



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 275 OF 2016

HEZRON OBAGAPETITIONER

VERSUS

OMINGO MAGARA.....1ST RESPONDENT

CENTRE FOR MULTI PARTY DEMOCRACY.....2ND RESPONDENT

PEOPLES DEMOCRATIC PARTY3RD RESPONDENT

REGISTRAR OF POLITICAL PARTIES4TH RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner pleaded against the 1st Respondent a violation of Article 77 (2) of the Constitution as set out below and suing the 2nd respondent Organization and the Political Party in which the 1st respondent was, respectively, chairman and party leader, and the Registrar of Political Parties as the 4th respondent, as follows:

“5. The Petitioner avers that the 1st Respondent has and is in continuous infringement of the Constitution and has threatened to further infringe the Constitution under the implementation of Article 77 (2) of, the Constitution as follows:-

a) The Respondent is the Party Leader of the People’s Democratic Party.

b) That on the 27th April 2015 vide gazette Notice No. 2842 of 17th April 2015 the 1st Respondent was appointed Chairman of Kenya International convention Centre by his Excellency the President.

c) By virtue of the appointment the 1st Respondent is a State Officer and therefore is continuance as a party leader is unconstitutional.

d) The Respondent is also Chairman of the 2nd Respondent and again by virtue of his

appointment as a State Officer he continues to violate the constitution.

e) The 1st Respondent's name has also been nominated by 3rd Respondent as the delegate of the 3rd Respondent of the Centre for Multi-Party Democracy Annual Delegate Conference scheduled for 30th June 2016 which contravenes the Constitution.

f) The Election of the 1st Respondent as Chairman of the Centre for Multi Party Democracy was irregular, illegal and a nullity.

6. The Petitioner contends that acts of the 1st Respondent of holding political interest in political parties and in affiliate organizations is unconstitutional and risks further contravention of the Constitution and the state of the organizations.

2. The Petitioner consequently sought in his Petition dated 30th June 2016 the following reliefs:

a) "The Honourable Court do issue a declaration that the 1st Respondent as a State Officer is disqualified from being a party leader of the 3rd Respondent.

ALTERNATIVELY

A declaration that the 1st Respondent being a party leader of the 3rd respondent is disqualified from holding a state office as Chairman of Kenyatta International Convention Centre.

b) The honourable Court do declare that Article 77 of the Constitution of Kenya is in force and Mandatory that a State Officer shall not hold office in a political party.

c) A Conservatory Order restraining the applicant from discharging any duties as a State Officer pending the hearing of this Petition and as long as he remains an Officer of the 3rd Respondent.

d) The 4th Respondent do deregister the 1st Respondent as a party leader of the 3rd Respondent and as a delegate or official of the 2nd Respondent for the reason that 1st Respondent is a State Officer.

e) The election of the 1st Respondent as the Chairman of the Centre for Multi-Party Democracy be declared illegal, null, void and irregular and the runners up in the election be declared chairman.

f) That cost of this petition be awarded to the Petitioner."

The petition was supported by an affidavit of the petitioner sworn on 30th June 2016 setting out the facts relied upon.

RESPONSES

3. The 1st respondent OMINGO MAGARA averred that he had upon appointment as Chairman of the Kenyatta International Conference Convention (by Gazette Notice NO. 2842 dated 17th April 2015 and published on 27th April 2015) resigned as a member of the 3rd Political Party and denied that the 2nd Respondent was a political party, as follows:

3. THAT *previously I was the party leader of the 3rd Respondent but resigned upon being appointed by His Excellency the President to the Chairman Kenyatta International Conference Centre Board (KICC Board). Attached and marked "OM1" is true copy of the resignation letter.*

4. THAT *it is not true that I am the party leader of the 3rd Respondent, but I am the Chairman of the Centre for Multiparty Democracy is a body formed by political parties and was registered as a*

trust in 2004.

5. THAT as the chairman of the 2nd Respondent I am an impartial chairman working for the benefit and in the interest of democracy in the country and the office is not a political party office or a political office.

6. THAT chairman's office of the 2nd Respondent is neutral party which does not support, act as an agent or support or show opposition to any political party and therefore the position does not conflict with my duties as the Chairman of the KICC Board.

