



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 288 of 2011**

**STEPHEN ASURA OCHIENG..... 1<sup>ST</sup> RESPONDENT**

**PATRICK OMONDI OOKO.....2<sup>ND</sup> RESPONDENT**

**PETER IMWATOK..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ORANGE DEMOCRATIC MOVEMENT PARTY.... 1<sup>ST</sup> RESPONDENT**

**GEORGE ALANDWA OMUERA..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioners have filed this petition dated 30<sup>th</sup> November 2011 following the party elections of the Orange Democratic Movement Party, a political party. The petitioners seek the following orders:

- a) **THAT** the 1<sup>st</sup> Respondent's elections for Makadara constituency held at City Hall within Starehe constituency were unconstitutional.
- b) A conservatory order restraining the 1<sup>st</sup> and 3<sup>rd</sup> Respondents from confirming the 1<sup>st</sup> Respondent Makadara constituency elections.
- c) A declaration that the elections of the 1<sup>st</sup> Respondent for the Makadara constituency violated the constitutional rights of the Petitioners and the same should not be confirmed but referred to arbitration as provided for in the constitution of the 1<sup>st</sup> Respondent within a stipulated time.

d) An order restraining the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent from confirming the results of the 1<sup>st</sup> Respondents Makadara constituency held on 24<sup>th</sup> – 26<sup>th</sup> November, 2011.

e) The cost of this Application

2. The petitioners also filed a Chamber Summons application dated 30<sup>th</sup> November 2011 in which they sought orders:

1. That this application be and is certified very urgent and service be dispensed with in the first instance.

2. That by way of conservatory orders the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents be restrained by themselves, agents or assigns from in any way confirming the results of the elections of the 1<sup>st</sup> Respondents of Makadara constituency until the final determination of the Petition herein.

1. Costs in the cause.

The application was supported by the affidavit of **Stephen Asura Ochieng**, the first Petitioner, sworn on 30<sup>th</sup> November, 2011

3. On 30<sup>th</sup> November 2011, this court directed the Petitioners to serve the Respondents and set the application for hearing on 6<sup>th</sup> December 2011. There was no appearance despite service and Counsel for the Petitioners, Mr. Oduor, argued the application for conservatory orders pending the hearing of the petition.

4. He relied on the affidavit of **Stephen Asura Ochieng** and submitted that the Petitioners are members of the ODM party in Makadara constituency. The party conducted its elections at the grassroots level in Makadara where the Petitioners are voters between the 24<sup>th</sup> and 26<sup>th</sup> of November 2011. Under Article 38 of the Constitution the Petitioners have a right to participate in the activities of their political party but they have been denied a chance to participate. The list of members that was used in the grassroots elections was not the correct one and the elections were held outside the constituency, in City Hall instead of at Makadara constituency due to the influence of the 2<sup>nd</sup> Respondent. He submitted that it is trite law that party elections should be held within the constituency, not outside. The Petitioners have complained to their party but received no response.

5. He submitted further that the petitioners were aware of the Political Parties Act 2011 and the Political Parties Tribunal. However, the political party machinery for resolution of disputes not having been invoked, the Political Parties, Tribunal has no jurisdiction under section 40 of the Political Parties Act. The Petitioners were therefore seeking orders to restrain the 1<sup>st</sup> and 3<sup>rd</sup> Respondents from in any way confirming the results of the 1<sup>st</sup> Respondent's elections for Makadara Constituency until the hearing of this petition. He argued that without these orders the petition will be rendered nugatory.

## **Findings**

6. It is, I think, beyond dispute that every citizen has the right to participate in the activities of a political party to which he or she is a member. Any act or omission that limits this right would clearly be in violation of Article 38 of the Constitution. However, the question must arise as to the appropriate forum for determination of a dispute regarding the violation of this right in respect of an individual or individuals, not by the state or state organs, but by their fellow members in a political party. Is the Constitutional and human Rights Division the appropriate forum for such disputes?

7. At the hearing of this application, I sought to know from Counsel for the Petitioners whether the petitioners had invoked the dispute resolution mechanism provided under the Political Parties Act, 2011. His response was that the jurisdiction of the Tribunal could not be invoked as the party dispute resolution process had not been exhausted as provided under section 40 of the Political Parties Act.

8. The Political Parties Tribunal is established under section 39 of the Political Parties Act, Act No. 11 of 2011. Its jurisdiction is provided under Section 40. As follows:

**(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.**

**(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.**

9. The issues in dispute between the petitioners and the respondents fall either under s. 40 (1) (a) or (1)(b). As members of the Orange Democratic Movement Party, the petitioners are entitled to participate in the elections of the party. If there is disagreement on who is a member and therefore entitled to vote in the grassroots elections or where the elections should be held, that is a matter that can be and ought to be settled through the internal party machinery.

10. At paragraph 5 of the supporting affidavit, the petitioners aver that they have complained to the 1<sup>st</sup> respondent. They do not, however, say what the outcome of their complaint was. Counsel submitted from the Bar that their complaint had not been responded to and therefore they had not brought themselves within the provisions of Section 40 (2) which provides that

***‘ Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.’***

11. The question that arises is this: can it be properly argued that a dispute cannot be referred for determination to the Political Parties Tribunal because the political party has failed or refused to activate the internal party dispute resolution mechanism, thus leaving an aggrieved party with no option but to turn to the High Court for redress? I think not. To hold otherwise would mean that parties could, by failing to resolve disputes internally, frustrate the operations of the Tribunal and render it totally redundant.

12. To my mind, the intention behind the establishment of the Political Parties Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunals established under the constitution and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between members of political parties amongst themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases.

13. To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as

permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners' grievance and the parties involved.

14. For the above reasons, I decline to grant the orders sought by the Petitioners in their application. However, Article 23(3) of the constitution empowers the court to grant appropriate relief in any proceedings brought before it under Article 22 of the Constitution. I therefore direct that this petition shall be marked as settled on the following terms:

- i) The first respondent, the Orange Democratic Movement Party, shall within **Seven (7)** days from the date hereof put in motion mechanisms to resolve internally the grievances raised by the Petitioners concerning the party's grass roots elections for Makadara Constituency, Nairobi.
- ii) Failing the activation of the party's dispute resolution mechanisms as above, the Petitioners shall be at liberty to lodge their dispute before the Political Parties Tribunal for determination.

**Dated and Delivered at Nairobi this 14<sup>th</sup> of December, 2011.**

**MUMBI NGUGI**  
**JUDGE**