REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

JUDICIAL REVIEW APPLICATION NO. 8 OF 2020

REPUBLIC.....APPLICANT

VERSUS

RODGERS A. TINDI.....1ST RESPONDENT

PHILIP MANGALA.....2ND RESPONDENT

JOHN MAKHANU WERE.....3RD RESPONDENT

KENYA AFRICAN NATIONAL UNION.....4TH RESPONDENT

***EX-PARTE*: JONATHAN CHACHA WECHE AND VINCENT SHIONGO**

JUDGMENT

1. The *ex-parte* applicant moved this court by way of a Motion, dated 24th June 2020, and filed on the same date, seeking, among other orders, an order of *certiorari*, questioning the 4th respondent's decision in Complaint No. 5 of 2020.

2. Complaint Number 5 was lodged by the 1st, 2nd and 3rd respondents in the Political Parties Dispute Tribunal in Nairobi, to be hereafter referred to as the Tribunal, seeking a permanent injunction, barring the *ex-parte* applicants from claiming that they are the officials of the 4th respondent, Lurambi Branch. In the complaint, the 1st, 2nd and 3rd respondents also sought for an order restraining or stopping the *ex- parte* applicants from receiving rent from the premises known as Kakamega Municipality Block II/230. It was from the determination of the Tribunal, on that complaint, that the subject judicial review emanates.

3. The *ex-parte* applicants have outlined the grounds on which they seek that the orders made by the Tribunal in Complaint No. 5 be quashed. The grounds are that the Tribunal lacked jurisdiction to entertain the complaint, that the Tribunal entertained a matter that was *sub-judice* and, that it acted in excess of its mandate by ousting duly elected officials of the 4th respondent.

4. The present application has been canvassed by way of written submissions. The *ex-parte* applicants submitted that the pendency of Kakamega CMCC No. 162 of 2019, filed by the 1st, 2nd and 3rd respondents estopped the Tribunal from hearing and determining Complaint No. 5 of 2020. In their submissions, the 1st, 2nd and 3rd respondents acknowledge that they indeed filed Kakamega CMCCC No. 162 of 2019, but submitted that the court in the said suit acknowledged that it did not have jurisdiction to grant the reliefs which they had sought. They submitted that their advocates, at the time, ought to have filed a notice of withdrawal of the suit, which was not done, and, for that reason, they plead that the mistakes of the advocate should not be meted out on them.

5. Let me know turn to the merits. In *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR (Nyamu J), the court highlighted the ground upon which judicial review orders may be sought and obtained, as follows:

> *"The grounds for judicial review have experienced unprecedented increase and the challenge for the court is to weigh each and every case presented before it on its own merits. However, there are conservative grounds that have remained outstanding in judicial review challenge such as: -*
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> *(i) Abuse of discretion.*
>
> *(ii) Irrationality.*

(iii) Excess of jurisdiction.

(iv) Improper motives.

(v) Failure to exercise discretion

(vi) Abuse of the rules of natural justice

(vii) Fettering of discretion.

(viii) Error of law."

6. The purpose of judicial review was explained in *Republic vs. Political Parties Dispute Tribunal & 3 others Ex-Parte Saadia Ahmed Mumin* [2018] eKLR (Odunga j) as follows:

> *"... the purpose of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question."*

7. *The supreme court practice 1997 Vol. 53/1-14/6 states*:

> *"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself.*
>
> *It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question."*

8. Did the Tribunal have jurisdiction to entertain the complaint? The Tribunal is established under Part VI of the Political Parties Act, Act No. 11 of 2011. The Act outlines the jurisdiction of the Tribunal under section 40, as follows:

> *"Jurisdiction of the Tribunal*
>
> *1) The Tribunal shall determine—*
>
> *(a) disputes between the members of a political party;*
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> *(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.*
>
> *(2) 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."*

9. The above provisions mandate the Tribunal to entertain disputes relating to members of a political party, subject to the members first exhausting the parties' internal dispute resolution mechanisms.

10. The parties hereto have indicated that the constitution of the 4th respondent provides for internal dispute resolution mechanisms. The said constitution has not been placed in the record before me by the parties. I, however, note that the Tribunal did have the advantage of hearing the parties, and analyzing the documents presented by the parties. In its decision, rendered on the 3rd June 2020, the Tribunal noted that the 1st, 2nd and 3rd respondents had written to the 4th respondent, regarding their complaint against the *ex-parte* applicants, but their quest was unfruitful.

11. The object of having a dispute resolved through internal mechanisms, provided by a political party, is the assumption of the expert bearing possessed by the political party, on grounds that the rules were developed by the political party itself. It is after the internal dispute resolution mechanisms fail that the member aggrieved approaches the Tribunal to have the dispute resolved. In *Rich Productions Limited vs. Kenya Pipeline Company & Another* [2014] eKLR(Mumbi Ngugi. J), the court said:

> *"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."*

12. Where a party raises a claim that a tribunal or any *quasi*-judicial body, or even a judicial body, exceeded its mandate, the burden of proving that lies on the person claiming so, and that burden can only be discharged by availing tangible evidence. See *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR (Nyamu J.).

13. The *ex-parte* applicants herein, in my view, have failed to prove that the Tribunal acted outside its jurisdiction, since its actions were well within its powers, and there is evidence that the 1st, 2nd and 3rd respondents had made attempts to resolve the current dispute with the 4th respondent, in vain.

14. Is the instant application *sub judic*e? Section 6 of the Civil Procedure Act, Cap 21, Laws of Kenya, in defining *sub judice*, provides as follows:

> *"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."*

15. The use of the word "or" in that provision, seems to imply that the statements are independent. However, the section should be read as a whole, as elaborated in *Thiba Min. Hydro Co. Ltd vs. Josphat Karu Ndwiga* [2013] eKLR (Olao J.), where it was said that it was "… *not the form in which the suit is framed that determines whether it is sub-judice, rather it is the substance of the suit and looking at the pleadings in both cases …"*

16. I have noted that no pleadings have been placed on record to assist me determine if the substance of Kakamega CMCCC No. 162 of 2019 and that of Complaint No. 5 of 2005 were the same. As such, the allegation that the instant application violated the *sub judice* rule has not been established or substantiated.

17. In the upshot, it is my finding that the Tribunal had jurisdiction to determine Complaint No. 5 of 2005, and that it acted within its mandate, and the orders it made are not available for quashing by way of the judicial review order of *certiorari*. Consequently, the Motion dated 24th June 2020 is not merited, and it is hereby dismissed, with costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF June 2021

W MUSYOKA

JUDGE