7. THAT as an office the Chairman's office of the 2nd Respondent is a political neutral office which does not support any particular political party.

8. THAT now I am no longer a party official and I don't hold any party position then the Petition in my view is overtaken by events and should be dismissed with cost."

4. The 2nd respondent filed an affidavit sworn by its Programme Officer OMWERI ANGIMA on 2nd November 2016 deponing that the 2nd respondent is a neutral party established by a Trust Deed dated 1st March 2004 and that there was no possibility of conflict of interest with the 1st respondent's role as chairman of KICC, as follows:

3. THAT I know as of my knowledge that both in the application aforesaid and the substantive Petition, the Petitioner has neither lamented any wrong doing nor sought for any orders as against the Second Respondent wherefore I verily believe that the instant Petition is on non-starter and ought to be dismissed and / or struck out forthwith as against the Second Respondent.

4. THAT without prejudice to my deposition in paragraph 3 hereinabove, I wish to confirm to this Honorable Court that indeed the First Respondent is the Chairman of the Second Respondent having been duly elected as such vide elections that were conducted sometime in June, 2016 and which elections I was the Returning Officer. (Annexed hereto and marked "OA1" is a true copy of the Elections Results in confirmation of the foregoing).

5. THAT I wish to further confirm to this Honorable Court that there had been no complaint save for this petition prior to or during the said elections whether against the First Respondent or Second Respondent and that the elections conducted were free and fair in line with the law and the Second Respondent's legal framework and instruments.

6. THAT I wish to further confirm to this Honorable Court that the Second Respondent is a neutral party in its dealings and which neutrality can be discerned from the Trust Deed establishing the Second Respondent in light of the objectives thereunder therefore I verily [believe] that there is no conflict of interest whether real or otherwise whatsoever between the Chairmanship of the First Respondent and that of First Respondent's position as Chairperson of the Kenya International Convention Centre (K.I.C.C.) (Annexed hereto and marked "OA2" is a true copy of the Trust Deed aforesaid in confirmation that the Second Respondent is a neutral party as can be seen from the objectives).

7. THAT I am informed by the First Respondent which information I verily believe to be true that he had already sometime in the year 2015 resigned as the Party Leader of the Third Respondent herein. (Annexed hereto and marked "OA3" is a true copy of letter dated 30th April 2015 in confirmation of the foregoing)."

5. The 3rd respondent did not enter appearance or file a replying affidavit in the matter.

6. The 4th respondent Registrar of Political Parties, Ms. LUCY K. NDUNGU, argued that the petitioner

was non suited against the 4th respondent as the latter's role was merely to register changes submitted by the political parties as follows:

9. **THAT** I am advised by my advocate an advice I truly believe to be true that under the Political Parties Act 2011, it is not within my mandate and functions to deregister or to change an official of a political party.

10. **THAT** In much as it is provided under the law that public officers shall not hold political offices, the procedure and process of changing a political party's official is outlined in Sec 20 of the Political Parties Act 2011 and my role is only to publish the changes as and when submitted by the political party.

11. **THAT** I am advised by my advocate an advice I truly believe to be true that based on the above reasons there is no case against the 4th Respondent as this is complete misjoinder as a Respondent in the Petition for the reason that there shall be no specific orders against ORPP in the long run.

12. **THAT** I pray that the only prayer in the alternative in this Petition against the Registrar of Political Parties be dismissed as the same is not within the law.”

SUBMISSIONS

7. The matter proceeded to the hearing of the main petition and Counsel for the Parties – Mr. Gikunda for the Petitioner, - made oral submissions on the Petition and judgment was reserved.

ISSUE FOR DETERMINATION

8. The only issue for determination is whether the 1st respondent as an appointed state officer being Chair of the Kenyatta International Convention Centre (KICC) is in breach of Article 77 (2) of the Constitution by holding at the same time an office in the Respondent Organization, and whether the 1st respondent had effectively resigned from the membership of the 3rd Respondent Political party.

9. If the answer to the first limb of the issue is in the affirmative or if the second inquiry is in the negative, the petitioner will be entitled to the declaration of violation of Article 77(2) of the Constitution and to consequent relief. Otherwise, the petition must be dismissed.

10. The term ‘State Officer’ is defined in Article 260 of the Constitution as “a person holding a State office” and that the 1st Respondent as an appointed chairman of the Kenyatta International Conference Centre (KICC) under the Tourism Act No. 28 of 2011 is a state officer, is indubitable. Indeed, it was common ground that the 1st respondent was an appointed state officer subject to the provisions of the Article 77(2) of the Constitution. What is dispute is whether the 2nd respondent is a political party for purposes of the prohibition in Article 77(2) and whether the 1st respondent had effectively resigned from the 3rd respondent political party at the time of the filing of the Petition.

11. The Petitioner's locus standi, despite not being a member of the 2nd and 3rd respondents, is easily answered by the universal standing provisions of article 258 as follows:

“**258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.**

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

DETERMINATION

The Principle

12. The prohibition against a state officer holding political party position is provided for under Article 77 (2) of the Constitution are as follows:

“(2) Any **appointed State officer** shall not hold office in **a political party**.”

13. The term ‘Political Party’ is defined in the Article 260 of the Constitution as follows:

““political party” means an association contemplated in Part 3 of Chapter Seven”.

Article 91 (1) of Part 3 of Chapter 7 of the Constitution gives the indicators of a political party as follows”:

“**91. (1) Every political party shall—**

(a) have a national character as prescribed **by an Act of Parliament;**

(b) have a democratically elected governing body;

(c) promote and uphold national unity;

(d) abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party;

(e) respect the right of all persons to participate in the political process, including minorities and marginalised groups;

(f) respect and promote human rights and fundamental freedoms, and gender equality and equity;

(g) promote the objects and principles of this Constitution and the rule of law; and

(h) subscribe to and observe the code of conduct for political parties.”

14. In addition, a political party must be registered as such under section 4 of the Political Parties Act which provide as follows:

4. Requirements of a political party

(1) An association of persons or an organisation shall not operate or function as a political party **unless it has been registered in accordance with the provisions of this Act.**

(2) The Registrar shall not register an association of persons or an organisation as a political party if such association or organisation does not meet the requirements set out in Article 91 of the Constitution.”

Whether the 2nd Respondent a political party

15. The TRUST DEED establishing the 2nd Respondent envisioned a public trust ***“which shall be the custodian of all political parties in order to carry out the objectives set out herein and more specifically for the enhancement of multiparty democracy in Kenya and strengthening the institutional capacity of political parties in order to promote social justice, equity and respect for human rights and fundamental freedoms through training, research, consultancy and through other lawful means....”***

16. It was not shown that the 2nd respondent was registered as a political party under the Political Parties Act, and Court has, therefore, no basis for holding that, in remaining a member of the 2nd Respondent, the 1st respondent violates Article 77 (2) of the Constitution. Accordingly, it has not been demonstrated that in holding an office in the 2nd Respondent, the 1st respondent was holding an ***“office in a political party”*** within the meaning of Article 77(2) of the Constitution.

Whether resignation of 1st respondent from leadership of 3rd respondent was effective

17. As regards, the 3rd respondent political party, the 1st respondent claimed to have resigned as Party Leader of the party, and therefore section 20 of the Political Parties Act is relevant, under which upon such notification, the political party is required to publish the change as follows:

“20. (1) Where a fully registered political party intends to change or amend—

(a) its constitution;

(b) its rules and regulations;

(c) the title, name or address of any party official; or

(d) its name, symbol, slogan or colour,

(e) the address and physical location of the head office or county office it shall notify the Registrar of its intention and the Registrar shall, within fourteen days after the receipt of the notification, cause a notice of the intended change or alteration to be published in the Gazette.

(2) The political party giving notification under sub-section (1) shall publish such notification in at least two daily newspapers having nationwide circulation.

(3) Upon the expiry of thirty days from the date of publication of the notice in subsection (1), the political party may, after taking into account any representations received from the public under subsection (1) and (2), effect the change or alteration in accordance with its constitution and rules.”

18. Failure by the 3rd respondent to notify the 4th respondent Registrar of Political parties may account for the confirmation by letter of 23rd June 2016 that the 1st respondent was the party leader of the 3rd respondent party. By analogy in the case of resignation from the party under section 14 of the Political Parties Act, the resignation of a party official is complete upon receipt of notification of the resignation to the Party. Section 14 provides as follows:

“14. (1) A member of a political party who intends to resign from the political party shall give a written notice prior to his resignation to—

(a) the political party;

(b) the Clerk of the relevant House of Parliament, if the member is a member of Parliament;
or

(c) the clerk of a county assembly, if the member is a member of a county assembly.

(2) The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House or county assembly.

(3) The political party of which the person is a member, the member, or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within three days of the resignation.” -

19. Accordingly, failure to by the 3rd respondent Political party notify the Registrar of Political Parties cannot detract from the resignation which takes effect immediately upon receipt by the political party. Failure to notify may make the political party liable to sanction under the Political parties Act, but it does affect the validity of the resignation.

20. The failure by the 3rd respondent to notify the Registrar, pursuant to section 20 of the Political Parties Act, of the change in the officials of the Party cannot be visited upon the 1st respondent who has dutifully tendered his resignation from the party leadership, in accordance with the law. The 1st respondent’s resignation letter dated 30th April 2015 was acknowledged by the 3rd respondent Political Party with receipt stamp dated the 4th May 2015, when his resignation must be deemed to have taken effect despite default, if any, by the 3rd respondent to notify the Registrar of Political Parties.

21. There was no evidence of collusion between the respondents to rebut the evidence of receipt of notice of resignation as a party leader of the 3rd respondent, and on a balance of probability, the Court must find that the 1st respondent had communicated his resignation to the 3rd respondent political party.

Whether 1st respondent otherwise barred from being Chair of the 2nd Respondent

22. Upon resignation as a party leader of the 3rd respondent political party in compliance with the provisions of the Constitution, the 1st respondent remained a party **member**, and as such member could still be deputized to represent the party in the 2nd respondent’s Board. Under Clause 10 of the Trust Deed, the Oversight Board comprises **“two representatives from each member party or forum, or as the general meeting shall determine.”**

23. In addition, it was not shown that the 1st respondent’s participation in the affairs of the 2nd Respondent offended political neutrality of his office as Chair of KICC in terms of section 12 of the Political Parties Act, which provides as follows:

“12. Restrictions on public officers in a political party

(1) A public officer shall not—

(a) be eligible to be a founding member of a political party;

(b) be eligible to hold office in a political party;

(c) engage in political activity that may compromise or be seen to compromise the political neutrality of that person’s office; or

(d) publicly indicate support for or opposition to any political party or candidate in an election.”

24. Accordingly, I do not find that the 1st respondent’s holding of the position of Chairman of the 2nd respondent Non-Government Organization was illegal in any way.

CONCLUSION

25. The petitioner has a right pursuant to Article 258 of the Constitution to bring the petition in public interest for the enforcement of the constitution even though he has not shown that he was a member of the 2nd respondent organization or the 3rd respondent political party.

26. The 1st respondent as chairman of the Kenyatta International Conference Convention is an *appointed state officer* for purposes of the section 77 (2) of Constitution. The 2nd Respondent as a Non-governmental Organization (established under a Trust Deed and being registered as a political party) is not a political party for purposes of the Political Parties Act, and the 1st respondent's membership thereto does not contravene the constitutional prohibition on state officers against becoming/being members of political parties under Article 77 (2) of the Constitution.

27. The Petitioner's case that the 1st respondent as a state officer has violated the constitutional provision of Article 77 (2) of the Constitution by remaining a member of the 2nd respondent Non-Governmental Organization is without merit.

28. The 1st respondent had effectively resigned from party leadership of the 3rd respondent party upon appointment as Chairman of the Kenyatta International Convention Centre and he has therefore not violated the provisions of Article 77 (2) of the Constitution by such membership as alleged.

ORDERS

29. For the reasons set out above, the Petition dated 30th June 2016 is dismissed.

30. There shall be no order as to costs.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 1st DAY OF MARCH 2017.

E. C. MWITA

JUDGE

Appearances:

M/S Gikunda Miriti & Co. Advocates for the Petitioner

Mr. Kiarie for the 1st respondent

Mr. Masika for the 2nd respondent

Mr. MakOlwal for the 4th respondent