



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.96 OF 2014

BETWEEN

ROGERS MOGAKA MOGUSU.....PETITIONER

AND

GEORGE ONYANGO OLOO.....1ST RESPONDENT

THE NATIONAL ALLIANCE.....2ND RESPONDENT

REGISTRAR OF POLITICAL PARTIES.....3RD RESPONDENT

JUDGMENT

Introduction

1. When the **Constitution 2010** was enacted, a new dawn was heralded with new and unique provisions hitherto unknown to the management of public affairs. One such provision relates to the manner in which public officers should conduct themselves *vis-à-vis* political matters and questions.
2. That is the basis of the Petition herein because the Petitioners have raised the question whether George Onyango Oloo, the 1st Respondent, can continue holding the position of Secretary-General of the 2nd Respondent. The National Alliance (hereinafter “**TNA**”) Party, which is a political party, duly registered as such, upon his appointment by the President as the Chairperson of the Lake Basin Development Authority vide Gazette Notice No.15745 of 23rd December 2013. They therefore seek the following orders;

“(a) This Honourable Court be pleased to issue a declaration that the 1st Respondent as a public officer is disqualified from holding the office of National Secretary General of the National Alliance or any other office in the political

party.

(b) This Honourable Court be pleased to issue a declaration that a public officer shall not hold office in a political party.

(c) This Honourable Court be pleased to award the Petitioner costs of and incidental to these proceedings on a full indemnity basis.

(d) This Honourable Court be pleased to make any order as it seems just.”

Petitioner’s case

3. In the Amended Petition dated 16th July 2014, the Petitioners aver that by continuing to hold his position as Secretary-General of the TNA Party, the 1st Respondent is in violation of **Articles 10, 232 and 260** of the **Constitution** as well as the entire **Chapter Six** thereof.
4. Further, that his conduct aforesaid exposes TNA to legal risks because as the Accounting Officer of the Party, he controls all its affairs including funds paid out of the Political Parties’ Fund. In addition, that TNA may face deregistration on account of violations of **Section 12(1)** of the **Political Parties Act 2011** and **Section 23** of the **Leadership and Integrity Act, Cap.182 Laws of Kenya**.
5. Regarding the Lake Basin Development Authority, it is their case that since it enjoys funds provided by Parliament, then its Chairman is a public officer and is subject to the **Public Officers Ethics Act 2003**.
6. In his submissions, Counsel for the Petitioners stated that following the decision of this Court in **KUDHEIHA vs Salaries and Remuneration Commission [2014] eKLR** on the criteria to be used in determining who a public officer is and the test also set in **Supreme Court Petition No.6 Fredrick Otieno Outa vs Jared Odoyo Okello & 4 Others [2014] eKLR**, it follows that the 1st Respondent is unqualified to continue holding both his positions at the same time and the Petition should be allowed.

1st and 2nd Respondents’ Case

7. The 1st and 2nd Respondents filed a Notice of Preliminary Objection on 9th May 2014 and raised the following issues;

“(1) That the dispute as pleaded by the Petitioner falls squarely within the Provisions of the Political Parties Act, Act No.11 of 2011.

(2) That the entire Petition is premised on a false Affidavit, and perjury being a serious offence against the Administration of Justice the entire suit is polluted abinitio, cannot survive perjury and ought to be struck off in limine.

(3) That the 1st Respondent is not a State Officer within the meaning of Article 260 of the Constitution.”

8. In addition, the 1st Respondent filed a Replying Affidavit sworn on 9th May 2014 and deponed that he is not a State Officer and therefore neither **Article 260(2)** nor **Articles 77(2)** apply to him. Further, that the Constitution of TNA does not bar him from serving as Chairman of LBDA.
9. No submissions were filed or tendered on behalf of the 1st and 2nd Respondents from this Court’s record at the time of writing this judgment.

Interested Party's Case

10. By a Replying Affidavit sworn on 7th May 2014, the Interested Party, the Registrar of Political Parties, deponed that cognizant of her duties to regulate, monitor and supervise political parties under the **Political Parties Act, 2011**, she issued a circular dated 4th July 2013 to all Political Parties on the provision of the law with regard to the conduct of party officials. Although she did not annex that Circular to the said Affidavit, the Petitioners produced it and it reads as follows;

“RE: ... HOLDING OF OFFICE IN POLITICAL PARTIES BY STATE OFFICERS

The above matter refers.

The Constitution provides specific restriction on activities of State Officers. Article 260 further defines a State officer as a person holding public office. State officers can either be appointed in accordance with laid out procedures or be elected through a free and fair election process spelt out in the Constitution and further legislated in the Elections Act and the regulations made there under.

The said provision was upheld in Constitutional Petition No.17 of 2010 vide a judgment delivered on 17th September 2012 in the High Court Mombasa which disqualified State officers from holding office in a political party.

Section 12 and 13 of the Political Parties Act, 2011 affirm provisions of the Constitution regarding the restriction of activities of public officers in a political party. A public officer in the context of the Constitution means a State officer or any other person other than a State officer who holds public office. Section 12 provides that a public officer shall not;

- *Be eligible to be a founding member of a political party;*
- *Be eligible to hold office in a political party;*
- *Engage in political activity that may compromise or be seen to compromise the political neutrality of that person's office; or*
- *Publicly indicate support for or opposition to any political party or candidate in an election.*
- *It further stipulates that the same shall not apply to the President, Deputy President, a Member of Parliament, Governor, Deputy Governor or a member of a County Assembly.*

Kindly comply.

Yours faithfully,

Signed

Lucy K. Ndungu

Registrar of Political Parties.”

11. In addition, the Interested Party has claimed that she was wrongly enjoined to these proceedings and in submissions, her Counsel stated that **“the Interested Party shall be fully guided by the Honourable Court's pronouncement and determination of this matter for proper management of political Parties.”**

Determination

12. From the pleadings and submissions, the following matters call for determination;

- i. Whether there is any constitutional question raised in the Petition and whether the mechanisms set out in the **Political Parties Act No.11 of 2011** should have been involved to settle this dispute (i.e. the question of jurisdiction).
- ii. Whether the 1st Respondent, upon appointment as Chairman of LBDA became a State/and/or public officer and whether thereby he is incapable of retaining his position as Secretary-General of TNA.
- iii. Whether the Petitioners are entitled to the remedies sought.

Jurisdiction

13. Save for what I have reproduced as Grounds No.1 of the 1st and 2nd Respondents' Notice of Preliminary objection, without submissions by the 1st and 2nd Respondents my answer to the question of jurisdiction is straight forward; this Court has jurisdiction to determine whether the 1st Respondent is or is not a State/public officer and whether the prayers elsewhere reproduced above are available to the Petitioners. I say so because under **Article 165(3)(d)** of the **Constitution**, the question whether the Constitution has been contravened is a matter squarely within this Court's mandate. That Article provides as follows;

“(1) ...

(2) ...

(3) Subject to clause (5), the High Court shall have—

(a) ...

(b) ...

(c) ...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to the constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) ...”

14. The question of alleged breach of **Articles 10 (National values and principles), Article 232 (values and principles of public service)** as read with **Article 260 (the definition of public and State officers)** are also matters that this Court can also certainly interrogate.

15. Having said so, the 1st and 2nd Respondents further raised the issue whether the present dispute should not have been settled under the provisions of the **Political Parties Act, No.11 of 2011**. No

specific provision of that Act has been cited in that regard and the Interested Party also said nothing of the matter. In the circumstances, to attempt to address the issue would be akin to groping in the dark and I will therefore not presume or speculate on the 1st and 2nd Respondents' arguments in raising that issue. Suffice is to say that this Court has jurisdiction to determine the Petition herein.

Whether the 1st Respondent upon appointment as Chairman of LBDA became a Public or State Officer and whether he thereby became incapable of retaining his position as Secretary-General of TNA

16. This issue goes to the root of the Petition before me and I should begin by recourse to **Article 260** on the definition of Public Officer. The Article in that regard provides that;

“public officer” means—

- (a) any State officer; or**
- (b) any person, other than a State Officer, who holds a public office;”**

17. In addition to the above definition and in the context of this Petition, **Article 232 (1)(c)** provides that a public officer shall abide by the values and principles of the public service set out therein and one of them is that he shall remain **“impartial”** in the provision of public services.

18. Of importance however is the express provision of **Article 77(2)** that an appointed State Officer **“shall not hold office in a political party.”**

19. State Officer is defined in **Article 260** of the **Constitution** as;

“State officer” means a person holding a State office;

20. Reading all the above provision together there is clearly no doubt that all State Officers are also Public Officers and that all other persons who hold public office are public officers.

21. I should also note that **Section 12** of the **Political Parties Act** provides as follows;

“(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.**
2. **Subsection (1) shall not apply to the President, Deputy President, a Member of Parliament, Governor, Deputy Governor or a member of a county assembly.**
3. **Until after the first elections under the Constitution, subsection (2) shall apply to the Prime Minister.” (Emphasis added)**

22. The above provision speaks for itself and requires no more than a literal interpretation.

23. **Section 23** of the **Leadership and Integrity Act 2012** provides as follows;

“(1) An appointed State officer, other than a Cabinet Secretary or a member of a County Executive committee shall not, in the performance of their duties-

- a. **Act as an agent for, or further the interests of a political party or candidate in an election; or**
- b. **Manifest support for or opposition to any political party or candidate in an election.**

(2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.

(3) Without prejudice to the generality of subsection (2), a public officer shall not;

(a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

(b) publicity indicate support for or opposition against any political party or candidate participating in an election.” (Emphasis added)

24. **Section 16** of the **Public Officer Ethics Act, Cap.183** further provides as follows;

“(1) A public officer shall not, in or in connection with the performance of his duties as such-

- a. **Act as an agent for, or so as to further the interest of, a political party; or**
- b. **Indicate support for or opposition to any political party or candidate in an election.**

(2) A public officer shall not engage in political activity that may compromise or be seen to compromise the political neutrality of his office.

(3) This Section does not apply to a member of the National Assembly or a councilor of a local authority.” (Emphasis added)

25. Like **Section 12** aforesaid, this **Section** requires no more than a literal interpretation and the next question to ask is, how have the Courts interpreted the meaning of a public officer and to whom does the definition cover?

26. In a judgment delivered on 17th September 2012 by Kasango, Muriithi and Nzioka JJ, the learned Judges held that Hon. Uhuru Kenyatta as **“a State Officer is disqualified from holding a political party post”** i.e. as Chairman of the Kenya African National Union (KANU) Party or **“holding any other political party post whilst he is a State Officer”** at the date of the said judgment, Hon. Uhuru Kenyatta was serving as Deputy Prime Minister and Minister of Finance.

27. In **Fredrick Otieno Outa vs Jared Odoyo Okello (supra)** the Supreme Court, having analysed all the definitions ascribed to **“public officer”** by **Section 2** of the **Leadership and Integrity Act** and **Section 2** of the **Political Parties Act**, then concluded as follows;

“Strictly speaking, the proper meaning of “public officer”, for purposes of the electoral law, is that embodied in Article 260 of the Constitution as read together with Section 2 of the Elections Act. The different definition in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provision. And thus, the proper meaning of “public officer” – currently is; (i) the person concerned is a State officer; or (ii) any other person who holds “public office” – an office within the national government, county government, or public service; (iii) a

person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.”

28. This Court in **KUDHEIHA (supra)** also found as follows;

“It cannot be denied therefore that in the above context, Moi Teaching and Referral Hospital as well as Kenyatta National Hospital are State Corporation established under Section 3 of the State Corporations Act. Public Universities such as Moi University, University of Nairobi, Egerton University etc are established by Acts of Parliament as public universities. Although these institutions do not receive monies from the Consolidated fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in Article 260 regarding funds from Parliament.

Further ‘Public fund’ has the meaning assigned to it by the Exchequer and Audit Act (Cap 412 Laws of Kenya). Public money is said therefore to include; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not. Given that definition of public funds and given that the Petitioner’s members work for institutions, parastatals or corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find.”

29. In summary, the interpretation given by the Supreme Court is binding on this Court under **Article 163(7)** of the **Constitution** and I shall apply it to the circumstances of this Petition. In that regard, I have also read the **Lake Basin Development Authority Act, 2012** and at **Section 11**, it provides as follows;

“(1) The funds of the Authority shall consist of-

(a) such moneys as may from time to time be provided by Parliament;

(b) moneys borrowed by the Authority on such terms and for such purposes as the Minister, in consultation with the Minister for the time being responsible for finance, may approve; and

(c) any moneys accruing to the Authority from any other source

(2) The funds of the Authority shall be invested in such manner as the authority may deem necessary.” (Emphasis added)

30. **Section 4(6)** as read with **Section 2** of the same **Act** provide as follows;

4(2) “Chairman” means the person appointed as chairman of the authority under paragraph (a) of subsection (1) of Section 4;

“non-official members” means the Chairman and members of the Authority appointed under paragraph (b) of subsection (1) of section 4.

4(6) The non-official members shall be paid by the Authority such remuneration and allowances as the Minister may from time to time determine.”
(Emphasis added)

31. If LBDA receives funds from the Parliament of Kenya and its Chairman gets paid from such funds, can it properly be said that he is not a public officer? I think not and the law as expressed

above bears me out.

32.It also follows that the Circular dated 4th July 2013 by the Registrar of Political Parties has captured the law well and ought to be implemented otherwise perceived partisan, non-impartial officials of political parties will also play important roles in public entities, a situation that cannot be proper in our new and settling constitutional dispensation.

33.It is my finding therefore that as Chairman of LBDA, the 1st Respondent is a public officer and it is untenable that he should continue holding the position of Secretary-General of TNA.

Are the Petitioners entitled to the orders sought?

34.Prayers (a) and (b) of the Petition raise questions which I have answered in the affirmative above and so they must be granted.

35.Prayer (c) is on costs but it is obvious to me that the Petitioners filed the above Petition for no personal gain. They filed it as public-spirited individuals intent on instilling discipline in the conduct of public affairs. It is therefore only fair that no party should be taxed with the costs of this litigation.

Conclusion

36. This Petition has brought to the fore the need to separate political activities from those in the public service in the context of the Constitution and Statutes. There is good reason why public officers should avoid partisan politics. To mix the two would only create tensions and unnecessary perceptions of lack of partiality. Let politicians, save those exempted by the law, like Members of Parliament, stick to political activity and leave public offices to those that have no open political biases along political party lines.

Disposition

37.Having held as above, it follows that the final orders to be made are;

(a) A declaration is hereby issued that the 1st Respondent as a public officer is disqualified from holding the office of National Secretary General of the National Alliance or any other office in that political party.

(b) A declaration is hereby issued that a public officer shall not hold office in a political party.

38.Each Party shall bear its own costs.

39.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Mr. Makolwal for 2nd Respondent

Mr. Cohen holding brief for Mr. Ahmed Nassir for 1st and 2nd Respondent

Mr. Kirwa holding brief for Mr. Langat for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE