



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CONSTITUTION PETITION NO. 13 OF 2014**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 27, 28, 47, 50, 159, 165, 197, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010,**

***AND***

**IN THE MATTER OF RULES 4, 10 AND 11 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURES RULES, 2013**

***AND***

**IN THE MATTER OF SECTION 14 OF THE COUNTY GOVERNMENT ACT NO. 12 OF 2012**

***AND***

**IN THE MATTER OF STANDING ORDERS NO. 156 AND 157 OF THE EMBU COUNTY ASSEMBLY STANDING ORDERS**

***AND***

**IN THE MATTER OF THE COMMONWEALTH PARLIAMENTARY PRACTICE PROCEDURES AND PRECEDENTS**

***BETWEEN***

**HON. KANJOGU NJIRU MBOGO.....1ST PETITIONER**

**HON. JOHN MWANGI MURIUKI.....2ND PETITIONER**

**HON. ROSE MUTHONI NDWIGA..... 3RDPETITIONER**

**HON. IBRAHIM SWALEH.....4TH PETITIONER**

**HON. AGATHA MUTHONI MBOGO..... 5TH PETITIONER**

**HON. SUSAN WANGAI NDWIGA.....6TH PETITIONER**

**HON ALBERT MUCHIRA KIGORO.....7TH PETITIONER**

**HON MICHAEL KARIUKI MUNYI.....8TH PETITIONER**

**VERSUS**

**THE SPEAKER – EMBU COUNTY ASSEMBLY.....1ST RESPONDENT**

**HON. ANDREW MBITHI MUIYA**

**MAJORITY LEADER – EMBU COUNTY ASSEMBLY.....2ND RESPONDENT**

**R U L I N G**

The petitioners filed this petition on the 10th December, 2014 seeking for temporary injunction/conservatory orders against the respondent to be restrained either by themselves or their agents or servants from removing or causing removal of the petitioners from the Embu County Assembly committees on infrastructure, Budget and Appropriation, Public Investments and Health pending the hearing and determination of this petition.

The respondents represented by Muchoki Kangatta and Njenga advocates filed a notice of preliminary objection dated 17/12/2014. Parties agreed to dispose of the preliminary objection by way of written submissions. The petitioner's counsels are Onyoni Opini & Gachuba advocates.

In their submissions the respondents argued that this court has no jurisdiction in view of Sections 39 and 40 of the Political Parties Act, No. 11 of 2011 to the extent that it provides for the Political Parties Tribunal.

It is the respondents contention that the dispute leading to the filing of this petition arose from disagreement of the Jubilee Coalition leaders. The petitioners are members of the Embu County Assembly nominated by the Jubilee Coalition to various committees of the County Assembly. The 2nd Respondent who is leader of Majority in the Assembly from Jubilee Coalition is said to have written to the first respondent the speaker of the Assembly instructing him to remove the petitioners from the committees. The Chief Whip of the Assembly who is from the same coalition wrote to the speaker urging him not to remove the petitioners from their positions in the committees. The speaker proceeded to act on the communication of the 2nd respondent who according to him has the mandate to communicate from the party position to the assembly.

The petitioners then filed this petition challenging the decision of the Leader of Majority to remove them as irregular and unlawful. From this summary of facts, the respondent argues that this court has no jurisdiction and that the matter falls within the ambit of the Political Parties Tribunal. In essence, the respondent contends that this is a dispute between members of a political party.

The petitioners opposed the preliminary objection on grounds that the petitioners are before the court for adjudication of their constitutional right were and continue to be violated by the respondents. Article 22(1) of the Constitution was cited that the petitioners have a right to sue for violation of their constitutional rights. This court is mandated under Article 165(3) to determine whether a right or a fundamental freedom has been violated, denied, infringed or threatened. Under Article 23 this court has power to grant the orders sought by the petition. The petitioners argued further that the facts leading to filing this petition have been misrepresented by the respondents. The nature of the dispute alluded to by the respondents has not been explained.

The petitioners further argued that for the Political Parties to hear any dispute as provided for under Section 40, it must be demonstrated that the internal mechanisms of the party have been exhausted. Further that the petitioners have not been given a chance by the 1st respondent to resolve the dispute if any within the party, inspite of the existence of the conflicting communication by the 2nd respondent and the party chief whip.

Considering that the Political Parties Tribunal lacks jurisdiction to determine violation or denial of the petitioners constitutional rights, it follows that the petition is rightly before the court for the determination

of the constitutional issues which also involve the rights of the people they represent.

The petitioners argued that the preliminary objection was not properly before the court because it has included matters of fact instead of being restricted on points of law.

I have considered the arguments of both parties in this application. The first issue for determination is whether the preliminary objection is properly before the court. In the case of **B VS ATTORNEY GENERAL, [2004] 1 KLR** where the court was faced with a similar issue, it was held;

*“A preliminary objection should be founded on pure points of law and should be truly prefatory and preparatory to issues of substance in the claim in question. Such an objection may also touch on uncontested facts, on the basis of which a decision by the court would dispose of the whole matter coming before in in limine”.*

In the case of **MUKISA BISCUIT CO. VS WEST-END DISTRIBUTORS LTD the Nairobi Civil Appeal No. 9 of 1969**, the Court of Appeal observed that:-

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

From the wording of the notice of the preliminary objection and the submissions of the respondent, it is my considered opinion that this objection is based on pure points of law regarding the jurisdiction of the court. The objection rightly touches on important matters of fact which the court ought to consider in determining whether it is possessed of jurisdiction to deal with this petition. The objection is, therefore, in order and properly before the court.

The law on the disputes to be resolved by the Political Parties Tribunal is contained in Section 40 of the Political parties Act, 2011 which provides:

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

The petition lists the acts of the 1st and 2nd respondent in paragraph 5, 6, 7, 8 and 9 accusing them of removing them from the leadership and memberships of various committees of the assembly without regard to the laid down procedure. The petitioners allege that they were not given a chance to be heard or served with a notice of the intended removal. It is their contention that the chief whip has the mandate to communicate to the speaker decisions of the party on removal.

It is in this capacity that he wrote a letter to inform the speaker that the position communicated a few days earlier by the leader of majority was wrong and not valid since the party had not held any meeting to make a decision for removal of the petitioners from the respective committees. The respondents on the other hand, argue that the mandate of communicating the party position lies with the 2nd respondent.

In respect of the acts explained of it is important to cite a few as presented in the supporting affidavit:-

### Paragraph 6

*That by a letter/internal memo dated 2nd December 2014 Hon. Linus Muchina in his capacity as Jubilee Coalition Majority Chief Whip in the County Assembly wrote to the 1st respondent informing him of the reversal of the decision communicated vide the 2nd respondent's letter dated 27th November, 2014 on basis that the jubilee coalition had not collectively made any such decision and in any case it was the duty and/or responsibility of the coalition chief whip which to whip members but not the majority leader.*

### Paragraph 7

*That communication from the chair on the 2nd December, 2014 the 1st respondent informed the Embu County Assembly Members that he had received the aforesaid two letters/memos and had made a decision to uphold the former with the effect that the Petitioners should be discharged from their respective County Assembly Committees membership.*

### Paragraph 8

- (i) The Jubilee coalition leaders and/or members never held any meeting which resolved to have the Petitioners discharged from the assembly committees.*
- (ii) The Petitioners were never given notice of the decision to discharge them from the Assembly Committees prior to the communication to the 1st Respondent by the 2nd Respondent.*
- (iii) The petitioners were never supplied with a list of accusations and/or misconduct, violation of jubilee coalition manifesto and/or other reasons that warranted the decision to discharge them from the assembly committees and neither were they given a chance to defend themselves an/or respond to any such accusations.*
- (iv) The Petitioners have never been summoned by the Jubilee coalition leaders for any meeting to discuss the decision to discharge them from the committee and the reason for such decision.*
- (v) The decision of the 2nd respondent communicated to the 1st respondent was not accompanied by minutes of the jubilee coalition meeting which made the resolution to discharge the petitioners from the committees.*

The reading of the foregoing paragraphs fault the procedure of removal by the Jubilee coalition through the 2nd respondent. The bone of contention is that the petitioners were not served with the allegations against them; and that they were not accorded the right to be heard by their party. The 1st respondent is also faulted for acting on the letter of the 2nd respondent which according to the petitioners was nullified by that of the chief. The petitioners' argument is that the 1st respondent's letter was not based on any minutes of the coalition which was unprocedural.

The respondents relied on the case of **REPUBLIC VS SUSAN KIHKA AND OTHERS, Nakuru Misc. Application No. 20 of 2014 (unreported)** where it was held:-

*It is not in dispute that the dispute herein is political, as it relates to a member of a political party and the decision of the members of the political party to remove the subject from the position as the leader of majority of the Jubilee coalition....it is noteworthy that the orders sought are discretionary and the court before exercising such discretion in favour of the subject matter must be satisfied that the subject has exhausted or followed the available legal procedures laid down by statute.*

The respondent also cited two other cases where the courts held that it had no jurisdiction on similar

grounds

1. ***PAUL PATOIRE OLE KAIKA VS ORANGE DEMOCRATIC MOVEMENT [2014] eKILR***
2. ***HON. ENG. EPHRAIM MAINA VS THE HON. ATTORNEY GENERAL & OTHERS [2013] eKLR***

It is not in dispute that the petitioners in this case are members the Jubilee coalition and that they were nominated by the coalition to contest their elective positions as members of Embu County Assembly. The first letter dated 27/11/2014 advising the 1st respondent on their removal was written by the 2nd respondent who is a leader of the coalition. The 1st respondent acted on that letter without considering whether the due process was followed by the party. He chose to ignore the 2nd letter by the chief whip another leader of the coalition which purported to nullify the 2nd respondent's letter. This conflict was followed by the action of the 1st respondent, caused the removal of the petitioners from their positions in the respective assembly committees.

I come to the conclusion that the dispute in the petition is a dispute between party members and the Jubilee coalition which is represented by its two leaders the 2nd respondent and the chief whip. It is therefore a dispute that ought to be resolved through the existing mechanisms of the Jubilee Coalition failure to which the Political Parties Tribunal may be approached. Although the petitioners claim that their constitutional rights were violated, this dispute cannot be converted into a constitutional petition considering the issues involved.

The petitioners are duty bound to engage the existing mechanisms as provided for in the Constitution of the Coalition and may approach the political Party Tribunals in the event that they are dissatisfied with the decision of the coalition.

I therefore uphold the preliminary objection that this court lacks jurisdiction to entertain the dispute. The petition is hereby struck out with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT EMBU THIS 10TH DAY OF MARCH, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Gachuba for Petitioners**

**Ms. Muriuki for Muchoki, Kangata, Njenga & Co. Advocates for the Respondents**

**F. MUCHEMI**

**JUDGE**