



REUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 259 OF 1998

KAMAU KIBUNJA.....APPLICANT

VERSUS

ATTORNEY GENERAL & 12 OTHERS.....RESPONDENTS

RULING

Kamau Kibunja, hereinafter called applicant was, at one time, a member of the thirteenth respondent society. His membership was terminated and he was expelled on 15th May, 1997. Other steps, which for purposes of this brief ruling, I can only refer to as administrative, were also taken against him by the thirteenth respondent.

Being dissatisfied with the decision to expel him from the membership, the applicant, by Originating Motion dated 13th March, 1998 and filed in the High Court Civil Registry on 18th March, 1998, invoked sections 71, 75, 80 and 82 of the Constitution, all of which, he said, had been breached, or were in danger of being breached by the respondents through the decision and actions of the thirteenth respondent.

The Originating Motion was brought under section 84 of the Constitution which provides, in sub-sections (1) and (2) thereof, for appropriate redress to a person who complains of breach or likely breach of his or her constitutional rights.

Not surprisingly, having been filed way back in 1998, the application has gone through a number of mentions before different judges. One particular mention came before the duty judge who, I was informed, directed that the application be heard by a single judge. This notwithstanding, no hearing took place and the application remained pending until it was recently mentioned before me for directions.

The mentions before me took place on a number of dates including 30th July, 2002 and 1st October, 2002. At these mentions, the applicant was represented by Dr Kamau Kuria Advocate while the respondents were represented by various advocates. Dr Kamau Kuria, in his submissions, demonstrated the manner in which, according to him, the rights of his client had been violated under the sections of the constitution already quoted. He, accordingly, asked me to set down the application for hearing before an appropriate bench.

The advocates for the respondents opposed Dr Kamau Kuria's request for a bench to hear the application. Mr Gichuru for the 2nd and 8th respondents urged that the applicant should pursue his complaints at an appropriate tribunal established under the Co-operative Societies Act which deals with disputes in Co-operative Societies. According to Mr Gichuru, there was no justification for the applicant to seek constitutional redress in the High Court until the statutory machinery given to him by the said Act of Parliament has been exhausted.

Mr Wachira advocate for the 7th and 13th respondents also addressed me in opposition to the request for a bench to hear the application. He pointed out that the application was mentioned before the duty judge in August, 1999. The duty judge gave directions and others that the hearing be done before a single judge. According to Mr Wachira, if the applicant acted in accordance with the duty judge's directions, the application would, as of today, have been heard and completed. Mr Wachira further supported the submissions of Mr Gichuru to the effect that the applicant should have exhausted the machinery of redress given to him by the provisions of the Co-operative Societies Act.

The State Counsel who appeared for the Attorney General also supported Mr Gichuru's submissions. She added that the dispute was, basically, between the applicant and the 2nd, 4th and 13th respondents. The Attorney General, according to her, only came in on behalf of the DO Mathira who, according to the applicant's affidavit, excluded the applicant from attending a meeting convened by the thirteenth respondent.

In reply to the submissions by the advocates for the respondents, Dr Kamau Kuria explained that, in 1998, when the application was filed, rules had not been made by the Chief Justice under section 84(6) of the Constitution to govern and control the hearing of applications brought under section 84 of the constitution. That was the same position when the application was mentioned before the duty judge who gave an order that hearing be done by a single judge. Now that rules have been made since the year 2001, Dr Kamau Kuria argued, it was only prudent and desirable that the matter be mentioned before the Chief Justice as required by those rules for directions as to the hearing of the application.

It is true that in 1998 the rules under section 84(6) of the Constitution of Kenya were not yet made. It is, equally, true that the rules have now been made and have been published in Gazette Notice No 133 of 2001. Although the application was filed before the rules, the hearing comes when the rules are in force, and in my opinion therefore, the hearing must be in accordance with the rules.

For the preceding reasons, I am satisfied that I am now seized of the application under new and additional matters which were not before the duty judge who gave directions in 1999. In the circumstances, I can, quite properly, look at the matter afresh and give directions in terms of the new Rules in Legal Notice No 133 of 2001.

I have examined the complaints raised by Dr Kamau Kuria in the Notice of Motion and the submissions he made before me. He has complied with the basic requirements in an application of this nature. He has identified the sections of the constitution which, according to his client, have been breached or are in danger of being breached. Dr Kamau Kuria has also demonstrated before me, with authorities, the manner of the alleged breaches. In previous rulings, I have held that an application coming under section 84 of the Constitution, should be able to specify these requirements to persuade me that there is a clear case that should go forward for a full hearing before a bench appointed by me for that purpose in accordance with the Rules in Legal Notice No 133 of 2001.

I have taken into account the submissions of Mr Gichuru on behalf of the 2nd and 8th respondents that the applicant should avail himself of the machinery given to him by the Co-operative Societies Act. While I recognise the weight of this submission, at the same time though, constitutional matters take precedent over any other matters. Where a party alleges infringement of constitutional rights, in my opinion, he has the right to bring an application directly and speedily under the constitution, irrespective of any other mode of action that may be available to him under any other law. Several decisions of this court have held so in the past and I am satisfied that this is the correct state of the law that should be upheld, subject, of course, to the peculiar circumstances of each case or application that comes before the courts.

As the application is under section 84 of the Constitution, the number of judges to hear it remains in my discretion. In exercising that discretion, I have said repeatedly in the past, I take into account several factors which include, but are not limited to the complexity of the case and the issues raised, their nature, their weight, their sensitivity if any, and the public interests in them if any. Several of these factors are obtainable in this application. Thus, all considered, I am persuaded that this is a proper case that should go for a full hearing before a bench of two judges to be appointed by me in due course. I order

accordingly. I now ask the advocates for the parties to give me their date proposals for the hearing which, in view of the crowded schedule of this court, must be between the 1st and 20th of December this year so that this matter does not remain pending into the new year.

Dated and delivered at Nairobi this 18th day of October, 2002

B. CHUNGA

CHIEF JUSTICE