



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

JUDICIAL REVIEW NO. 271 OF 2016

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE DOCTRINE OF ULTRA VIRES,

IMPROPORTIONALITY AND UNREASONABLENESS

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF PRINCIPLE OF FAIR ADMINISTRATIVE PRACTICES

AND

IN THE MATTER OF THE PRINCIPLE OF NATURAL JUSTICE

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT NO 11 OF 2011

AND

IN THE MATTER OF THE POLITICAL PARTIES DISPUTES TRIBUNAL

AND

IN THE MATTER OF THE ARBITRATION ACT, 1995

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE POLITICAL PARTIES DISPUTES TRIBUNAL.....1ST RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....2ND RESPONDENT

HON. FRANCIS MATHEKA.....INTERESTED PARTY

EX-PARTE

1. HON. THOMAS KASOA

2. HON ALEX KAMITU

RULING

1. These proceedings were instituted by way of a Notice of Motion dated 1st November, 2016 by which the ex parte applicants herein sought the following orders:

a. An order of Certiorari to call into court and be quashed the decision of the Political Parties Disputes Tribunal in PPDT Complaint No. 23 of 2016 delivered on the 13th October, 2016 directed at the speaker of the county Assembly of Machakos to revoke any gazette Notice of the 1st and 2nd ex-parte applicants as the minority leader and minority whips respectively and making a declaration that the interested party is the minority leader of the county Assembly of Machakos.

b. Costs of the proceedings be provided for

2. The cause of action according to the 1st ex-parte applicant, who claimed to be elected as a Member of the Machakos county Assembly through Chama Cha Uzalendo and subsequently elected as the member of County Assembly as a minority leader in their house, is that after a meeting held on 2nd March, 2016 by Mwananchi Coalition that was formed between the National Democratic Congress and the Party of Independent Candidates, the 1st interested party was elected the minority Leader and the speaker of the county assembly was notified but however the Ex-parte applicant was not notified of such meeting. The 1st ex-parte applicant in his affidavit deponed on 18th October, 2016 averred that the interested party filed a complaint to the Political Parties Dispute Tribunal and allegations were made against the speaker of the county assembly of Machakos and the dispute related to who between the interested party and himself were the legitimately elected minority leader of the county assembly of Machakos.

3. It was averred that the interested party and the 1st ex-parte applicant are members of the Chama Cha Uzalendo party and that the dispute resolution mechanism in the political party is governed by the Party's constitution and specifically article 24 elucidates that before seeking redress in court, a party ought to exhaust internal resolution mechanisms and further that disputes between party members are to be resolved through recourse to arbitration. The deponent averred that without following the legal procedures the respondents and interested party were adamant in having the dispute heard before a panel of judges. It was averred that the Political Parties Disputes Tribunal had no mandate to entertain a dispute against the Speaker of the County Assembly of Machakos hence its decision made on 13th October, 2016 was made contrary to the mandate of the Political Parties Disputes Tribunal under the Political Parties Act, 2011 and the constitution of Kenya 2010 and the same ought to be declared null and void and quashed by the honourable court. Copies of the pleadings filed in the Political Parties Disputes Tribunal, the Party's Constitution, the impugned judgement and orders issued by the Political Parties Disputes Tribunal were annexed to the application.

4. There is no indication of any response from the Respondents and the interested party despite an indication of service on them as evidenced by the affidavit of service sworn by Peter Sema Mutunga on 8th May, 2017 and filed on 9th May, 2017.

5. Submissions were filed on behalf of the ex parte applicants on 30th May, 2017. According to the ex-parte applicants, the issues for determination are three-fold, *to wit*; Did the 1st Respondent have jurisdiction to direct the Speaker of the County Assembly of Machakos; Did the dispute between the interested party and the 1st and 2nd Applicants go through the proper internal dispute mechanism process before the same was lodged at the 1st Respondents tribunal and finally Did the 1st Respondent issue orders not sought for by the interested party.

6. On the first issue, counsel submitted that under Section 40(1) of the Political Parties Act, 2011 the jurisdiction of the Political Parties Disputes Tribunal does not include disputes with regard to the actions of the Speaker of a County Assembly and the jurisdiction lies with the High Court. According to counsel, the pleadings in the Political Parties Disputes Tribunal, the cause of action and all accusations were substantially related to the Speaker of the County Assembly of Machakos and the said speaker was not made party to the proceedings. Further that the judgement and orders of the Political Parties Disputes Tribunal that were dated 13th October, 2016 were directed to the said speaker to revoke the gazette of the 1st and 2nd ex-parte applicants as Minority Leader and Minority Whip in the County Assembly of Machakos and were made without jurisdiction to do so; the said decision was made against the principles of rationality, logic and reasoning under the Constitution of Kenya and the Wednesbury test. Counsel cited the case of **Council of Civil Service Unions v Minister of State for Civil Service (1984) 3 All ER 935**

7. On the 2nd issue, counsel submitted that there were internal dispute resolution mechanisms that were provided for by the party and the provisions of Section 40(2) of the Political Parties Act, 2011 qualifies the jurisdiction of the Political Parties Disputes Tribunal as being subject to exhaustion of internal political party dispute resolution mechanisms. It is counsel's submission that the said internal dispute resolution mechanisms were not employed or exhausted.

8. On the third issue, counsel submitted that the Tribunal could not grant an order not sought by the party for a party is bound by his pleadings. Counsel submitted that the Tribunal ordered costs and yet a prayer was made seeking no order as to costs. Counsel cited the case

of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014) eKLR.**

9. I have considered the submissions made on behalf of the Ex-parte applicants herein.

10. The issues for determination are whether the Political Parties Disputes Tribunal had jurisdiction to entertain the dispute and or grant the orders; and what orders the court may make.

11. The general rule as to jurisdiction is found in **Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Limited [1989] KLR 1** where Nyarangi J stated that where a court lacks jurisdiction, it has no power to make one more step and should down its tools.

12. In **Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367** the Court of Appeal stated that:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

13. The jurisdiction of the Political Parties Disputes Tribunal is laid out in Section 40 of the **Political Parties Act** that provides as follows:

(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) Dispute between an independent candidate and a political party;***
- (e) Disputes between coalition partners; and***
- (f) Appeals from decisions of the Registrar under this Act;***
- (f) Disputes arising out of party primaries.***

14. The substance of the dispute before the tribunal was the election of the 1st and 2nd ex-parte applicants as Minority Leader and Minority Whip and the acknowledgement of the same by the Speaker, Machakos County Assembly. The tribunal was urged to restrain the 1st and 2nd ex-parte applicants from assuming office and the tribunal in its judgement found that the 1st ex-parte applicant was not duly elected as the Minority Leader and therefore he had no power to nominate the 2nd ex-parte applicant as minority whip and that the interested party was the duly elected minority leader of the Machakos County Assembly and thus the speaker was ordered to revoke any gazetteement that was issued to acknowledge the 1st and 2nd ex-parte applicants as Minority Leader and Minority Whip respectively. From this decision, two questions arise namely: Does the tribunal have powers to overrule the actions of the Speaker of a county Assembly? Does the tribunal have powers to bypass internal dispute resolution mechanisms?

15. From the pleadings, it appears that there was a dispute between the ex-parte applicants and the interested party over who was to assume the role of the Minority leader and the applicant submitted that the mechanism for settlement of the dispute is governed by the party constitution. I am guided by the provisions of section 40(2) of the Political Parties Act that 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 mechanisms.”

16. The undisputed evidence on record is that disputes relating to party members are to be resolved by having recourse to arbitration. Therefore the import of Article 24 of the party constitution is to oust the jurisdiction of the tribunal to hear the dispute at first instance. From the judgement, it appears that there was no oral evidence tendered before the tribunal. Hence the matter was determined on affidavit and documentary evidence by the tribunal. It is my observation that the tribunal took it that the party employed a dispute resolution sitting at Small World Country Club on 20th April, 2016 but seems not to have satisfied itself that any arbitrator was appointed to resolve the dispute that found its way to the tribunal and in this regard I find that in terms of Section 40(2) of the Political Parties Act, the tribunal had no jurisdiction to entertain the dispute in the first place.

17. Accordingly, the decision made on 13th October, 2016 must be null and void. It was held by Lord Denning in **Macfoy vs. United Africa Co. Ltd [1961] 3 All ER 1169 at 1172** as follows:

“where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse”

18. In the result it is the finding of this court that the Ex_parte applicants application has merit. The same is allowed as prayed as follows:

1) An Order of Certiorari removing into this Court for the purposes of being quashed the proceedings and decision of the Political Parties Disputes Tribunal in Complaint No. 23 of 2016 – Hon Francis Matheka vs. Hon Thomas Kasoa & Another - which decision is hereby quashed.

19. As regards the issue of costs, I note that the applicants have sought for costs. However in light of the provisions of Article 160(5) of the Constitution, the Tribunal was exercising judicial authority and thus its members cannot be held liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. Nevertheless, the interested party who was the prime mover of the proceedings before the Tribunal will bear the applicants’ costs of these proceedings. It was the interested party who opted not to follow the dictates of the Political Parties Act and he should therefore bear the costs of these Judicial Review proceedings.

It is so ordered.

Dated, Signed and Delivered at **Machakos** this 7th day of **May, 2019**.

D. K. KEMEI

JUDGE