



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 94 of 2005**

KIPKALYA KIPRONO KONES APPELLANT

AND

REPUBLIC 1ST RESPONDENT

THE ELECTORAL COMMISSION OF KENYA 2ND RESPONDENT

EX-PARTE

KIMANI WA NYOIKE 3RD RESPONDENT

EDWARD KAGIRI 4TH RESPONDENT

SAMMY MAINA 5TH RESPONDENT

JOHN CHEBII 6TH RESPONDENT

(All suing as the National Officers of the Forum for the Restoration for the People (Ford People))

KIMANI WA NYOIKE 7TH RESPONDENT

(Being an appeal from a Judgment and an Order derived there from of the High Court of Kenya at Nairobi (Ojwang', J) dated 23rd April, 2004

In

H.C.Misc. Civil Appl. No. 129 of 2003)

JUDGMENT OF THE COURT

The appellant before us is **Kipkalya Kiprono Kones**. He is a nominated Member of Parliament and was purportedly so nominated by a political party called **FORD PEOPLE** which is one of the registered political parties in Kenya and which also qualifies as a parliamentary political party due to the fact that it has elected members of Parliament. Nominated members of Parliament are provided for under the provisions of **section 33** of the Kenya Constitution. That section provides:-

“33 (1) 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 qualified 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.”

Then there is **section 41** of the Constitution which creates the Electoral Commission referred to in **section 33**. **Section 41**, where relevant, provides:-

“41 (1) There shall be an Electoral Commission, which shall consist of a chairman and not less than four and not more than twenty- one members appointed by the President.

(1A) Every member of the Commission shall be a citizen of Kenya.

(2) The Commission shall elect a vice-chairman from among its members.

(2A) The chairman and the vice chairman of the Commission shall be persons who have held or are qualified to hold office of a judge of the High Court or judge of appeal under this constitution.”

The other remaining provisions of **section 41** deal with the qualifications of Commissioners, when their offices become vacant, the process of removing them from office and such like matters.

We have already indicated that Ford People is a parliamentary political party. The Electoral Commission (the Commission hereinafter) determined, under **section 33 (4)** of the Constitution, that Ford People was entitled to propose one member to be appointed by the President to the National Assembly as a nominated member. Under **subsection (5) of section 33**, Ford People was, therefore, required to forward one name to the Commission and the Commission would in turn forward that name to the President. We must stress at this stage that it is not the function of the Commission to appoint nominated members to the National Assembly; the appointment of such members is the function of the President and all that is required of the Commission by the Constitution is that it receives the names of the proposed appointees from the parliamentary political parties, ensures that the principle of gender equality is observed by the parties and once it (Commission) is satisfied on that aspect of the matter, its only function is to forward the names to the President for appointment. We suppose that if the Commission were to notice that a parliamentary political party had forwarded to it the name of a person not qualified to be appointed, e.g. if the person is an undischarged bankrupt, or a non citizen of Kenya, the Commission would be perfectly within its mandate to return the name of the unqualified person to the relevant parliamentary political party and ask that party to propose the name of a qualified person. One would hardly expect the Commission headed by a person who has held or is qualified to hold the office of a judge to forward to the President the name of an unqualified person to be appointed as a member of the National Assembly. But apart from such matters, the role of the Commission is to receive names from the parliamentary political parties and then forward the names to the President for appointment and once the President has appointed the persons

whose names are submitted to him by the Commission, those persons become nominated members of the National Assembly and can only await the swearing in by the Speaker and it is to be noted that all members of the Assembly, whether elected or nominated must be sworn-in by the Speaker – see **section 49 (1)** of the Constitution which provides:-

"Every member of the National Assembly shall before taking his seat in the Assembly, take and subscribe the oath of allegiance before the Assembly, but a member may before taking and subscribing that oath take part in the election of the Speaker of the National Assembly."

So that it is not the swearing - in by the Speaker which confers the right to membership of the Assembly; that right is conferred by election, in the case of an elected member and by appointment by the President, in the case of a nominated member. The swearing in by the Speaker is merely to enable the member to participate in the proceedings of the Assembly after the Speaker has been elected.

We again assume that each and every parliamentary political party has a process of selecting its members or member for nomination to the Assembly. In the case of Ford People, we were told that it has provided for the process of selection in its constitution and that is the genesis of the dispute before the Court.

Ford People has a leadership structure which consists of, among other officials, the Party Leader and the Chairman General. We were told the Party Leader is the Hon. Simeon Nyachae and the major role of that officer in the party appears to be to stand for election as President of the Republic on behalf of the Party. Hon. Simeon Nyachae, being the Party leader was the Party's Presidential Candidate during the December 2002 Parliamentary and Presidential elections and the dispute before us has its origins from those elections.

Kimani Wa Nyoike, the 3rd Respondent herein, is or was the National Chairman and the National Officer of the party - see his affidavit of 12th February, 2003. In that affidavit, the 3rd Respondent swore that the party has a National Executive Council (NEC) which consists of:-

- (i) The Party Leader
- (ii) All National Officials elected at the National Delegates Congress, including all Functional Secretaries elected by the General Council on delegation from the National Delegates Congress.
- (iii) The Party Chief Whip in Parliament.
- (iv) The Executive Director, who shall be an ex-officio member.

The functions of the "NEC" are said to be:-

“acting as the executive body of the General Council and the National Delegates Congress and to ensure that all decisions and policies made are duly carried out by the Party and the Secretariat.”

In the event of an emergency the "NEC" shall assume full responsibility of the party and shall report to the next General Council meeting. At all meetings of the "NEC" and the General Council, the National Chairman or in his absence the National Deputy Chairman shall preside and in the absence of the National Chairman and his Deputy the members shall elect one from among themselves to preside.

Article 18 of the Party Constitution deals with "Nomination of Party Candidates" which shall be by members by secret ballot and is as follows:-

- (i) Party Presidential Candidate in respect of Presidential Elections – party leader as elected by the National Delegates Congress;
- (ii) Party Parliamentary Candidate in respect of Parliamentary Elections – all registered party members within the branch;

(iii) Party Local Authority Candidate in respect of Local Authority Elections - all registered party members within the sub-branch.”

In special circumstances making it physically or technically impossible to hold a nomination by election as provided above, the National Executive Committee shall convene and make an appropriate decision in the best interest of the party. Though these provisions do not really cover the process of choosing a party member for nomination or appointment to Parliament, the 3rd Respondent contended, we think with some justification, that the naming and forwarding of such a name to the Electoral Commission should and ought to have been done by the National Executive Council which, under the party constitution, is authorized to make decisions on behalf of the National Delegates Congress and the General Council. But in our view, that issue is neither here nor there and this will subsequently become apparent later on.

The Commission, i.e. 2nd Respondent herein, informed Ford People that of the twelve seats available for nomination, the party was entitled to one. According to the 3rd Respondent Mr. Kimani Wa Nyoike, on 3rd January, 2003 the Party Leader called him and asked him to join a meeting with the Party Leader and the newly elected Party Members of Parliament. He, i.e. the 3rd Respondent attended that meeting and the issue of selecting a party member for nomination to Parliament came up. The 3rd Respondent thought that was not the proper forum for carrying out such a selection and he said so. According to the 3rd Respondent, the Party Leader asked him to leave and he did leave the meeting. In his absence the Appellant was selected or elected or whatever one may call it, as the party candidate for nomination to Parliament. The name of the Appellant was duly forwarded to the Commission under the hand of the Party Leader, and other party members present at the meeting.

In the afternoon of the same day, the 3rd Respondent convened what, in his view, was a NEC meeting and at that meeting, the 3rd Respondent was chosen as the party’s candidate for nomination to National Assembly. The name of the 3rd Respondent was also forwarded to the Commission so that instead of having only one name to be forwarded to the President for appointment to Parliament the Commission had two names, i.e. that of the Appellant and that of the 3rd Respondent. The Commission did not explain to the superior court, nor to this Court, the method it used to deal with the issue of the two names, but there is no dispute that the Commission forwarded to the President the name of the Appellant and not that of the 3rd Respondent. The Commission dealt with the issue of nominations between 14th and 17th January, 2003, and there was no dispute on the evidence the President did appoint the Appellant as a nominated member of the National Assembly and the appointment was Gazetted on 24th January, 2003. The Appellant was duly sworn in as a nominated member of Parliament on 18th February, 2003.

The 3rd Respondent was grievously offended by all this, so much that on 12th February, 2003 he issued a notice to the Registrar of the High Court that he intended to apply to the Court within seven days for orders of *certiorari*, *prohibition* and *mandamus* and on 14th February, 2003, four days before the gazettelement of the Appellant’s appointment, Mr. Kihara, learned counsel for the 3rd Respondent, filed an ex parte chamber summons under **Order 53 Rules 1** and **2** and under **section 3A** of the Civil Procedure Act and by the said summons, the 3rd Respondent asked the superior court for:-

“1.

2. *leave to bring certiorari, prohibition and mandamus proceedings directed against the Respondent and such leave do operate as stay of the Respondent’s orders and/decisions made and/or proceedings taken on 14th and 17th January, 2003, together with all consequential orders and/or proceedings thereto.*

“3. **THAT** by way of *certiorari* to move into court and quash the order and/or decision(s) or proceedings taken by the Electoral Commission of Kenya made on 14th and 17th January, 2003 refusing to forward the 2nd Applicant’s name and particulars for appointment as Ford People’s nominated member of Parliament to His Excellency the President of the Republic of Kenya

and instead forwarded the name of KIPKALYA KIPRONO KONES.

4. By way of mandamus the Respondent be directed to forward the names and particulars of the 2nd Applicant KIMANI WA NYOIKE for appointment as Ford People's nominated member of Parliament to His Excellency Honourable Mwai Kibaki, The President of the Republic of Kenya.

5. By way of Prohibition Order the Respondent to refrain from wrongly interpreting, or misinterpreting or taking a biased position in their reading of the 1st Applicant's Constitution and in particular refrain from taking proceedings in support of the nomination of KIPKALYA KIPRONO KONES as the party's nominee."

The grounds in support of these prayers were stated on the body of the summons and they were seven in number with other sub-paragraphs. The grounds were that:-

“(a) On or about 31st December, 2002 the Respondent [i.e the Electoral Commission of Kenya] informed the 1st

Applicant [i.e. 3rd Respondent] that by virtue of **section 33** of the Constitution of the Republic of Kenya, it was

entitled to name or nominate one person for it to forward for appointment by His Excellency the President.

(b) By a letter dated 3rd January, 2003 the 1st Applicant by its National Executive Committee (NEC) informed the

Respondent that it had named and chosen the 2nd Applicant (i.e. KIMANI WA NYOIKE) for nomination to the Parliament for the one place allocated to it.

(c) On diverse dates between 14th and 17th January, 2003 the Respondent was reported in the media as having

selected and forwarded for nomination the name of one KIPKALYA KIPRONO KONES and refused or rejected the name of the 2nd Applicant.

(d) The Respondent in the same media reports was said to have made the subject selection on reliance of (sic)

Article 6 of the 1st Applicant's Constitution and hence had refused to base its decision on any of the following:-

(i) **Sections 1A and 33 (1), (2) and (3)** of the Constitution of the Republic of Kenya.

(ii) **Articles 11, 12, 17(b) and 18** of the 1st Applicant is Constitution which set out that such an executive decision should be made by the 1st Applicant's NEC and not by the 1st Applicant's Party Leader Hon. Simeon Nyanchae when he wrongly purported to nominate a one KIPKALYA KIPRONO KONES to fill the party's nomination seat subject matter hereof.

(e) Made the decision to be selective against the Applicants on its own without hearing them or any of them, in any

way whatsoever.

(f) The act of the Respondent has sharply divided the 1st Applicant's membership, and has made the operation of

the Applicant suffer paralysis, as it has cast doubt as to which organ of the party has the constitutional mandate

to make such an executive decision.

(g) Further the action by the Respondent is ultra vires its powers and the mandate given to it by law and has

erroneously made the Respondent the selecting, appointing/nominating authority over the party concerned, and His Excellency the President.”

These grounds were further amplified by a statement of facts filed with the summons. Though the grounds talk of the 1st Respondent as being the party, namely Ford People, the chamber summons did not have the name of Ford People and the summons, though nominally brought by the Republic as is the usual practice, only showed that the Republic brought it ex-parte

“1. **KIMANI WA NYOIKE**

EDWARD KAGIRI

SAMMY MAINA

JOHN CHEBII (all suing as the National Officers of The Forum for the Restoration of Democracy for the People (Ford people)

2. **KIMANI WA NYOIKE.”**

Nothing really turned on this point either in the superior court or in this Court but it could well cause confusion as to who was the 1st Respondent and who was the 2nd Respondent. Apart from the statement of facts, there was also a short verifying affidavit sworn by the 2nd Respondent in the appeal.

The ex parte chamber summons was heard by Mr. Justice Kuloba and by his order dated 17th February, 2003, the Judge granted the leave sought but declined to order that the leave he granted should operate as a stay, with the result that the President did appoint and gazetted the appointment of the Appellant as a nominated member of the National Assembly, and the Appellant was thereafter sworn in as such member. Kuloba, J's order had directed that the substantive application be filed within twenty - one (21) days and pursuant to that order a notice on motion dated 28th February, 2003 was lodged in the superior court on 3rd March, 2003. The notice on motion basically repeated the contents of the *ex parte* chamber summons and made basically the same prayers. The motion was at first fully heard by Mr. Justice Rimita but he was unable to give a decision thereon and the motion was eventually heard *de novo* by Mr. Justice Ojwang' between 20th January, 2004 and 9th March, 2004 when the learned Judge reserved his judgment to 23rd April, 2004. On the latter date, the learned Judge delivered his judgment which ran into 82 typed pages. He basically held that judicial review was in the circumstances, available to the Respondents against the Commission and the learned Judge issued the following orders:-

“1. That an Order of certiorari be and is hereby issued removing into the court and quashing the order and/ or decisions or proceedings taken by the Electoral Commission of Kenya on 14th and 17th January, 2003.

