**Kones v Republic and others *ex parte* Kimani wa Wanyoike and others**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 10 November 2006

**Case Number:** 94/05

**Before:** Omolo, O’kubasu and Githinji JJA

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**Summarised by:** R Rogo

*[1] Constitutional law – Whether judicial review can oust constitutional provisions.*

*[2] Electoral laws – Whether nomination of Members of Parliament amounts to an electoral process.*

*[3] Electoral laws – Whether plaints and judicial review are applicable in electoral proceedings –*

*Rationale for exclusively allowing petitions – Whether a stay or injunction is available in electoral*

*proceedings.*

*[4] Judicial review – Whether the electoral commission and Parliament is amenable to judicial review*

*proceedings – Whether a nominated Member of Parliament can be removed by judicial review.*

**Editor’s Summary**

The appellant was nominated to Parliament by a political party called Ford People which is one of the registered political parties in Kenya and which also qualifies as a parliamentary political party. Nominated members of Parliament are provided for under the provisions of section 33 and 41 of the Kenyan Constitution. The role of the Electoral Commission is to receive names from the parliamentary political parties and then forward the names to the president for appointment and once the president has appointed the persons whose names are submitted to him by the commission, those persons become nominated members of the National Assembly and can only await the swearing in by the speaker. Every parliamentary political party has a process of selecting its members or member for nomination to the Assembly. In the case of *Ford People* the process of selection is provided for in its Constitution, and this was the genesis of the dispute before the court. Kimani Wa Wanyoike, the third respondent herein, is or was the National Chairman and the National Officer of the party. He swore an affidavit that the party has a National Executive Council (NEC). In the event of an emergency the “NEC” shall assume full responsibility of the party and shall report to the next General Meeting. Article 18 of the party Constitution deals with “Nomination of Party Candidates” which shall be by members by secret ballot. The third respondent contended, that the naming and forwarding of such a name to the Electoral Commission should and ought to have been done by the National Executive Council which, under the party Constitution, is authorised to make decisions on behalf of the National Delegates Congress and the General Council. The Commission ie second respondent herein, informed Ford People that of the twelve seats available for nomination, the party was entitled to one. According to the third respondent, Kimani Wa Wanyoike, on 3 January 2003, the Party Leader called him and asked him to join a meeting with the Party Leader and the newly elected party members of parliament. The third respondent attended that meeting and the issue of selecting a party member for nomination to parliament came up. The third respondent thought that was not the proper forum for carrying out such a selection and he said so. The party leader asked him to leave the meeting. In his absence the appellant was selected or elected or whatever one may call it, as the party candidate for nomination to parliament. The name of the appellant was duly forwarded to the commission under the hand of the party leader, and other party members present at the meeting. Thereafter, the third respondent convened a NEC meeting wherein he was chosen as the party’s candidate for nomination to National Assembly. His name was also forwarded to the Commission so that instead of having only one name to be forwarded to the president for appointment to parliament, the commission had two names ie that of the appellant and that of the third respondent. The commission forwarded to the president the name of the appellant and not that of the third respondent. The president appointed the appellant as a nominated member of the National Assembly and the appointment was gazetted on 24 January 2003. The appellant was duly sworn in as nominated Member of Parliament on 18 February 2003. The third respondent was grievously offended by all this, that on 12 February 2003 he issued a notice to the Registrar of the High Court that he intended to apply to the Court within seven days for orders of *certiorari*, prohibition and mandamus and on 14 February 2003, four days before the gazettement of the appellant’s appointment, counsel for the third respondent filed an *ex parte* chamber summon under Order LIII, rules 1 and 2 and under section 3A of the Civil Procedure Act seeking the said orders. On 17 February 2003 the application was heard and the judge granted the leave sought but declined to order that the leave he granted should operate as a stay, with the result that the president did appoint and gazetted the appointment of the appellant as a nominated member of the National Assembly. Thereafter, he was sworn. On 3 March, a Notice of Motion was lodged pursuant to the court order that a substantive application be made within 21 days. The notice of motion basically repeated the contents of the *ex parte* chamber summons and made basically the same prayers. The motion was eventually heard *de novo* and it was held that judicial review was in the circumstances, available to the respondents against the commission and granted the sought orders. The appellant was aggrieved by the orders and appealed.

