**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 1523 OF 1983**

**NYARIBARI .....PLAINTIFF**

**VERSUS**

**HON.D A ONYANCHA.....1ST DEFENDANT**

**MBARIA MAINA.....2ND DEFENDANT**

**RULING**

July 26, 1988, **Tanui J** delivered the following Ruling.

The plaintiff, who is the unsuccessful candidate in the KANU nomination held on February 22, 1988 at the West Mugirango Constituency, filed this suit on April 25, 1988 naming Hon DA Onyancha, MP as the first defendant and Mr Mbaria Maina the District Commissioner for Kisii District, as the second defendant. It is the plaintiff's case that by virtue of his being duly qualified, he stood KANU nomination with the first defendant at the said constituency which was conducted by the second defendant, in his capacity as the returning officer. Further it was the plaintiff's case that contrary to the KANU nomination rules registers were not verified and were not used at the polling stations for the nomination exercise; that from the results KANU registered voters who voted at nomination exceeded registered voters; the results announced were contrary to those certified and retained by accredited agents; the second defendant refused on demand by the plaintiff to afford the plaintiff a recount of the votes; certificate of results was not opened verified and complied with in the presence of candidates or their accredited agents; voters were imported and transported from polling station to polling station; agents and supporters of the plaintiff were chased away and his posters destroyed by chiefs and assistant chiefs and by agents and supporters of the first defendant; agents of the plaintiff who did not countersign the certificate of results in dispute were not afforded a recount, and that at the end of the nomination exercise in the said constituency the second defendant declared the first defendant as a winner by seventy percent, thereby going in unopposed.

The plaintiff sought declaration(s) that the first defendant's nominationwas invalid and void, (b) that the nomination procedure was abused and (c) the nomination be repeated. Both the defendants were served with the summons and by the time this application was heard the Attorney-General had entered appearance for the second defendant, while the first defendant had entered appearance and filed his defence.

By this application brought by a chamber summons under Order VI rule 13 of the Civil Procedure Rules, the first defendant in seeking a summary dismissal of the plaint, on the ground that it does not disclose a reasonable cause of action. No affidavit in support of the said application was annexed to it but grounds upon which it was based were given and these were:

**(a) A candidate who fails to obtain nomination under KANU Nomination Rules, as the plaintiff herein, and is dissatisfied by the decision of the Returning Officer must appeal to the party President as stated in Rule 31(iii) of the KANU Nomination Rules;**

**(b) Because the Kanu nomination rules provide remedy as stated above, the plaintiff must exhaust that remedy and can only seek review from this Honourable court if KANU has failed to implement the remedy provided for in its nomination in compliance with its own rules and regulations;**

**(c) The plaint herein has not alleged that the plaintiff has exhausted the remedy provided by KANU in section 31 (ii) of the Nomination rules by appealing to the party president nor that KANU or the Party president has wholly denied or wrongfully implemented the plaintiff's right to the said remedy:**

**(d) The plaint is misconceived in that under the KANU Nomination Rules no jurisdiction lies with the High Court to hear matters concerning KANU nominations.**

Only the party President has jurisdiction to hear grievances regarding the nomination and appeals from decision of the Returning Officer, the decisions of the Party president regarding these matters are final.

At the hearing of this application, Mr Makhecha and Mr Anasi, for the first defendant and Mr Muhoro for the second defendant raised several points in addition to the above, in support of their contention. In my view the main and formidable ground they advanced was that as the nomination, conducted on February 22, 1988, was under the purview of the KANU Nomination Rules, this Court has no jurisdiction to hear and to determine grievances which arose thereat, the said KANU Nomination Rules being meant to exclusively regulate the internal affairs of KANU. The recent decision of Akiwumi J in the HCC No 724 of 1988, *Joseph Keffa Wagara and another v John Anguka* and another was cited to me in support of the applicant's contention.

The counsel for the respondent, however, citing section 60 of the Kenya Constitution, contended that the High Court being a court of unlimited and original jurisdiction any rule or law that either expressly or impliedly ousted the jurisdiction of the court over any matter was void as being inconsistent with Constitution. They further contended that if the KANU nomination rules had the effect of ousting the jurisdiction of the court from determining disputes arising from nomination exercises conducted under them, then the said rules were void as being inconsistent with the Kenya Constitution.

As stated above the applicant has rested his application on the ground that this Court has no jurisdiction to hear such a suit. In view of this it is not necessary for me to look at the plaint so as to determine whether or not it brings out the essential ingredients of what constitutes a case for action as laid down by Spry VP of the former Court of Appeal in the case of *Auto Garage v Motokov* [1971] EA 514 at page 519. All that I have to do is to examine closely the claim that this Court has no jurisdiction as this goes to the root of the itself.

It appears to me that the applicant's claim that this court has no jurisdiction to hear and to determine this suit raises two implications. In the first place I entirely agree with the counsels for the respondent that the Kenya Constitution has conferred, on the High Court unlimited original jurisdiction in civil and criminal matters. However I do not agree with them in their contention that any statute, rule or regulation which ousts or tends to oust the jurisdiction of the High Court from determining any matter is inconsistent with the constitution is void. Of course we are all fully aware of the very many statutes, rules, regulations etc which confer the adjudication of disputes on specially constituted bodies or tribunals.

Does it mean then as claimed by the respondent, that the Co-operative Act, the Land Adjudication Act, the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and many other similar statutes, are void and just because the jurisdiction of determining disputes arising from them is conferred on bodies other than High Court? I do not think so. In my view the Parliament can and has all along conferred such jurisdiction on specially constituted tribunals as it pleases provided that such conferment

and the ouster of the jurisdiction of the High Court it creates is clearly expressed.

By Rule 31 (iii) of the Nomination Rules KANU has made a clear provision for an unsuccessful candidate who is dissatisfied with the decision of the returning officer to appeal to the Party President. This in my view is a clear ouster of the jurisdiction of this Court from the determination of the disputes which arise from the exercise of KANU nominations.

The second implication of the applicant's contention is that as a general rule courts are reluctant to interfere with the internal management of such bodies as clubs, societies, churches and even companies, etc Perhaps a review of few of the decided cases would help illustrate this point. In the case of *Narotam Valji and another v Bhika Mulji and others* (1952) XIX EACA 193 the appellants had sued the respondents for a declaration that they had been unlawfully expelled from an incorporated association and for damages. The Court of Appeal for Eastern Africa in upholding the decision of the Supreme Court of Kenya, held that courts have no jurisdiction to entertain such suits unless it could be shown that by expulsion the appellants had been deprived of a right of property vested in them as members.

The plaintiff in the Uganda case of *Musa Misango v Eria Musigure and others* [1966] EA 390 was Director and Chairman of Luwero Coffee Growers and Curers Ltd and in a suit he filed against the defendants he alleged that they had committed a number of irregularities in the election of new company officials. Sir Udo Udoma CJ at page 396 said:

> *"It is elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so."*

In the *Lalji Megji and others v Dhanji and others* [1975] EA 301, the chairman of Shree Cutch Satsang Swaminayaran Temple in Nairobi brought an action against he chairman of Shree Cutch Satsang Swaminayaran Temple, Mombasa, for declarations and injunctions. The case went to the Court of Appeal for Eastern Africa on appeal from the High Court of Kenya. In declining to grant reliefs sought and in upholding the decision of the High Court, Law VP at page 113 said:

> "The courts will entertain suits by members claiming to have been irregularly or improperly expelled, and will interfere if the rules providing for expulsion have not been strictly observed, or if the principles of natural justice have been violated. The foundation for this jurisdiction is the right of property vested in the member, of which he is unjustly deprived by the unlawful expulsion, see *Halsbury's Laws of England*, Vol. 6, 4th edition, para 298. But where property rights are not affected, courts should be slow to interfere in the ordinary running of club affairs by the committee into whose hands the management of the club has been entrusted by the members.
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> If wrong decisions are made, and the club's affairs are mismanaged, then the remedy, as the judge commented, is primarily in the hands of the members. They can replace the committee. So long as the committee is acceptable to the majority of the members, then its decision, and its interpretation of the rules, should be accepted so long as honestly and fairly arrived at, which will be presumed to be the case unless the contrary it shown. It is only in the most serious cases, where *mala fides* on the part of the office-bearers is established, that interference by a court in the internal affairs of a club, not involving property rights, would be warranted."

The above case was quoted with approval by Akiwumi J in his judgment in the case of *James Keffa Wagara and another v John Anguka and another* HCCC No 724 of 1988. The facts of that case are almost on all fours with the facts of the instant case. After carefully weighing all the facts before him the learned judge held that the court has no jurisdiction to hear such a case as to do so would be tantamount to interfering with the internal affairs of KANU. Bearing in mind rule 31 (iii) of KANU Nomination Rules which ousts the jurisdiction of this Court from disputes from KANU nominations and having reviewed the above authorities dealing with court's attitude to the internal managements of such bodies as KANU, I agree with the view expressed by Akiwumi J in the said case. In the instant case no proprietary rights were claimed to have been affected by irregularities complained.

Furthermore the respondent has not complained of any bad faith on the part of the applicant. In the circumstances I hold that this Court has no jurisdiction to hear this suit. The plaint in this suit is hereby struck out as prayed with costs.

There remains one matter in the case upon which I ought to comment. During the hearing of this application it became clear that as a returning officer for the said KANU nomination, Mr Mbaria Maina, along with other District Commissioners for other districts, was an agent of KANU at that time and not of Kenyan Government. His acts during the nomination claimed by the plaintiff to have caused the irregularities complained of are therefore attributable to his principal. the KANU. In the circumstances KANU should have been made a party in this case. The omission to make KANU a party was another serious defect in the plaint. I adopt what was stated in the case of *Misango* where at 400, Sir Udo Udoma former CJ of Uganda said:

> "It may be mentioned that the plaintiff has not joined the company as a defendant in this suit. This is a serious omission having regard to the relief claimed which if granted might affect the company itself."

In the instant case the decision of the court was likely to affect the interests or rights of KANU and it was proper that it was made a party. There was no application to amend the plaint but in view of the fact that I hold the Court has no jurisdiction to hear this suit such an application would not have served any purpose.

As a mere agent of KANU, Mr Mbaria Maina should not have been made a party, in the same way as the labour officers appointed returning officers for trade union elections are not made parties in suits arising from such elections. The representation of Mr Mbaria Maina by the Attorney General in this case is therefore not clear. If he is representing Mr Maina as a Government Officer, then he has no *locus standi* as Mr Maina was an agent of KANU. However, if he represents Maina as an individual there is nothing wrong with it as the Attorney General can and has represented individuals in civil cases in the past when he has been requested to do so even when such individuals are not Government officers.

**Dated and delivered at Nairobi this 26th day of July, 1988**

**B.K TANUI**

**JUDGE**