



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, KARANJA & MARAGA, JJ.A)

CIVIL APPLICATION NO. NAI. 260 OF 2007(UR 160/2007)

BETWEEN

PETER O. NGOGE APPLICANT

AND

HON. FRANCIS OLE KAPARO 1ST RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY 2ND RESPONDENT

THE ELECTORAL COMMISSION OF KENYA 3RD RESPONDENT

THE HON. ATTORNEY-GENERAL 4TH RESPONDENT

(An application for leave to appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Nyamu, Wendoh & Dulu JJ) dated 9th October, 2007

in

H.C. Misc. No. 22 of 2004 (OS)

RULING OF THE COURT

1. In his notice of Motion dated 18th October, 2007 and brought under **Rules 1 (3), 39, 42 and 43** of the **Court of Appeal Rules** (the Rules), the Applicant seeks leave to appeal to this court against the ruling of the High Court delivered on **9th October, 2007** by Nyamu, J (as he then was), Wendoh and Dulu, JJ in Nairobi H. C. Misc. Application No. 22 of 2004 (OS). He also seeks that the costs of this application be paid by the Respondents. The application is based on the grounds that the Applicant’s intended appeal is arguable and has overwhelming probability of success; that unless leave was at that time granted immediately some of the prayers in the OS would be overtaken by events thus rendering the intended appeal nugatory; that the ruling is unconstitutional, unjustified, and unreasonable as well as a clear manifestation of bias against the Applicant; that the Attorney General has not controverted the Applicant’s claim in the OS; that in flagrant violation of **Section 37** of the retired Constitution there had been no elections of the Speaker of the National Assembly since 22nd January, 2003 when the President, nominated

members and constituted the National Assembly; and that this Court should uphold the Constitution as the supreme law of this country by granting the leave sought.

2. The facts giving rise to this application are briefly these. After the 2002 General Elections in Kenya, the Hon. Ole Kaparo and the Applicant were nominated as candidates to contest for election to the office of the Speaker of the Kenyan National Assembly. Those elections were held in Parliament Buildings on 9th January, 2003 and were presided over by the Clerk of the National Assembly, the second Respondent. Hon. Ole Kaparo, the first Respondent garnered 205 votes while the Applicant garnered 2 votes. Consequently the Clerk declared the first Respondent the winner.

3. Aggrieved by those results, on 12th January, 2004 the Applicant filed Nairobi H. C. Misc. Application No. 22 of 2004 and sought several declarations. Those relevant to this appeal were to the effect that the purported election of the Speaker was unconstitutional and therefore null and void. The Applicant's contention was premised on the ground that under **Section 31** of the retired Constitution which was operative at that time, the National Assembly consisted of both elected and nominated members of Parliament. The President appointed nominated members of Parliament on 22nd January, 2003. As of 9th January, 2003, therefore, the National Assembly was not properly constituted and according to the Applicant, it was actually non-existent hence his contention that the purported election of the Speaker on 9th January, 2003 was null and void. The other declarations the Applicant sought in that OS were that anything the first Respondent and or the National Assembly did under the superintendence of the first Respondent was also illegal and as such null and void.

4. Upon being served, the Respondents engaged various counsel to represent them. By a Notice of Appointment of Advocate dated 4th May, 2004 signed by D.O. Rabala, the Litigation Counsel, and filed in Court on 6th May, 2004, the Hon. the Attorney General intimated that he would act for himself in the matter. On 30th January, 2004 Jemimah Keli Advocate entered appearance for the Electoral Commission of Kenya. On 19th August, 2004, M/s Oraro & Co. Advocates entered appearance for the Clerk of the National Assembly, the second Respondent.

5. In his Chamber summons dated 8th October, 2007 the Applicant sought a review of the earlier High Court order of 27th June, 2007 on the grounds that Mr. George Oraro, Advocate had intermeddled with the proceedings by purporting to appear and raising a preliminary objection on behalf of the National Assembly which was not a party. He based his prayer for review on a letter dated 27th July, 2004 which he claimed the Attorney General had written purporting to appoint Mr. Oraro to act for the National Assembly. The Applicant also took issue with Ms Jemimah Keli appearing for the Electoral Commission of Kenya (ECK) and Stella Munyi appearing for the Attorney General. According to the Applicant, Ms Keli was an employee of ECK and was therefore not supposed to appear for her employer. He contended that Ms Munyi having not filed any Notice of Appointment, she should not have been allowed to appear for the Attorney General or the first Respondent.

6. In response to that Application, M/s Oraro & Co. Advocates filed a notice of preliminary objection challenging the competence of the application. After hearing arguments on that preliminary objection, the High Court struck out the affidavit in support of that application as being scandalous and consequently dismissed the application itself. It is against that order that the Applicant seeks leave to appeal.

7. Relying on his affidavit in support of the application, Mr. Ngoge, the Applicant reiterated the grounds upon which this application is brought as summarized above and added that since the appointment of the nominated members of the National Assembly, the Clerk of the National Assembly had refused to place the Applicant's application to be elected Speaker dated 3rd January, 2003 on the floor of the House; that despite the fact that the Attorney General had filed a

notice of appointment of advocate as appearing for all the Respondents in the OS, the learned Judges exhibited open bias and intellectual dishonesty by allowing Mr. George Oraro, who had not and could not have been appointed to act for the National Assembly as he was at that time suing it, to appear for the National Assembly which was not even a party to the OS and ambush the Applicant with a preliminary objection as to the competency of his OS; that the learned Judges of the High Court erred in allowing Mr. Oraro to raise a preliminary objection and thereby buy time for the first Respondent who had not been elected Speaker to illegally continue exercising the powers and performing the functions of that office; that learned Judges of the High Court exhibited open bias by dismissing the Applicants application and refusing to grant him leave to appeal without assigning any reasons therefor; and that in the circumstances the Applicant's intended appeal is arguable and this court will also subvert the Constitution if it does not grant him leave to appeal. The Applicant concluded that even though his intended appeal has been overtaken by events its determination will nevertheless vindicate and enable him to sue for damages.

