

IN THE COURT OF APPEAL
AT NAIROBI

(Coram: Kwach, Cockar & Muli JJ.A.)

CIVIL APPLICATION NO. NAI. 92 OF 1992 (NAI.40/92UR)

BETWEEN

THE SPEAKER OF THE NATIONAL ASSEMBLY.....APPLICANT

AND

THE HON. JAMES NJENGA KARUME.....RESPONDENT

(Application for stay of execution in an intended Appeal
from a ruling of the High Court of Kenya at Nairobi
(Shields, J.) dated 20th May, 1992

in

H.C. MISC. APPL. NO. 388 OF 1992)

RULING OF THE COURT

This is an application under rule 5(2)(b) of the Court of Appeal Rules brought by the Speaker of the National Assembly (the Speaker), seeking a stay of the orders of the Honourable Mr. Justice Shields made under Order 53 of the Civil Procedure Rules, on 20th May 1992, whereby he granted Honourable James Njenga Karume (the respondent) leave to apply for an order of certiorari to remove into the High Court and quash the declaration dated 9th March 1992, by the Speaker published in the Kenya Gazette Notice No. 977 of 1992, declaring the Kiambaa Parliamentary seat held by the respondent vacant. In granting leave to apply, the Judge also made a direction under Order 53 r 1(4) that the grant of leave to apply was to operate as a stay of the declaration made

by the Speaker. The application is supported by the affidavit of Mr. Moiwo Ole Keiwa sworn on 22nd May 1992. There is a replying affidavit sworn by the respondent and filed in Court on 27th May 1992, in opposition to the application.

At the 1988 General Elections, the respondent was returned as the Member of Parliament for Kiambaa constituency in Kiambu District. At that time Kenya was still a one-party state and one had to be a member of the Kenya African National Union (KANU) before one could be elected as a Member of Parliament. Section 2A of the Constitution of Kenya was still in place. It provided as follows:

"2A. There shall be in Kenya only one political party, the Kenya African National Union."

Following the repeal of section 2A of the Constitution last December, Kenya became a multi-party state and a number of opposition parties have since been formed, including the Democratic Party (DP). The respondent resigned from his ministerial position and joined the Democratic Party of which he says he is a founder member.

The Speaker, pursuant to the provisions of section 40 of the Constitution as amended by the Constitution of Kenya (Amendment) (No.2) Act, 1991 (Act No. 12 of 1991) and section 18 of the National Assembly & Presidential Elections Act (Cap 7) (Elections Act) declared the Kiambaa parliamentary seat vacant.

The respondent being dissatisfied with the Speaker's declaration filed a petition on 30th March 1992, being Election

Petition No. 2 of 1992, under section 20(1)(b) of the Elections Act, challenging the declaration of the Speaker. That petition is still pending before the High Court.

Thereafter on 30th April, 1992, the respondent filed Miscellaneous Civil Cause No. 388 of 1992 under Order 53 rule 1 of the Civil Procedure Rules, seeking leave to apply for an order of certiorari to remove into the High Court and quash the Speaker's said declaration and a direction that the grant of such leave do operate as a stay of the said declaration. It was that application which came before Shields J, ex-parte on 5th May, 1992 for hearing and 20th May, 1992 when he granted the orders sought by the respondent.

The Speaker has filed a notice of appeal under rule 74 of the Rules of this Court and has taken out a Notice of Motion seeking to stay, suspend, vary or discharge the orders made by the Judge pending the hearing and determination of the appeal.

The thrust of Mr. Satish Gautama's submissions, on behalf of the Speaker, was that Parliament in its own wisdom having prescribed the procedure to be followed by anyone seeking to challenge a declaration made by the Speaker under section 18 of the Elections Act, it was not open to the respondent to bypass this procedure by invoking the prerogative orders under Order 53 of the Civil Procedure Rules. In his view, where there is an effective remedy available it is not open to a party to invoke Order 53 of the Civil Procedure Rules. The other point which Mr. Gautama stressed was that the respondent failed to disclose in

his statement of facts the fact that he had already filed an election petition which was still pending before the Court. In his submission this amounted to a concealment of a material fact which could have affected the Judge's exercise of his discretion and he may well have declined to grant the leave and/or the order of stay.

In reply to these submissions, Mr. Mukuria, for the Respondent, related the special circumstances which made it necessary for an application to be made under Order 53 of the Civil Procedure Rules. These were that it was difficult to constitute an election court expeditiously and further that experience had shown that it took 4 to 5 years before an election petition was heard. He also contended that the provisions of the Elections Act did not exclude the remedy available under Order 53 of the Civil Procedure Rules.

Irrespective of the practical difficulties enumerated by Mr. Mukuria, these should not in our view be used as a justification for circumventing the statutory procedure.

Section 23(2) of the Elections Act has provided for all interlocutory matters in connection with a petition to be dealt with and decided by any Judge.

Section 40 of the Constitution of Kenya (Amendment) (No.2) Act, which came into force on 20th December 1991 reads:

"40. 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 a 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:~~

Provided that this sub-section shall not apply to any member who is elected as Speaker".

The next relevant provision is section 44 of the Constitution of Kenya, the material parts of which state:

"44 (1) The High Court shall have jurisdiction to hear and determine any question whether -

(a).....

(b) the seat in the National Assembly of a member thereof has become vacant.

(3) An application to the High Court for the determination of a question under sub-section (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."

The other provisions are sections 19 and 20 of the Elections Act, the material parts of which read:

"19. An application to the High Court under the Constitution to hear and determine a question whether -

(a).....

(b).....

(c) the seat in the National Assembly of a member thereof has become vacant,

shall be made by way of petition, and shall be tried by an election court consisting of three Judges.

20. (1) A petition -

(a).....

(b) to seek a declaration that a seat in the National Assembly has not become vacant, ~~shall be~~ presented within twenty-eight days after the date of publication of the notice published under section 18."

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.

As for Mr. Gautama's second point, Mr. Mukuria conceded that the filing and pendency of the election petition had not been disclosed in the respondent's statement of facts. In our view this was a material fact which was capable of affecting the manner in which the Judge exercised his discretion. (See Rex v Kensington Income Tax Commissioners e.p. Princess Edmond de Polignac [1917] 1 KB 486 and The Owners of Lilian S' v Caltex Oil

(Kenya) Ltd. (Civil Appeal No. 50 of 1989) (unreported).).

We are satisfied that there are substantial points to be raised in the appeal and that this is a proper case in which a stay ought to be granted. No prejudice will result to the respondent as the Speaker is in any event obliged to issue the necessary writ under section 13(2)(C) of the Elections Act within 4 months from 9th March 1992, being the date of publication of the declaration.

The application is allowed and we stay ALL the orders made by the High Court on 20th May, 1992, pending the hearing and determination of the intended appeal as prayed for in the Notice of Motion dated 22nd May, 1992. Costs of the application to be in the appeal.

Dated and delivered at Nairobi this 29th day of May 1992.

R.O. KWACH

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JUDGE OF APPEAL

A.M. COCKAR

.....
JUDGE OF APPEAL

M.G. MULI

.....
JUDGE OF APPEAL

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

AG. DEPUTY REGISTRAR