party, and or accepts political posts in that other party. In such a situation it would be burying ones head in the sand to continue saying that such a Member of Parliament has not resigned from the party which sponsored him simply because he has not written a letter of resignation. However, such a conduct would be treated as amounting to resignation must in our mind, be such overt conduct that any reasonable person will see it as a conduct that leaves none with any other conclusion but that the member is for all intents

and purposes is no longer a member of the party that sponsored him. As we have stated above, it is the Court which will be investigating the case that will decide after receiving evidence that the conduct of the member was such that it could amount to constructive resignation.

In the case before us the Constitution of Shirikisho Party of Kenya states at clause 4 (f) as follows:

> (f) RESIGNATION: The resignation in writing of any member shall be effective immediately the letter of his resignation has been delivered to the party office.

Thus in this case, resignation from the party should be in writing. The 2nd respondent should have been shown to have resigned in writing before the provisions of section 40 could catch up with him on account that he resigned from the sponsoring party at a time when that party was still a parliamentary party. What about constructive resignation? Can one say his conduct was such that only one conclusion could be reached and that is that he had actually severed his links with Shirikisho party? As we have observed above allegations were made in the statement such as that he had taken membership card of another party (KANU) but no evidence was adduced to verify the same. For example, it was alleged in the statement that the ceremony of his defection to KANU was reported by the Kenya dailies on 30th April 2002 in a prominent manner but copies of the same dailies were not annexed to the verifying affidavit. Again, it was stated that he issued press statement of his plan to defect on 28th April 2002 the same press statement was not availed and lastly by way of examples that he was given life membership card of KANU but the card was not annexed. The applicant maintained that those allegations remained proper as they were not denied, but the Court needed the evidence to be able to consider whether the same amounted to overt actions such that one could conclude from reading the same that the 2nd respondent had constructively resigned from Shirikisho party even if he did not write a letter of resignation.

Thus, even if we were to look into the substance of the application, there would not have been enough evidence to lead us into the conclusion that 2nd respondent had constructively resigned from the party with which support he went to Parliament.

Before we conclude this ruling, we do agree with Mr Mungatana that the practice of members elected with support of one party defecting to another party once in parliament without following the right procedure of tendering their written resignation is unhappy and needs to be stamped out. We cannot say that once a member is elected into the August House, on the ticket of a party, he cannot change his mind and seek to be in another party. That is his democratic right. All we are saying is that he has to accept that as a honourable member, he should strive to always remain honourable by being honest and bold enough to actually resign in writing and leave his seat vacant so that the party that had earlier sponsored him can have a chance to sponsor another person who accepts its policy. Such an action of following the right procedure will also avoid confusion both in the House and in the country.

If, however, a member decides to defect to another party without following the right procedure, then as we have stated, the voters who feel their rights to proper representation have been infringed should proceed to the High Court present evidence to the satisfaction of the Court and seek a determination that the seat has become vacant and armed with that determination the Speaker would then be asked to act under section 18 of the National Assembly and Presidential Elections Act Chapter 7 Laws of Kenya. The Court will determine in such a case whether there is upon evidence before it, constructive resignation or not.

This application cannot succeed. It is dismissed with costs to the respondents.

We want to state that the hearing of the matter started on 23rd October 2002 and the hearing was concluded on 24th October 2002. We reserved the ruling to be delivered on 25th November 2002, but on 25th October 2002 the Parliament was dissolved only one day after the hearing was concluded. The effect of that is that as at the time of the delivery of this ruling, the seat is already vacant and the two orders sought cannot be made even if the application were to succeed as courts do not make orders in vain.

Dated and delivered at Mombasa this 25th day of March, 2002

J.W.O OTIENO **L .P OUNA**

JUDGE **JUDGE**