IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, GATEMBU & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 66 OF 2013

BETWEEN

ALUOCH POLO ALUOCHIER.....APPELLANT

AND

ATTORNEY GENERAL.....RESPONDENT

***(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Majanja, J.) dated 21st January 2013* in HC Pet. No. 446 of 2012)**

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JUDGMENT OF THE COURT

In this appeal ***the appellant, Isaac Aluoch Polo Aluochier***, is aggrieved by the judgment and decree of the High Court ***(Majanja, J.)*** by which the learned judge dismissed his petition, with no orders on costs. In the said petition, the appellant pleaded that some 80 persons, whom he described as "interested parties" and named in a schedule to the petition, had violated ***Article 77(2)*** of the ***Constitution*** by holding offices in political parties while they were State officers. Those "interested parties" included a former Vice President, the former Prime Minister, two former Deputy Prime Ministers, Ministers, Assistant Ministers and both elected and nominated Members of Parliament. By way of remedies, he prayed for a declaration to that effect; a further declaration that the State was in dereliction of its duty by failing to enforce the Constitution against the said persons; a declaration that ***section 12 (2) and (3)*** of the ***Political Parties*** Act which permit some specified public officers to hold office in political parties was unconstitutional; removal of the said persons from office; an order disqualifying them from contesting elections or holding any other public office; an order for recovery of all salaries and allowances paid to the said persons; and most astonishingly for a person who claimed to be pursuing public interest litigation, payment to himself of exemplary damages of ***Kshs 40,000,000.00***.

On 3rd December 2012, the learned judge delivered a ruling in which he struck out the 80 "interested parties" from the petition after finding that there were only two issues for determination to which the Attorney General was the proper respondent. Those issues were:

i. whether the appellant had established a cause of action; and

ii. in light of ***Article 77(5)*** of the Constitution, what is the proper procedure or sanction for determining breaches of ***Chapter Six*** of the Constitution by State officers.

In reaching that ruling the learned judge also took into account the decision of the High Court in ***Abdullahman Ahmed Abdalla & Others v. Hon. Uhuru Kinyatta & Another, Pet. No. 17 of 2010***, which had already declared that State Officers were not eligible to hold offices in political parties.

The respondent, the Attorney General, opposed the petition arguing that it was not necessary for the High Court to issue another declaration on the same issue, having already done so and determined that State officers could not hold office in political parties. He also contended that no orders could issue against the interested parties against whom the appellant had sought drastic orders, because they were struck out and would not have an opportunity to be heard.

As far as we are able to tell from the record, the appellant did not appeal against the ruling of 3rd December 2012, because the notice of appeal before us relates only to the judgment of 21st January 2013. That however has not stopped the appellant from inviting us to set aside the ruling although there is no notice of appeal against it.

After hearing the petition, the learned judge dismissed the same, noting that Article 77(2), which is in Chapter Six of the Constitution on ***Leadership and Integrity***, cannot be read in isolation of the other provisions in the same Chapter, particularly ***Articles 79*** and ***80*** which require Parliament to enact legislation to establish mechanism for administration of the Chapter and to provide among others, penalties for contravention of its provisions. He further noted that pursuant to Articles 79 and 80, Parliament had enacted the ***Ethics and Anti-Corruption Act*** and the ***Leadership and Integrity Act*** providing a framework for enforcing Chapter Six of the Constitution, which the appellant had failed to avail himself.

In his lengthy and winding memorandum of appeal, the appellant contends, *inter alia* that the learned judge erred by: requiring him to follow a "fictitious" procedure under the Leadership and Integrity Act; rendering a contradictory judgment; abdicating his responsibility to discipline State officers; and by declining to grant the remedies the appellant had prayed for. At the hearing of the appeal we sought to find out from the appellant whether the appeal was not an academic exercise, granted that the elections he wanted to bar the concerned State officers from contesting in 2013 had already taken place, and subsequently other elections had taken place in 2017 without the prohibitory orders he had sought. The appellant was however adamant that he was entitled to urge his appeal, including the issue of award to him of exemplary damages, which was still live.

The appellant urged the appeal on the basis of his written submissions, in which he introduced a myriad of new issues that were not before the learned judge. As far as is relevant to the appeal, the appellant submitted that it was not mandatory for his grievance to be addressed by the ***Ethics and Anti-Corruption Commission (EACC)*** or the mechanism created by the Leadership and Integrity Act before he could get a remedy from the court. In his view, the EACC could have taken up the matter on its own initiative and in any event, the role of disciplining State officers lies with the courts. He also contended that for the period between the promulgation of the Constitution on 27th August 2010 and the enactment of the Leadership and integrity Act on 27th August 2012, there was no mechanism for enforcement of Chapter Six of the Constitution, which he could have resorted to. He added that under the ***Public Officer Ethics Act***, disciplinary action against the "interested parties" was optional rather than mandatory.

The appellant further submitted that he was entitled to compensation as a private citizen, not only for disbursements, but also for his professional time in enforcing compliance with the Constitution. In his view he should be paid on the same basis as the state organs that are mandated to protect the constitution, but failed to do so. On exemplary damages he contended that the State should pay him double the amount of money it had paid the state officers in question. This was apparently based on the analogy of the ***Income Tax Act*** and the ***Anti-Corruption and Economic Crimes Act, 2003*** where a party in default or one who is convicted of an economic crime is obliged to pay double the amount involved. After payment of the said amount to him, the appellant submitted that the State could then proceed to recover the amount from the State officers concerned.

The respondent did not file written submissions as directed and did not appear during the highlighting of the submissions although he was duly served with the hearing notice. We have carefully considered the record of appeal, the judgment of the learned judge and the submissions by the appellant. As we have already adverted, what is before us is an appeal against the judgment dated 21st January 2013 in respect of which there is a notice of appeal. Although the appellant has invited us to consider and overturn the ruling dated 3rd December 2012, there is no notice of appeal against that ruling. In the absence of such notice of appeal, we must decline the invitation to delve into the ruling. (See **Nguruman Ltd v. Shompole Group Ranch & Another [2014] eKLR).**

The courts in this jurisdiction have stated numerous times that they should not be asked to make orders in vain or to entrain matters in pursuit of academic or abstract disputes. In ***Hitenkumar Amritlal v. City Council of Nairobi [1982] eKLR*** this Court declined to grant the orders sought by a party after it found that it would be quite useless and serve no practical purpose to grant the order and added that it will not make an ineffective order. Similarly in ***Taytheon Aircraft Credit Corporation & Another v. Air Alfaraj Ltd [1998] eKLR***, this Court reiterated that a court should not make an order, which to its knowledge is incapable of enforcement.

Although ***Article 22*** of the Constitution now makes it possible for a person acting in public interest to institute proceedings for enforcement of the Bill of Rights, that provision was not intended to enable such persons to bog down the courts with theoretical disputes and academic pursuits, however intellectually stimulating. In addition to the principles set out in ***Article 159*** to guide in the exercise of judicial authority, account must also be taken of ***Article 201(d)*** of the Constitution, which demands of the Judiciary, as an organ of the State, to ensure prudent and reasonable use of the public money at its disposal. (See ***Wilson Ong'ere Ochola v. ODM & 3 Others, CA No. 271 of 2017)***.

As we have already pointed out, in ***Abdullahman Ahmed Abdalla & Others v. Hon. Uhuru Kinyatta & Another*** (supra), the High Court had already made the declaration sought by the appellant. He sought a similar declaration in the petition leading to the judgment impugned in this appeal. It has also come to light, without the appellant's disclosure, that subsequent to the judgment in his ***Constitutional Petition No. 446 of 2012***, he filed in the High Court ***Constitutional Petition No. 360 of 2013, Isaac Aluoch Polo Aluochier v. Uhuru Muigai Kenyatta & Another***, seeking the same declaration as regards appointed State officers holding offices in political parties, which the High Court somehow granted vide a judgment dated 22nd April 2016. Surely there has to be an end to the number of declarations that the courts can be asked to make on the same issue.

Save for the issue of the humongous damages, which the appellant claims and the constitutionality of section 12(2) of the Political Parties Act, the rest of his claim was for declarations which the High Court had already issued in different petition and for an order barring the interested parties from contesting the 2013 elections. The High Court did not stop the interested parties from participating in the elections and indeed some of them contested the elections. Not only that, they also contested the subsequent elections in 2017. A court cannot be asked to undo the result of those elections, without serious consequences. In any event, the interested parties, having been struck off the petition and there having been no appeal against the ruling which struck them off, we doubt whether the drastic orders sought by the appellant could have issued without first affording those interested parties an opportunity to be heard (See ***Onyango Oloo v. Attorney General [1986-1989] EA 456*** and ***Pashito Holdings Ltd. & Another v. Paul Nderitu Ndun'gu & Others [1997] 1 KLR (E&L).***

While we agree with the appellant that the mere existence of other procedures and dispute resolution mechanisms do not necessarily preclude him from approaching the High Court for a remedy, nevertheless there must be a good reason why those mechanisms cannot be resulted to, such as that they are not efficacious before the court can ignore them. This is particularly the case where the mechanism is prescribed by the Constitution. It is not for fun that the Constitution or Parliament has established those mechanisms; they are intended to be invoked and

utilised. They must be invoked, unless it is shown to the court's satisfaction that they are not otherwise efficacious. In ***Speaker of the Senate & Another v Attorney General [2013] e KLR***, the Supreme Court reiterated that procedures prescribed by the Constitution must be adhered to. (See also ***Speaker of National Assembly v. Karume [1992] KLR 21; Narok County Council v. Transmara County Council & Another, CA No. 25 of 2000*** and ***Mutanga Tea & Coffee Company Ltd v. Shikara Ltd & Another [2015] eKLR)***.

The appellant's petition was founded on alleged violation of Article 77(2) of the Constitution, which prohibits an ***appointed*** State officer from holding office in a political party. Article 75 (2) of the Constitution specifically provides how a State officer who is alleged to have violated Article 77 is to be dealt with. It provides thus:

> **"75. (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—**
>
> **a. any conflict between personal interests and public or official duties;**
>
> **b. compromising any public or official interest in favour of a personal interest; or**
>
> **c. demeaning the office the officer holds.**
>
> **2. A person who contravenes clause (1), or Article 76, 77 or 78 (2) —**
>
> **a. shall be subject to the applicable disciplinary procedure for the relevant office; and**
>
> **b. may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.**
>
> **3. A person who has been dismissed or otherwise removed from office for a contravention of the provisions mentioned in clause (2) is disqualified from holding any other State office.** [Emphasis added].

In this case the specific mechanism for dealing with a recalcitrant State officer has been provided, not by Parliament, but by the Constitution itself. Such person is to be subjected to the disciplinary procedures relevant to his or her office. It is only after being found culpable under such procedures that such an officer may be dismissed or removed from office, after which he or she is disqualified from holding any other State office and thereafter barred from holding a State Office. With respect, we are not persuaded that the appellant is entitled to ignore those express provisions of the Constitution and to merely ask the Court itself to find the interested parties guilty of violation of the Constitution and bar them from holding State offices. In our view that can only happen after following the procedure specifically prescribed by the Constitution. The learned judge did not err by declining to usurp the roles specifically reserved by the Constitution for a disciplinary mechanism.

As regards the contention that section 12(2) of the Political Parties Act is unconstitutional for permitting the President, Deputy President, a member of Parliament, Governor, Deputy Governor or a member of a County Assembly to hold offices in political parties, it is patently clear that the prohibition by Article 77(2) of the Constitution on holding office in a political party is limited to ***"appointed"*** State Officers. The prohibition does not extend to ***"elected"*** State officers, who are the ones covered by section 12(2) of the Political Parties Act.

We do not think there is any substance in the appellant's claim for the huge figures that he describes as exemplary damages payable to him. In ***Obongo & Another v. Municipal Council of Kisumu [1971] EA 91***, it was held that exemplary damages are awardable where oppressive, arbitrary or unconstitutional action by servants of the government is established or where it is proved that the defendant's action was calculated to procure him some benefit at the expense of the plaintiff. (See also ***Bank of Baroda (Kenya) Ltd v. Timwood Products Ltd [2008] eKLR).*** In this case, not only has the liability of the interested parties not been established, but also the appellant has not even invoked the mechanism prescribed by the Constitution.

In our minds, a person who claims to champion public interest is also not entitled to enrich himself at public expense. If it were so, there would be no difference at all between the appellant and the people he claims have violated the Constitution, public interest and trust. When we inquired from the appellant why he should be paid the damages he had claimed, his answer was that he is not employed to defend public interest; he was doing so on his own time; and for public good. In those circumstances, he felt that the Attorney General should pay him damages, and thereafter pursue and recover the same from the interested parties.

It is true that the appellant is not employed to defend the public good, but it should not be forgotten that he assumed that responsibility on his own volition, freely and without any compulsion. What chaos would result if millions of Kenyans decided to litigate over alleged violation of provisions of the Constitution in return for the kind of enormous awards that the appellant claims? What is the loss and damage that the appellant has suffered over and above other Kenyans to entitle him to the award of damages he claims? In our view the claim for the supernormal damages in these circumstances is as fanciful as it is misguided.

We are persuaded that this appeal has no merit. If the respondent had participated in the same, we would not have hesitated to award costs against the appellant. This appeal stands dismissed in its entirety. It is so ordered.

Dated and delivered at Nairobi this 25th day of May, 2018

W. OUKO

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JUDGE OF APPEAL

S GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR