



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. E248 OF 2021

HON. ISAAC MWAURA MAIGUA.....APPELLANT/APPLICANT

-VERSUS-

JUBILEE PARTY..... 1ST RESPONDENT

REGISTRAR OF POLITICAL PARTIES.....2ND RESPONDENT

THE HON. KENNETH LUSAKA, SPEAKER

OF THE SENATE.....3RD RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....4TH RESPONDENT

RULING

- 1) The subject matter of this ruling is the notice of preliminary objection dated 21st May 2021, filed by the 1st respondent. In aforesaid notice, the 1st respondent seeks to have the dismissal and or striking out of the appellant's application and appeal dated 11th May 2021. With the concurrence of learned counsels appearing in this matter, this court gave directions to have the notice of preliminary objection disposed of by written submissions.
- 2) I have considered the grounds set out on the face of the notice of preliminary objection. I have further considered the rival written submissions plus the authorities cited. It is the submission of the 1st respondent that this court lacks jurisdiction to entertain, hear and determine this matter.
- 3) It is pointed out by the 1st respondent that the appellant's application relates to the replacement of the appellant as the 1st respondent's nominated member to the senate therefore the application is not capable of invoking this court's jurisdiction as an election court.
- 4) It is further argued that the appellant's appeal is in respect of a challenge of disciplinary process hence it cannot be transmuted into an appeal to an electoral process. The 1st respondent also argued that the appellant filed the amended motion dated 13.5.2021 with full knowledge that the nomination of Sammy Prisa Leshore to serve as a senator representing the people with disabilities has crystallised.
- 5) It is the argument of the 1st respondent that the dispute relating to the nomination and replacement of the appellant can only be determined by dispute resolution forums on electoral processes.
- 6) The 2nd respondent supported the 1st respondent's preliminary objection vide its submissions dated 27th May 2021 and urged this court to determine the question of jurisdiction based on the decision of **Samuel Kamau Macharia and another =vs= Kenya Commercial Bank Ltd & 2 others (2012) e KLR**.
- 7) The 3rd respondent, too, supported the 1st respondent's preliminary objection. It is argued that the orders sought if granted violates the principle of separation of powers since they seek to interfere with the internal management of parliament and the political parties that constitute members of parliament.
- 8) It is further argued by the 3rd respondent that the appeal has been overtaken by events and hence rendered as an academic exercise.

9) The 4th respondent on the other hand too, supported the 1st respondent’s preliminary objection. It pointed out that the appeal cannot be used as an avenue to adjudicate the question as to whether or not Sammy Prisa Leshore was lawfully elected as a member of the senate since by doing so, the court will have transmuted the appeal into an election petition and the court into an election court.

10) The appellant vehemently opposed the notice of preliminary objection arguing that the same does not qualify to be regarded as a preliminary objection. This court was urged to bear in mind that it is not required to enter into any detailed analysis of the facts as same will thus render the preliminary objection one not based on a point of law if it requires analysis of evidence. This court was beseeched to find that there is no proper preliminary objection before the court to determine.

11) The appellant has pointed out that the 1st respondent has misconstrued the appellant’s appeal as an invocation of the court’s jurisdiction as an electoral court or appellate electoral court which is not the case.

12) It is stated that the court’s jurisdiction is invoked by dint of Section 41 of the Political Parties Act. It is also argued by the appellant that the 1st respondent had failed to tender credible evidence to establish that the nomination with respect to Sammy Prisa Leshore had crystalised.

13) Having considered the grounds set out in the preliminary objection and the rival written submissions plus the authorities cited, it is apparent that this court has been invited to determine the question whether the 1st respondent’s notice of preliminary objection qualifies to be regarded as a preliminary objection.

14) In the case of **Mukisa Biscuit Manufacturing Co. =vs= West End Distributors Ltd (1969) E.A 696**, the court defined a preliminary objection inter alia as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

15) I have already set out the grounds the respondents put forward in support of the notice of preliminary objection. There is no doubt that this appeal arose out of the decision of the Political Parties Disputes Tribunal and by dint of Section 41 of the political Parties Act, this court assumes jurisdiction to entertain the same.

16) It is argued that by a gazette notice the appellant was replaced by one Sammy Prisa Leshore as a member of senate representing persons with disabilities. The question which must be answered and settled is whether using the processes mentioned hereinabove, the position stated by the 1st respondent crystalised.

17) This may call for evidence to ascertain. It would appear that the preliminary objection ceases to be one when evidence is required to ascertain certain facts before the court. The other issue which is contested is the assertion by the 1st respondent that the appellant’s appeal hinged on the alleged nomination of another person to allegedly replace the appellant. The issue which will need to be determined is whether or not the appeal transmuted itself into an election petition.

18) This is a matter which must first be ascertained upon considering evidence and submissions. In sum, I have come to the conclusion that the 1st respondent’s preliminary objection is premised on contested facts and evidence.

19) In other words, I find that the 1st respondent’s objection does not qualify to be regarded as a preliminary objection. Consequently, the notice of preliminary objection dated 21st May 2021 is ordered struck out with costs abiding the outcome of the applications dated 11th and 12th May 2021.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF JUNE, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondent