IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL NO. 138 OF 2010

BETWEEN

PAUL KIBUGI MUITE, REGINA MUNG'ARA & JAMES WAKABA (suing as chairman, SecretaryGeneral & Treasurer of Safina Political Party.....APPELLANTS

AND

THE ELECTORAL COMMISSION OF KENYA.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPODNENT
DANIEL MAANZO, ABRAHAM CHEPKONGA AND LILIAN ALNGA (Joined as Chairman, Secretary General & Treasurer of

ORANGE DEMOCRATIC MOVEMENT OF KENYA.....1ST INTERESTED PARTY

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh & Khamoni, JJ.) dated the 7th May, 2010

in

H.C.PETITION NO. 60 OF 2008)
****

JUDGMENT OF THE COURT

The appellants herein, ***PAUL KIBUGI MUITE***, ***REGINA MUNG'ARA*** and ***JAMES WAKABA*** (Suing as ***CHAIRMAN, SECRETARY GENERAL & TREASURER OF SAFINA POLITICAL PARTY***) filed a Petition in the High Court being Petition No. 60 of 2008. The Petition was filed:

"Under Sections 33, 70, 82 and 84 of the Constitution of Kenya, Sections 17 of the National Assembly & Presidential Elections Act, Chapter 7 of the Laws of Kenya, section 3 of the Judicature Act, Chapter 8 of the Laws of Kenya and the Constitution of Kenya (*Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual****) High Court practice and Procedure Rules, 2006.)"***

The gist of the appellants' complaint is contained in the following paragraphs of the Petition:-

"8. Under Section 33 of the Constitution parliament is properly constituted with 12 nominated

members and pursuant to sub-section (3) & (4) of the Constitution the principle of proportional representation and party strength is to be applied in making such nomination with the 1st Respondent mandated to determine the proportion.

9. The Inter Party Parliamentary Agreement signed by the respective parties in 1997 gave life to section 33 of the Constitution as amended and further stipulates the formula for arriving at the proportion as being the number of Members of Parliament a party has divided by the total number of parliamentarians which is 210 multiplied by 12.

10. Following the cancellation of elections in three (3) constituencies namely Kamukunji, Kilgoris and Wajir North the total number of elected members of parliament numbers 207 three short of the threshold set under section 33 of the Constitution.

11. Pursuant to the provisions of section 33 as read together with the formula in the Inter Party Parliamentary Agreement the distribution of nominated members of parliament to the respective parties ought to have been as follows:-

a. ODM - 5.73913 approx.6 Nominated MP's
b. PNU - 2.49275 approx.3 Nominated MP's
c. ODM-K - 0.92754 approx.1 Nominated MP
d. KANU - 0.81159 approx.1 Nominated MP
e. SAFINA - 0.28986 approx.1 Nominated MP

TOTAL <u>12 Nominated Members of Parliament</u>

12. On the 12th of January, 2008 the 2nd Respondent wrote to the Petitioners herein purporting to deny the Petitioners their constitutional right to nominate a member of parliament in accordance with the law and in total breach of the provisions of section 33 of the Constitution as read together with the Inter Party Parliamentary Agreement.

13. The Respondents have instead unconstitutionally and irregularly allocated the Petitioners rightful nomination entitlement to the Interested Party herein in flagrant contravention of the Constitution and the IPPG Agreement."

Pursuant to the above and other complaints stated in the Petition, the appellants (***as the Petitioners in the said Petition***) sought the following orders from the High Court:-

"a) There be a Declaration that the decision of the Respondents conveyed by a letter dated the 12th of January, 2008 purporting to deny the Petitioners herein their Constitutional entitlement to nominate a member of parliament and to allocate the slot to the interested party herein is unconstitutional for being in contravention of Sections 33, 70 and 82 of the Constitution.

b) There be a Declaration that under Section 33 of the Constitution as read together with the provisions of the Inter Party Parliamentary Group Agreement, 1997, the purported award of an additional slot to the Interested Party is unconstitutional, ultra vires, null and void.

c) There be a Declaration that the Petitioners Political party is entitled to one nomination slot.

d) Any further or other orders, directions or writs this Honourable Court deems just, fit and appropriate to grant.

e) The costs of this petition be provided for."

In the Petition, the Electoral Commission of Kenya was named as the 1st Respondent and the Attorney General as the 2nd Respondent. ***DANIEL MAANZO, ABRAHAM CHEPKONGA*** and ***LILIAN***

ALUNGA (joined as Chairman, Secretary General & Treasurer of ***ORANGE DEMOCRATIC MOVEMENT OF KENYA***) were named as the 1st Interested Party.

The Petition was placed before the High Court (Khamoni & Wendoh, JJ.) for consideration. The learned Judges of the High Court considered what was urged before them and dismissed the Petition. In concluding their judgment, the learned Judges said:-

"As correctly pointed out by Mr. Kipkogei, it seems all that the Applicants intended to challenge was the exercise of power by the 1st Respondent under section 33 of the Constitution, but that should have been done through Judicial Review. However, that would not have had an effect on the nomination process, taking into account the fact that the President had appointed the nominated Members of Parliament under section 33(5) before they could take the oath of office. It is true that under section 84(2), the High Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions under section 70 to 83. This court has earlier found that there are no rights or freedoms to be enforced and therefore an order of certiorari would not issue in vain. If there are no constitutional issues raised, it means that the application is misplaced and there can be no reason to invoke Judicial Review jurisdiction when such an application could have been made from onset.

For all the reasons given in this judgment, we find that the Petitioners are not deserving of the declarations sought in the Petition and the same is dismissed with the Petitioners bearing the costs."

It is the foregoing that provoked this appeal which came up for hearing on ***30th March, 2011*** when Mr. Wambola and Mr. Sagana appeared for the appellants. while Mr. M.G. Murugu appeared for the 1st respondent and Mr. Moses Kipkogei, (State Counsel), appeared for the 2nd respondent.

In his submissions, Mr. Sagana argued the 20 grounds of appeal in clusters and he started with the cluster of ***grounds 5, 12, 13, 14, 17 & 18***. Under these grounds, Mr. Sagana submitted that the learned judges of the superior court erred when they stated that it would be in vain even if the orders sought were granted as no seat would be created in Parliament. It was his submission that the appellants wanted the two nominations to ODM-K declared invalid so that the Electoral Commission could decide which party is to be given the two slots.

Mr. Sagana then dealt with ***grounds 9 & 11*** and under these grounds he challenged the decision of the High Court on the issue of discrimination. He submitted that the appellants had, indeed, specified the nature of discrimination.

On ***grounds 2 & 4*** Mr. Sagana pointed out that the Petition before the High Court was not challenged as the ODM-K and the Attorney General did not file any papers. Hence, in his view, the appellants' case in the superior court was essentially unopposed.

Grounds 6, 7, 8, 15 & 16 were on the procedure adopted in the superior court and Mr. Sagana was of the view that his clients' constitutional rights had been infringed and that is why they filed a constitutional reference. Mr. Sagana sought refuge in the provision of ***Article 159(2) (d)*** of the 2010 Constitution in urging us to determine this matter without undue regard to procedural technicalities. He emphasized that Safina Party was fighting for a slot among the nominated Members of Parliament.

Finally, Mr. Sagana dealt with ***ground 10*** by submitting that the appellants' case was not properly considered by the superior court. He referred us to the Agreement signed by the Parliamentary Parties. In his view, giving ODM-K two slots was illegal, unlawful and discriminatory and against legitimate expectation by the Safina Party.

Mr. Sagana therefore asked us to allow this appeal in view of his submissions as summarized above.

In his submissions, Mr. Murugu started by telling us that what were sought in the superior court were

essentially declaratory orders. In his view, the appellants are asking Parliament to create another seat which is the same as amending the Constitution.

Mr. Murugu went on to argue that the **IPPG** (Inter Party Parliamentary Group Agreement) was not part of the evidence placed before the superior court. He further submitted that the only way of challenging the nomination should have been by way of an Election Petition.

Mr. Murugu was of the view that the Superior Court could check excess of jurisdiction and under ***section 33*** of the old Constitution what was to be determined was the number of slots to be given to the parties.

Mr. Murugu sought to rely on this Court's decision in ***KIPKALYA KIPRONO KONES V. REPUBLIC & ANOTHER EX-PARTE KIMANI WA NYOIKE & 4 OTHERS*** – Civil Appeal No. 94 of 2005 and asked us to dismiss this appeal.

On his part, Mr. Kipkogei associated himself with the submissions of Mr. Murugu in supporting the judgment of the superior court and went on to state that there was no issue of breach of fundamental rights since the issue of slots was a matter of arithmetic. Mr. Kipkogei therefore urged us to dismiss this appeal.

The dispute in this appeal relates to the nomination of the Nominated Members of Parliament. ***Section 33*** of the old Constitution under which this process had to be carried out provided that:-

"33(I) subject to this section, there shall be twelve nominated members of the National Assembly appointed by the President following a general election to represent special interests.

(2) The persons to be appointed shall be persons who, if they had been nominated for a parliamentary election would be qualifiers to be elected as members of the National Assembly.

(3) The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the national Assembly, taking into account the principle of gender equality.

(4) The proportions under sub-section (3) shall be determined by the Electoral commission after every general election and shall be signified by the chairman of the commission to the leaders of the concerned parliamentary parties, the president and the speaker.

(5) The names of the nominees of parliamentary parties shall be forwarded to the President through the Electoral Commission who shall ensure observance of the principle of gender equality in the nominations."

It was argued in the superior court that the formulae to determine how many slots will be allocated to each political party had been agreed upon by the Inter Party Parliament Agreement (IPPG). According to the appellants, the formula provided in the IPPG, the parties were entitled to nominate members as follows:-

ODM - 6 nominated MPs

PNU - 3 nominated MPs

ODMK - 1 nominated MP

KANU - 1 nominated MP

SAFINA - 1 nominated MP

The appellants (*who as already stated were the officials of SAFINA Party*) were surprised when they were denied the slot of one nominated Member of Parliament as they had expected. In his replying affidavit, Mr. Kivuitu (the Chairman of the disbanded Electoral Commission of Kenya), agreed with the appellants as regards the number of seats each party scored in the General Elections of 2007. Mr. Kivuitu went on to depone that pursuant to ***section 33*** of the repealed Constitution, the Electoral Commission of Kenya (ECK) allotted seats for nominated Members of Parliament taking into account each party's proportionate representation in Parliament. Mr. Kivuitu denied that SAFINA party was entitled to one slot for nomination because its proportionate representation in Parliament was far much lower than that of ODMK and that SAFINA Party had only 5 seats which was 0.289 proportionate representation which could not be equated with ODMK's 16 seats and 0.9275 proportionate representation in Parliament. Mr. Kivuitu denied all allegations of illegality or discrimination attributed to Electoral Commission of Kenya. Mr. Kivuitu finally deponed that the IPPG had no force of law but, nevertheless, it was complied with by the ECK in allocating slots to the Political Parties.
Hence from the above, the Chairman of ECK informed the Superior Court that the seats for nominated Members of Parliament were allocated in accordance with the Constitution and in compliance with IPPG. It was the appellant's contention that ***Sections 33, 70*** and ***80*** of the repealed Constitution were not complied with. There were allegations of discrimination and breaches of fundamental rights but it is our view that these were not proved. Indeed, all the appellants wanted was a slot for one nominated Member of Parliament. The appellants were particularly aggrieved by the fact that ODMK which had been initially allocated one seat was allocated yet another seat which meant the appellants' party was allocated no seat.
This being a first appeal it is our duty to re-evaluate and assess all that was urged before the superior court and make our own findings (See – ***SELLE V. ASSOCIATE MOTOR BOAT COMPANY LTD [1968] E.A. 123 and WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A. 1).***

We have gone over what was before the superior court, the findings of that Court and the submissions of counsel before us. As already stated, the dispute related to the nominations of Members of Parliament after the 2007 General Elections. We have already indicated elsewhere in this judgment how the political parties performed in the said General Election. The bone of contention was that SAFINA Party was not given its due entitlement of the seats of Nominated Members. According to the appellants, the nomination of Nominated Members should have been as stated in paragraph 11 of the Petition. That paragraph reads as follows:-

11. Pursuant to the provisions of section 33 as read together with the formula in the Inter Party Parliamentary Agreement the distribution of nominated members of parliament to the respective parties ought to have been as follows:-

a. ODM - 5.73913 approx.6 Nominated MP's
b. PNU - 2.49275 approx.3 Nominated MP's
c. ODM-K - 0.92754 approx.1 Nominated MP
d. KANU - 0.81159 approx.1 Nominated MP
e. SAFINA - 0.28986 approx.1 Nominated MP

TOTAL 12 Nominated Members of Parliament".

As already stated elsewhere in this judgment this process of nomination of Nominated Members of Parliament was essentially arithmetical. Although the appellants went to the superior court alleging all sorts of breaches of fundamental rights and provisions of the Constitution, we do not think these had any place in this matter. The main complaint was that the ECK was unfair in the manner it allocated seats for nominated Members of Parliament. We have referred to the replying affidavit of Mr. Kivuitu, the then Chairman of ECK. In that replying affidavit, Mr. Kivuitu indicates the way the process was carried out. The learned Judges of the superior court were satisfied with Mr. Kivuitu's explanation. We, on our part have reconsidered the matter and have come to the same conclusion as the Judges of the superior court that the ECK cannot be faulted in the manner it carried out the process of allocating the 12 seats of Nominated Members of Parliament to various political parties.

In any case, the 1st interested party was not before us and it would not be fair to make any decision without its participation. Again the complaint related to allocation of slots for nominated members which has already been done and there is no way it can be rectified without creating unnecessary negative consequences at this late hour. If the complaint was, as we have found, about the process of nomination by ECK then the matter should have been brought to the High Court by way of a Judicial Review and on that score we agree with the superior court's decision.

That being our view of the matter, we therefore find no merit in this appeal and we accordingly order that the appeal be and is hereby dismissed with costs.

Dated and delivered at NAIROBI this 1st day of July, 2011.

E.O. O'KUBASU
.....
JUDGE OF APEPAL

E.M. GITHINJI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR