



Association of Friends of Youths and Women v Speaker, National Assembly & 3 others (Petition E025 of 2023) [2023] KEHC 23548 (KLR) (9 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
PETITION E025 OF 2023
DO CHEPKWONY, J
OCTOBER 9, 2023**

**IN THE MATTER OF ARTICLES 2, 4, 10, 19, 21, 22, 23, 47, 73, 165,
236, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: THE STANDING ORDER 20A
OF THE NATIONAL ASSEMBLY STANDING ORDERS**

**IN THE MATTER OF: THE UNPROCEDURAL REMOVAL OF
THE DEPUTY MINORITY WHIP IN THE NATIONAL ASSEMBLY**

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 20115

BETWEEN

ASSOCIATION OF FRIENDS OF YOUTHS AND WOMEN PETITIONER

AND

SPEAKER, NATIONAL ASSEMBLY 1ST RESPONDENT

CLERK, NATIONAL ASSEMBLY 2ND RESPONDENT

NATIONAL ASSEMBLY 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. On May 30, 2023, the Petitioners moved the court through a Petition and a Notice of Motion application, both dated the same date. The Petition sought the following orders:-
 - a. A declaration that the national assembly standing order number 20A (4) and (5) violates articles 10, 47 and 236 of the Constitution thus null and void.



- b. A declaration that the decision to remove Hon Sabina Chege as communicated by the 1st respondent *vide* communication of May 4, 2023 is null and void ab initio for being contrary to articles 10, 47 and 236 of the Constitution.
 - c. That costs of the petition be borne by the respondents.
2. The notice of motion application dated May 30, 2023 on its part seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of this Petition this Honourable Court be pleased to issue a conservatory order suspending the implementation of the decision to remove Hon Sabina Chege from the office of deputy minority whip in the National Assembly as communicated by the 1st respondent *vide* communication of May 4, 2023.
 - d. That the honourable court be pleased to issue such further order or orders as it may deem just and expedient for the ends of justice.
 - e. That the costs of this Application be provided for.
3. The application is based on the grounds set out on its face and those in the annexed affidavit of Allan Mburu, the petitioner/applicant, chairman. To wit, it is the petitioner's/applicant's contention that the Speaker of the National Assembly, the 1st respondent herein communicated to the National Assembly that he had received a letter dated April 6, 2023 from the leader of the minority party informing him of the removal of Hon. Sabina Chege as the deputy minority whip on the basis of her disloyalty to the Minority Party and dalliance to the majority party. However, in communicating the contents of the said letter, the 1st respondent refrained from interrogating on the legality of the suggested removal of the Hon. Sabina Chege on the reason that the subject was a preserve of other adjudicating bodies such as the judiciary. As such, the 1st respondent allowed the minority party thirty (30) days to communicate on the replacement of the deputy minority whip.
4. The Petitioner now alleges that standing order No.20A(4) of the National Assembly states that a decision for replacing a whip or deputy whip shall be communicated in writing and Standing Order No.20A(5) provides that the 1st Respondent shall thereafter communicate such decision without any interrogation, that the two provisions have failed to lay down the procedure to be followed for the removal of a whip or Deputy Whip hence contrary to Articles 10, 47 and 236 of the Constitution which guarantees the right to fair administrative action and fair hearing. Ultimately, the Petitioner challenges the Constitutionality of Standing Order No.20A(4) and Standing Order No.20A(5) of the National Assembly in view of Articles 10, 47 and 236 of the Constitution and seeks conservatory order staying a decision from being taken against Hon. Sabina Chege pursuant to the said Standing Order until their constitutionality is determined.
5. The 4th Respondent filed Grounds of Opposition dated 7th June, 2023 highly opposing its inclusion in the matter since acts or omissions by him have been disclosed hence no cause of action had been raised against him. In any event, he avers that it would be against the mandate of the 4th Respondent to go against the decisional independence of the bodies whose acts have been impugned. Simply put, the 4th Respondent alleges that no cause of action has been disclosed against it and the Petition does not require the 4th Respondent to implement or undertake the action in the prayer sought.



6. On 13th June, 2023, the 1st, 2nd and 3rd Respondents filed Notice of Preliminary Objection on the following grounds:
 - a. That the Honourable Court lacks the jurisdiction to determine this manner under the doctrine of "exhaustion", courts must exercise restraint in exercising their jurisdiction conferred by law and must give deference to such dispute resolution mechanisms established by law with the mandate to deal with such specific disputes in the first instance.
 - b. That the Petition and Application are in contravention of Article 159 of the Constitution of Kenya as read together with Section 40 of the *Political Parties Act*, 2011. The Petitioner, having failed to exhaust the alternative mechanisms under the Constitution and the *Political Parties Act*, the Petition and Application violates the Constitutional principle/doctrine of exhaustion.
 - c. That the Petition and Application are therefore premature and not ripe for determination by this Honourable Court.

Basically the 1st and 3rd Respondents challenge the court's jurisdiction to hear and determine the Petition on the basis of the doctrine of exhaustion.

7. To this end, this Court shall start by addressing the Notice of Preliminary Objection as a response to the Notice of Motion application dated May 30, 2018 before delving into the other two applications dated June 12, 2023 and June 13, 2023 which are merely joinder applications and may be dependent on the outcome.
8. On the same June 13, 2023, Hon Sabina Chege moved the court seeking to be enjoined as an Interested Party in the matter. Similarly, on the same June 13, 2023 Azimio la Umoja One Kenya Coalition Party filed an application seeking to be joined as a 5th Respondent in these proceedings and for the matter to be transferred to Milimani High Court and be consolidated with Petition No. E166 of 2023, for hearing and determination. It further seeks to have the orders of May 31, 2023 vacated.
9. This application by Azimio la Umoja Kenya Coalition was opposed through a Replying Affidavit sworn by Allan Mburu as a Chairman of the Petitioner stating that the 5th Respondent does not qualify as a party in the proceedings since its rights have not been violated or infringed in any way and therefore does not have an interest in the matter and is only seeking to divert the attention of the court to other issues other than those raised in the Petition. As such the Petitioners hold that the 5th Respondent not being a party in the suit cannot seek vacation of court orders and the application should therefore be dismissed.
10. On June 14, 2023 the court issued directions for the pending applications and the notice of preliminary objection filed by the 1st and 3rd Respondents to be canvassed contemporaneously by way of written submissions which parties complied. The court has read through the said submission to be considered in the determination of the application and notice of preliminary objection.
11. The Notice of Preliminary Objection filed herein has raised the issue of jurisdiction, which may dispose off the entire Petition, if successful. This is because it is trite law that jurisdiction of courts is everything and without it the court must down its tools. This was the position laid out in the celebrated case of "*Owners of the Motor Vessel "Lilian S' v Caltex Oil (Kenya) Ltd*[1989], where it was held:-

“Jurisdiction is everything. Without it a court has no power to make one more 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....Where a court takes it upon itself to



exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given.”

12. To determine the notice of preliminary objection, the court has read through the notice of motion application and petition alongside the affidavits filed by the Petitioner and the grounds set out in objection and the submissions filed by the parties in urging their respective positions in the matter. The issue for determination is whether this Court has jurisdiction to handle the Notice of Motion application and Petition.
13. The law on what amounts to a Preliminary Objection was settled in the case of *Mukisa Biscuits Manufacturing Limited v West End Distributors* [1969] EA 696 and has been accepted across most jurisdiction with little or no additions given the dynamic nature of the law.
14. In view of that, and in reiteration of the precedents on the same subject, this Court points out that a Preliminary Objection is said to only consist of pure points of law and must not deal with factual information which stand to be tested by the rules of evidence. This if argued at a preliminary stage, a Preliminary Objection ought to be capable of disposing off a suit. Such pure points of law may include an objection to the court’s jurisdiction as taken by the 1st, 2nd and 3rd Respondents herein. Their objection is that the Petitioner ought to have given precedence to other forms of dispute resolution mechanisms and as more specifically as laid down under section 40 of the *Political Parties Act*.
15. Thus, in a matter such as the instant one, under the doctrine of exhaustion, this court’s jurisdiction would be invoked after that of the Political Parties Dispute Tribunal hence the right relief and or cause of action on the petitioner/applicant gravamen lies with the said Tribunal.
16. Section 40 of the *Political Parties Act* provides that:-
 - (1) The Tribunal shall determine—
 - (a) disputes between the members of a political party;
 - (b) disputes between a member of a political party and a political party;
 - (c) disputes between political parties;
 - (d) disputes between an independent candidate and a political party;
 - (e) disputes between coalition partners; and
 - (f) appeals from decisions of the Registrar under this Act; (fa) disputes arising out of party primaries.

Section 40(2) of the Act provides that:-

“Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”

17. A reading of the said provision clearly shows that there is a stipulated procedure for resolving disputes under the *Political Parties Act*, which ought to be followed before moving to court.
18. It is widely accepted that the doctrine of exhaustion precludes a party from seeking redress from a court of law on an action without first pursuing other available remedies. The exhaustion doctrine therefore serves the purpose of ensuring that there is postponement of the court’s consideration of matters to ensure that a party is, first of all, diligent in the protection of its own interests within the mechanisms



in place for resolution outside the courts. (see the case of *William Odhiambo Ramogi and 3 others v Attorney General & 4 others, Muslims for Human Rights and 2 others (Interested Parties)* [2020] eKLR.

19. In addressing the issue of whether the dispute raised in the Petition and application is a preserve of the Political Parties Disputes Tribunal, it is imperative to adopt the ‘predominant issues’ before court, which implies that what is important when determining whether the court has jurisdiction in a matter before it is to consider the predominant cause of action as opposed to individual cries, grievances and reliefs sought by the parties.
20. Thus, whereas it is true that the first call in a dispute between a Political Party and its members is the internally laid down dispute resolution mechanism, then the Political Parties Dispute Tribunal, the predominant cause of action in this Petition is whether the standing orders numbers 20A(4) and 20A(5) of the National Assembly are unconstitutional in view of articles 10, 47 and 236 of the *Constitution of Kenya, 2010*. And depending on the outcome thereof, the question becomes whether the action to remove Hon. Sabina Chege from the position of Minority Whip can then be taken up pursuant to the impugned standing orders numbers 20A(4) and 20A(5) of the National Assembly.
21. It is this Courts humble view that the exhaustion requirement would not serve the values enshrined under article 159 of the *Constitution* for the reason that it is outside the ambience of the Political Parties Dispute Tribunal to address the Constitutionality of legal provisions or any regulations thereof. Consequently, the court’s jurisdiction to address the issues raised in the Petition is not ousted under section 40 of the *Political Parties Act*.
22. However, turning to the merit of the application dated May 30, 2023, the same substantially seeks conservatory orders suspending the implementation of the decision to remove the Hon. Sabina Chege from the office of the Deputy Minority Whip in the National Assembly. The major ground adduced in support of this prayer being that whereas the standing orders numbers 20A(4) and 20A(5) of the National Assembly form a basis of implementing the decision for removal of the Minority whip and the Deputy Minority Whip, no procedure is provided for before the removal as a measure of safeguarding the constitutional rights of the affected member especially on due process and fair administrative action.
23. It is this court’s view that courts ought to be hesitant in sanctioning acts done pursuant to provisions of a statute unless the said statute or provision thereof has been declared unconstitutional. This is so because the doctrine of presumption of constitutionality and legality of statutes fronts that unless otherwise proven, statutes are deemed constitutional and valid, and may only be suspended in the clearest of cases, for example, where the statute under question is a threat to life or to the Bill of Rights. That having been said, whereas it is alleged that standing orders numbers 20A(4) and 20A(5) of the National Assembly should be declared unconstitutional, it is yet to be demonstrated to this court that the same are a threat to life or to the Bill of Rights.
24. Nonetheless, it is worth of note that the decision to remove Hon. Sabina Chege from the position of Minority Whip was undertaken *vide* a letter dated April 6, 2023 and is yet to be implemented pursuant to standing order 20A(5). In a nutshell, the decision was communicated *vide* the letter dated 6th April, 2023 which she cannot be suspended on the basis of the unconstitutionality of the Standing Orders Numbers 20A(4) and 20A(5) of the National Assembly for obvious reason that it was not issued or passed under the said provisions, or among other Standing Order of the Parliament connected to Standing Order No.20A(5). The decision in the letter dated 6th April, 2023 is by the Minority Party on the basis of their party regulations, wherein the court believes there is a procedure provided for, to circumvent or weigh the merits of such decision.



25. Moreso, it is important to point out that in the communication dated 4th May, 2023, the 1st Respondent overruled the decision in the letter dated April 6, 2023 for being incompetent and for failing to comply with the requirements of Standing Order Numbers 20A(4) and 20A(5) of the National Assembly. The 1st Respondent clearly outlined the reasons for his refusal to implement the communication in the letter dated April 6, 2023.
26. Having read through the extracts of the letter dated May 4, 2023, this Court finds that at no point does the 1st Respondent oppose or oblige with the requests made in the letter dated April 6, 2023. His advice was that if the Minority Party wished to continue with the exercise of removing the Hon. Sabina Chege from the Deputy Minority Whip, then it ought to proceed on a fresh communication which is compliant with standing order 20A but not the impugned communication in the letter dated April 6, 2023. The 1st Respondent never communicated that the decision in the letter dated April 6, 2023 to remove the Hon. Sabina Chege would be implemented.
27. In this court's respectful and humble view, the Petitioner's missed it all and or misconstrued and misunderstood the communication by the 1st Respondent's dated 4th May, 2023. In view of this, there is no decision to suspend.
28. Having pointed out that, it is trite law that where the Constitution or Statute or a political party provides for internal dispute resolution mechanisms, the same must be exhausted first before approaching the court. If this is not done, then this court's jurisdiction is ousted or restricted. This was the position in the case of *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* [2016] KLR where it was held that:
- “The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute...The subject's right of access to the courts may be taken away or restricted by statute...Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court's jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner.”
29. This issue was also discussed in the case of *Rich Productions Limited vs. Kenya Pipeline Company & another* [2014] where the court held that:
- “The reason why the Constitution and law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 of the Constitution to supervise bodies such as the 2nd Respondent such supervision is limited in various respects, which I need not go into here. Suffice it that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issues in dispute into constitutional issues when it is not.”
30. This court finds that it has no jurisdiction to make any further orders in the matter. In the upshot:-
- a. The notice of preliminary objection dated June 12, 2023 is partly found to have merit in view of the doctrine of exhaustion.



- b. The notice of motion application dated May 30, 2023 is found lacking in merit and is dismissed accordingly.
- c. The parties to move to the appropriate forum for further orders in regard to petition, and the application for joinder by the 4th and 5th respondents.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 9TH DAY OF OCTOBER, 2023.

D.O CHEPKWONY

JUDGE

