REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 436 Of 2013

POLITICAL PARTIES FORUM COALITION &

OTHERS ……...PETITIONERS

VERSUS

CENTRE FOR MULTI –PARTY DEMOCRACY &

OTHERS …….……RESPONDENTS

RULING

Introduction

1. The petitioners have challenged the provisions of the Political Parties Act which provides for the disbursement of funds from the Political Parties Fund to only those parties which garnered at least 5% of the votes cast in the last general elections. They filed this petition and were heard by Majanja, J, who dismissed their claim and found that the provisions of the impugned section 25(2)(a) of the Political Parties Act was constitutional.

2. Upon delivery of the judgment dismissing the petition, the applicants then made an oral application for an injunction to prohibit the release of the political funds to the qualifying political parties, which application was dismissed. They did not file a formal application for an injunction then, but in April, 2014, they filed an appeal against the judgment.

3. On 18th June 2014, they filed an application before the Court of Appeal seeking the following orders at prayers 2 and 3:

1. …
2. ***That an order of injunction do issue restraining the 1st respondent by themselves or through their agents or representatives, or otherwise howsoever, from disbursing any portion of the Political Parties Fund to select parties or otherwise committing the Funds, pending the hearing and determination of the application interested parties.***
3. ***That an order of injunction do issue restraining the 1st respondent by themselves or through their agents or representatives, or otherwise howsoever, from disbursing any portion of the Political Parties Fund to select parties or otherwise committing the Funds, pending the hearing and determination of Civil Appeal No. 80 of 2014 Political Parties Coalition Forum & 3 Others vs The Office Of The Registrar Of Political Parties & 2 Others."***

4. The petitioners submit that while the application was certified urgent, no interim orders were granted. It was however scheduled for hearing before the Court of Appeal on 16th September 2014. The petitioners then filed the present application under certificate of urgency on 27th August 2014.

The Application

5. The application is supported by the affidavit of **Julius Mwangi Muriuki** sworn on 27th August 2014. The petitioners pray that an injunction be issued to stop the disbursement of the Political Parties Fund pending hearing and determination of the petitioner's application for injunction pending appeal which is currently pending before the Court of Appeal. Prayer 4 of the application is in the following terms:

"**THAT** an order of injunction do issue against the 1st respondent restraining the 1st respondent whether by itself, its officers servants and/or agents, representatives, or otherwise howsoever, from disbursing any portion of the Political Parties Fund to select parties or otherwise committing the Funds, **pending the hearing and determination of the Petitioner's application for injunction pending appeal in the Court of Appeal. "**

Submissions by the Petitioners

6. The contention by the petitioners is that their appeal will be rendered nugatory if an injunction is not issued to stop the disbursement of the funds to allow their application before the Court of Appeal to be heard. They argue though their Counsel, Mr. Kanjama, that both the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and Order 40 of the Civil Procedure Rules provide that the discretion of the court to issues the injunctive orders sought is unlimited.

7. The petitioners submit that they have a right of appeal, which they have exercised; that their appeal meets the requirements of the Court of Appeal Rules, Rule 5(2)(b), namely that it is arguable; and that if the injunctive orders are not issued, it will be rendered nugatory if the fund is allocated to the three political parties only.

8. They submit further that they have, in accordance with the provisions of Order 40, brought their application timeously as it seeks to stop the disbursement of funds allocated under the 2014/2015 budget which was passed in June 2014. They also contend that their application was precipitated by information that they obtained in August 2014 about the imminent disbursement of the funds. It is their case that they represent 35% of the total votes cast; and that their claim was on 35% of the political parties' fund.

9. The **National Rainbow Coalition (Narc-Kenya),** an interested party, supported the application. Its Learned Counsel, Mr. Wilson, agreed with the submissions made on behalf of the petitioner, arguing that the disbursement of the political parties funds to only three political parties goes against the principle of democracy. It was his submission that no prejudice would be suffered if the money is not released pending the hearing of the application before the Court of Appeal.

The Response

10. The respondents oppose the application. The 1st respondent has filed an affidavit sworn by the Registrar of Political Parties, Ms. Lucy Ndung'u, on 8th September 2014. Through Mr. Imende, Counsel for the 1st respondent, they submitted that the present application seeks the same orders as are before the Court of Appeal as it seeks an injunction to stop the disbursement of funds pending the hearing and determination of the application before the Court of Appeal, which is exactly the same prayer as is being sought before that Court. It was therefore the respondents' contention that this court cannot entertain an application seeking similar orders as those that are

pending before the Court of Appeal.

11. It was also the respondents' contention that the Court of Appeal had the discretion, upon hearing the parties, to decide whether or not to grant interim orders pending the hearing of the application before it. It was the respondents' submission that the present application seeks to usurp that discretion.

12. The respondents argue further that the petitioners had not made their application for an injunction timeously. Mr. Imende submitted that an oral application for stay was made and dismissed on 3rd February 2014, the date judgment in the petition was delivered, but the application before the Court of Appeal was made on 18th June 2014. It was their case that the budget cycle was known to the petitioners, and if it was considered urgent that the disbursement of the funds be stopped, an application for stay would have been made sooner. It was their contention therefore that there was no justification for the delay in making the application.

13. The respondents further contend that there has been no change of facts between what was presented before Majanja J and what is before the court; and that the amount of money in question remains the same and for the same purpose.

14. They therefore urged the court, in determining the application, to consider the interests of the parties and what prejudice would be suffered if the application is not granted and which greater injury should be avoided. They took the view that the court should not stop the disbursement of funds to parties which had garnered 65% of the aggregate vote while the petitioners got 35%. In this regard, the respondents argued that the petitioners were giving inaccurate information as they had conceded that taken in the aggregate, the number of votes that they had garnered would reach almost 5%. Greater prejudice would therefore be suffered by the three political parties which would be unable to meet their obligations under section 26 of the Political Parties Act.

15. The interested parties, Orange Democratic Movement (ODM) and The National Party (TNA) agreed with the respondents' position. ODM relied on an affidavit sworn by its Secretary General, Prof. Peter Anyang' Nyong'o on 3rd September 2014. Mr. Makori for the ODM submitted that having filed the application before the Court of Appeal, the jurisdiction of this court was ousted. It was his further submission that restraining the disbursement of the funds would be punitive to ODM

16. Mr. Omboga for the TNA relied on the affidavit sworn by Onyango Oloo on 3rd September 2014. He submitted that the Political Parties Act recognizes only political parties, not coalitions. It was also his submission that the present application was the same application that was made orally before Majanja J and rejected.

Rejoinder

17. In his reply, Mr. Kanjama sought to draw a distinction between the issue of jurisdiction and abuse of the court process. He submitted that the court has jurisdiction under rules 11, 20 and 21 of the Mutunga Rules as well as Order 40 and Article 159; and that there was no abuse of the court process as would arise under the provisions of section 6 of the Civil Procedure Act.

18. His contention was that the petitioners could not get an interim order from the Court of Appeal as only one judge of the Court certified their application urgent while jurisdiction to hear the application was vested in three judges; that the Court of Appeal would be seized of the application on 16th of September 2014 when it sits to hear the application and determine whether to give an injunction pending appeal. The intention of the present application was therefore to preserve the status quo pending the application before the Court of Appeal; and that there was concurrent jurisdiction between the High Court and the Court of Appeal with regard to applications for injunctions or stay orders.

19. Counsel further maintained that there had been a change of facts that had necessitated the filing of this application; that the change of facts was the reading of the budget on 17th June 2014 and until the budget was read, the petitioners could not litigate the issue which only became a live issue with the reading of the budget.

20. To the respondent's submission that the budget cycle was known, the petitioners argued that they had applied to the Court of Appeal but that they could not be heard until after the vacation; that the new facts were known after the petitioner learnt that the political parties funds were about to be disbursed, and that it would defeat the court process were the funds to be disbursed.

21. Counsel asked the court, in balancing interests as submitted by the respondents, to consider that there were 60 political parties that participated in the elections, which also represent the public interest, have manifest support and are required to discharge the functions in section 26 of the Political Parties Act. It was his submission that if these other parties could discharge their functions without the political parties' funds, so could the three parties which were currently entitled to the fund; and further, that if the Court of Appeal was to find that the petitioners are entitled to a proportionate share of the funds, it will not be possible to recover the funds.

Determination

22. Having read the application and affidavits in support and in opposition and heard counsel for the parties, I take the following view of the matter.

23. The issue that this application raises is fairly simple: whether the court should grant an order restraining the disbursement of funds from the Political Parties Fund to the three parties which qualify under the provisions of the Act pending the hearing and determination of an application that is set to come up for hearing before the Court of Appeal on 16th September 2014.

24. The determination of this issue is dependent on three other issues. The first is on the court's finding on whether it can properly exercise jurisdiction in circumstances where the Court of Appeal is also seized of the same matter. The second is whether the application has been brought timeously and is therefore deserving of the court's consideration; and thirdly, whether the appeal would be rendered nugatory if the injunctive orders are not granted.

25. It is not in dispute that the petitioners were heard and a decision rendered on 3rd February 2014 on the constitutionality of section 25(2)(a) of the Political Parties Act. The court (Majanja J) ruled that the section did not violate the constitution. The petitioners then made an oral application for stay, which was rejected in the court's ruling also dated 3rd February 2014.

26. I note that the petitioners issued a notice of appeal on 14th February 2014, and their appeal was filed on 15th April 2014. However, an application for an injunction before that court was not made until 18th June 2014.

27. The respondents have argued that this court has no jurisdiction to deal with the present application while a similar application is pending before the Court of Appeal. The petitioner sees this issue, not as one of jurisdiction, which Mr. Kanjama contends that the court can exercise simultaneously with the Court of Appeal, but as one raising the question whether there is abuse of court process and offending against the provisions of section 6 of the Civil Procedure Act.

28. I agree with the petitioners that the High Court has jurisdiction to consider an application for stay or for an injunction pending appeal. My concern, however, is whether this court can properly exercise discretion to grant an injunction while the same application is pending before the Court of Appeal. This case is reminiscent of the situation in **High Court Petition No. 402 of 2014-The National Land Commission –vs-Cabinet Secretary, Ministry of Land Housing & Urban Development & Another** in which the petitioner sought injunctive and other orders from this

court in a matter in which they had sought similar orders in the Supreme Court. It was the view of the court in that matter, a view I also hold in this matter, that it ***"would not be proper for this court to enter into a consideration of the matters raised in the application or the petition, or purport to give any orders in respect thereto, while the same issues are live before the Supreme Court."***

29. It may, however, be that I am mistaken in finding that the court cannot address its mind to the issue while a similar application is pending in the Court of Appeal. I will therefore consider the two other factors set out above

30. The petitioners explain their coming to this court to seek relief on the basis that they were not able to obtain interim orders from the Court of Appeal as only one judge certified their application urgent but the jurisdiction to consider the application for injunctive orders lies in a three judge bench of the Court. Which then raises the question of the timing of the application before the Court of Appeal.

31. As noted above, the decision that the petitioners seek to appeal against was made on 3rd of February 2014. While a Notice of Appeal was filed within the same month, and the appeal two months later, in April 2014, no application for an injunction was made until June 2014.

32. I agree with the respondents therefore that there had been delay on the part of the petitioners in making their application for an injunction to the Court of Appeal. Had they made it at the time they filed their appeal, doubtless there would have been sufficient time for the Court of Appeal to consider the application and issue such orders as it deemed appropriate; and this would have obviated the need for the current situation in which the High Court and the appellate court are seized of the same matter.

33. The petitioners submit that they could not litigate the issue until the budget for 2014/2015 was passed, which is when the issue of the allocation to the political parties from the fund became live. It is on this basis that they justify the filing of the application before the Court of Appeal on 18th June 2014.

34. In my view, this argument is not tenable, for two reasons. The first is that the grounds relied on in the application before the Court of Appeal do not show in any way that the application was precipitated by the passing of the budget for 2014/2015.

35. Secondly, as submitted by the respondents, the budget cycle is known; and the court having found that the provisions of the Political Parties Act are constitutional, it would have been prudent to assume that in compliance with the law, Parliament would make provision in the budget for the Political Parties Fund, and that the fund would have been allocated to the qualifying political parties in accordance with the law whose constitutionality is the subject of the petitioners' appeal.

36. The petitioners allege that their appeal would be rendered nugatory if this court does not grant the orders sought. I am not satisfied that this is the case. In his ruling on the oral application for an injunction on 3rd February 2014, Majanja J stated as follows at paragraph 5 and 6 of the ruling:

[5.]…if the petitioners were to succeed, they would be entitled to the full benefits of the entire fund which has not been appropriated in terms of section 24(1)(a) of the Act. The implication of this is that the appeal cannot be rendered nugatory as all what (sic) Parliament will be required to do will be to comply with the law as stated by the appellate court.

[6.] On the other hand, I have highlighted the need for public funding for political parties as an important element of democracy. The entitlement of those parties to part of the fund is not disputed and I do not think it would be fair to them to be denied their legal entitlement particularly as where it is clear that if the appeal succeeds, the Fund would be entitled to at least the sums due under section 29(1)(a) of the Act and provision will be made for the smaller

parties."

37. I agree with this view. Should the petitioners' appeal succeed, then Parliament will be required to make appropriate provision for the parties. This however, will not affect the entitlement of the interested parties to the funds, which entitlement will not be affected by any decision made on the appeal.

38. For the reasons set out above therefore, I decline to issue the orders sought in the application dated 27th August 2014.

39. It is hereby dismissed, but with no order as to costs.

Dated Delivered and Signed at Nairobi this 15th day of September 2014

MUMBI NGUGI

JUDGE

Mr Kanjama instructed by the firm of Muma & Kanjama Advocates for the petitioner

Mr Imende instructed by the firm of Mohammed Muigai Advocates for the 1st respondent

Mr Wilson instructed by the firm of C.N Kihara & Co. Advocates for NARC-K an interested party

Mr Omboga instructed by the firm of Omboga & Co. Advocates for TNA, URP – Interested party

Mr Makori instructed by the firm of S.O. Makori & Associates for ODM – interested party