REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 6287 OF 1992

CHARLES KAGAI MWIHIA .....APPLICANT

NANCY WAMBUI KANGETHE.....APPLICANT

VERSUS

NDOLO AYAH .....RESPONDENT

JOSEPH G KAMOTHO.....RESPONDENT

RULING

The applicants have resorted to the unusual procedure of bringing a constitutional reference to this Court by way of an origination of summons, for the following orders:

1. That this honorable Court be pleased to declare that the Kenya African National Union is not legally entitled to nominate H E Daniel Toroitich Arap Moi to be its presidential candidate in the general elections scheduled in Kenya on 29th December, 1992 as the latter is disqualified by section 9 of the Constitution of Kenya as amended by Act No 6 of 1992 (The Constitution of Kenya (Amendment) Act 1992) which provision makes him ineligible to be a President of Kenya for a further term.

2. That this honourable Court be pleased to make a declaration that H E Daniel Toroitich Arap Moi, the current President of the Republic of Kenya, is not eligible under the Constitution of Kenya, as amended by Act No 6 of 1992 (The Constitution of Kenya (Amendment) Act 1992), to be nominated as the presidential candidate in the forthcoming general elections scheduled to be held on December 29th, 1992.

The application is supported by the affidavits of the applicants who as electors and registered voters, in the forthcoming presidential elections, claim that as such, they are entitled to seek the intervention of this Court to prevent what they regard as a violation of the Constitution of Kenya namely the nomination and presentation by KANU of President Daniel Toroitich Arap Moi as its presidential candidate. It is averred in their affidavits that since President Moi has previously held the office of President of Kenya for more than two terms, he was now ineligible and disqualified under s 9 of the Constitution which forbids the election of any person to " hold office as President for more than two terms", from being further nominated for and elected as the President of Kenya.

The respondents who are the Chairman and Secretary General respectively, of KANU then applied to have the originating summons struck out on grounds which can be summarized as follows: -

(a) That the applicants have no *locus standi* to bring their application because *inter alia* they have not shown, not being members of KANU or otherwise, that they have suffered any injury or damage;

(b) That the application is bad in law;

(c) That no violation of the Constitution or any law had occurred; and

(d) That s 9 of the Constitution is not retrospective in its application.

Before hearing arguments on the preliminary objections raised on behalf of the respondent, I acceded to the request made by Mr A B Shah counsel for the respondents, that the Attorney General do appear as *amicus curiae* in view of the obvious public interest and important constitutional issues that the applicant's application raised.

But before going to consider the preliminary objections raised, it will be useful to give the setting within which the application has been brought. It is not necessary to say anymore than that as a result of the general feeling in the country expressed in many ways, that Kenya should no longer have a one party system, but a multi-party one, a bill was introduced towards the end of 1991 in Parliament to effect the necessary change. The objects and reasons of the bill state that:

> "The principal object of this bill is to amend the Constitution to repeal section 2A which provides that KANU should be the only political party in Kenya."

This bill became law on 20th December, 1991 under the name of the Constitution of Kenya (Amendment) (No 2) Act, 1991 which I shall henceforth refer to as the " No 2 Act". In the No 2 Act not only was s 2A which provided that KANU shall be the only political party in Kenya, repealed. Other amendments to the Constitution repealed the requirement that a candidate for President or election as a member of the National Assembly shall be nominated by KANU. Also, and in line with the multiparty system created by this Act and which was to come into being, the No 2 Act provided by a new s 40 of the Constitution for a member of the National Assembly who crosses the carpet to cease to be a member of the National Assembly. But this No 2 Act was not the end of the story, naturally. The next important bill prepared for presentation to the National Assembly was published in the special issue of the Kenya Gazette Supplement of 3rd March, 1992. This bill proposed certain fundamental changes to the Constitution. Among these are the abolition of the Office of the Vice-President; the Speaker is to act as President in the case of a vacancy in that office or during the absence or incapacity of the President; there is to be a Prime Minister who shall be the Head of the Government appointed by a President now only a Head of State, from the party that commands the support of the majority in the National Assembly, and, a President under the amended Constitution, is to hold office limited to two terms of five years each. It is also provided for the President in office prior to the holding of the multiparty election under the amended Constitution and subsequently, to continue in office until the president elected at the forthcoming multiparty elections and subsequent ones, assumes office. The actual provisions as to the terms of office of the President contained in clause 6 of the bill are as follows: -

> "1. The President shall hold office for a term of five years beginning from the date on which he is sworn in as president.
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> 2. No person shall be elected to hold office as President for more that two terms.
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> 3. The President shall, unless his office becomes vacant by reason of his death, his resignation or his ceasing to hold office by virtue of section 10 or 12, continue in office until the person elected as President at a subsequent presidential election assumes office.
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> 4. The holding of the Office of the President shall be incompatible with the holding of any office of profit or of an office in any professional or labour organization and with any professional activity or any other public employment."

And there are other amendments which are not germane to the present application, but there is yet one more that is. This is contained in clause 32 of the bill which provides for necessary savings and transitional provisions. Sub clause (1) makes provisions to enable the existing President, Vice President,

Minister or Assistant Minister prior to the elections to continue in office until the persons elected as President and appointed Prime Minister after the elections and in pursuance of the amended provisions of the Constitution, take office. This to my mind, having regard to the fundamental changes to the executive political institutions introduced, constitutes proper and necessary savings and transitional provisions. Within the context of the provisions of sub clause (1) and the fundamental changes proposed, sub clause (2) goes on to provide, for the avoidance of doubt, that although the person holding the Office of the President prior to the coming into force of the provisions of the bill, may continue to act as such, until a President is appointed in accordance with the provisions of the bill, the provisions of the bill with respect to the term of office of the President elected under the bill, shall only apply to the President elected under the provisions of the bill upon his assumption of office thereunder and not retrospectively. In other words, the person elected as President under the bill shall not be regarded as the President who was in office prior to the forthcoming presidential elections and the new provisions as to the limitation of terms of office, shall not apply to him.

At first sight, sub clause (2) of clause 32 may appear to be concerned with savings and transitional provisions, but to my mind, it also does provide that the limitation of terms of presidential office shall not effect presidential terms of office held previously. However, the bill met with resistance not only from the KANU parliamentary group but also from the other political parties which had been by then formed and registered and other national movements. The result was that the bill was not presented to the National Assembly. Instead, another bill, which was bereft of all the fundamental changes earlier proposed, was presented to the National Assembly. It did, however, contain the same provisions as to the limitation of presidential terms of office, as set out in clause 6 of the previously withdrawn bill. The savings and transitional provisions to be found in clause 32 of the previous bill were not repeated. This second bill was enacted as the Constitution of Kenya (Amendment) Act 1992 which I shall henceforth refer to as " the 1992 Act". The material change produced by the 1992 Act for the purposes of the present application, and as already set out in clause 6 of the previous bill, is to repeal the existing s 9 of the Constitution whereunder there was no limit to the number of terms that the President under the amended Constitution may hold office, and *inter alia*, to replace it with provisions limiting the terms of office of a President to two terms. The savings and transitional provisions contained in the previous bill were omitted in the 1992 Act. It was to be argued during the hearing of the preliminary objection to the present application that the replacement by the provisions of s 5 of the 1992 Act of the old s 9 with the new one without the inclusion of the savings and transitional provisions, was a clear indication that the limitation of the terms of office of the President was intended to be retrospective.

Anyway KANU has now nominated President Daniel Toroitich Arap Moi to be its candidate for President hence the bringing of this present application that has been brought as a constitutional reference, and as such, I think that I am entitled to deal with it. But first, what are the conditions under which an application can be made to the Courts to determine issues arising out of an alleged breach of provisions of the Constitution. Section 84(1) of the Constitution for instance, specifically gives the High Court original jurisdiction to hear and determine applications made by a person who claims that any of his fundamental rights and freedoms guaranteed under sections 70-83 of the Constitution has been violated. The present application is not such an application. Other sections of the Constitution also provide for specific redress that may be sought and how, under other provisions of the Constitution. It is said by Mr Kariuki, counsel for the applicants, that the present application is brought under s 10 (2) of the Constitution, to determine whether President Moi is qualified to be nominated for election as President in the forthcoming elections. What then are the qualifications for nomination for election as a President? For the answer to this one must turn to section 5 (2) of the Constitution, which is in the following terms:

> " A person shall be qualified to be nominated for election as President if, and shall not be so qualified unless, he:-
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> (a) is a citizen of Kenya; and
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> (b) has attained the age of thirty five years; and
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> (c) is registered in some constituency as a voter in elections to the National Assembly".

It is not the case of the applicants that President Moi does not qualify under any of the criteria set out in section 5(2) of the Constitution. The application it may be recalled is:

> "That this honorable Court be pleased to declare that the Kenya African National Union is not legally entitled to nominate H E Daniel Toroitich Arap Moi to be its presidential candidate in the general elections scheduled in Kenya on 29th December, 1992 as the latter is disqualified by section 9 of the Constitution of Kenya as amended by Act No 6 of 1992 (The Constitution of Kenya (Amendment) Act 1992) which provision make him ineligible to be a President of Kenya for a further term."

But can this be right? It may well be that President Moi may be disqualified from being elected to hold office for more than two terms on the grounds that he has already held office for more than two terms, but that is a different matter from his being disqualified at the outset from being nominated for election on those grounds since disqualification from being nominated as are set out in section 5(2) of the Constitution involve quite different and specific grounds. It is in my view, a fundamental issue in that, if the application is as it is, for a declaration that President Moi be declared disqualified from being nominated as presidential candidate then this must be supported which it is not, at least by some evidence that he doesn't comply with any of the conditions laid down in section 5(2) of the Constitution and on this ground alone I would under different circumstances, dismiss the present application as being misconceived. If the desire of the applicants is that President Moi be declared as ineligible to be elected as President because he had already, held office as President for more than two terms, that is another matter and in which case, a specific application to that effect should have been brought. But even so, can such an application be brought or even one contesting his qualification to be nominated for election as President, by way of the present originating summons? I would say no. Section 10 of the constitution provides in subsection (1) and (2) that:

> "(1) Subject to this section, section 44 shall apply to the hearing and determination of a question whether a person has been validly elected as President, as it applies to the hearing and determination of a question whether a person has been validly elected as a member of the National Assembly.
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> (2) Where a person applies to the High Court for the determination of more than one of the following questions namely; whether the President was qualified to be nominated for election as President, or was validly elected as President, or was validly elected as a member of the National Assembly, he shall make one application only to the High Court".

Whilst subsection (1) of section 10 provides that section 44 shall also apply to the hearing and determination of the validity of a presidential election, subsection (2) stipulates without derogating derogaly from the provisions of section 44, that only one application shall be brought. As it can be seen, subsection (2) makes more than procedural provisions as to the number of times that an application may be made to question whether a person has been validly elected as President whether on the grounds of his being disqualified to be nominated for election as President, or not being validly elected as President or as a member of the National Assembly. That the issue whether a person is qualified to be nominated for election as President is a matter that affects the validity of his election as President, is further reinforced by the provisions of subsection (4) of section 10 which is as follows:

> "(4) Where the High Court determines under section 44 that the President has not been validly elected as President for any reason other than that he has not been validly elected as a member of the National Assembly or that the seat in the Assembly of the President has become vacant, he shall cease to hold office."

The President can thus, be declared under the provisions of section 44 which have been made by section 10(1) to apply to the President, not to have been validly elected for any number of reasons including his not being qualified to be nominated in the first place, for election as a President.

It is now necessary to consider section 44 to see how the determinations of issues are to be made and

what sort of applications can be brought. It is clear from such a consideration of section 44 that the National Assembly is given the important function of prescribing:

> " the circumstances and manner in which, the time within which the conditions upon which an application may be made to the High Court."

and " the powers, practice, and procedure of the High Court in relation to the application". The National Assembly consequently made mandatory provisions in section 19 of the National Assembly and Presidential Elections Act to the effect that such an application shall be by way of a petition subsequent to the presidential elections, to be tried by an Election Court consisting of three judges. This being so, and whether the applicants have *locus standi* or not, the present application is nevertheless not only premature but wrongly brought and should on these grounds be dismissed.

In the well known case of *Thande v Montgomery* [1970] EA 341, the East African Court of Appeal held that preliminary elections such as nominations to stand for elections, was part of the election process and such, could be challenged after the elections by way of an election petition. More recently, in the case of the *Speaker of the National Assembly v The Hon James Njenga Karume,* Civil Application No NAI 92 of 1992 (NAI, 40/92 UR) the Court of Appeal when considering the pre-dominance and pre-eminence of section 19 of the National Assembly and Presidential Elections Act, observed as follows:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."

I would add that the present application brought in the way in which it has been brought, cannot oust clear constitutional and statutory provisions.

In view of the foregoing, it is unnecessary for me to determine any of the other issues argued in the hearing of the objections to the present application.

In the result, the present application is dismissed with costs, but not for two counsel as requested.

Dated and delivered at Nairobi this 11th day of December, 1992

A.M AKIWUMI

JUDGE