REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

PETITION NO.11 OF 2015

HON JOHN MUSAKALI ..... PETITIONER

VERSUS

THE SPEAKER COUNTY OF BUNGOMA).....1ST RESPONDENT

COUNTY ASSEMBLY OF BUNGOMA) ..... 2ND RESPONDENT

HON HENRY NYONGESA KHAEMBA) ..... 3RD RESPONDENT

HON MOSES WABWILE)..... 4TH RESPONDENT

AMANI/JUBILEE COALITION)..... 5TH RESPONDENT

RULING

This is a ruling on a preliminary objection raised on behalf of *Hon. Henry Nyongesa* and *Hon. Moses Wabwile*, the 3rd and 4th respondents respectively, objecting to the court's jurisdiction to hear the petition and application filed by *Hon John Musakali* the petitioner herein. The petitioner had been elected Minority Leader in the County Assembly of Bungoma, (the 2nd respondent), under the umbrella of Amani/Jubilee Coalition, (the 5th respondent), and had remained so until 13th August, 2015 when members of the 5th respondent held a meeting and passed a resolution to remove him and elected the 3rd respondent in his place.

Aggrieved by the turn of events, the petitioner lodged a petition in Court dated 17th August, 2015 against *The Speaker, County of Bungoma, (1st respondent),* County Assembly of Bungoma, (2nd respondent) and the other 3 respondents seeking to block his removal and the election of the 3rd respondent to replace him.

Simultaneous with the filing of this petition, the petitioner took out a Notice of Motion filed on the same day brought under various Articles of the Constitution and the Bill of Rights, seeking temporary orders to restrain the 1st and 2nd respondents from tabling the resolution of the meeting of 13th August, 2015 or any motion for the removal of the petitioner as Leader of Minority in the 2nd respondent Assembly, or allowing the 3rd respondent to assume office as Leader of Minority, until the petition is heard and determined.

Upon being served and filing of responses to the application and the petition, the 3rd and 4th respondents

took out a Notice of Preliminary Objection dated 19th August, 2015, and filed in court on 20th August, 2015 objecting to the jurisdiction of the court hearing this Petition on grounds that:-

> *1. The election or removal from office of the Leader of Minority of a Party or Coalition of Parties in the County Assembly is a political act expressing the will of the people under Article 1(1), (2), (3)(a), 4(b) of the Constitution, a matter not contestable n a court of law.*
>
> *2. Having regard to the path provided for in Article 159(2) of the Constitution, and the provisions of Political Parties Act, the grievances alleged in this petition, whether having merit or not whether false or true, fall for determination in the Political Parties Disputes Tribunal and not a court of law.*
>
> *3. The party named "Amani Coalition" is not a legal organ capable of suing or being sued. (Abandoned)*
>
> *4. No constitutional or Statutory precepts or imperative is alleged to have been violated or alluded to in the Petition or affidavit sufficient to attract the court's discretion as sought or at all.*

Sensing this, the petitioner filed his own preliminary objection saying that the 3rd and 4th respondents had flouted *Rule 15* of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules, 2013.

Directions were given on 21st August, 2015, when the court with concurrence of parties, ordered that the Preliminary Objections be heard first and scheduled the same for hearing on 31st August, 2015. On that day, (31st August, 2015) *Mr Bwonchiri* appeared for the petitioner, *Mr Situma* for the 1st and 2nd respondent, *Mr Wasilwa* for the 3rd and 4th respondents and *Mr Ocharo* for the 5th respondent. The matter could not proceed and was adjourned to 2nd September 2015 when the Preliminary Objection was taken. The court reminded the parties that it would be appropriate to hear the main petition and render a conclusive decision but they elected to argue the Preliminary Objection.

Mr Wasilwa, learned counsel for 3rd and 4th respondents, addressed the court on the Preliminary Objection basing it on the principles laid down in the case of *Mukisa Bisquits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696,* that the court does not have jurisdiction to hear the petition. Learned counsel referred to paragraph 6, 7 and 8 of the petition to show that this was an issue of elections within political parties or coalition of parties which elected Minority Leader of the Coalition of Parties in the County Assembly. Counsel submitted that since the Coalition resolved to replace the petitioner with the 3rd respondent, it was indisputable that the petitioner was removed from the post of Leader of Minority by his own coalition of parties which was not unconstitutional. According to counsel, this being an internal dispute of political parties or a coalition of parties, the resolution of that dispute lay with the Political Parties Tribunal, and for that matter, *section 40(1)* of the Political Parties Act provides a mechanism for resolving such disputes. He was of the view that the petitioner should have moved the Political Parties Tribunal for resolution of his dispute and not the court.

Counsel cited a number of decisions to buttress his arguments and show that the court lacked jurisdiction. These included *Born Bob Marren vs The Speaker of The County Assembly of Narok, Constitutional Petition No.1 of 2014 (Naivasha*) for the proposition that since the petition touched on the elections under Standing Orders, of The Assembly, it was not a pure constitutional matter of violation of rights which the High Court could address under *Article 165(3)* of the Constitution, before exhausting the mechanism under the Political Parties Act.

The petitioner in that case had been removed from the position of leader of minority party in the Narok County Assembly. The court dismissed the petition because internal dispute resolution mechanism had not been exhausted before invoking the jurisdiction of the court; *Republic vs County assembly of Migori exparte John Owino JR No.1 of 2014 – Migori*, for the proposition that the majority of the members of the coalition having exercised the option to elect a new Majority Leader, the court ought to defer to that

position as it represents the will of the majority of the members of that majority party and the elections of the Leader of Majority is a prerogative of the members of the party or coalition of parties and the dispute ought to be resolved within the Dispute Resolution Mechanisms under the Political Parties Act, *Jeremiah Lomorukai vs County Government of Turkana & others Petition No.11 of 2014 (Kitale),* for the proposition that removal or replacement of Leader of Majority or Minority in a County Assembly was within the leadership of the County Assembly and the political parties and that resolution was a political decision governed by County Assembly Standing Orders which are internal rules governing conduct of internal processes and courts should exercise utmost restraint in such matters since the jurisdiction of the court is hampered/curtailed by existence of Alternative Disputes Resolution Mechanisms – under the Political Parties Act; and *Jeniffer Ekhiya vs County Assembly of Vihiga Petition No.1 of 2015 (Kisumu),* for a similar proposition. Counsel therefore urged the court to down its tools citing the precedent setting case of *The Owners of Motor Vessel "Lillians" vs* Caltex Oil Kenya Ltd [1989] KLR 1. He prayed for dismissal of the petition.

Responding to the preliminary objection raised by the petitioner, that the 3rd and 4th respondents did not file a Memorandum of Appearance as required by the Constitution of Kenya (Protection of Constitutional Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Mr Wasilwa submitted that being rules of procedure they are directional and cannot nullify steps taken by a party in proceedings. Such steps are only irregular and not illegal. Counsel submitted that having filed a Notice of Appointment, it cured the irregularity of failure to file a Memorandum of Appearance as required by *rule 15* of the Rules.

Mr Ocharo, learned counsel for 5th respondent, opposed the Preliminary Objection by the 3rd and 4th respondents, saying the petition before court cannot be conclusively decided through a Preliminary Objection. Counsel pointed out that all the decisions cited by counsel for 3rd and 4th respondents, had been arrived at after those petitions had been fully heard together with the objections. Counsel argued that according to the rule setting decision in *Mukisa Bisquits* (supra), the court is required to look at the pleadings only and not evidence. Mr Ocharo argued that the court should not make a decision without hearing the petition and considering the issues raised therein. Counsel submitted that the 5th respondent whose members are said to have removed the petitioner, has disowned that resolution, hence the need to inquire into this matter during the hearing of the petition. Counsel further submitted that *section 40* of the Political Parties Act, does not apply in the circumstances of this case, saying there is no document governing the relationship between the various political parties forming the 5th respondent. He asked the court to look at paragraph 9 of the 5th respondent's replying affidavit sworn on 28th August 2015. He urged the court to inquire into whether the alternative mechanism is adequate. On his part counsel cited the case of *Rose Wangui Mambo & 2 others vs Limuru Country Club & 17 others vs Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme & 3 others Petition No.65 of 2010 (NBI,)* to support up his position. Counsel distinguished the decisions cited by the 3rd and 4th respondents saying they concerned political parties with structures unlike the 5th respondent.

Mr Ocharo further argued that the Constitution does not differentiate between private and public rights saying the court should protect all rights in the Bill of Rights and cited *Article 260* which includes un-incorporated parties. According to counsel, *Article 20* of the Constitution binds all to abide by the Bill of Rights without applying different standards. He urged the court to apply the Constitution in a manner that protects the Bill of Rights. He distinguished the decision in *Jennipher Ekhuya* (supra), saying that the court in that case had found it had jurisdiction but dismissed the petition because there was another mechanism for resolving that dispute. He urged the court to dismiss the Preliminary Objection and allow the petition to proceed to hearing.

Mr Situma counsel for the 1st and 2nd respondents, elected not to participate in the Preliminary Objection saying, that his clients were neutral parties to the dispute herein. He said his clients had filed their own application to have their names expunge from these proceedings, and he would decide how to proceed depending on the outcome of the Preliminary Objection.

Mr Bwonchiri, learned counsel for the petitioner, opposed the Preliminary Objection saying that the court

should look at the petition together with the Constitution of Kenya (Protection of Constitutional Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. He submitted that the 3rd and 4th respondent did not comply with those rules when they filed a Notice of Appointment instead of a Memorandum of Appearance and were therefore not properly before court. On the main Preliminary Objection, counsel argued that going by the decision in *Mukisa Bisquits* (supra), a Preliminary Objection cannot be sustained if what is sought is the exercise of the court's discretion. According to counsel, the Preliminary Objection raised by the 3rd and 4th respondents will require that certain facts be ascertained which removes it from a pure point of Law. He said that there were affidavits filed referring to a coalition of parties a clear testimony that facts have not been agreed but remain to be ascertained.

Mr Bwonchiri went on to submit, that there is a specific procedure for electing leaders of Majority and Minority in the County Assembly and if those are disputed facts, then a Preliminary Objection cannot stand like in this case. According to counsel, the petitioner represents Amani/Jubilee Coalition and urged the court to look at the facts and affidavits and find that the Preliminary Objection is pre-mature. He further argued that since the 5th respondent takes a position that is different from the rest of the respondents, the decision in *Mukisa Bisquits* (supra), supports his view that the Preliminary Objection is premature. He argued that since the petition is based on several Articles of the Constitution, *section 40(1)* of the Political Parties Act does not apply in the petitioner's case.

The learned counsel continued that the jurisdiction of the court is derived from *Article 165* of the Constitution with original and unlimited jurisdiction to hear all disputes including that of the petitioner. Counsel argued that the position of the Leader of Majority and Minority being a creature of *section 10* of the County Government Act, 2012 those offices must be protected by the court. He cited *Article 159* of the Constitution as one requiring the court to do substantive justice, and *Article 259(1)* of the Constitution says that it requires the court to look at the petitioner and his position *vis a vis section 40(1)* of the Political Parties Act. Counsel cited several decisions to strengthen his arguments including *Rose Mambo* among others for the proposition that the court has a duty to uphold the Bill of Rights and can enforce a private right against a public body. He pleaded with the court to find that the preliminary objection was not merited and dismiss it with costs.

I will first deal with Mr Bwonchiri's objection to the 3rd and 4th respondent's standing in this petition. Counsel has argued that the 3rd and 4th respondents flouted *Rule 15* of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, by filing a Notice of Appointment instead of a Memorandum of Appearance as required by that rule. Learned counsel submitted that the rule uses the word *shall,* and as such, it is mandatory that a party complies with it. According to him, the 3rd and 4th respondents are not properly before court by virtue of this omission. Mr Wasilwa's response was that the rule is merely directional and cannot invalidate parties' pleadings simply because of its breach. He asked the court to use its discretion and find that the breach did not go to the root of the matter.

Courts in this country have spoken on this issue of procedure and the need to do substantive justice, and I can only add my voce to what they have said. It is imperative that courts consider substance rather than apply restrictive procedural technicalities that tend to hinder the course of justice. The Overriding Objective under *section 1A* and *1B* of the Civil Procedure Act enjoins courts to dispense proportionate, substantive and equitable justice when dealing with matters before them. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (The Rules), have themselves embodied the Overriding Objective contained in the Civil Procedure Act. *Rule 3(4)* of the Rules Provides as follows:-

> *"The court in exercising its jurisdiction under these rules, shall facilitate the just, expeditious, proportionate and affordable resolution of all cases."*

This means the court in exercising its jurisdiction must strive to do justice.

Speaking about the Overriding Objective found at both sections 1A and 1B of the Civil Procedure Act,

and sections 3A and 3B of the Appellate Jurisdiction Act, in the case of *Safaricom Ltd vs Ocean View Beach Hotel Ltd & 2 others [2010] eKLR, Nyamu, J.A. said:-*

> *"The Court has the duty to interpret the Acts and exercise the powers under the Acts and the rules made pursuant to the Acts so as to attain the overriding objective. Both provisions are aimed at inter alia, making case management principles the central tool in attaining and furthering the overriding objective. It must be remembered that the core business of the courts is to do justice and the principle aim of the overriding objective is to enable the courts to act justly."*

I agree with Nyamu, JA. but I must add that the Overriding Objective should not be used to relieve parties of their obligations under the Rules. Overriding Objective is not a licence for parties to ignore clear rules of procedure and proceed as though they did not exist. In applying this principle, the court will consider individual cases and I agree with the holding in the case of *Kenya Commercial Finance Co. Ltd vs Richard Akwesera Onditi CA No. NAI 329 of 2009* that:-

> *"In applying the principle and concept of Overriding Objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of* ***sections 3A*** *and* ***3B*** *of the Appellate Jurisdiction Act"* (similar to *sections 1A* and *1B* of the Civil Procedure Act).

Similar sentiments were echoed in the case of *Mradura Suresh Kantaria vs Suresh Manalal Kantaria, C.A. No.277 of 2005* where the court said:-

> *"The Overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained ."*

The 3rd and 4h respondents though were required by the Rules to file a Memorandum of Appearance, filed a Notice of Appointment, and the petitioner has objected to this. The question I must ask is; what prejudice has this mis-step caused to the petitioner? Is it a matter that can disentitle the 3rd and 4th respondents from being heard? Is it so serious that it renders the 3rd and 4th respondents participation in this case untenable? To my mind, I think, this is a mere technical issue of procedure that should not disentitle the 3rd and 4th respondents from being heard. The omission does not go to the root of the matter before court, and that is what the overriding objective is all about.

Even though the 3rd and 4th respondents were required to file a memorandum of Appearance but filed a Notice of Appointment, that alone would still entitle their advocate to address the court and argue the Preliminary Objection since the advocate would be properly on record. Given that there is no prejudice to be suffered, I find that this objection is not well founded and I decline the invitation to find otherwise. That objection by the petitioner is therefore declined and dismissed.

Turning to the main Preliminary Objection, I think, the starting point is the statement of law made in the case of *Mukisa Bisquiti's Manufacturing Co. Ltd vs West End Distributors [1969] EA 696* where Law J.A. had the following to say:-

> *"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, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration ..."*

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and

remain to be ascertained, that would not be a suitable Preliminary Objection on a part of law.

Echoing the same position, Ojwang , J (as he then was), deciding in the case of *Oraro vs Mbaja [2005] KLR 141* and after quoting the statement of Law, JA. in Mukisa Bisquits (supra) continued:-

> *"A 'Preliminary Objection' correctly understood is now well defined as and declared to be, a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a Preliminary point ... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ..."*

It is on the basis of the above decisions that the 3rd and 4th respondents have raised Objection to the jurisdiction of this court to hear the present petition and the application. The law is that where the jurisdiction of a court to hear a dispute before it is challenged, that court must determine that question at once, and should it hold the opinion that it lacks jurisdiction, it should down its tools. This is the position in law that was laid down in the precedent setting case of *The Owners of Motor Vessel "LILLIANS" vs Caltex Oil Kenya Ltd [1989], KLR 1*, where *Nyarangi, J.A* said at page 14 –

> *"Jurisdiction is everything. 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 and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

And in *Boniface Waweru vs Mary Njeri & Another Misc. Application No.639 of 2005, Ojwng, J.* (as he then was) said:-

> *"Jurisdiction is the first test in the legal authority of a court or Tribunal and its absence disqualifies the court or Tribunal from determining the question."*

A preliminary objection as to jurisdiction being so central to the authority of the court to undertake proceedings in a case before it, must be raised at the earliest opportunity so that the court does not engage in a futile exercise. This Novel Principle is espoused in a number of judicial decisions. In *Air Alfaras Ltd vs Paytheon Air Craft Credit Corporation & Another [2000] KLR 62* it was held:-

> *"Any issue regarding jurisdiction ought to be considered first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the merits of the application would be futile."*

And in the case of *Kakuta Maimai Hamisi vs Peris Pesi Tubiko & 2 others [2013] eKLR* the Court of Appeal said:-

> *"So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a desideration imposed on courts out of decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in rain."*

This court has been called upon to find that it has no jurisdiction to deal with the matter before it. The 3rd and 4th respondents have referred to paragraphs 6, 7 and 8 of the petition to fortify their arguments why they think this court lacks jurisdiction to hear this matter. Those paragraphs are as follows:-

"6. That the petitioner was elected as such under the New Ford Kenya political party.

7. That immediately the Assembly Commenced its settings the petitioner was elected as the leader of the Minority Party/Coalition of AMANI/JUBILEE under the County Standing Orders the Constitution, 2010 and the County Government Act, 2012.

8. That on 13th August, 2015 a meeting was held by some members who claimed to be from JUBILEE/AMANI COALITION the 5th respondent and who resolved to replace the petitioner by electing Hon. Henry Nyongesa Khaemba the 3rd respondent as the new Minority Leader."

Looking at the above averments, affidavits filed in court by various parties herein, submissions by counsel, and authorities cited, the central issue is about the removal of the petitioner as leader of minority and election of the 3rd respondent to replace him. According to the pleadings herein, that removal and election of the replacement was done by members of the 5th respondent. This being an action taken by members of a coalition in which the petitioner belongs, and even though the petitioner doubts whether the procedure was followed and he even says he was not given a chance to defend himself, the court has to decide whether it has jurisdiction and whether it should intervene.

Jurisdiction of the High Court is derived from *Article 165(3)* of the Constitution and a proper reading of that Article shows, that the court has a very wide jurisdiction. It also has jurisdiction to hear all disputes including Jurisdiction to hear and determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated infringed, or threatened. The only Limitation the Constitution imposes is found in *Sub-Article (5)* where it says:-

(a) The High Court shall not have jurisdiction to hear matters reserved for the exclusive jurisdiction of the Supreme Court under this Constitution.

(b) Falling within the jurisdiction of the courts contemplated in *Article 162(2)*

The limitation is on matters reserved for the Environment and Land Court, and Employment and Labour Relations court. Except in those cases, the

High Court has jurisdiction to hear and determine all other disputes unless expressly excluded by statute.

Article 159(2)(c) of the Constitution provides for resolutions of disputes through other dispute resolution mechanisms and there is now the Political Parties Tribunal established under *section 39* of The Political Parties Act (No.11) of 2011. *Section 40(1)* of the Act 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 Political Parties

d.) disputes between an independent candidate and a political party.

e.) disputes between coalition parties and

f.) appeals from decisions of the Registrar of the political parties under this Act.

2.) Notwithstanding sub-section (1), the Tribunal *shall not hear or determine a dispute under paragraphs (a),(b),(c) or € unless the dispute has been heard and determined by the Internal Political Party Dispute Resolution Mechanism.*

The reason behind the establishment of the Political Parties Tribunal were better captured in the *case of Stephen Asura Ochieng vs Orange Democratic Movement Petition No.289 of 2011* where the court said:-

> *"The intention behind the establishment of the political parties Tribunal was to create a specialised body for the resolution of inter-party and intra-party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of Judicial power by Courts and Tribunals established under the Constitution and for the use of alternative dispute resolution mechanisms ..."*

The position of leader of majority and minority in the County Assembly is created by *section 10(1)* of the County Government Act, 2012 which provides that each Assembly shall have a leader of the Majority Party and one of Minority Party. The leader of the Minority Party is the leader of the second largest party or Coalition of Parties in the County Assembly. These leaders are elected by members of their parties in the Assembly in accordance with standing orders of the Assembly. In the case of the petitioner, he was elected pursuant to Standing Order No.16 of his Assembly which provides as follows:-

> "*1.) the minority party or coalition of parties in the County Assembly shall elect a member of the Assembly belonging to the party or coalition of parties to be the leader of the minority party.*
>
> *2.) In electing members under paragraph (1) the minority party or coalition of parties in the County Assembly shall take into account any existing coalition agreement entered into pursuant to the Political Parties Act.* (Emphasis added)
>
> *2.) (sic) A member elected under paragraph 2 may be removed by a majority of votes of all members of the minority party or coalition of parties in the County Assembly.*
>
> *3.) The removal of a member from the office under paragraph (3) (sic) shall not take effect until a member is elected in the manner provided for under paragraph (1).*
>
> *4.)The whip of the Minority Party or Coalition of Parties in the County Assembly shall forthwith, upon a decision being made under this standing order, communicate to the Speaker in writing the decision together with the meeting of the minutes at which a decision was made."*

The petitioner is a member of the 5th respondent, a coalition of parties he leads in the Assembly. *Section 2* of the Political Parties Act defines a coalition as –

> *"An alliance of two or more political parties formed for the purpose of pursuing a common goal and is governed by a written agreement deposited with the Registrar."*

Section 10 of the Act provides for the formation of coalitions either pre or post elections and in both cases, coalition agreements must be deposited with the Registrar. The section is also clear that coalition agreements must set out matters specified in the 3rd schedule to the Act. One of the matters coalition agreements must include, according to *sections 2(k)* and (*m),* is Dispute Resolution Mechanism and Procedures, and procedure for appeal to the Tribunal respectively. The schedule also covers a wide range of issues including how coalition partners should share positions and responsibilities. That is perhaps why Standing Order No.16 of the 2nd respondent, emphasises on the need for members to take into account any coalition agreement entered into pursuant to the Act, while conducting elections of leader of minority.

Both the County Government Act and *Standing Order No.16* are clear, that those positions belong to political parties and in the case of Standing Order No.16, political party or Coalition of parties while electing leader of minority must take into account any such coalition agreements. This means the petitioner's own party in the coalition must have agreed on how to relate and such an agreement deposited with the Registrar of political parties in accordance with the Act.

The removal of the petitioner was done by members of his coalition under Standing Orders of the

Assembly which is a political process. Once elected leader of minority, the petitioner was bestowed with a political trust by his own coalition members and if they thought he had lost that trust, they could exercise their right under standing orders and replace him. This is an internal process that is permitted by rules of procedure within the 2nd respondent. If his own party in the coalition was unhappy with his removal, it could have activated the dispute resolution mechanism under the coalition agreement.

The petitioner and 3rd respondent belong to the same party, New Ford Kenya, (NFK) – a member of the 5th respondent. Members of the 5th respondent met on 13th August, 2015 and resolved to replace the petitioner in accordance with the Standing Order No.16. That decision was communicated to the leadership of the 2nd respondent but the whip of the 5th respondent says he did not forward the communication, but that communication was done by his deputy. This is a clear case of infighting within the 5th respondent, an internal matter, where the whip and his deputy act differently yet they serve the same coalition.

That being the case in this petition really, the question is whether this court should intervene, hear this petition and stop the removal of the petitioner from his position as Leader of Minority in the Assembly, and the election of the 3rd respondent into that position. It is true the Constitution protects the petitioner's political rights under the Bill of Rights. It is also true that those rights are enforceable under *Article 22* of the Constitution and the petitioner has a right to access the court under *Article 22*, while *Article 258* allows the petitioner to approach the court when he thinks there is a threat to the Constitution.

However the court is also alive to the fact that the same Constitution has created institutions which must be allowed to function and carry out their mandate, including the Political Parties Tribunal. The removal of the petitioner being a political process where members of his own coalition in the Assembly expressed their will to replace him, and although the petitioner says *section 40* of the Political Parties Act does not apply to him, the Political Parties Tribunal was established to deal with such disputes as the petitioner's. All political parties and coalitions are required to have internal dispute resolution mechanisms in order to promote internal democracy. The political parties

Tribunal would not function if courts were to assume jurisdiction and deal with matters meant for it. If that were to be the case, *Article 159(2)(c)* of the Constitution would not have any relevance in this country regarding alternative disputes resolution.

I have carefully considered this matter and the decisions cited by counsel on both sides, and I am grateful to them for the industry and learning they put into this matter, but with greatest respect, this appears to be a clear case of confusion within the 5th respondent, its members and its leadership in the Assembly.

On issues of election of minority and majority leaders such as the one before me and more so when such matters are internal, courts have expressed themselves quite clearly as shown in the long line of decisions cited before court. They have said, and I agree, that courts should be slow in assuming jurisdiction in internal disputes, or in matters meant for the Political Parties Tribunal. This court, despite the wide jurisdiction bestowed on it by the Constitution, takes a similar view, that the dispute before it falls within the mandate of the Political Parties Tribunal, and if unhappy with the outcome, there is an avenue by way of appeal to it.

For those reasons, this court declines to assume jurisdiction in this matter. The Preliminary Objection by the 3rd and 4th respondents succeeds and is hereby allowed. The petition herein is hereby struck out. Each party will however bear their own costs.

Dated and delivered at Kakamega this 9th day of October, 2015.

E. C. MWITA

J U D G E