2. That an Order of mandamus be and is hereby issued directing the Respondent to comply with the provisions of section 33 and in particular section 33 (3) and 33 (5) of the Constitution of

Kenya, as well as with the general law of the land, in respect of the one nominated seat in Parliament already reserved to the Parliamentary Party known as Forum for the Restoration of Democracy for the People (Ford People).

- 3. That a certified copy of this Judgment shall be provided to the Speaker of the National Assembly, to serve as a basis for any decisions such as he may consider himself empowered to make by virtue of section 44 or any other pertinent section of the Constitution of Kenya.*
- 4. That depending on such action as the Speaker of the National Assembly may take within his powers as set out under the Constitution of Kenya, the Applicants in these proceedings shall be at liberty to make any further applications by virtue of section 44 or any other pertinent section of the Constitution.*
- 5. That the costs of these proceedings shall be borne by the Respondent.”*

By these orders, all that which Ojwang’ J did was to quash the proceedings of the Commission made between 14th and 17th January, 2003, i.e. the proceedings which led to the Commission forwarding to the President the name of the Appellant for appointment as a member of the National Assembly. Having thus quashed those proceedings, the learned Judge then went on to issue an order of **mandamus** directing the Commission to comply with the provisions of **section 33** of the Constitution as well as “with the general law of the land,” whatever that may mean. The learned Judge then left it to the Speaker of the National Assembly to take whatever action he felt empowered to take under **section 44** of the Constitution of the Republic. **Section 44** to which the learned Judge severally referred deals with “Determination of questions as to membership of National Assembly” and is in the following terms:-

- “44 (1). The High Court shall have jurisdiction to hear and determine any question whether –*
- (a) a person has been validly elected as a member of the National Assembly; or*
 - (b) the seat in the National Assembly of a member thereof has become vacant.*
- (2) An application to the High Court for the determination of a question under sub-section*
- (1) (a) may be made by any person who was entitled to vote in the election to which the application relates or by the Attorney-General.*
 - (3) An application to the High Court for the determination of a question under subsection (1)*
- (b) may be made -*
- (a) Where the speaker has declared that the seat in the National Assembly of a member has by reason of a provision of this Constitution become vacant, by that member; or*
 - (b) In any other case, by a person who is registered as a voter in elections of elected members of the Assembly or by the Attorney-General.*
- (4) Parliament may make provision with respect to:-*
- (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and*
 - (b) the powers practice and procedure of the High Court in relation to the application.”*

There can be no doubt from the provision contained in **section 44 (3) (a)** that the Speaker has the power to declare the seat of a member of the National Assembly vacant, but that power is only exercisable by the Speaker where it is shown that “by reason of a provision of this Constitution” the seat ought to be

declared vacant. **Section 39 (1)** of the Constitution sets out the circumstances under which a member of the National Assembly shall vacate his seat in the Assembly and those circumstances are that:-

- “(a) the member has ceased to be a citizen of Kenya;
- (b) (Deleted)
- (c) circumstances arise that if he were not a member of the Assembly, would cause him to be disqualified by **section 35(1)** or by any law made in pursuance of **section 35 (3)** or **(4)** to be elected a member; or
- (d) without having obtained the permission of the Speaker, he has failed to attend the Assembly on eight consecutive days on which the Assembly was sitting in session.”

This last provision may, however, be waived in respect of such a member by the President. Then **section 39 (2)** provides that an elected member or a nominated member shall vacate his seat as such member if he is elected as Speaker.

So that the Constitution even controls the circumstances under which the Speaker may declare the seat of a member vacant. The circumstances listed in **section 39** are not, of course exhaustive. Pursuant to **section 44 (4)** Parliament enacted the National Assembly and Presidential Elections Act, **Chapter 7** of the Laws of Kenya, and **Part VI** of that Act deals with presentation of petitions which, according to **section 44 (4)** of the Constitution, is the manner of making an application to the High Court for the purpose of determining whether a person has been validly elected as a member of the National Assembly or whether a seat of a member of the National Assembly has become vacant. By **section 18** of the National Assembly and Presidential Elections Act:-

“If the Speaker has reason to believe that the seat in the National Assembly of a member thereof has become vacant, he shall call for such evidence on the matter as he thinks necessary and may consult the Attorney-General, and shall thereafter –

(a) if he is satisfied that the seat has become vacant, declare that the seat has become vacant, and publish notice of the declaration in the Gazette; or

(b) if he is not so satisfied refuse to so declare.”

In either of these situations, a member whose seat has been declared vacant or a person registered as a voter in elections to the National Assembly may challenge the Speaker’s decision under **section 44 (3) (a)** and **(b)** of the Constitution. The way to bring such challenge is through a petition as set out in **section 19 (1)** of the Act. Then **section 30** of the Act provides:-

“30 (1) At the conclusion of the trial of a petition, the election court shall determine the question raised in the petition, and shall certify its determination to the Speaker.

(2) Upon receipt of a certificate under this section the Speaker shall give the necessary directions for altering or confirm the return and shall take such action thereon, pursuant to section 18, as shall be necessary.”

Neither the Constitution itself nor the Act made pursuant to the Constitution defines what is meant by “a member of the National Assembly” and the Constitution itself, apart from setting out the different processes by which members get to the National Assembly, does not draw any other distinction between the members.

Now, Ojwang’ J. by his judgment, wanted the Speaker of the National Assembly to act under **section 44** of the Constitution and under **section 39** declare the seat of the Appellant as being vacant. The parties aggrieved by the acts or omissions of the Commission for the reasons already stated herein, wanted the

Appellant's seat declared vacant and they approached the High Court by way of judicial review. Ojwang', J thought he could do so and made the orders we have seen. The Appellant was aggrieved by those orders and he appealed to this Court on a total of twenty-five (25) grounds. It is not possible to deal with those grounds one by one. Suffice it to say that, Mr. Orengo, the learned lead counsel for the Appellant, concentrated more on Ground 1 in the memorandum of appeal and that ground was that:-

"1. The learned Judge erred in law and fact in failing to appreciate that the procedure for declaration of a seat in the National Assembly vacant is laid down by the Constitution of Kenya read together with the National Assembly and Presidential Elections Act, (Cap 7 Laws of Kenya) and that is by way of a petition and not by way of Judicial Review Proceedings. Accordingly, the superior Court had no jurisdiction to hear and determine the matter."

Grounds 2 and 3 are also relevant at this stage. Those grounds are that:-

"2. The learned Judge erred in law and fact in failing to appreciate that the act of transmission by the Electoral Commission of Kenya of the name of the Appellant to the appointing authority, having been acted upon and implemented by the President of the Republic of Kenya was not legally and factually available for quashing."

3. The learned Judge erred in law and fact in failing to appreciate that the Appellant was appointed as a nominated member of the National Assembly by the President of the Republic of Kenya by virtue of the provisions of section 33 of the Constitution of Kenya and that decision of the President still remains valid and was not the subject of the Judicial Review Proceedings. Accordingly, the order issued by the superior court was issued in vain."

On ground one Mr. Orengo strenuously submitted before us that the procedure or process by which a seat in the National Assembly is to be declared vacant is elaborately set out in the Constitution itself and in the Act made pursuant to **section 44 (4)** of the Constitution. Accordingly, submitted Mr. Orengo, judicial review proceedings were not available to the Respondents as not only had the Appellant been appointed a member of the Assembly by the President, but he had also been sworn in by the Speaker of the National Assembly. For legal and practical purposes, submitted Mr. Orengo, the Appellant had become a member of the National Assembly and, therefore, he could only lose that membership through the procedure set out in the Constitution and the Act.

In answer to these submissions by Mr. Orengo, Mr. Kihara appeared to draw a distinction between elected members of National Assembly and nominated members and Mr. Kihara submitted that the Constitution only provides for removal of elected members while there is no provision for dealing with nominated members of the National Assembly. Accordingly, argued Mr. Kihara, there being no constitutional provisions for the removal of nominated members, the aggrieved parties were entitled to invoke the judicial review process and Mr. Justice Ojwang' was correct in holding that the judicial review process was, in the circumstances, available to the aggrieved parties.

For our part, we have no doubt that though the Commission (i.e. the Electoral Commission of Kenya) is a creature of the Constitution itself, and though it is provided in **section 41 (9)** of the Constitution that:-

"In the exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority,"

yet the Commission is still amenable to the supervisory jurisdiction of the High Court, which jurisdiction can be exercised by the High Court through the process of judicial review. **Section 123 (8)** of the Constitution itself specifically provides that:

"No provision of this Constitution that a person shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or

any other law.”

That provision is clearly intended to ensure that the rule of law, which it is the primary duty of the courts to enforce, is complied with by all organs of the state, and no state organ is permitted to say that the Constitution confers on it powers the exercise of which cannot be questioned by the courts. The Public Service Commission, for example, is also a creature of **section 106** of the Constitution and **section 106 (12)** specifically provides that:-

“Subject to this Chapter, the Commission shall, in the exercise of its functions under this Constitution, not be subject to the direction or control of any other person or authority.”

That provision, however, has never been a bar nor has it ever been pleaded as a bar to the power of the High Court to, for example, quash the decisions of the body by way of certiorari where it is shown that an order of certiorari ought to issue. The point we are making is that the Commission, i.e. the Electoral Commission of Kenya, is amenable to the jurisdiction of the High Court and in appropriate circumstances, the High Court will intervene in its decision-making processes through the procedure of judicial review. We did not understand even Mr. Adere, the learned counsel for the Commission, to in any way contest that point though Mr. Adere did submit that in merely receiving the names of candidates from political parties and forwarding those names to the President for appointment, the Commission was not acting judicially or in a quasi-judicial manner and because of that, the remedy of judicial review was not available to the parties who applied for the same. There is some considerable merit in this submission by Mr. Adere but because of the view we have taken of the matter, we do not feel called upon to finally determine the issue. It must wait for resolution on another occasion.

We go back to the basic question: Even if the Commission, in receiving names and forwarding them to the President for appointment was acting in a quasi-judicial capacity, was the process of judicial review available to the parties offended by the Commission's actions?

We have pointed out that Mr. Kihara drew a distinction between nominated and elected members of the National Assembly. With the greatest respect to Mr. Kihara, we cannot find in the Constitution itself the basis for such a distinction. Nominated members get to the National Assembly through a process set out in detail by the Constitution itself. We have already set out the relevant provisions of the Constitution. The first process is to be selected or chosen by a parliamentary political party and each such party will have its own method of choosing its candidate. It appears that at the time the Appellant and the 3rd Respondent were chosen or purported to have been chosen, there were two rival camps in Ford People; that is nothing surprising to find in our political parties. Each camp then sent the names of a person to the Commission. The Commission sent the names of the Appellant to the President and the President did in fact appoint the Appellant as a nominated member of Parliament and the Appellant was duly sworn in by the Speaker as such member. By the time Mr. Justice Ojwang' was delivering his judgment on 23rd April, 2004, the Appellant was in fact a member of Parliament through the process of nomination. It may well be that the Commission was wrong in choosing to forward to the President the name of the Appellant instead of that of the 3rd Respondent. But even if the process of nomination was faulty, the Appellant, through that faulty process, became a member of the National Assembly and the Constitution sets out in detail the procedure for removing a member from the Assembly. There are basically two routes of becoming a member of the Assembly – through election and through nomination and those two routes are set out by the Constitution. But in terms of removal, the Constitution has set out only one process; we would have expected that if the makers of the Constitution had wanted different ways of removing members from the Assembly, they would have specifically spelt out two ways as they did with entry into the Assembly. Clearly, it would be unreasonable to think that if a nominated member were, for example, declared bankrupt and thus become disqualified, then the only way to remove him would be to go to the High Court through the judicial review process. That would be totally unnecessary and untenable as the Constitution itself has provided for the manner of removing members from the National Assembly. Under **section 44 (1) (b)** of the Constitution, the High Court has jurisdiction to determine the question of whether a seat in the Assembly has become vacant and **section 18** of the National Assembly and Presidential Elections Act, as we have seen, gives the Speaker of the Assembly the power to declare a seat vacant if:

“..... he is satisfied that the seat has become vacant,”

and all the Speaker is required to do is that:-

“..... he shall call for such evidence on the matter as he thinks necessary and may consult the Attorney-General”

The section does not bind the Speaker to act only on documentary evidence, but it must be admissible and acceptable evidence. **Section 40** of the Constitution, for example, provides:-

“A member of the National Assembly who, having stood at his election as an elected member with the support of or as a supporter of a political party or having accepted appointment as a nominated member as a supporter of political party, either –

(a) resigns from that party at a time when that party is a parliamentary party; or

(b) having, after the dissolution of that party been a member of another parliamentary party, resigns from that other party at a time when that other party is a parliamentary party, shall vacate his seat forthwith unless in the meantime that party of which he was last a member has ceased to exist as a parliamentary party or he has resigned his seat.”

Under this section, read in conjunction with **section 18** of the Act, if admissible and acceptable evidence, and we repeat, not necessarily documentary evidence, were to be placed before the Speaker that a member has resigned from the party which sponsored him to the National Assembly, the Speaker would be perfectly entitled to declare the seat of such a member vacant. No distinction is drawn between an elected member and a nominated member and if the Speaker does declare a seat vacant, the only remedy open to the member is to move to the High Court under **section 44** of the Constitution.

We think we have said enough to show that a seat in the National Assembly can only be declared vacant under the circumstances stated in the Constitution and through the processes set out therein. That has always been the position taken by the courts in previous decisions. There is, first the case of **THE SPEAKER OF THE NATIONAL ASSEMBLY VS. THE HON. JAMES NJENGA KARUME**, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported). This was, of course an application for a stay of some orders of the High Court under **Rule 5 (2) (b)** of the Court of Appeal Rules, and that being the position, no concluded views could be expressed. But the Court of Appeal, consisting of **KWACH, COCKAR & MULI, JJA** did state as follows in their Ruling dated 29th May, 1992.

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

Next there was the case **RICHARD CHIRCHIR & ANOTHER VS. HENRY CHEBOIWO & ANOTHER** which was decided by this Court on 24th December, 2002. In that case which was started by a plaint an order of injunction was granted by this Court stopping a returning officer from publishing election result in a particular constituency and in granting the injunction, the Court, composed of **GACHUHI, KWACH & COCKAR, JJA**, apparently rejected the argument that the only way to come to Court in regard to matters arising under the National Assembly and Presidential Elections Act was through an election petition. But in **KIMANI WA NYOIKE VS. THE ELECTORAL COMMISSION OF KENYA & ANOTHER**, Civil Application No. NAI 213 of 1995 [96/95 UR] (unreported) the Court did point out that in the case of **CHIRCHIR VS. CHEBOIWO**, supra, the Court did not at all refer to its earlier remarks made in the **SPEAKER VS. NJENGA KARUME** case. In the **KIMANI WA NYOIKE** case, supra, the Court concluded as follows:-

“We think the procedure for addressing grievances arising from elections is through an election

petition and that is exactly what the Court was saying in KARUME'S Case. That view had full support in authority both local and foreign. In RAPHAEL SAMSON KITHIKA MBONDO VS. LUKA DAUDI GALGALO AND PAUL JOSEPH NGEI, Election Petition No. 16 of 1974 (unreported) it was alleged that Mr. Ngei and his supporters had in effect physically prevented Mr. Mbondo from presenting his nomination papers. Mr. Mbondo, however, did not go to the High Court by way of a plaint to compel the returning officer or anyone else to accept his papers. He waited until the results were published and then he filed an election petition. The election of Mr. Ngei was nullified and Mr. Ngei was found guilty of an election offence.”

The Court then continued as follows:-

“.....What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the Court observed in KARUME'S Case. We would unhesitatingly prefer to base our decision on the KARUME Case rather than the CHEBOIWO Case. The case of THE QUEEN VS. THE COUNTY JUDGE OF ESSEX AND CLARK [1887] 18 QB. 704 which was cited to us is also to similar effect.”

The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, **Chapter 26** of the Laws of Kenya and in **Order 53** of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular. The Law Reform Act and **Order 53** of the Civil Procedure Rules are both inferior to and can only apply subject to the provisions of the Constitution. No doubt, mistakes even grievous mistakes, will be made in the process of elections or nominations but such mistakes cannot be used to stop the electoral or nomination process. In filing either their plaint or the judicial review process now under consideration, the clear intention of the parties aggrieved by the action of the Commission was to stop the Commission from proceeding with the process of nominating the Appellant. If the Commission can be stopped from completing the process of nomination, it can also be stopped from completing the process of elections. That cannot be allowed because if it were to be allowed, the country may well end up having no members in the National Assembly as there undoubtedly will be interventions by the courts in the process of either electing or nominating members to the National Assembly. Ojwang' J's orders are a clear example of such intervention, and inevitably such interventions might well become the order of the day if ordinary processes of approaching the courts – such as by way of a plaint, originating summons or judicial review – were to be allowed to take root in the electoral processes. It is to be remembered that neither the Constitution nor the National Assembly and Presidential Elections Act, makes provisions for interim reliefs such as injunctions, orders of stay and so on during the hearing of an election petition. If an injunction were to be issuable against a sitting member of the National Assembly, the effect of that would be to render the constituency represented by such a member to be without a representative during the hearing of the petition, however long the hearing may last. Again if a plaint was filed seeking to stop the electoral process from going on and an interim injunction were to be issued pending the hearing and determination of the suit the people in the electoral area involved in the suit would be virtually disenfranchised pending the hearing and determination of the suit. In this particular case when an application for leave to apply for the orders was made, an order was also sought that the leave granted ought to act as a stay. Had the latter order been granted the process of nomination would have come to a grinding halt and probably upto this time, Ford People would still be without its nominated member. The framers of the Constitution must have had these considerations in mind when dealing with the issue of election petitions and come to the conclusion that it would be far much better to have even a defective election than no election at all and that after the members have all joined the National Assembly those whose elections are subsequently found to have been defective can be weeded out through election petitions and fresh elections held for the particular area(s). The same considerations must apply to nominated members. That the courts take such a long time to hear and determine election petitions is a serious blot upon the judicial system. But that blot must find its solution elsewhere and the solution does not lie in employing other methods except those provided for in the Constitution.

The basic fallacy underlying the judgment of Mr. Justice Ojwang' seems to us to be that he seems to have

thought that he was merely stopping the Commission in proceeding with the process of nomination. But as we have said, even if the process employed by the Commission in deciding which of the two persons should be sent to the President for appointment was entirely defective, the process had been completed by the President appointing the Appellant as a member of the National Assembly. It must be this realization which made Mr. Justice Ojwang' to issue some of the orders directed at the Speaker of the National Assembly to take unspecified measures to carry out the learned Judge's quashing of the acts of the Commission which led to the appointment of the Appellant. But the Speaker, like all of us are bound by the Constitution and the National Assembly and Presidential Elections Act. There was no reason which could have led the Speaker to declare the seat held by the Appellant vacant. Such a declaration could only be done within the confines set out in the Constitution. The other alternative for the learned Judge was to issue to the Speaker a certificate of determination under **section 29** of the National Assembly and Presidential Elections Act. But the learned Judge would have had no jurisdiction to issue such a certificate because there was no election petition before him. Perhaps the learned Judge was asking the Speaker to carry out an investigation under **section 18** of the Act to determine if the seat of the Appellant had become vacant. It would be inappropriate for the High Court to make such an order because it is not to be forgotten that the declaration by the Speaker that a seat held by a member has become vacant is itself challengeable in the High Court through an election petition and there would be no reason for the High Court to involve itself in such a circus.

We have said enough, we think to show that the procedure of judicial review, like that of plaint or any such like procedure, is and was not available to the parties aggrieved by the acts or omissions of the Commission. We re-assert, as we previously did, that the only valid way of challenging the outcome of the electoral process, and for that purpose nominating members to the National Assembly is part of the electoral process, is through an election petition as provided in the Constitution and the National Assembly Presidential Elections Act. **Section 44** of the Constitution merely talks of an "application" being made to the High Court. But **section 19 (1)** of the Act specifically provides that the application to the High Court ...

"shall be made by way of petition"

That has been the way, is the way and shall continue to be the way until and unless Parliament decrees otherwise. Accordingly the notice of motion dated 28th February, 2003 and which was brought under **Order 53** pursuant to the leave granted on 17th February, 2003, was for dismissal and ought to have been dismissed. Mr. Justice Ojwang' erred in allowing that motion.

That being our view, the Court's final orders shall be that we allow this appeal, set aside each and every order made by Mr. Justice Ojwang' and replace those orders with one dismissing the notice of motion dated 28th February, 2003 and lodged in High Court on 3rd March, 2003. In view of that holding the Notice of Cross-Appeal lodged by the 3rd, 4th, 5th, 6th and 7th Respondents has no chance of success and we order that it is also dismissed.

On costs, this dispute arose simply because of the indiscipline in Ford People; had they not had two camps in the same party, they would have agreed on one person to recommend for nomination. The Appellant himself was part of that indiscipline and so were the 3rd, 4th, 5th, 6th and 7th Respondents. As for the Commission, i.e. the 2nd Respondent, it adamantly refused to disclose to the parties aggrieved by its acts or omissions the basis upon which it had chosen to forward to the President the name of the Appellant and not that of the 3rd Respondent. In the circumstances, the order on costs which commends itself to us is and shall be that each and every party to the litigation shall bear their own costs in the High Court and in this Court.

Before we leave the matter, may we express our sincere thanks and appreciation to each and every counsel for their research and diligence. We have not found it necessary to deal with the authorities presented by them before us, particularly those of Mr. Kihara who as usual, did all he could to advance the case of his clients. We have not dealt with the cases simply because of the view which we have taken with regard to whether the remedy of judicial review was available to the parties represented by Mr.

Kihara. We must nevertheless express our appreciation for the industry and diligence shown by counsel.

The final orders of the Court shall be those already set out herein.

Dated and delivered at Nairobi this 10th day of November, 2006

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.