8. The application is opposed. Mr. Amoko, holding brief for Mr. Oraro for the second Respondent, submitted that this application is frivolous and vexatious as the Applicant has not demonstrated that he has an arguable appeal. He submitted that Mr. Oraro filed a notice of appointment and raised the preliminary objection on behalf of the 2nd Respondent and not the National Assembly. Given the fact that the Applicant was complaining of delay, he concluded, the High Court was right in refusing to grant him leave so that it could proceed with the hearing of the OS itself before the first Respondent, whose election as Speaker of the National Assembly the Applicant was challenging, served his full term.

9. Mr. Owino, holding brief for Mr. Murgor for the 3rd Respondent, associated himself with Mr. Amoko's submissions in opposing this application. Ms Munyi for the fourth Respondent, also opposed the application. She submitted that as the matter was urgent, the High Court was entitled to deny the Applicant leave so that it could proceed to hear the main application.

10. In response to those submissions, the Applicant maintained that Mr. Oraro raised the preliminary objection on behalf of the National Assembly which was not a party in the matter. In allowing him to raise the preliminary objection, the High Court denied the Applicant his right to a fair hearing contrary to **Section 77** of the retired Constitution.

11. We have considered these rival submissions and carefully read the record in this application. As we have pointed out the Applicants main complaint in the OS was that the first Respondent had irregularly been elected Speaker and sought that the matter be heard expeditiously. Instead of pursuing that course of action, he started challenging counsel appearing for the parties. It was none of his business which counsel appeared for which party. At any rate that contention was totally misconceived.

12. In respect of Mr. Oraro, the Applicant completely misapprehended the import of the Attorney General's letter of 27th July, 2004. The Attorney General never appointed Mr. Oraro to appear for the National Assembly. For ease of reference we would like to set out verbatim the contents of that letter. It read:

“The Hon. Speaker has asked me to identify a suitable advocate to represent the National Assembly in the above case. In consultation with the Hon. Speaker, I have identified you as such an advocate.

If you accept the brief, please immediately get in touch with Mr. Samuel W. Ndindiri, the Clerk of National Assembly for instructions.

Please note that the National Assembly will be responsible for your fees and disbursements and therefore you should agree with the said Clerk, the terms of your engagements.”

By this letter the Attorney General did not appoint Mr. Oraro to act for the National Assembly or any other party in the OS. This is a letter of introduction and recommendation. All that the Attorney General did was to recommend Mr. Oraro to the Speaker. It was the Speaker who finally decided to engage Mr. Oraro and pay his fees.

13. The Applicant has made heavy weather of Mr. Oraro raising a preliminary objection on behalf of the National Assembly which is not a party to the OS. That contention has no basis. As we have pointed out, M/s Oraro & Co. Advocates entered appearance for the second Respondent. That firm drew and filed the preliminary objection dated 8th August, 2007, challenging the competence of the OS itself. It also drew and filed the first Respondent's replying affidavit sworn on 6th September, 2004 by Mr. Samuel W. Ndindiri who was then the Clerk of the national Assembly. In the handwritten proceedings exhibited by the Applicant on page 421 of the record of this motion, Mr. Oraro is recorded as stating that he appeared for the second Respondent only. It is after that that he proceeded to raise the preliminary objection that led to the dismissal of the Applicant's application of 8th August 2007.

14. We do not on our part see anything wrong even if Mr. Oraro raised that preliminary objection on behalf of the National Assembly through its Clerk who was a party. The Applicant's main complaint in the OS was that as the National Assembly had not been properly constituted as of 9th January, 2003, the Clerk of the National Assembly erred in conducting the election of the Speaker. In conducting the elections, the Clerk was discharging his official duties, albeit according to the Applicant, irregularly. As far as the Speaker was concerned, and in our view rightly so, that is a matter that concerned the National Assembly. It should be recalled that among the prayers the Applicant sought in the OS included declarations that whatever the first Respondent did in his capacity as the Speaker of the National Assembly and whatever businesses the National Assembly transacted under his superintendence are null and void. Although we doubt if any court properly directing itself in the matter could issue such declarations against the National Assembly, the National Assembly was right to be jittery in the matter and could therefore not sit back and risk its businesses being declared null and void. In our view, the National Assembly was therefore entitled to be represented and heard in the OS. We suppose the reason why it did not apply to be joined in the OS is because its Clerk, in his official and not private capacity, was already a party and so it would ventilate its views through him.

15. We are in no doubt that the Applicant's chamber summons dated 8th October, 2007 was a frivolous side show intended to keep the OS pending in court. We therefore find that the High Court was right in dismissing it so that it could deal with the issues raised in the OS before the first Respondent, whose election the Applicant was challenging, served his full term. Granting leave to appeal will not only be a waste of judicial time but will also assist the Applicant to perpetuate his side shows. We accordingly dismiss this motion with costs to the Respondents.

DATED and delivered at Nairobi this 20th day of April 2012

S.E.O. BOSIRE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

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JUDGE OF APPEAL

**I certify that this is a true
copy of the original**

DEPUTY REGISTRAR