**Held** – The Constitution does not provide a distinction between nominated and elected members of the National Assembly. It may well be that the Commission was wrong in choosing to forward to the President the name of the appellant instead of that of the third respondent. But even if the process of nomination was faulty, the appellant, through that faulty process, became a Member of the National Assembly and the Constitution sets out in detail the procedure for removing a member from the Assembly. There are basically two routes of becoming a member of the Assembly. But in terms of removal the Constitution has set out only one process; we would have expected that if the makers of the Constitution had wanted different ways of removing members from the Assembly they would have specifically spelt out two ways as they did with entry into the Assembly. Clearly, it would be unreasonable to think that if a nominated member were, for example, declared bankrupt and thus became disqualified, then the only way to remove him would be to go the High Court through the judicial review process. That would be totally unnecessary and untenable as the Constitution itself has provided for the manner of removing member from the National Assembly. Under section 44(1)(*b*) of the Constitution and section 18 of the National Assembly and Presidential Elections Act, if admissible and acceptable evidence and, not necessarily documentary evidence, were to be placed before the speaker that a member has resigned from the party which sponsored him to the National Assembly, the speaker would be perfectly entitled to declare the seat of such a member vacant. No distinction is drawn between an elected and a nominated member and if the speaker does declare a seat vacant, the only remedy open to the member is to move to the High Court under section 44 of the Constitution. The Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the national assembly. These procedures ought to be followed and the judicial review process which in Kenya is provided for in the Law Reform Act (Chapter 26 of the Laws of Kenya) and in Order LIII of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular. The Law Reform Act and Order LIII of the Civil Procedure Rules are both inferior to and can only apply subject to the provisions of the Constitution. (*The Speaker of the National Assembly v Karume* civil application number Nairobi 92 of 1992 Nairobi 40 of 1992 UR; *Kimani Wa Wanyoike v The Electoral Commission of Kenya and another* civil application number Nairobi 213 of 1995 [96 of 1995 UR] applied; *Richard Chirchir and another v Henry Cheboiwo and another* distinguished). In filing either their plaint or the judicial review process now under consideration, the clear intention of the parties aggrieved by the action of the Commission was to stop the commission from proceeding with the process of nominating the appellant. If the commission can be stopped from proceeding with the process of nomination, it can also be stopped from completing the process of elections. That cannot be allowed because if it were to be allowed, the country may well end up having no members in the National Assembly as there will undoubtedly be interventions by the courts in the process of either electing or nominating members to the National Assembly. Such interventions might become the order of the day if the ordinary processes of approaching the court-such as by way of a plaint, originating summons or judicial review-were allowed to take root in the electoral process. Neither the Constitution nor the National Assembly and Presidential Elections Act makes provision for interim relief such as injunctions, orders of stay and so on during the hearing of an election petition. If an injunction were to be issued against sitting member of the National Assembly, the effect of that would be to render the constituency represented by such a member to be without a representative during the hearing of the petition, however long the hearing may last. Again if a plaint were filed seeking to stop the electoral process from going on and an injunction were to be issued pending the hearing and determination of the suit, the people in the electoral area involved in the suit would be virtually disenfranchised pending the hearing and determination of the suit. The framers of the Constitution must have had these considerations in mind when dealing with the issue of election petitions and come to the conclusion that it would be far much better to have a defective election than no election at all and that after members have all joined the National Assembly those whose elections are subsequently found to have been defective can be waded out through election petitions and fresh elections held for the particular area. The same considerations must apply to nominated members. That the courts take such a long time to hear and determine election petitions is a serious blot upon the judicial system. But that blot must find its solution elsewhere and the solution does not lie in employing other methods except those provided by the Constitution. Even if the process employed by the commission in deciding which of the two persons should be sent to the President for appointment was entirely defective, the process had been completed by the President appointing the appellant as a member of the National Assembly. The Speaker, like all of us is bound by the Constitution and the National Assembly and Presidential Elections Act. There was no reason that could have led the speaker to declare the seat held by the appellant vacant. Such a declaration could only be done within the confines set out in the Constitution. The other alternative for the learned Judge was to issue to the Speaker a certificate of determination under section 29 of the National Assembly and Presidential Elections Act. But the learned Judge would have no jurisdiction to issue such a certificate because there was no election petition before him. Perhaps the learned Judge was asking the Speaker to carry out an investigation under section 18 of the Act to determine if the seat of the appellant had become vacant. It would be inappropriate for the High Court to make such an order because it is not to be forgotten that the declaration by the Speaker that a seat held by a member has become vacant is itself challengeable in the High Court through an election petition and there would be no reason for the High Court to involve itself in such a circus. The procedure of judicial review, like that of a plaint or any such like procedure is and was not available to the parties aggrieved by the acts or omissions of the commission. The only valid way of challenging the outcome of the electoral process, and for that purpose nominating members to the National Assembly, is part of the electoral process, is through an election petition as provided in the

Constitution and the National Assembly and Presidential Elections Act.

Appeal allowed.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Chirchir and another v Cheboiwo and another* – **D**

*Kimani Wa Nyoike v The Electoral Commission of Kenya and another* civil application number Nairobi

213 of 1995 – **AP**

*Mbondo v Galgalo and another* election petition number 16 of 1974 (UR)

*The Speaker of the National Assembly v Karume* civil application number Nairobi 92 of 1992 (UR) – **AP**

***United Kingdom***

*The Queen v The County Judge of Essex and Clark* [1887] 18 QB 704