



**Amukhale v Independent Electoral & Boundaries Commission &
another; Musundi & another (Interested Parties) (Judicial Review
E007 of 2022) [2022] KEHC 12071 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 12071 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
JUDICIAL REVIEW E007 OF 2022
PJO OTIENO, J
JUNE 24, 2022**

BETWEEN

JOAB MWAMTO AMUKHALE APPLICANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

RETURNING OFFICER-LURAMBI CONSTITUENCY 2ND RESPONDENT

AND

MOSES MUSUNDI INTERESTED PARTY

A N C INTERESTED PARTY

RULING

1. There are two preliminary objections to the petition filed by the respondents. The first of the notices of preliminary objection was filed by the 1st and 2nd interested parties dated June 13, 2022 and alleging that;

"there is no suit before the court as the pleadings have been lodged in breach of order 2 rule 16 of the Civil Procedure Rules, by reason of which there is nothing to adjudicate upon and secondly that the court lacks jurisdiction to deal with the dispute in this matter on account of article 88(4)(e) of the Constitution, section 13 and 74(1) of the Elections Act and the Political Parties Act section 40(f)."

2. The second notice of preliminary objection is raised by the 1st and 2nd respondents and dated June 14, 2022 and alleges that the honourable court lacks jurisdiction to entertain this matter in view of the provisions of article 88(4)(e) of the Constitution of Kenya and section 74(1) of the Elections Act, 2011;



the application is incompetent as the orders sought are legally untenable in view of the provisions of article 88(4) (e) of the [Constitution of Kenya](#) and section 74(1) of the [Elections Act](#) which vests the 1st respondent with the power to settle nomination disputes; the orders sought cannot be granted as the court lacks jurisdiction and granting the orders sought will be tantamount to the court usurping the 1st respondent's constitutional mandate and lastly that the suit is in its entirety premature, misconceived and constitutes an abuse of the due process of the law and ought to be struck off with costs.

3. It was directed by the court that the preliminary points be canvassed by written submission but the 1st and second respondents and the *ex-parte* applicants filed their respective submissions with the interested parties reporting to court the desire to ride on the back of the respondents.

1st and 2nd Respondents' Submissions

4. It is the submission of the 1st and 2nd respondents that the subject dispute is on nomination of candidates to participate in elections and that since the [Constitution](#) and electoral laws have clothed the Independent Electoral and Boundaries Commission with jurisdiction to determine such disputes, the hearing and determination of this suit by this court would amount to a usurpation of that mandate and jurisdiction. They submit that the jurisdiction of this court can and has in this particular case been ousted by statute then cited the case of [Eliud Wafula Maelo v Ministry of Agriculture & 3 others](#) [2016] eKLR and [Pevans East Africa Ltd & another v Chairman, Betting Control & Licensing Board & 7 others](#) [2018] eKLR on the ouster of the courts jurisdiction.
5. They further argue that article 88(4)(e) of the [Constitution](#) and section 74(1) of the [Elections act](#) has vested the Independent Electoral and Boundaries Commission with the mandate to determine nomination disputes and cited the case of [Eric Kyalo Mutua v Wiper Democratic Movement –Kenya](#) [2017] eKLR and [Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others](#) [2019] eKLR.

Ex-Parte Applicant's Submissions

6. It is the submission of the applicant that section 40(a) and (f) of the [Political Parties Act](#) vests the Political Parties Dispute Tribunal with the mandate to determine disputes between members of a political party and disputes arising out of party primaries. The applicant argues that it is not only the Independent Electoral and Boundaries Commission that is mandated to deal with pre-election disputes but also the Political Parties Dispute Tribunal then placed reliance on the case of [Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others](#) [2019] eKLR.
7. The applicant further submits that the dispute on nomination was determined by the Political Parties Dispute Tribunal and the decision by the Political Parties Dispute Tribunal was shared with the Independent Electoral and Boundaries Commission but the Commission opted to ignore it hence the Independent Electoral and Boundaries Commission cannot now sit as an appellate body.

Issues

8. This court has considered the application and submissions offered by the parties and identifies the issue for determination to be whether this court has the jurisdiction to entertain this suit which essentially seeks the enforcement of a decision by the Political Parties Disputes Tribunal.



Analysis

9. The jurisdiction of this court emanates from either the Constitution or legislation or both. Here the question is not precisely ouster of jurisdiction but postponement pending preliminary and original jurisdiction to be exercised by other bodies and organs of state.
10. The present dispute is founded on the decision of Political Parties Dispute Tribunal directing that the applicant be issued with a nomination certificate as the candidate for the 4th respondent for Shieywe ward, in the place of the 2nd interested party.
11. By the powers vested in it under section 40 of the Political Parties Act, the Political Parties Dispute Tribunal heard the disputes arising out of party primaries between the applicant and the 1st interested party being members of the 2nd respondent party and made a decision directing that the applicant be issued with a nomination certificate by the 1st respondent.
12. In my discernment, this application merely seeks to achieve the enforcement of the decision by the Political Parties Dispute Tribunal. The court takes the learning that every court, unless the law otherwise provides, must be in charge of its processes including the enforcement of the determinations reached.
13. How to enforce the decisions of the tribunal is sanctioned by section 41(3) of the Political Parties Act which provides: -

“A decision of the tribunal shall be enforced in the same manner as a decision of a Magistrates Court but the tribunal shall have the powers of the High Court to punish for any acts or omissions amounting to contempt of the tribunal.”
14. The applicant has instead of seeking to enforce the judgment of the Political Parties Dispute Tribunal as provided for in section 41(3), resorted to seeking the intervention of this court to help him enforce a judgment in which he is a decree holder. Even in pure civil litigation the law under section 34 of the Civil Procedure Act is that enforcement of a decision is done by the trial court and not another. It may be true that the applicant is alleging the legality, propriety and rationality of the actions of the respondent but that can effectively and lawfully be done by seeking that the tribunal enforces its determinations. In any event the disputes challenging the certification by the 2nd respondent are due for challenge before the Disputes Resolution Committee of the 1st respondent that has not been done.
15. The jurisdiction of the court over disputes handled by the tribunal must remain supervisory by way of judicial review and appeals but such must be undertaken without the perception that the court appears as the executing court.
16. The jurisdiction of the court in supervision does not extend to include enforcement of decrees of the tribunal. The court thus determines that even though the application seeks an order of *certiorari*, that as well should have been pursued before the Dispute Resolution Committee in terms of article 88(4) of the constitution. I find that in bringing the matter here it was hurried and in violation of the doctrine of exhaustion.
17. Accordingly, for the reasons set out above, the two preliminary objections are allowed and application is thus struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 24TH DAY OF JUNE 2022.

PATRICK J O OTIENO



JUDGE

In the presence of:

Mr Munyendo for the applicant.

Mr Samba for the 1st and 2nd respondent.

Mr Malalah for Biketi for the 2nd interested party.

Court Assistant: Kulubi.

