



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 21 OF 1998

IN THE MATTER OF

THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS

ACT

(CHAPTER 7 OF THE LAWS OF KENYA)

AND REGULATIONS MADE THEREUNDER

AND

IN THE MATTER OF A VACANCY

IN THE GATANGA PARLIAMENTARY SEAT

BETWEEN

SAMUEL KAMAU MACHARIA.....PETITIONER

AND

DAVID WAKAIRU MURATHE.....1ST RESPONDENT

SPEAKER OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

R U L I N G

The facts leading to these proceedings are brief and straightforward. Both the petitioner and the 1st respondent were candidates for the Gatanga Constituency Parliamentary seat in the elections held on 29th and 30th December, 1997.

After the said elections the 1st respondent was declared winner and Gazetted as the duly elected member of Parliament for the Gatanga Constituency. He was then subsequently sworn in by the 2nd respondent, The speaker of the National Assembly and duly took his seat in the National Assembly.

By a letter dated 18th March, 1998, the 1st respondent is said to have given notice to the 2nd respondent that he had resigned from his parliamentary seat and also as a member of Parliament for Gatanga Constituency. The second defendant is said to have carried out investigations relating to the said resignation and on 5th May, 1998 issued a statement to the effect that his investigations had revealed that the first respondent had resigned as stated.

It is the petitioner's case that, upon finding that the 1st respondent had vacated his seat by way of resignation, the 2nd respondent was obliged by virtue of section 18 of the National Assembly and Presidential Elections Act (Cap.7 Laws of Kenya) to declare the seat vacant and issue the necessary writs. Further that, the 2nd respondent has failed to act in accordance with the mandatory provisions of sections 13 and 18 of the act aforesaid. The petitioner was then compelled to present this petition.

By a Notice of Preliminary objection, the second respondent, through counsel states that this Honourable court has no jurisdiction to entertain the petition by virtue of the provisions of the National Assembly (Powers and Privileges) Act Chapter 6 of the Laws of Kenya as well as on the common law on Parliamentary immunity and the Constitutional principle of Separation of Powers of the Legislature, the Executive and the Judiciary. Consequently the 2nd respondent prays that the petition be struck out with costs. Both learned counsel have made their able submissions and cited some authorities.

Mr Wetangula the learned counsel for the 2nd respondent based his arguments on sections 30, 56 and 57 of the Constitution as well as sections 12 and 29 of the National Assembly (Powers and Privileges) Act Cap.6 Laws of Kenya. Mr A.N. Ngunjiri the learned counsel for the 1st respondent supported Mr Wetangula. On the other hand, Mr Githu Muigai, the learned counsel for the petitioner opposed the preliminary objection on the basis of sections 44 and 60 of the Constitution as well as section 18 of the National Assembly and Presidential Elections Act Cap. 7 Laws of Kenya.

Section 30 of the Constitution provides:

“30. The legislative power of the Republic shall vest in the Parliament of Kenya which shall consist of the President and the National Assembly.”

Section 56 of the Constitution provides, inter alia that, subject to the Constitution the National Assembly may make standing orders (including in particular orders for the orderly conduct of the proceedings). Section 57 of the Constitution provides that:-

“57 Without prejudice to the powers conferred by section 56, Parliament may, for the purpose of the orderly and effective discharge of the business of the National Assembly, provide for the powers, privileges and immunities of the Assembly and its committees and members.”

It is Mr. Wetangula’s submission that the legislative powers vested in Parliament by section 30 of the Constitution cannot be exercised by any other organ of the Government. Further, the standing orders made under section 56 of the Constitution have excluded any discussion, in Parliament, of any matter pending in a court of law. These standing orders (Nos. 37 and 74) were enacted in recognition of fundamental principle of separation of powers.

The learned counsel further submitted that, in compliance with section 57 of the Constitution, Parliament enacted the National Assembly (Powers and Privileges) Act Cap.6 Laws of Kenya wherein the jurisdiction of this court and its officers is expressly excluded in sections 12 and 29 of the said Act. The court, he submitted, has no jurisdiction supervising or pretending to supervise Parliament. When the speaker made the ruling the subject of this petition, he was acting within the standing orders and the privilege accorded to him is absolute and whether parliament acts properly or not the remedy lies in Parliament itself.

The petitioner is asking this court to investigate what happened in Parliament and give directions to the second respondent who is an officer of Parliament. Mr Wetangula submits that the court cannot make such a declaration.

The Judicature is created under Chapter 4 of the Constitution, section 60(1) of which provides:

“60(I) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.”

Section 44 1(b) of the Constitution confers upon the High court the jurisdiction to hear and determine any question whether the seat in the National Assembly of a member thereof has become vacant. Section 44 (3) of the Constitution provides as follows:

“44 (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.”

It is significant to note that section 44 of the constitution falls under Chapter 3 which deals with Parliament.

Section 12 of the National Assembly (Powers and Privileges) Act Cap.6 Laws of Kenya provides:-

“12. No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court.”

The proceedings herein do not relate to the Assembly or Committee of Privileges and that section does not aid the 2nd respondent.

Section 29 of the same Act reads as follows:

“29. Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Orders.”

There is no provision both in Cap 6 or the standing orders that empowers the 2nd respondent to declare a seat in the National Assembly vacant. That power is conferred by section 18 of the National Assembly and Presidential Elections Act. Cap. 7 Laws of Kenya. In both the said Act and the Constitution the jurisdiction to determine the question of whether the seat has become vacant is conferred upon the High Court. Accordingly, the second respondent cannot rely on section 29 of Cap.6 aforesaid to oust the jurisdiction of this court.

Even if one were to find that the actions of the 2nd respondent were under Cap. 6(which they were not) and therefore aided by section 29 thereof to deny the court jurisdiction, that would offend the Constitution. Section 3 of the Constitution provides that, “if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

Further to the foregoing the Judicature Act Cap 8 Laws of Kenya and in particular section 3 (1) thereof enjoins the courts in this country to exercise their jurisdictions in conformity with the Constitution.

The learned counsel cited several authorities from the English jurisdiction to advance his submission that the courts have no jurisdiction to question whatever takes place in Parliament. Britain does not have a written Constitution hence the sovereignty of Parliament. But in Kenya we have a Constitution whose supremacy as set out therein is unambiguous and unequivocal.

I find support in a case from the Indian jurisdiction on this point. In re under Article 143 Constitution of India - All India Reporter 1965 (vol.52) P. 745 at p.763-4 the court observed, inter alia,

“ In a democratic country governed by a written constitution, it is the constitution which is supreme and sovereign.....it is no doubt true that the constitution itself can be amended by the Parliament, but that is possible because Art 368 of the constitution itself makes provision in that behalf, and the amendment of the constitution can be validly made only by following the procedure prescribed by the said article. That shows that even when the Parliament purports to amend the constitution, it has to comply with the relevant mandate of the Constitution itself. Legislators, Ministers and Judges all take oath of allegiance to the constitution, for it is by the relevant provisions of the constitution that they derive their authority and jurisdiction and it is to the provisions of the constitution that they owe allegiance. Therefore, there can be no doubt that the sovereignty which can be claimed by the Parliament in England, cannot be claimed by any Legislature in India in the literal absolute sense.”

I cannot agree more when we relate this to our country. And so, in the end I find that this court has jurisdiction to preside over and adjudicate upon the present proceedings notwithstanding that the 2nd respondent is a party. To hold otherwise would be an abhorrent affront to judicial conscience and above, all the Constitution itself. I also believe that this is consonant with the doctrine of separation of powers.

Accordingly the preliminary objection is hereby dismissed with costs.

Order accordingly.

Dated and delivered at Nairobi this 19th day of August, 1998.

A. MBOGHOLI MSAGHA

JUDGE



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