



REPUBLIC OF KENYA
COURT OF APPEAL AT NAIROBI

Civil Appli 111 of 2007 (UR. 73/2007)

1. COUNCILLOR JOSEPH CHACHA MWITA

2. COUNCILLOR AISHA KARISA KATANA

3. COUNCILLOR ANDREW JACKSON KIPSANG KIPTOO

4. COUNCILLOR CHARLES LORONGOI

EJORE.....APPLICANTS

AND

1. HON. UHURU KENYATTA

2. HON. WILLIAM K.S. RUTO

3. HON. BILLOW KERROW

4. HON. DALMAS OTIENO

5. HON. HENRY KOSGEI

6. HON. CHRIS OKEMO

7. HON. GIDEON NDAMBUKI RESPONDENTS

(Application for injunction and stay of the order made by the superior court in the High Court of Kenya at Nakuru (Mr. Justice Musinga) dated the 19th day of April, 2007

in

H.C.C.C. NO. 54 OF 2007)

RULING OF THE COURT

The four applicants, Joseph Chacha Mwita, Aisha Karisa Katana, Andrew Jackson Kipsang Kiptoo and Charles Lorongoi Ejore, are elected councilors from different wards in the country on a Kenya African National Union (KANU), political party ticket. Their application is for a stay of execution and an

injunction pursuant to the provisions of rule 5(2)(b) of the Rules of this Court, and more specifically that:

(1)

(2) there be a stay of execution of the order made on 19th April 2007 in Nakuru High Court Civil Case No. 54 of 2007 pending the hearing and determination of Civil Appeal No. NAK .8 of 2007 (UR).

(3) there be stay of any arbitration proceedings as ordered in the said suit pending the hearing and determination of Civil Appeal No. NAK. 8 of 2007 (UR).

(4) a temporary injunction order be granted pending the hearing and determination of Civil Appeal No. NAK 8 of 2007 (UR) restraining the Respondents:

(a) from taking any action in or on behalf of a society known as Kenya African National Union (KANU) which would deprive the Applicants their statutory rights under the Local Government Act, Cap 265 Laws of Kenya; or

(b) from merging KANU or its affairs with another society /political party known as Orange Democratic Movement of Kenya (ODM-K) and or Liberal Democratic Party and or any other political party whatsoever;

And

(c) from taking any action which is ultra vires the Constitution of KANU; and

(d) from holding themselves out as members and officials of KANU while at the same time holding themselves out as members and officials of ODM – K.

There are seven named respondents, namely, Hon. Uhuru Kenyatta, Hon. William K.S. Ruto, Hon. Billow Kerro, Hon. Dalmas Otieno, Hon. Henry Kosgei, Hon. Chris Okemo and Hon. Gideon Ndambuki. They have been described as elected officials of KANU, but who purport to be also members of ODM-K.

There are a number of recent authorities starting with Githunguri v. Jimba Credit Corporation Ltd (No.2) (1988) KLR 838, which set out the principles which guide this Court in applications under rule 5(2)(b), aforesaid. First an applicant must show that his intended appeal is arguable or that it is not frivolous. Secondly, that unless he is granted either a stay of execution or an injunction or both, as the case may be, his appeal or intended appeal, if successful, will be rendered nugatory. These principles are now well settled and do not need further discussion or elaboration.

The dispute between the parties started with the filing of a plaint by the applicants on 12th May 2007, seeking declaratory and injunctive reliefs as well as damages against the respondents, as follows:

(a) A declaration that:

(i) KANU is an independent society or political party with a constitution spelling out its rights and privileges

(ii) The acts of its officials (read respondents) in negotiating a merger with the Liberal Democratic Party (LDP) and Labour Party of Kenya to strengthen ODM-K is contrary to that constitution.

(iii) Such a merger, if successful, will deny them the right to defend their civic seats on a KANU ticket.

(2) A perpetual injunction to restrain the respondents from:

(a) handling the affairs of KANU

- (b) dealing with the property and assets of KANU
 - (c) holding themselves out as KANU members
 - (d) negotiating any merger of KANU with any other society or political party.
- (3) A mandatory injunction to compel the respondents to surrender the property and assets of KANU to either the party or themselves.
- (4) Damages and costs.

Filed with the plaintiff was a chamber summons under O.XXXIX rules 1 and 2 of the Civil Procedure Rules, in which the applicants, inter alia, prayed for a temporary injunction on the same terms as the prayers in the plaintiff for injunctive relief. The application which bears the date 9th March, 2007, is still pending, and the grounds in support thereof are the same as those which have been proffered in support of the motion before us.

The hearing of the aforesaid chamber summons was forestalled by an application by the respondents which was expressed to be brought under section 6 of the Arbitration Act, Act No.4 of 1995, among other provisions, seeking, among other orders, an order that proceedings in the applicants' aforesaid suit be stayed pending arbitration:

“... as stipulated by Article 23 on page 25 of the Constitution of Kenya African National Union binding the parties hereto and in accordance with the provisions of the Arbitration Act, 1995, Act No.4 of 1995, Laws of Kenya.”

Section 6 of the Arbitration Act, permits the stay of judicial proceedings in a matter which is the subject of an arbitration agreement. A court before which such matter is pending cannot, suo motu, order a stay. It has to be moved by a formal application but before the party applying takes any steps in the proceedings. The respondents appropriately moved the superior court for an order staying the applicants' suit, above.

Musinga, J. heard that application. In his view the respondents are still KANU members and therefore subject to the provisions of the party constitution, and consequently, the dispute between the applicants and the respondents is among those envisaged under Article 23, aforesaid. On that ground and the ground that the decision which the applicants are challenging is one by the party's National Delegates Conference of the party to which none of them was a member, he ordered that the dispute be referred to arbitration by a panel of arbitrators to be appointed by the National Chairman of KANU in Consultation with the National Executive Council (NEC) within 30 days to deal with the dispute. To facilitate the arbitration the learned Judge ordered a stay of the proceeding of the applicants' suit. The applicants were aggrieved and have filed Civil Appeal No. 88 of 2007.

At the centre of the dispute between the parties is the decision by National Delegates Conference for KANU to join ODM – K as a corporate member. The applicants fear that such a move if allowed, will kill KANU, and thus render them partyless and consequently deny them the right to seek an elective office on a KANU ticket.

The matter before us is not the applicants' appeal. That being the case we are precluded from coming to a conclusive view on the matter. It is however, important to note that Mr. Katwa for the respondents does not oppose prayers (1), (2), and (3) of the motion, which to some extent supports their motion before the superior court. It should be recalled that in the High Court they had sought for a stay of the proceedings in the applicant's suit pending arbitration in terms of the party Constitution. His clients are, however, opposed to the prayer for injunction which if granted, will stop the respondents from operating as officials of KANU.

While we agree that the applicants have an undoubted right of challenging the decision of the superior

court and that the court has a duty to protect KANU members against decisions which are in breach of the party Constitution, it is our view that the court has a reciprocal duty to ensure that it does not hamstring elected officials from performing the duty or duties the electors have bestowed upon them. As a court we might not know the wishes of the electors unless resolutions by them are placed before us. No resolution has so far been placed before us to show that the electors have resolved to stop the respondents from performing their respective duties as officials of KANU. So without in anyway attempting to deal with issues in the appeal, it is our view that prayer (4), of the motion, as worded, seeks, on the main, an order grinding to a halt the operations of KANU. The respondents, it would appear, are the only National Officials and injunctioning them from service as such officials might result to there being no one in office. Justice must look at both sides of the street, and consider the likely effect of the orders sought by a litigant. Besides, courts act on the basis of evidence and sound legal principles. We discern from the scanty evidence on record that the decision by KANU to co-operate with ODM-K, was reached at a meeting of one of the party organs. We do not have details of the meeting and whether that decision was validly made or otherwise. That might probably be clarified at the hearing of the applicants' appeal. But as matters stand now we eschew making any order likely to paralyse the operations of the party, KANU. We have looked at the authorities which Mr. Kiplenge for the applicants cited to us and are of the view that they will be more relevant to the appeal and hence our reluctance to discuss them here.

In the result as the respondents do not oppose the other prayers, the order which commends itself to us is to grant prayer (2) and (3) of the Notice of Motion dated 17th May 2007 and filed in court on the same day. Prayer (1) is spent and so we make no order thereon. We decline to grant prayer (4) for the reasons already stated. The costs of the motion shall be in Civil Appeal No. 88 of 2007. Orders accordingly.

Dated and delivered at Nairobi this 13th day of July 2007

P.K. TUNOI

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR