



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW MISC. NO. 18 OF 2018

IN THE MATTER OF ARTICLES 10, 23, 38, 47 AND 178 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 3, 4, 5, 7 FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF KIAMBU COUNTY ASSEMBLY STANDING ORDERS

AND

IN THE MATTER OF LACK OF FAIR HEARING PRIOR TO DISCHARGE FROM COUNTY ASSEMBLY COMMITTEES

AND

IN THE MATTER OF AN EXERCISE OF A STATUTORY DUTY BY PUBLIC ENTITIES

BETWEEN

NGUGE DANIEL NGUGI.....1ST APPLICANT

KAREMA SIMON KURIA.....2ND APPLICANT

TAKI JULIUS MACHARIA.....3RD APPLICANT

VERSUS

HON. STEPHEN R. N. NDICHO.....RESPONDENT

RULING

1. Nguge Daniel Ngugi, Karema Simon Kuria and Taki Julius Macharia (1st, 2nd and 3rd Applicants respectively) are members of the County Assembly of Kiambu. In the material period, they were nominated by their political party, the Jubilee Party, to sit in various committees of the said county assembly. Whilst the 1st Applicant sat in the Finance, Budget and Appropriations and Selection Committees, the 3rd Applicant sat in the Public Service and Administration Committee. The 2nd Applicant also sat in the Finance Budget and Appropriations Committee. The events leading to the present action are as follows. On 4th September 2018, a communication was dispatched by way of a letter of even date, being annexure “SN1” to the Replying affidavit.

2. Emanating from the Office of the Majority Leader and Office of the Majority Party Whip of the Jubilee Party, the communication

addressed to the Respondent in his capacity as the Speaker of the County Assembly of Kiambu, the letter was to the effect, *inter alia* that:

“RE: NOTICE TO DISCHARGE MEMBERS FROM COMMITTEES

Pursuant to provisions of Standing Order 188 (1) of the County Assembly of Kiambu Standing Orders, the Jubilee Party being the nominating party has discharged the above mentioned Honourable Members from the Committees listed below:

1. COMMITTEE ON FINANCE, BUDGET AND APPROPRIATIONS

By this notice and in compliance with provisions of Standing Order 221(2), the underlisted Honourable members stand discharged from the Committee on Finance, Budget and Appropriations:

1. Hon. Nguge Daniel Ngugi, MCA

2. Hon. Karema Simon Kuria, MCA

2. COMMITTEE ON PUBLIC SERVICE AND ADMINISTRATION

By this notice, the Honourable Taku Julius Macharia, MCA stands discharged from the Committee on Public Service and Administration.

3. COMMITTEE ON SELECTIONS

By this notice, the Honourable Nguge Daniel Ngugi, MCA stands discharged from the Committee on Selection.”(sic).

3. The communication is signed by **Hon. Antony Ikonya, MCA**, the Majority Party Leader and **Hon. Elijah Njoroge, MCA** the Majority Party Whip, and resulted in the communication from the Chair of the House, that is, the Respondent, dated 5th September, 2018 to the following effect, *inter alia*:

“COMMUNICATION ON A NOTICE TO DISCHARGE MEMBERS FROM COMMITTEES

Honourable Members,

My office is in receipt of a letter dated 4th September, 2018 from the Assembly Jubilee Party Leadership, that is the Office of the Majority Party Leader and the office of the Majority Whip whose reference is notice to discharge members from Committees.

The Letter reads and I quote:

....

“Honourable Members,

As a matter of practice in other Commonwealth parliaments and in accordance with the provision of standing orders 189(2), I am required to communicate receipt of such notification for your information. Arising from the above, I now refer the matter to Committee on Selections to expedite nomination and replacement of affected Members to **committees so as to avoid stalling of business of the Assembly” . (sic)**

4. It would appear from the uncontroverted contents of paragraph 11 and annexure “SN3” of the Replying affidavit, the Applicants subsequently invoked the internal party dispute resolution mechanism of the Jubilee Party. A decision was rendered on 2nd October 2018 by the Secretary General of the Jubilee Party, Raphael Tuju. To the effect *inter alia* that:

“After listening to ... members of the Kiambu County Assembly Committee members who were de-Whipped from various department committees of the assembly and the leadership of the assembly, Majority Leader and the Chief Whip.

The party resolved as follows:

1. That the Jubilee Party leadership of the house is hereby asked to appoint the de-whipped M.C.A’s to different committees in line with the interest of the Party.

2. That the court cases filed by the JP members in pursuant of the differences/disputes should be withdrawn in the interest of the party image and smooth service delivery of the Assembly and County.”

5. At the time of the canvassing of the instant motion, the Applicants had NOT withdrawn the motion filed in this court on 12th September,2018 and pressed on with it. The motion is seeking: -

“2... leave to commence judicial review proceedings seeking orders of Prohibition barring the Respondent acting through himself, agents, servants, employees ... from in any way interfering, discharging, removing or in any other way undertaking acts that prejudice the operations of the applicants in rendering their services in their respective County Assembly of Kiambu Committees.

3. ...leave to commence judicial review proceedings seeking orders of Mandamus compelling the Respondent to avail reasons, documents, minutes or proceedings occasioning the discharge, removal and/or interference with the applicants rendering then services in their respective committees.

4. ...leave to commence judicial review proceedings seeking order of Certiorari quashing the respondent’s communication of 5th September, 2018, purporting to discharge the Applicants from their respective committees.

5. ...leave granted to commence judicial review proceedings operates as a stay barring the respondent... acting through himself, agents, servants ... from in any way interfering, discharging, removing or in any way undertaking acts that prejudice the operations of the applicants in rendering their services in their respective County Assembly of Kiambu Committees pending the hearing and determination of these **Judicial review proceedings.”(sic).**

6. The motion is expressed to be brought under Article 23 of the Constitution, Sections 3, 4, 5, 7, 9 and 11 of the Fair Administrative Action Act and order 53 Rules 1, 2, 3, and 4 of the Civil Procedure Rules and is supported by the grounds on the face of the motion and the affidavit sworn by the 1st Applicant on his own behalf and on behalf of his co-Applicants.

7. The gist of the Applicants’ complaint is that they were unaware of any communication from the Jubilee Party to the Respondent justifying the communication of 5th September 2018 and that the Respondent’s action purporting to discharge them from the committees is illegal, unprocedural and against the rules of natural justice, in addition to being a violation of the Applicants’ constitutional rights. The Respondent, through his affidavit in reply, earlier adverted to, narrated the events leading to his communication and asserted that, party affairs are fall under the office of the Majority Leader and are not within his purview as Speaker of the County Assembly, and that, with particular regard to the subject matter, his role was limited to receiving and communicating the notice of discharge of the Applicants, pursuant to Kiambu County Assembly Standing Order No. 188; and that the action of discharging a member from a house committee lay with the nominating party, in this case, the Jubilee party.

8. During the oral canvassing of the motion, the Applicants counsel reiterated the depositions in their affidavit, emphasizing that the Applicants were denied the right to be heard before discharge from the respective committees. Counsel for the Respondent restated the material in the Replying affidavit and argued that the Respondent is the wrong party to be sued as the actions complained of were by the political party.

He stated that no *prima facie* case had been established to justify the orders sought. It was his view that the definition of an administrator as found in the Fair Administrative Action act must be read alongside the provisions of Standing Order 188 of the Kiambu County Assembly. The Applicants’ rejoinder was to distinguish between removal from membership of Committees by the party, and removal from office by the Respondent, pursuant to Standing Order 90 and 91. That the Respondent is an administrator and therefore bound by the provisions of the Fair Administrative Action Act. That the Respondent was under a duty to ensure that the Applicants received a hearing before removal from office.

9. The court has considered the material and arguments canvassed by the respective parties. Only two issues in my opinion require determination and will dispose of the matter. Firstly, the nature of this dispute and secondly, whether this court is the proper forum to adjudicate over it. Or in other words whether the Applicants’ complaint is one for which this court ought to give leave to commence judicial review proceedings.

10. Concerning the first issue, the Applicants’ pleadings speak for themselves. The Applicants were aggrieved that they had been de-whipped from membership of various committees of the County Assembly and appeared to assert that no communication from their political party to that effect had been received by the Respondent. At paragraph 7 of the supporting affidavit, the Applicants depose that the Respondent purported to discharge them from the committees **“in the guise of having received communication from the Jubilee Party, which is the nominating party”** (sic). And further at paragraph 8, that:

“... what is stated in the communication by the Respondent is untrue as we have not ourselves received the alleged communication by the Jubilee Party or word that there was an intention to discharge us, or any complaints made to the Jubilee party requiring us to be discharged”

11. Thus, it is disingenuous for the Applicants, when confronted with the communication from the nominating party authorizing their discharge, to change tack and argue that they were removed from “office” and that pursuant to standing Order 90 and 91 ought to have been given a hearing by the Respondent. A cursory reading of the said provisions and comparative reading with other provisions in **Part XVI** of the Standing Orders clearly shows that references therein are to removal from office and not from house committees. The title to **Part XVI** of the Standing Orders reads: **“PROCEDURE FOR REMOVAL FROM OFFICE”**. Standing Orders 84, 85, 86, 87 for instance, provide for the procedure for the removal of a governor, Deputy Governor, Member of County Executive from office.

12. Standing Orders 90 and 91 are of general application to the removal of the incumbent of different offices under the Part. Standing Order 90 states that:

(1) Whenever any written law or these Standing Orders

—

a) Requires the Assembly to refer to or form a committee for purposes of considering a petition or proposal for the removal of a person from office, the person being removed from office shall be availed, in writing, the information contained in a petition or proposal and shall be entitled to legal representation and availed with the report of the committee, together with any other evidence adduced and such note or papers presented to the committee at least three days before the debate of the motion.

b) Requires the Assembly to hear a person on grounds of removal from office; or in such similar circumstances, the Assembly shall hear the person...” (emphasis added)

13. The Applicants occupied the elective office of Member of County Assembly. From their own pleadings, the removal complained of is their discharge from membership of house committees and not removal from office. Pursuant to Standing Order 185 they were nominated to the said committees by their political party. They have not cited any provision, outside of Standing Order 188 which requires compliance with Standing Order 90 and 91 concerning the discharge of members from committees. The undisputed fact that the Applicants in the initial stage referred the dispute concerning their discharge to the internal party mechanism in the Jubilee Party for resolution of disputes, and their own annexures confirm that their discharge was effected pursuant to Standing Order 188 of the Kiambu County Assembly. The said order provides that;

“The Assembly party that nominated a member to a committee, may give notice in writing, to the speaker that the member is to be discharged from a committee.

(2) The discharge of member shall take effect upon receipt by the Speaker of notice under paragraph

(1).”

14. And while the Respondent did in fact communicate the decision of the nominating party to discharge the Applicants, the decision was by the political party, as demonstrated by annexure “SN1” to the Replying affidavit. There can be no disputing that the dispute presented in this case is a political dispute, emanating from the decision of the Jubilee party to de-whip the Applicants. Both the nomination of members of committees pursuant to Standing Orders 184 – 187 and discharge therefrom under Standing Order 188 are primarily the prerogative of the nominating political party.

15. As regards the second issue, Parliament, in recognition that disputes could occur in political parties, has provided a special mechanism to deal with them. Hence the provisions of Sections 39 and 40 of the Political Parties Act. Section 39 provides for the establishment of the Political Parties Disputes Tribunal. Its jurisdiction is stipulated in Section 40(1) as follows:

“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”.

16. In reinforcing the independence of political parties in the management of their internal affairs, including disputes arising, Section 40(2) of the Act provides that:

“(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 mechanism.”

17. Contrary to assertions by the Applicants, it is an inescapable fact that, rightly or wrongly, they were discharged from their respective committees by their nominating party acting pursuant to the Standing Orders of the Kiambu County Assembly, and not by the Respondent. The Respondent's nexus with the Applicant's woes appears tenuous at best, a peripheral act of communicating the decision of the Applicants' party to the County Assembly, and no more. In my view, by dint of the provisions Section 9(2) of the Fair Administrative Action Act, as read together with Section 40(1) (a) and (b) of the Political Parties' Act , this dispute belongs to the Political Parties Disputes Tribunal, now that the Applicants have already undeniably exhausted the internal party mechanism anticipated by section 40(2) of the Political Parties Act.

18. For all these reasons, it is my considered opinion that the Applicants' motion is both misconceived and bereft of factual or legal foundation.

The motion filed on 12th September 2018 is accordingly dismissed with costs.

SIGNED AND DELIVERED AT KIAMBU THIS 12TH DAY OF MAY 2020.

C. MEOLI

JUDGE