REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 602 OF 1992

JARAMOGI OGINGA ODINGA & 3 OTHERS.....APPLICANT

VERSUS

ZACHARIAH RICHARD CHESONI .....RESPONDENT

ATTORNEY GENERAL.....RESPONDENT

RULING

By their originating motion dated 13/7/92 the applicants Messers Odinga, Kibaki, Nganga and Makau Chairmen of FORD, DP, KENDA and SDP registered political parties came to Court asking for declarations and orders on 11 grounds against the 1st respondent, Justice Chesoni, the Chairman of the Electoral Commission and 2nd respondent the Hon The Attorney General.

Put together the prayers are for orders that the 1st respondent had become unfit and unqualified to head the Electoral Commission; that the voter registration exercise which was going on then was null and void for that reason and therefore this Court should issue a restraint against 1st respondent from acting as the Electoral Commission Chairman, and another order should stop the voter registration with the end result that the voters cards so far issued should be destroyed. In essence this Court was being asked to declare the whole voter registration exercise of no effect at all.

Mr M'Inoti represented applicants. Mr Ransley and Miss Janmohamed for the 1st respondent while Mr Keiuwa came in for the Attorney General.

Before the hearing of the application which touched on various subjects including universal suffrage, preliminary points of law were raised by the respondents' counsel. These can be categorized under 4 main heads: (1) Non-joinder of Electoral Commission as a party (2) The form and procedure adopted by the applicants in bringing this application; (3) Whether there was a cause of action and (4) Applicants' *locus standi.*

(1) Non-joinder of Party:

This was Mr Keiuwa's main point of objection. He associated himself fully with Mr Ransley's points which will follow presently. Then for his part Mr Keiuwa argued before us that the applicants had not joined the EC as a party although prayers were made for orders against it. Accordingly he asked us to strike out grounds 1, 2(b), 6, 7, 8, 10 and 11 of the originating motion. Mr M'Inoti countered this by referring to order 1 r 9 CPR:

> 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of

the parties actually before it.

In accordance with this rule then we could only dispose of the controversy between 1st and 2nd respondent. But applicants could amend the motion to bring in the Electoral Commission otherwise any orders would affect these two only leaving out the Electoral Commission. Mr M'Inoti however argued that the Attorney General was the principal adviser and counsel of the Government with its departments. The Electoral Commission was such a department.The Electoral Commission was such a department as the Public Service Commission is and thus the Attorney General was rightly sued. The Public Service Commission is another creature of the Constitution. Several cases were cited and chief among them was the case of *Mwangi Stephen Murithi vs Attorney General* HCCC 1170/1981 (unreported). In this matter the plaintiff had been retired by the Public Service Commission. He was not amused by that. He sued the Attorney General. One of the points that were canvassed was whether the plaintiff was non-suited on that ground. Hancox J as he then was heard the case. He concluded that *Murithi's* case constituted civil proceedings within s12 (1) of the Government Proceedings Act. Accordingly the Attorney General had been properly sued. But here we came up a hitch. These proceedings are brought under an originating motion. This form and procedure is contested by Mr Ransley. It is not indicated in the originating motion that the Attorney General was being sued on behalf of the Electoral Commission as a government body. Indeed this cannot appear in the originating motion where parties are hardly described. But even if that were so, the question remained to be answered. It was added that injunctions do not issue against the Government according to Government Proceedings Act s 16 (1) (i) (cap 40) yet those were asked for in prayers 9 and 11. Secondly, it was further argued, if the Attorney General was here for the Electoral Commission as a whole, why was the 1st respondent, the Electoral Commission Chairman sued separately? Although it can be done under order 1 rule 9, no move had so far been taken to effect amendments to join the Electoral Commission to the parties so that any errors are corrected and the case proceeds before us to determine matters in controversy with all due parties appearing. On reading the Government Proceedings Act there is even the issue of a statutory notice under s 13A which ought to go to the Attorney General if he is being sued for and on behalf of the Government. When referring to this Act Mr Keiuwa did not refer to this section and Mr M'Inoti did not wish to say anything about that Act at all.

We were however satisfied that the Electoral Commission should be considered in the same class as the Public Service Commission on whose behalf the Attorney General appears in Court when it is sued. He was thus sued here on behalf of the Electoral Commission and so we did not sustain the objection raised on this point at all. As for suing 1st respondent separately we were of the view that the applicants in their prayers had made complaints specific to him as the Electoral Commission Chairman and for that reason it was proper that he appear as a separate party.

Accordingly we concluded that there was no non-joinder of parties at all.

(2) The Form and Procedure: Mr Ransely raised this issue and argued before us that the Constitution as well as any other statutes which afford an aggrieved party recourse to Court for redress, do also spell out the mode to follow. Where a mode is not provided for then an originating motion comes to the parties' aid. But where there is no provision or mode to follow, then a party must seek redress by filing a plaint.

Mr Ransely continued that this originating motion was brought under sections 60 and 123 (8) of the Constitution. None of these refers to any mode of filing proceedings under them. Why then did the applicants file an originating motion? Three cases were cited to us regarding the form and procedure of filing proceedings.

In *Boyes vs Gathure* [1969] EA 385, an application had been made to the Registrar of Titles to remove a caveat. A party applied to a judge in chambers to extend that caveat's life. It was accordingly extended. This mode of application was challenged because the relevant Act allowed a party to "apply by summons." In this matter the Court of Appeal considered whether it was correct for the applicant to come to the High Court for extended life of a caveat by way of a chamber summons as he had done, or if he ought to have filed an originating summons. The former is for interlocutory matters in an existing suit while the latter brings parties to Court in specific actions for the first time and with a view to have the

parties' rights determined conclusively. The Court agreed that the application by way of chamber summons was in the wrong form but that did not invalidate the proceedings. The irregularity did not go to the Court's jurisdiction and it did not occasion any failure of justice. The Judge however should have struck out or rejected that application, because of the wrong form of bringing it. The application ought to have been by an originating summons.

E vs E [1910] EA 604, was the next case cited to us. It also concerned use of originating summons in dissolution of a Mohammedan marriage. The defendant objected to this mode of instituting proceedings. The application for dissolution was struck out because it was brought under the originating summons instead of the correct mode of plaint. This is so because under the Mohammedan Divorce & Succession Act (cap 156) no form or procedure for dissolution of a marriage is set out. This was in line with the Court's view in *Boyes & Gathure* case (*supra*) namely striking out or rejecting proceedings brought to Court under a wrong form.

The earlier case of *St Benoist Plantations Ltd vs Jean Felix* (1954) 21 EACA 105 was relied on by both sides. This case was also referred to in the *Boyes* case (*supra*). In this case the respondent had moved the Court by originating motion for an order that the Court appoint 2 chartered accountants to investigate the affairs of the company under section 136 of the Companies Ordinance. Affidavit in support of this originating motion showed misappropriation of company's funds and misconduct on the part of a director. The appellant company argued *inter alia* that the application for investigation was not in proper form as the originating motion was not then known and applied in Kenya. In this case the originating motion had been brought under (the now) order 50 rule 1. It was observed at pp 108:

> "It seems clear … that if the local statute law provides a form of procedure for any specific proceedings, that form must be adopted. It is only where no form is provided that one is thrown back on the English procedure as at 12th August, 1897 …. If the local law does not provide a suitable or at least a competent mode of procedure for an application under s 136, it must be made under the old English procedure … by originating motion."

The same point was repeated on the same page after describing the uses of either the originating summons or origination motion in England. The Court observed:

> "There is in England a general rule that where a statute provides for an application to the Court but does not specify the form in which it is to be made, and the Rules do not expressly provide for any special procedure, the application may usually be made by originating motion."

Mr M'Inoti argued that his clients had under s 60 of the Constitution a right to come to Court for redress. That section did not provide for the mode and procedure by which to come to Court. Accordingly the applicants had adopted the originating motion as the avenue to travel to Court. The respondents' side could not hear of this. They argued before us that there was no right or provision to come to Court under section 60. That section did not give rights of action or causes of action whereupon it could be said that if it did not not provide for a mode to seek redress when those rights were breached, then the originating motion could be the appropriate way. That is what formed the substantial part of the next 2 preliminary points regarding the cause of action and *locus standi*, which he will turn to next. But we are of the view that where no mode of coming to Court is provided for yet one has a cause of action the originating motion may be used. In fact the party suing will choose the mode. If it is found unsuitable a proper one will have to be adopted so that justice is done to the parties. The Court then commented thus at pp 109:

> "… (it) … may be argued, first that a suit instituted by plaint is the omnibus procedure in this country or alteratively that application should be made here by petition. We think that an application should properly be regarded as something distinct from an action or suit commenced by a plaint. In many cases the relief sought might be obtained by action – sometimes by claiming a declaration, but an application should in the ordinary sense be a summary proceeding, something simpler and shorter than an action."

So other modes of coming to Court include plaints, petitions and applications.

Accordingly it is clear that in such a situation where one has a cause but he is not provided with the form and procedure to bring that cause to Court for relief, the form and procedure adopted and used as appropriate should be. In our present case if the applicants have a cause of action under s 60 (Constitution) how do they move? That section does not provide for a mode or procedure to come to Court for redress. They should as they did file an originating motion. We were therefore satisfied that applicants' originating motion is a competent form by which to come before us. The applicants are coming to us contending that their rights under the Constitution are in jeopardy. In other jurisdictions where a party alleges violation of his rights under the Constitution while rules obtain as to mode and procedure to go about seeking redress, the position is different. The party simply goes by the laid down rules. For instance in Uganda in 1967 they had such clearly laid down regime. The party had to come to Court by way of originating motion and no other (See *Masaba vs R* [1967] EA 488).

(3) Cause of action: It was argued for the applicants that they had a cause for action under section 60 (1) Constitution because that section says:

> s 60 (1) There shall be a High Court which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such jurisdiction and powers as may be conferred on it by this Constitution or any other law. (underlining supplied).

We did not agree with the counsel's submissions on applicants' behalf that by such words this section created causes of action. On plain reading the section establishes a High Court. It gives it a wide power to deal with matters known to law without being limited as to territorial or monetary value. This contrasts with the subordinate courts whose territorial and pecuniary as well as subject matter jurisdiction is limited by specific statutes. The same with the Court of Appeal. It too operates within a given and specific law. In essence, matters which come before it are only on appeal. It need be stated that the High Court does not have to deal with any subject under the sun. The subject must be known to law; it must be a justiceable matter. Also in its exercise of jurisdiction the Court will enforce rules of practice and suppress any abuses of its process to ensure that justice is done to parties before it. The High Court does not have a general power to entertain at any instance of anyone any matter raising a constitutional or any other issue. Its role is not that of standing as an ever-open forum for ventilation of all grievances that draw upon the Constitution or any law for support. The Court's unlimited powers ought to be and are used with judicial restraint and only in situations where ends of justice may be defeated by failing to exercise them. To use these inherent or residual powers, the Court must be satisfied on grounds placed before it that the powers should indeed be used. That, in our opinion, is what section 60 (1) provides for. It does not create causes of action or courses to follow in those actions. S 123 (8) gives this Court power to review actions of persons or authorities given duties and functions they should execute without control and direction from any source. This Court is thus mandated to determine questions arising from whether such body or authority has exercised such functions according to the legal provisions applicable. That is all.

We appreciate that for an aggrieved party to come to us for redress under the Constitution only two sections avail. S 84 is for a party whose fundamental rights and freedoms have been or are likely to be infringed. These rights fall between ss 70 – 83 of our Constitution. The mode to come to this Court has been by way of originating motion. Indeed it can be added that if by application of other sections of the Constitution one's fundamental rights and freedoms are breached, by clearly showing that state of affairs as bringing that party under s 84 for redress, this Court will hear him/ her.

This Court will also hear a party whose case falls under s 67 of the Constitution. By this section, if a case is before a subordinate court and it appears to that Court that a substantial question of law falls to be interpreted by the High Court that Court may or if a party to the proceedings so requests it, shall refer the matter to the High Court for interpretation.

No other provision exists in our Constitution creating causes and courses of action. Indeed it is not that all sections of the Constitution must be contended in Court anyway. The provision for the Electoral Commission in such a section. Under s 41 (1) the Electoral Commission is established with its chairman plus the members. This is a presidential prerogative. The qualifications for an electoral commission member are set out in section 41 (3). The manner to remove a commission member is by a presidential

tribunal appointed under s 41 and (6). Reasons for removal fall in sub (5). There is no room for this Court to declare any Electoral Commission member "unfit and disqualified" therefore removing him from the Electoral Commission. That is how the Legistlature intended it to be and this Court will not arrogate to itself the duty or any thing regarding removal of electoral commission members. Flowing from the foregoing, prayers, against the electoral commission or its Chairman are untenable as causes of action before this Court. In sum, we were not satisfied that s 60 creates any causes of action at all. Therefore those which were claimed as such were not maintainable before us at all. The purpose of s 60 is explained above and that is all. And if a party has no cause of action, ie the basis on which he files proceedings before a Court, then that Court wastes no time in going through a form of hearing. It is futile. Accordingly we were satisfied that the applicants had no cause of action to bring before us to hear. The Constitution did not create any cause of action for them and we were not told that any other law did so at all.

(4) *Locus Standi*. Do the applicants have a legal standing before this Court in the current proceedings? The argument on behalf of the applicants is that they indeed have the right to bring these proceedings. They are chairmen of registered political parties. They feel that any Electoral Commission irregularity in voter registration will affect and impair the electors' right to vote in the coming general elections. It is trite law that a party coming to Court for redress should have genuine interest known to law which has been or is likely to be prejudiced. The Court then is expected to apply the law to the facts of the case which may involve a broken contract, personal injury, damage to reputation or property, breach of statutory right or duty etc and pronounce a verdict. But if the prejudice affects others' interests and one purports to bring any action on their behalf, one will be taken to be a mere busybody who has no right to stand before Court unless one satisfies the Court as to ones capacity to come to it on behalf of others. For that reason it is necessarily procedural that a party describe himself *vis a vis* the action and relation to other parties. When it comes to the public interest, where a party suffers generally as any other, then relator actions lie. These actions fall under ss 61 and 62 of the Civil Procedure Act and they are limited to public nuisance and public charity. The Attorney General is the principal aggrieved party but 2 or more private persons, having interest in the given action, and with the Attorney General's written consent, can sue. However even in such situation, if a private citizen suffered or is likely to suffer more than the public generally, then he can sue on his own.

From reading the originating motion it is quite apparent that what the applicants are praying declarations for is to the effect that if such declarations do not issue the Kenyan public entitled to or registered to vote in the forthcoming general elections will be prejudiced. It is claimed that there are prejudicial defaults and irregularities as per the paragraphs of the originating motion. But what is the applicants' own interest in jeopardy to entitle them to come before us? As electors? We cannot advert to any other capacities and descriptions they may have. What is the applicants' *locus standi*? Lord Denning's *Discipline of the Law* was cited to us (pp 115). Therein the learned and eminent lord justice had referred to 2 cases. In *R vs Magistrates Court* (1957) 5LGR 129, it was briefly stated that one party had been allocated a plot. The applicant who had no legal right to it thought that he was entitled. Lord Denning was on the bench that heard the application. They held that the applicant had a *locus standi.* These Local Government Reports (LGR) are not easily available here for our own reading to follow the arguments. But the other case quoted in the same book was *R vs Paddington Valuation Officer Ex parte Peachey Property Corporation Ltd* [1966] 1 QB 380. A valuation list had been prepared. The applicant was not affected by any errors that were found in that list. But he was allowed to complain and be heard that the list was invalid. Particularly with regard to the last case, we cannot say what the valuation law /rules involved and how they were worded. We could not therefore say more about it. Yet we are still far from discerning the applicants' rights to come before us. Is this a representative proceeding before us? We can hardly say so. Are applicants aggrieved parties? In connection with these proceedings let us turn to the National Assembly & Presidential Election Act and Rules (cap 7). The electors' registration is provided for in the Constitution and this Act governs the process thereof.

The law is clear (both under the NAPE Act and Rules) that a voter who is aggrieved before and after the elections can come to Court.

During voter registration, any aggrieved person who feels that there is any irregularity likely to affect his right to vote eg faults and errors with his card, he can go to the local registration office, and then to the

subordinate court for redress. It does not allow for some busybody to raise a complaint on behalf of others in this respect.

After elections if one is aggrieved about the results he can go to the subordinate court for local authority elections by way of an application. Or he can move the High Court by filing a petition. That shows that the aggrieved party has the ground on which he stands to be heard. There is no ground on which an individual can stand before us in the voter registration claiming to do so on behalf of the public who are described here as millions of Kenyans. Not even on the issue of ID cards. The applicants have no "personal interest" at stake. At least the prayers do not disclose one yet it was claimed that they had an interest at stake which gave them legal standing before us. We could hardly find statute or case law in support of such a stance. Only individual voters whose "personal interests" are at stake, if any have a legal standing before this Court. It is not for anybody who feels that voters may be aggrieved.

In the matter of what may be presumed as affecting the general public and therefore prompting one of the them to file a suit or constitutional reference, two cases from West Indies end support to the position that one coming to Court in such proceedings should have *locus standi*.

One such case arose in the Bahamas – *Kenneth Wallace Whitefield and The Attorney General of the Bahamas, In Re The Bahamas Court of Appeal* (Appeal No 11/89) (published in the *Commonwealth Law Bulleting* Vol 16 No 3 July, 1990). In this case the Prime Minister agreed with the Chief Justice before he attained the retirement age of 65 that the latter would continue in office for 2 more years. As per the Constitution the Prime Minister was obliged to consult with the leader of the opposition on this matter. The Prime Minister by oversight did not do so. The appellant sought by declaration that the Chief Justice had not been validly permitted to continue in office. He had sat on an Election Court which dealt with a matter involving the appellant.

The Court of Appeal in dismissing the appeal held *inter alia* that there was no legal right being claimed and the appellant had no *locus standi*. The appellant had not shown that he had suffered any disadvantage or detriment because of the alleged defect in the procedure.

It can be seen therefore that even a person who can demonstrate a special interest he thinks entitles him to a declaration or relief, the Court must be satisfied, not only that that interest exists but also that it has been prejudiced. It has been prejudiced and therefore the litigant is entitled to a relief from the Court he has approached. In essence, it is even harder for the intending litigant who has shown no personal interest at all which has been prejudiced as our instant case is.

Another case is from St Vinicent and the Grenadines, also in the West Indies. Briefly put, in that Country the Constitution allowed the Governor-General to appoint 2 senetors from the opposition in Parliament. After elections there was no opposition member elected to the House to be appointed. But 4 were appointed from the Government side. The plaintiffs sought for a determination on questions *inter alia* whether the Government was legally constituted. The High Court dismissed the application on grounds that the plaintiffs had no *locus standi* to bring the proceedings. They had not proved that their personal interest was being contravened in any way by the alleged improperly constituted Government. The fact that they were tax payers and registered voters of the Nation did not confer them with *locus standi*. (See *Commonwealth Law Bulleting* Vol 17 No 1 Jan, 1991). We were in agreement with these two decisions that the party coming to Court must have *locus standi*. That is the law.

In conclusion we were satisfied that the applicants had no *locus standi* in regard to the prayers they presented. They did not disclose the applicants "personal interest" which was in jeopardy which interest would give the applicants the right in law to stand before this Court to be heard.

We accordingly uphold two of the preliminary points of law raised and dismiss the application with costs.

Orders accordingly.

Dated and delivered at Nairobi this 13th day of November 1992

F.E ABDULLAH **E.M GITHINJI** **J.W MWERA**

JUDGE **JUDGE** **JUDGE**