



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E118 OF 2021

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 23, 25, 27, 47,
165(3) (d), 258 AND 260 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 1(1) & (2), 2(1), 3(1), 10(1), (2), 19 (2),
20(2), 24(1) (2) & (3), 27(1), 35(1), 38(1) (2) & (3), 47(1) (2), 48, 50(1) (2),
94(1) (2), (4) & 117 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ATION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: STANDING ORDER NO. 20 OF THE SENATE STANDING ORDERS

-BETWEEN-

HON. CLEOPHAS MALALA.....1ST PETITIONER

AMANI NATIONAL CONGRESS.....2ND PETITIONER

AND

THE SPEAKER OF THE SENATE.....1ST RESPONDENT

THE ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

PARLIAMENTARY SERVICE COMMISSION.....3RD RESPONDENT

AND

HON. STEWART MADZAYO.....1ST INTERESTED PARTY

RULING

THE PETITION

1. The Petitioner through a Petition dated 9th April, 2021 seek the following reliefs:-

a) A declaration that the Coalition Agreement dated 22nd February, 2017 as amended to include Chama Cha Mashinani vide Admission Agreement dated 20th April, 2017 and further amended vide the Addendum filed with the office of the Registrar of Political Parties on 27th April, 2017 is a complete code governing the affairs of the opposition coalition in Parliament and therefore binding unless vacated.

b) A declaration that the purported decision allegedly made by ‘NADA Senators’ on 24th March, 2021 and communicated to the Speaker through the Senate Minority Deputy Whip, Hon. Senator Beatrice Makori Kwamboka of the 2nd Respondent, removing the 1st Petitioner from the office of Deputy Senate Minority Leader, was made by a non-existent organ of the Minority coalition with no authority or power to make decisions on behalf of the NASA coalition and therefore null and void.

c) A declaration that the 1st and 2nd Respondents contravened the rights of the 1st Petitioner guaranteed under Article 24, 25, 27, 35, 47, 48 and 50(1) of the Constitution.

d) An order of Certiorari be and is hereby issued to bring to the High Court and quash the communication of the speaker of the senate made on 24th March 2021 informing the Senate that the Minority Party has made the following changes:

i. Senator Cleophas Malala, MP stands removed from office of the Deputy Senate Minority Leader;

ii. Senator Stewart Madzayo, MP stands elected to the office of the Deputy Senate Minority Leader.

e) An order that the 2nd Respondent to bear the costs of these proceedings.

f) Any other relief this Honourable Court deems fit.

NOTICE OF MOTION

2. Simultaneously with the filling of the Petition the Petitioners filed an application dated 9th April 2021 seeking the following orders:-

a) Prayer no. 1 Spent.

b) That Pending the hearing and determination of this Application inter-partes, a conservatory order be and is hereby issued stopping the 3rd Respondent from undertaking any action in respect of the office currently held by the 1st Interested Party-Deputy Senate Minority Leader.

c) Pending the hearing and determination of this Application inter-partes, the 1st Interested Party be and is hereby prohibited from assuming, continuing in or performing the functions of the office Deputy Senate Minority Leader.

d) Pending the hearing and determination of the Petition inter-partes, decision of the 1st Respondent to communicate and inform the senate that 1st Petitioner had been replaced by the 1st Petitioner had been replaced by the 1st Interested Party in the office of the Deputy Senate Minority Leader be and is hereby suspended.

e) The Cost of this application be borne by the 2nd Respondent.

3. The Application is premised on supporting affidavit of the Hon. Cleophas Malala and Kelvin Lunani dated 9th April 2021 as well as further affidavit in Reply by Hon. Senator Cleophas Malala dated 7th May 2021.

RESPONDENTS RESPONSE

4. The 2nd Respondent filed Replying Affidavit sworn upon by Edwin Sifuna the 2nd Respondent’s Secretary General on 23rd April 2021. They also filed a Preliminary Objection challenging the jurisdiction of the Court to hear and determine both the application and the Petition.

SUBMISSIONS BY PARTIES

5. The parties filed submissions in support and in opposition of the Notice of motion dated 9th April 2021. The Petitioners submission were filed on 7th May 2021 whereas the 2nd Respondent’s submission were filed on 11th May 2021.

BACKGROUND

6. The application and the Petition arise from the decision of the members of the 2nd Interested Party to replace, the 1st Petitioner as the Deputy Minority Leader in the Senate. On 14th March 2021, the 1st Petitioner, was removed from the position of the Senate Deputy Minority Leader by a group, calling itself NASA Senators, mainly drawn from the 2nd Respondent. The 1st Respondent, the Speaker of the Senate ruled that the Petitioner had been removed and replaced by 1st Interested Party.

7. The substance of the application and the Petition is based on the alleged breach of the NASA Coalition Agreement dated 22nd February 2017.

8. The Petitioners contended, that the other three partners to the coalition objected the said removal, as the same had been done illegally by the 2nd Respondent, based on its numerical strength in the Senate but in complete disregard of the Coalition Agreement, that is binding upon all the partners thereto.

9. The 1st Petitioner approached the Political Parties Tribunal and registered a complaint against the 2nd Respondent, on account of violating and disregarding the Coalition Agreement and was able to obtain an interim order, suspending the decision made by the 2nd Respondent's Senators, disguised as NASA Senators.

10. The Petitioners in addition, have invoked the jurisdiction of the Court contending violation of their rights by the 2nd Respondent, which move is to be implemented by the 1st and 3rd Respondents.

ANALYSIS AND DETERMINATION

11. I have very carefully considered the pleadings herein and the rival submissions and from the aforesaid the following issues arise for consideration:-

a) Whether this Court has jurisdiction to hear and determine the application and the Petition. (If the Court has jurisdiction)

b) Whether the Petitioner has met the threshold for granting conservatory orders sought. (If the Court has jurisdiction to hear and determine the matter.)

A. WHETHER THIS COURT HAS JURISDICTION TO HEAR AND DETERMINE THE APPLICATION AND THE PETITION.

12. The 2nd Respondent in its Preliminary Objection contended, that the Court lacks jurisdiction to hear and determine this matter for failure on part of the Petitioners to have complied with **Section 40 of the Political Parties Act** and **Section 9(2) of the Fair Administrative Action Act**.

13. It is 2nd Respondent's contention, that if the Preliminary Objection is upheld, it would determine these pleadings in their entirety and as such sought the same to be heard first.

14. The 2nd Respondent urged that under **Section 40(2) of the Political Parties Act** and **Section 9(2) of the Fair Administrative Action Act**, this Court lacks jurisdiction to hear any dispute between Political parties; between coalition partners and by any person claiming breach of fair administrative action, unless and until the dispute has been heard and determined by the Internal Political Party Dispute Resolution mechanisms and thereafter the Political Parties Tribunal or until all appeal mechanisms provided for in law have been exhausted.

15. It is noted with regard to **Section 40 of the Political Parties Act**, it is provided as follows:-

“(1) The Tribunal shall determine-

(a) ...

(b) ...

(c) Disputes between political parties;

(d)

(e) Disputes between coalition partners; and

(f)

(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. (Emphasis added).

16. The Petition under paragraph 46 of the Petition as well as the application seek to invoke **Section 4 and 5 of the Fair Administrative Action Act**, which is not ripe for consideration by virtue of **Section 9(2) of the Fair Administrative Action Act**, which clearly provides:-

“(2) The High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

17. It is trite that Court cannot act in matters where it has no jurisdiction for jurisdiction is everything, and a premise upon which a Court or Tribunal derives the power, authority and legitimacy to entertain any matter before it. In support of this proposition reliance is placed in the case of **Phoenix of E.A. Assurance Co. Limited vs. S. M. Thiga t/a Newspaper Service [2019] eKLR** where the Court stated thus:-

“...’Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”

18. I find, that having stated the relevant law relied upon, by the 2nd Respondent, in support of their Preliminary Objection, I have in return to find out whether it has been established, whether the Petition and the application fall within the purview as circumscribed under **Section 40(2) of the Political Parties Act** and **Section 9(2) of the Fair Administrative Action Act** before aking cognizance of issue raised in the parties’ pleadings herein.

19. A close perusal of the Petitioners’ pleadings, it is clear, that the alleged dispute herein, arose from the NASA Coalition Agreement of 22nd February 2017, running from page 1 – 17 annexed to the 1st Petitioner’s supporting Affidavit, which as noted do not have pages 14 and 15 therein. The 2nd Respondent has annexed complete copy of the same marked as exhibit ES-1, which reveals existence of provision for Internal Dispute Resolution Mechanisms.

20. This Court noted that **Article 12 of the Agreement** unequivocally provides, that any dispute between Coalition Partners be first submitted to the summit, failing which the same should be referred to a Dispute Arbitration Panel subject to the right of appeal to the Political Parties Tribunal. This Article binds parties in respect of any dispute between Coalition Partners. In the instant application, and Petition, I find that no explanation or excuse, has been provided nor is there an attempt to explain the Applicant’s failure to comply with clear and express mandatory Statutory provisions of the NASA Coalition Agreement, the Political Parties Act or the Fair Administrative Action Act.

21. It is clear, that the Petitioners have not demonstrated the reasons for failure to comply with the Exhaustion Doctrine, before moving this court through the Application and the Petition herein. The 2nd Respondent urge, that the Petitioners, should have complied with the Exhaustion Doctrine and further they have not given sufficient reasons for their failure to do so. Reliance was placed in Mativo J’s decision in the case of **Godfrey Osotsi vs. Amani Naitonal Congress (2019) eKLR** which set out an elaborate analysis of the rationale for the exhaustion doctrine (see para 29 thus);

“I have severally stated that this doctrine is now of esteemed juridical lineage in Kenya [24] and was felicitously stated by the court of Appeal [25] in Speaker of National Assembly vs. Karume [26] in the following words:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

29. The above case was decided before the promulgation of **Constitution of Kenya**. However, many cases in the **post-2010 era** have found the reasoning sound and provided justification and rationale for the doctrine under the **2010 Constitution**. [27] The court of Appeal provided the Constitutional rationale and basis for the doctrine in **Geoffrey Muthinja Kabiru & 2 others vs. Samuel Munga Henry & 1756 others**, [28] where it was stated that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts... This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

30. In the matter of the **Mui Coal Basin Local Community**, [29] the High Court stated the rationale thus:-

“The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution; that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fess to the forum even while creating what Supreme Court Justice J. B. Ojwang’ has felicitously called an “Ascendant Judiciary.” The Constitution does not create an Imperial Judiciary zealously fueled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases...”

22. The Petitioner relied on **Article 22 and 258 of the Constitution** in justifying the filing of this Petition, urging every person has the right to

institute Court proceedings claiming, that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. He further urged that the Constitution provides, that every person has the right to institute Court proceedings, claiming that this Constitution has been contravened or is threatened with contravention either on their own behalf and on behalf of others more importantly and pertinent in the public interest. Reliance was placed in the case of *E. W. A & 2 others vs. Director of Immigration and Registration of Persons & another* [2018] eKLR at para 24:

“As for the appropriate reliefs, this Court is empowered by Article 23(3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition “appropriate relief” is the one given by the South African Constitutional Court in Minister of Health & Others vs. Treatment Action Campaign & Others (2002) 5 LRC 216 at page 249 thus: “...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights... The courts have a particular responsibility in this regard and are obliged to forge new tools’ and shape innovative remedies, if need be to achieve this goal.”

23. The issue as raised in the Preliminary Objection by the 2nd Respondent, is whether this Court lacks jurisdiction to hear and determine this matter but not the issue related to institution of Petition on enforcement of Bill of Rights under **Article 22** or on enforcement of the Constitution under **Article 258**. The issue raised by the 2nd Respondent is non-compliance with clear provisions with regard to Exhaustion Doctrine of internal dispute resolution mechanism, Political Party Dispute Resolution Mechanism and Political Parties Tribunal or Appeal mechanisms as provided for in law. I find where there is a clear procedure for redress of any particular dispute prescribed by the Constitution or any Act of Parliament, or in an agreement, that procedure should faithfully and strictly be followed without failure before a party can move and seek relief form a Court of Law.

24. In the instant Petition and application, the Petitioners overlooked a clearly spelled out procedure, without having the dispute first heard and determined through Internal Political Party Dispute Resolution Mechanisms, as well as through Political Parties Tribunal, and if need be through Appeal Mechanisms, as provided in law. I find as the Petitioners / Applicants failed to exhaust the mechanisms for dispute resolution as set for in law, this Court has no jurisdiction until that is complied with first to review the decision complained of. I find this Court lacks jurisdiction to hear the application and the Petition for reasons set out in this ruling.

25. In view of my findings, on the key issue on jurisdiction, in which I have found that this Court lacks jurisdiction to entertain the application and the Petition, for failure on part of the Petitioners to comply with Exhaustion Doctrine, I shall not proceed to determine the application and Petition for want of jurisdiction.

26. ***The upshot is that the application and the Petition are accordingly dismissed. Each party to bear its own costs.***

Dated, Signed and Delivered at Nairobi on this 1st day of July, 2021.

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J. A. MAKAU

JUDGE