



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO. 1A OF 2019

IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 1, 2, 10, 19, 20, 21, 22, 23, 38, 43, 47,

48, 50, 81, 185 AND ARTICLE 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF THE SAMBURU COUNTY ASSEMBLY SERVICE BOARD

AND

IN THE MATTER OF THE SPEAKERS PANEL

AND

IN THE MATTER OF THE SAMBURU COUNTY ASSEMBLY

BETWEEN

CHRISTOPHER LENTUKUNYE.....1ST PETITIONER/APPLICANT

RAISY AHAMED LETURA.....2ND PETITIONER/APPLICANT

PETER LEMPEI.....3RD PETITIONER/APPLICANT

SHADRACK NAKINI LESOIPA.....4TH PETITIONER/APPLICANT

VERSUS

THE CLERK, SAMBURU COUNTY ASSEMBLY.....1ST RESPONDENT

THE SPEAKER, SAMBURU COUNTY ASSEMBLY.....2ND RESPONDENT

COUNTY ASSEMBLY OF SAMBURU.....3RD RESPONDENT

RULING

1. Before me is the preliminary objection against the Petition. The Respondents assert that I have no jurisdiction to hear the matter before me by dint of the provisions of Sections 39, 40 and 41 of the Political Parties Act, Act. No. 11 of 2011. It is urged that I should therefore decline the suit. The Petitioners are of a contrary view. The parties made oral submissions through their able counsels as follows.

2. Miss Kendi appeared for the Petitioners while Mr. Karanja appeared for the Respondents. Mr. Karanja argued the preliminary objection by stating that the objection is based on the fact that this Honourable Court has no jurisdiction to hear and determine the case per Sections 39, 40, 41 of Political Parties Act, 2011. He submitted that the Petitioners are members of Samburu County Assembly and were holding various positions in the County Assembly of Samburu. He named them as the representative in the County Service Board, the Deputy Majority Leader, member of the Speaker's Panel and the Majority Whip. He stated that all of them belonged to Jubilee Party and had been nominated to those positions by Jubilee Party. He argued that there were allegations that the Speaker of the Samburu County Assembly made a communication from the chair on 20th March 2019 to the effect that the Petitioners had ceased acting in those positions on advice of Jubilee Party. He posits that the Speaker in accordance with Standing Orders of the County Assembly then made the orders. He argues that what is being challenged is not a decision of County Assembly but the decision of Jubilee Party. He submits that the Petitioners if aggrieved, they should have approached the Political Parties Tribunal since they assert that there was no meeting of Jubilee Party and that what was communicated was 'cooked'. He asserts that if they were aggrieved by the action of the Jubilee Party and if a decision was made by the Party without them being heard, that is a question under Section 40 of the Political Parties Act and the prayers in the Petition complain about the acts of removal from their leadership positions. He asked a question which begs an answer. If there is a right impaired can the Political Parties Act deal with it? He stated the answer was in the affirmative as these issues can be dealt with by the Political Parties Tribunal. He relied on the decisions of **Republic v Susan Kihika & 2 Others Ex Parte George Mwaura Njenga [2014] eKLR** and **Born Bob Maren v Speaker Narok County Assembly & 3 Others [2015] eKLR** which all held the disputes between the party members and the party are to go to the Tribunal. He argued that where there is a clear procedure for the adherence to the law, the dispute ought to be preferred in accordance with the process under the law. He also relied on the authority cited by the Petitioners' being the case of **Republic v Chairman, Political Parties Disputes Tribunal & 2 Others Ex Parte Susan Kihika Wakarura [2017] eKLR**, where the court was clear at paragraph 35.

"Reads"

The Tribunal can deal withor denial of rights. The Constitution under Article 23 brings this tribunal into life. Even where there is a violation of rights the subordinate courts and Tribunals can enforce the rights. The only thing they cannot do is to interpret the Constitution. That is a question for the superior courts but not the Tribunal. No prayer for the interpretation of the Constitution in the Petition. The failure to give a person hearing is a violation of rights and that is not a question of interpretation of Constitution. They have decided to sue Speaker, Clerk and County Assembly does not take away jurisdiction. Once the preliminary objection is raised the court is obliged to look at the position and decide if it is a dispute between Political Party and its members the court's hands are tied. We urge court to find the Petition does not meet threshold and should be referred to the right jurisdiction and that you strike it out with costs.

That is all.

Kendi – We oppose the preliminary objection. The position is per the Replying Affidavit of 17th April 2019. There is also a list and bundle of authorities dated 23rd July 2019. The Petition before court involved unprocedural and removal of Petitioners from their offices. They are members of the County Assembly. The 1st Petitioner was member of Samburu Public Service board, the 2nd Petitioner was Party Majority Leader, the 3rd was nominated to the Speaker panel and the 4th Petitioner was the Majority Whip and appointee to Speaker panel.

The procedures for removal are stipulated in the County Assembly Service Act. The county government Act and the Constitution as well as the County Assembly Service Standing Orders. For 1st Petitioner to be removed from his office of County Assembly the procedure is stipulated under Section 12(5) of the County Assembly Service act. The County Assembly which is the 3rd Respondent has to pass a motion on the said removal which motion is subject to debate, thus the 1st Petitioner has a right to be heard under Standing Order 63 and Constitution. On position of 2nd Petitioner who was Majority Leader there has to be compliance with Standing Orders No. 19 of the Samburu County Assemblies Act. This is at page 68 of the Petition wherein the Whip of the party forwards a decision to Speaker in writing together with minutes together with the proceedings where decision was made. The communication has to be in writing from Whip of the Party. This is forwarded to the 4th Respondent the Speaker. In our askance the Petition paragraph 30 we contend no meeting was held and as such no minutes were forwarded to the 2nd Respondent. The obligation under Standing Orders are complied with for the 3rd Petitioner who was member of Speaker Panel. Procedure is per Standing Order No. 17 of the County Public Service Act per Page 16 where 2nd Respondent (the Speaker) has to forward a notice to the house business committee which then gives notice to replace after considering if the notice is valid. The 4th Petitioner was Majority Whip and also member of speaker Panel. The procedure of removal is the same procedure to be followed as I have stated for the 4th Petitioner and the office held the procedure for removal is under Order 17. It is similar to that of the 3rd Petitioner. The Petitioner is on the unprocedural and unconstitutional baseless removal from office by the Respondents who did not follow the laid down procedures on their actions or omissions as laid out their removal just because they are from Jubilee Party cannot be treated as a Jubilee Party affair. This is supported by our first authority which is the case of Republic v Chairman Political Parties Disputes Tribunal & 2 others [2017] eKLR. Paragraph 77 ofof Republic v Benjamin Washiali [2018] eKLR their removal by the Respondents cannot be termed as a Jubilee Party affair.

Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 Others Ex-Parte Alfred Kiptoo Keter & 3 Others [2018] eKLR

The court has requisite jurisdiction to deal with the matter under Section 2 of the employment Act article 165(3) and article 162(2) of the constitution as they touch on breach of constitution right of the Petitioners under rule 7 of the Rules of this court pursuant constitution of a Petition. A Petition like this one is a breach of Constitution and this court ought to be slow in terminating such proceedings summarily except where it is clear the jurisdiction is not founded. Preliminary objection is premature as the matter requires court to determine the matters before it which is the decision by the Respondent and we pray the preliminary objection be dismissed with costs.

Karanja – It is not disputed the 4 Petitioners held the positions by virtue of membership to Jubilee party. It is not disputed their removal was triggered by Jubilee Party. The Tribunal has powers to determine whether Jubilee Party complied with the law. The political parties Tribunal has power to ascertain whether Jubilee Party followed the correct procedure. If court looks at the standing orders on removal, the court will see it is by the party rules and makes a decision communicated to Speaker. If they made communication without following the rules that can be challenged before Political Parties Disputes Tribunal. The parties are concerned in determining the appointment to political parties. If there is removal you do not approach Employment & Labour Relations Court but the Political Parties Tribunal. Refer paragraph 77 of Washiali case. Paragraph 77 is distinguishable. The members of Parliament were being removed from committee are elected. The

parties before you were removed on communication after the party changed the parties to represent it. This dispute is for the Political parties Dispute Tribunal. The striking out is not they will have remedy. There is remedy before a competent authority. Refer this to the appropriate tribunal and so we urge you to strike it out. Uphold or object. They should take it to the Political Parties Disputes Tribunal. That is our prayer.

3. A preliminary objection on jurisdiction ought to be raised at the earliest opportunity. This saves a court and parties the wasted time and resources that would otherwise be deployed in hearing on the merits a matter that falls outside the jurisdiction of the court. In the case of **The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited (1989) KLR 1** Nyarangi JA famously stated thus:-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

Similarly in the case of **Owners and Masters of The Motor Vessel “Joey” v Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2007] eKLR** the Court of Appeal {Omolo JA, Tunoi JA (as he then was) Githinji JA} expressed itself as follows:-

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

4. The provisions of Section 40 of the Political Parties Act, 2011 are worth reproducing in their entirety.

40. (1) The Tribunal shall determine—

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and a political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners; and

(f) appeals from decisions of the Registrar under this Act.

(underline mine)

The law in respect of political party disputes is clear. There is a mechanism where a dispute such as the one playing out before me is to be resolved. The positions subject of the Petition are contested political party positions and are therefore not *strictu sensu* employment or labour relations. They do entail some degree of servanthood but are not within the confines of Article 162(2)(b) matters.

5. From the foregoing it is clear there is merit in the preliminary objection which is hereby allowed with costs to the Respondents. Petition is struck out with costs.

It is so ordered.

Dated and delivered at Nyeri this 26th day of September 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar