



**Speaker of the National Assembly v Karume (Civil Application
92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling)**

Speaker of the National Assembly v James Njenga Karume [1992] eKLR

Neutral citation: [1992] KECA 42 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 92 OF 1992
RO KWACH, AM COCKAR & MG MULI, JJA**

MAY 29, 1992

BETWEEN

SPEAKER OF THE NATIONAL ASSEMBLY APPELLANT

AND

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 HC Misc Appl No 388 of 1992)

Existence of practical difficulties does not justify circumventing the procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament

Reported by Kakai Toili

***Constitutional Law** - Legislature - Speaker of the National Assembly (Speaker)- challenging decisions of the Speaker - procedure to be followed - whether the existence of practical difficulties justified circumventing the procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament.*

Brief facts

The applicant applied for stay of orders of the High Court, where it granted the respondent leave to apply for an order of *certiorari* to remove into the High Court and quash the declaration by the Speaker declaring the Kiambaa Parliamentary seat vacant. The High Court also ordered that the leave was to operate as a stay of the declaration made by the Speaker. It was submitted for the Speaker that there existed a prescribed procedure to be followed by anyone seeking to challenge a declaration made by Speaker under section 18 of the National Assembly and Presidential Elections Act (Cap 7) and the respondent could not invoke the prerogative orders under Order LIII of the Civil Procedure Rules. The respondent contended that it was difficult to constitute an election court thus it was necessary to involve the procedure of Order LIII of the Civil Procedure Rules.



Issues

Whether the existence of practical difficulties justified circumventing the procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament.

Held

1. Irrespective of the practical difficulties enumerated by counsel for the respondent, they should not be used as a justification for circumventing the statutory procedure. Where there was a clear procedure for the redress of any particular grievance prescribed by the or an Act of Parliament, that procedure should be strictly followed. Order 53 of the could not oust clear constitutional and statutory provisions.
2. The filing and pendency of the election petition had not been disclosed in the respondent's statement of facts, that was a material fact which was capable of affecting the manner in which the trial court exercised its discretion. There were substantial points to be raised in the appeal and the instant matter was a proper case in which a stay ought to be granted. No prejudice would result to the respondent as the Speaker was in any event obliged to issue the necessary writ under section 13(2) (c) of the within 4 months from March 9, 1992, being the date of publication of the declaration.

Application allowed; all the orders made by the High Court on May 20, 1992, were stayed pending the hearing and determination of the intended appeal; costs of the application to be in the appeal.

Citations

1. *Rex v Kensington Income Tax Commissioners Ex Parte Princess Edmond De Polignac* [1917] 1 KB 486
2. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1

Statutes

1. Court of Appeal Rules (cap 9 Sub Leg) rules 5 (2)(b); 74
2. Constitution of Kenya (Amendment) Act (No 2) 1991 (Constitution of Kenya Sub Leg) section 40 3. Civil Procedure Rules (cap 21 Sub Leg) order LIII rule 1(4)
4. Constitution of Kenya sections 1A, 44
5. National Assembly & Presidential Elections Act (cap 7) sections 13(2) (c); 18; 19; 20(1)(b); 23(2)

RULING

- 1 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](#), cap 21 on May 20, 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 March 9, 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 Moijo Ole Keiwa sworn on May 22, 1992. There is a replying affidavit sworn by the respondent and filed in Court on May 27, 1992, in opposition to the application.
- 2 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.”



3. 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.
4. 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.
5. The respondent being dissatisfied with the Speaker's declaration filed a petition on March 30, 1992, being Election Petition No 2 of 1992, under section 20(1)(b) of the *Elections Act*, challenging the declaration by the Speaker. That petition is still pending before the High Court.
6. Thereafter on April 30, 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 May 5, 1992 for hearing and May 20, 1992 when he granted the orders sought by the respondent.
7. 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.
8. 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.
9. 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.
10. 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.
11. 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.



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

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”.

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

- (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 subsection (1)
 - (b) may be made
 - (a) where the Speaker has declared that the seat in the National Assembly of a member has by a reason of a provision of this Constitution become vacant; by that member.”

14. 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.”

15. 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.

16. 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, ex parte 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).
17. 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 March 9, 1992, being the date of publication of the declaration.
18. The application is allowed and we stay all the orders made by the High Court on May 20, 1992, pending the hearing and determination of the intended appeal as prayed for in the Notice of Motion dated May 22, 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

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JUDGE OF APPEAL

M.G MULI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

