



REPUBLIC OF KENYA



**Mongare v Basweti & 3 others (Civil Appeal EPA 004 of 2022)  
[2022] KEHC 9849 (KLR) (Civ) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 9849 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL EPA 004 OF 2022**

**JN MULWA, J**

**JUNE 30, 2022**

**BETWEEN**

**SHUKIN OONGE MONGARE ..... APPELLANT**

**AND**

**ERIC OMANWA BASWETI ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**NATIONAL POLICE SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the decision of the Independent Electoral & Boundaries Commission Dispute Resolution Committee delivered on 19th June 2022 in Complaint No. 305 of 2022)*

**JUDGMENT**

1. The Appellant, a registered voter in Bomwagamo Ward within North Mugirango Constituency in Nyamira County, lodged Complaint No. 305 of 2022 in the Independent Electoral & Boundaries Commission (IEBC) Dispute Resolution Committee against the 1<sup>st</sup> Respondent. The basis of the complaint was that the 1<sup>st</sup> Respondent is ineligible for registration as a nominated aspirant for the Member of County Assembly (MCA) for Bomwagamo Ward for reasons that he failed to resign from public office at least six (6) months before the date of the general elections as required by Section 43(5) of the *Elections Act*, 2011. For that reason, the Appellant sought for the recalling and cancellation of the nomination certificate issued to the 1<sup>st</sup> Respondent.



2. In a Ruling delivered on 19<sup>th</sup> June 2022, the Dispute Resolution Committee dismissed the complaint on the ground that the allegation was based on illegally obtained evidence and had therefore not been proved to the required standard. Being dissatisfied by the decision, the Appellant lodged an appeal in the High Court *vide* a Memorandum of Appeal dated 22<sup>nd</sup> June 2022 on the following grounds:
  1. That the Independent Electoral and Boundaries Commission Dispute Resolution Committee erred in law and in fact by failing to consider that the respondent did not resign on or before February 09, 2022, being six months prior to the General Elections.
  2. That the Committee erred in law and in fact by failing to consider that the purported undated resignation letter before it expressly states that the 1<sup>st</sup> Respondent intended to leave the Public Service by way of retirement on 1<sup>st</sup> May 2022.
  3. That the Committee erred in fact by failing to find that there was neither resignation nor retirement by the 1<sup>st</sup> Respondent.
  4. That the Committee erred in law and in fact by failing to authenticate the letter purportedly authored by the Chairperson of the National Police Service Commission to acknowledge the 1<sup>st</sup> Respondent's retirement from the Police Service in spite of its authenticity having been questioned.
3. In opposition, the 2<sup>nd</sup> Respondent raised a Notice of Preliminary Objection dated 27<sup>th</sup> June 2022 seeking an order that the appeal be struck out on two main grounds. Firstly, that there is no right of appeal to this court from decisions of the IEBC under Article 88(4) (e) of *the Constitution*, Section 4 of the *Independent Electoral and Boundaries Commission Act* and Section 74 of the *Elections Act*. Secondly, that this court lacks jurisdiction to hear and determine this appeal pursuant to the decisions in *Kelvin Oselu Obondo v Orange Democratic Movement & 3 others* [2017] eKLR that barred an appellant from approaching this court by way of an appeal; and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)* [2019] eKLR which pronounced that a decision of the 2<sup>nd</sup> Respondent's Dispute Resolution Committee can only be challenged by the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the Constitution*.
4. The court will first pronounce itself on the preliminary objection as this will determine whether or not it will be necessary to delve into the merits of the appeal.
5. In its written submissions filed herein, the 2<sup>nd</sup> Respondent asserted that the question of jurisdiction is a core issue that goes to the root of this Honourable Court's competency to hear and determine the instant appeal. It argued that a Court can only exercise jurisdiction as conferred by *the Constitution* or other written law but cannot arrogate itself jurisdiction or imply it. It reiterated that neither *the Constitution*, the *Elections Act*, the *IEBC Act* nor the Rules of Procedure for Settlement of Disputes under the *IEBC Act* provide for lodging of an appeal against a decision of the IEBC Dispute Resolution Committee to any court. According to the 2<sup>nd</sup> Respondent, the Appellant wrongly seeks to invoke this court's appellate jurisdiction contrary to express provisions of the law and therefore the instant appeal has no legs to stand on. Reliance was placed on the case of *Kelvin Oselu Obondo v Orange Democratic Movement & 3 others* [2017] eKLR.
6. On the other hand, the Appellant contended that the 2<sup>nd</sup> Respondent has not laid a legal basis upon which its preliminary objection is founded as it has not pointed out the specific provision of the law that prevents the Appellant from proceeding with this Appeal. Further, the Appellant submitted that the 2<sup>nd</sup> Respondent's suggestion that the Appellant should approach this court as a Judicial Review



Court is misguided. He argued that the appeal is based on matters of fact as well as law and not on the procedural aspects of the proceedings before the Committee. In addition, he asserted that many other aggrieved litigants have approached the High Court in a similar way and therefore he should not be blocked on that basis.

7. The issue that arises for determination from the preliminary objection is whether this court has jurisdiction to determine the appeal.
8. Jurisdiction is conferred by *the constitution* or by statute and without it, a court of law cannot validly take any step in a matter. In *Owners of the motor vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR1, Nyarangi, JA held as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. In determining whether this court has jurisdiction to determine the instant appeal, it is important to first appreciate the jurisdiction of the IEBC in nomination disputes. Article 88(4) (e) of *the Constitution* confers the IEBC with jurisdiction to settle disputes arising from nominations of candidates for elective political positions. Article 88(4) (e) is replicated verbatim under Section 74(1) of the *Elections Act* No. 24 of 2011 and Section 4(e) of the *Independent Electoral and Boundaries Commission Act* No. 9 of 2011. The IEBC exercises this jurisdiction through its Dispute Resolution Committee.
10. However, there is no specific provision for appeal to this court from the decision of the IEBC Dispute Resolution Committee in either *the Constitution* or the two statutes mentioned above. In *Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR, the Supreme Court laid down various guidelines for determining when an election court can be seized of a pre-election dispute inter alia:

“(iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.

11. In *Tom Ogalo Oluoch v Independent Electoral & Boundaries Commission* [2017] eKLR, the late Onguto J. struck out an appeal against the decision of the IEBC Dispute Resolution Committee and held:

“In my view, as neither *the Constitution* nor the *Elections Act* grants any right of appeal to a party who is aggrieved or dissatisfied with a decision of the Respondent rendered pursuant to s.74 of the *Elections Act*, an appeal from the Respondent’s disputes committee cannot properly lie and be lodged before the High Court.

11. The High Court certainly has powers to superintend bodies exercising judicial and quasi-judicial powers but not through the appellate avenue unless expressly provided for by law. In the instant case, a more appropriate avenue would be to question the decision of the Respondent by way of an application for judicial review.”



12. In *Shem Odongo Ochuodho v Independent Electoral and Boundaries Commission & another* [2017] eKLR, Lesiit J. while determining an application for review of an order that struck out a similar appeal held:

“These two provisions of the law (article 88(4) (e) of *the constitution* and Section 74(1) of the *Elections Act*) do not clothe this court with jurisdiction to hear appeals from the IEBC Dispute Committee. They are completely silent on that issue. The only conclusion to be drawn from the silence of *the Constitution* and the statutes on the matters of appeals to the High Court from this body is that such jurisdiction does not exist....38. The Applicant was not without a remedy. He had the option to challenge the decision of the IEBC under Article 23 (3) of *the Constitution*, or Civil Procedure Rules through judicial review proceedings. There was no jurisdiction to this court in its appellate jurisdiction.”

13. In *Kelvin Oselu Obondo v Orange Democratic Movement & 3 others* [2017] eKLR, Muchelule J. also struck out an appeal from the decision of the Dispute Resolution Committee of the IEBC on the ground that the high court has no appellate jurisdiction over such decisions. See also Njuguna J. in *Festus Tamaa Mutuku v Returning Officer - Kitui East Constituency & 5 others* [2017] eKLR.
14. From the above authorities, it is evident that there is consensus that the high court cannot exercise its appellate jurisdiction over the decisions of the IEBC Dispute Resolution Committee. The court can only entertain such matters when sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*. In the premises, I find that this court has no jurisdiction to hear and determine the Appellant’s appeal.
15. At the time of finalizing with the preparation of the judgment at 1.30pm today, 30<sup>th</sup> June 2022, the 3<sup>rd</sup> Respondent through its advocates served the court with an application by Notice of Motion dated 30<sup>th</sup> June 2022 seeking that the court puts on hold delivery of the judgment scheduled for 4.00pm, to consider new evidence being a letter from the chairperson of the National Police Service Commission dated 23<sup>rd</sup> June 2022 confirming that the letter of resignation purportedly issued to the 1<sup>st</sup> Respondent by the 3<sup>rd</sup> Respondent’s chairperson is a forgery; and, a letter from the Office of the Inspector General, National Police Service dated 29<sup>th</sup> June 2022 confirming that the 1<sup>st</sup> Respondent retired from public service on 1<sup>st</sup> June 2022.
16. For the foregoing, it is regrettable that the said new evidence, though in my view is very crucial in the fair determination of the 1<sup>st</sup> Respondent’s qualification for nomination as the MCA for Bomwagamo ward in North Mugirango Constituency, I am unable to accede to the request. This is so because of the urgency of the matter and timelines by the 2<sup>nd</sup> Respondent/IEBC, and the fact that this court cannot deal with the Notice of Motion ex parte without all the other parties being served and an inter partes hearing undertaken.
17. Having rendered myself as above and in line with the holding in the celebrated case of *Owners of the motor vessel “Lillian S” v Caltex Oil (Kenya) Ltd (supra)*, I now down tools in respect of the entire appeal, as there would be no basis for continuation of the proceedings.
18. Accordingly, the preliminary objection by the 2<sup>nd</sup> Respondent is upheld. The Appeal is therefore struck out for being incompetently filed before this court. This being a matter of public interest as a pre-election dispute, I direct each party to bear own costs of the appeal.

Orders accordingly.

**DELIVERED DATED AND SIGNED THIS 30TH DAY OF JUNE 2022.**



**J. MULWA**  
**JUDGE.**

