



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI. NAI NO. 6 OF 2008 (UR. 5/2008)**

**PAUL KIBUGI MUIITE )**

**REGINA MUNG'ARA )**

**JAMES WAKABA )**

*(suing as a Chairman, Secretary & Treasurer*

*of Safina Political Party..... APPLICANTS*

**AND**

**ELECTORAL COMMISSION OF KENYA .....RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT OF KENYA..... 1<sup>ST</sup> INTERESTED PARTY**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> INTERESTED PARTY**

*(An application for stay under the inherent jurisdiction of the Court pending the filing, hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi (Emukule, J.) dated 17<sup>th</sup> January, 2008*

**in**

**H.C.MISC. APPL. NO. 14 OF 2008)**

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**RULING OF THE COURT**

The applicants, *Paul Kibugi Muite, Regina Mung'ara* and *James Wakaba*, are the Chairman, Secretary and Treasurer respectively, of a political party known as Safina. They were also the applicants in an application for leave to apply for judicial review before the superior court, to wit Miscellaneous application No. 14 of 2008. In that application, as also in this one the Electoral Commission of Kenya, the Orange Democratic Movement of Kenya and the Attorney General are named as respondents.

In their application to the superior court, the applicants were seeking the leave of that court to apply for, among other things, an order of prohibition prohibiting the respondents from allocating to any other political party other than Safina the right or entitlement to nominate a member of parliament, and also leave to apply for an order of *mandamus* compelling the respondents to allocate the Safina political party

a slot to nominate a member of parliament in accordance with the 1997 Inter Party Parliamentary Group agreement (IPPG).

The right to apply for an order of judicial review is donated by **O.53** of the Civil Procedure Rules which is made pursuant to the provisions of the Law Reform Act Cap 26 Laws of Kenya. The procedure provided therein for moving the court requires that before a person can move the court for such an order he should seek the leave of the court, which leave is applied for by an *ex parte* chamber summons to a Judge in chambers. It is after the grant of leave that the person concerned can move the same court by motion for the relevant order.

The applicants lodged their application for leave in the High Court Registry on 16<sup>th</sup> January, 2008. In that application leave was sought to apply for *certiorari* to move to the court for purposes of quashing the decision “of the respondents conveyed by a letter dated the 12<sup>th</sup> January, 2008 purporting to deny the applicants herein the opportunity to nominate a member of parliament.” They also applied for prohibition and *mandamus* as earlier stated; as well as for an order that the leave, if granted, to operate as an order of stay of the implementation of that decision.

Among the facts outlined in the affidavit and statement in support of the application are the following. Safina as a political party participated in the general elections held on 27<sup>th</sup> December, 2007, and five of its party members were elected to Parliament. In total the number of elected parliamentarians was 207. Some constituencies’ elections were nullified, otherwise the total number should have been 210 members. **Section 33** of the Constitution of Kenya provides for the nomination of 12 members of parliament to bring the total to 222 members. The nomination exercise follows a formula which was agreed upon at an Inter Party Parliamentary forum (IPPG), which formula follows the principle of proportional representation based on party strength. On the basis of that formula it is contended that Safina is entitled to nominate 1 Member of Parliament. However, notwithstanding that arrangement the letter of 12<sup>th</sup> January, 2008 was addressed to the party which thus provoked the aforesaid application.

The letter of 12<sup>th</sup> January, 2008 was addressed to the Secretary, Safina Party, P. O. Box 14746 – 00100 Nairobi, and read as follows: -

“Dear Sir,

RE: NOMINATION OF MEMBERS OF PARLIAMENT

*I understand you have come to collect a letter giving your political party a slot or slots among the nominated Member of Parliament. I wish to inform you that your political party does not qualify (sic) any slot.*

*Yours faithfully,*

S.M. KIVUITU

CHAIRMAN”

The applicants have come to this Court “*under section 3 (2) of the Appellate Jurisdiction Act, Chapter 9, Laws of Kenya*” for an order of stay of the implementation of the decision contained in the letter dated 12<sup>th</sup> January, 2008 earlier on alluded to, pending the filing, hearing and determination of the intended appeal against the decision of the superior court denying them leave. In its decision delivered on 17<sup>th</sup> January, 2008, the superior court (Anyara Emukule, J.) ruled principally that prohibition could not issue because what the applicants were seeking to prohibit had already been done, and all they could properly apply for is an order of *certiorari* to quash the decision denying them a slot in the nomination exercise.

Several grounds have been advanced in support of the application, but we consider it imperative to

raise *suo motu*, an issue with regard to the jurisdiction of this Court to grant the order prayed for. We pointed this issue out to Mr. P.L.O Lumumba for the applicants, who submitted before us that, unlike ordinary applications which are normally brought under *rule 5 (2) (b)* of the Court of Appeal Rules, the applicants' application was brought pursuant to the provisions of *section 3 (2)* of the Appellate Jurisdiction Act which in his view, enables this Court to exercise inherent jurisdiction. In his view *section 3 (2)* above, should be read disjunctively with *section 3 (1)* of the same Act in order to enable the court as the court of last resort to do substantial justice without having any undue regard to technicalities of procedure. In his view *section 3(2)*, above, enables the Court to do “*nearly everything*”. He cited many authorities relating to the exercise of judicial discretion and asked us to apply those.

The jurisdiction of this Court stems from the Constitution. *Section 64 (1)* thereof provides as follows:

“64 (1). There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.”

From the outset, it is clear that this Court is denied original jurisdiction to hear and determine both criminal and civil cases. The High Court on the other hand has unlimited original jurisdiction to hear and determine such cases (see *section 60* of the Constitution.) Mr. Lumumba must have, in our view, meant that since the High Court has such jurisdiction, this Court by *dint* of the provisions of *section 3 (2)* of the Appellate Jurisdiction Act, would exercise such wide powers on matters which come to it from the High Court.

A careful reading of *section 64(1)* above, however, does clearly show that the jurisdiction of this Court is circumscribed. It can only exercise its jurisdiction and powers “in relation to appeals from the High Court as may be conferred on it by law.” In other words the Court must first look at the law conferring upon it the jurisdiction and power, before making any move. The law which generally gives jurisdiction and powers to this Court to hear and determine appeals is the Appellate Jurisdiction Act. *Section 3 (1)* of that Act, provides: -

“3(1). The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of appeal under any written law.”

Although the above sub-section does give general power, it does at the same time limit that power to be exercised only where a right of appeal is given by other law. The applicants have a right of appeal against the decision they intend to challenge before this Court. There is no doubt on this. The question which arises is whether this Court has the power to grant a stay of the decision disclosed in the letter of 12<sup>th</sup> January, 2008. Ordinarily an application for stay would be made under *rule 5(2) (b)* of this Court's Rules which provides that:

“5 (2) (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution, an injunction or stay of any further proceedings on such terms as the Court may think just.”

There would have been no problem had the application sought an order staying the High Court proceedings. But the applicants were aware that such an order would not have assisted them, because the nomination exercise is on, and could be concluded any time now. However, by seeking a stay of the implementation of the decision denying them a slot they seem to have put a clog to this Court's power to grant them the order they seek.

*Section 3(1)* and *3 (2)* of the Appellate Jurisdiction Act has been considered by this Court and its predecessor the Court of Appeal for East Africa in past cases. In the case of Anarita Karimi Njeru v. R. (No. 2) [1979] KLR 162 at P. 167 this Court authoritatively rendered itself thus:

“.....the establishment of this Court, and its predecessors has remained, in effect, unaltered from 1902

until the present with the result that we can safely rely on authorities contained in our law reports going back to that date, all of which are authority for interpreting strictly the enactments conferring jurisdiction on this court and its predecessors.”

The Court then considered various previous decisions and came to the conclusion that this Court enjoys no general supervisory jurisdiction over the judicial process and only has jurisdiction as is expressly conferred on it by statute.

In *Onyango v. R.* [1983] KLR 252, the Court made it abundantly clear that it has no inherent jurisdiction. Its jurisdiction, like that of its predecessor, the Court of Appeal for East Africa, is derived from statute.

Coming to Mr. Lumumba’s submission on the interpretation of *section 3 (2)* of the Appellate Jurisdiction Act, we are of the considered view that the sub-section must of necessity be read conjunctively with *section 3 (1)* of the same Act. The latter sub-section donates the jurisdiction which the Court exercises; namely the jurisdiction to hear and determine appeals from the High Court. *Sub-section (2)* however makes provision dealing with the manner of exercise of that jurisdiction. It should be read with *rule 31* of the Court of Appeal rules, which provides;

“31. On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs.”

It is axiomatic that the above rule derives its validity from the Appellate Jurisdiction Act. *Section 5* of that Act, empowers the Rules Committee to make rules of court regulating the practice and procedure of the Court of Appeal and the High Court in relation to appeals to this Court. So *rule 31*, above, amplifies, how the Court should exercise this jurisdiction under *section 3 (1)* above. It is our view that *section 3 (2)*, cannot operate independently of *section 3 (1)*. That is why we think, *section 3 (2)* in its opening, is worded as it is, namely: -

“For all purposes of and incidental to the hearing and determination of any appeal .....

The word “incidental” is defined in the Concise Oxford Dictionary, 9<sup>th</sup> Edition, as “*having a minor role in relation to a more important thing, event etc, ... following as a subordinate event*”. So in hearing and determining appeals the Court must first have jurisdiction to hear. Hearing here implies that issues of both fact and law between the parties in a suit are being fought.

The applicant’s appeal has not been filed. That being so it cannot be said to be available for hearing and determination pursuant to the provisions of *section 3 (2)*. What is before us is an application independent of the intended appeal. Independent because the appeal has not been filed. And applications which can be filed independent of an intended appeal are those made under *rule 4* of the Court Rules for enlargement or extension of time; those made under *rule 5*, above; those made under *rule 39* for leave and fitness to appeal in criminal matters, and for leave to appeal in civil matters.

The last aspect we would consider is that what is sought to be stayed is an extra judicial decision. No appeal lies from such a decision to this Court. Appeals to this Court must be against decisions of the High Court, not otherwise. That decision, if at all it is appealable, it is not appealable to this Court. So other than dealing with it pursuant to an appeal from the High Court, we will lack jurisdictions to entertain a challenge to it.

We do not agree with Mr. Lumumba that this Court has general power under *section 3 (2)* to do almost “everything”. Its power is circumscribed not only by the Constitution but also by the Appellate Jurisdiction Act. For that and the reasons we set out earlier, we rule that this Court lacks the jurisdiction to grant the orders sought. Consequently, the applicants’ application is incompetent. It is accordingly struck out with no order as to costs.

*Dated and delivered at Nairobi this 8<sup>th</sup> day of February,. 2008.*

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**E.O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**