



Barrawah v Mnyazi & another; Independent Electoral & Boundaries Commission (Interested Party) (Miscellaneous Constitutional Petition E003 of 2022) [2022] KEHC 12751 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12751 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CONSTITUTIONAL PETITION E003 OF 2022**

SM GITHINJI, J

JUNE 21, 2022

BETWEEN

STEPHEN SANGA BARRAWAH APPLICANT

AND

AMINA LAURA MNYAZI 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT NATIONAL ELECTIONS

BOARD 2ND RESPONDENT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION . INTERESTED PARTY

RULING

1. Before the court for determination is the 1st respondent's Notice of Preliminary Objection dated and filed on May 23, 2022 seeking to strike out the Applicant's Notice of Motion dated May 10, 2022 on the following grounds: -
 1. The 2nd respondent in compliance with the Political Parties Disputes Tribunal's orders in Mombasa PPD/TA/E001/2022 Stephen Sanga Barrawah v Amina Laura Mnyazi and Orange Democratic Movement National Elections Board and in compliance with rules 8(b) and 23 (2) (e) of the Orange Democratic Movement Party Primaries and Nomination Rules, 2021 issued to the 1st Respondent the Orange Democratic Movement Party's Certificate of Nomination on the 9th day of May 2022 for the position of Member of the National Assembly for Malindi Constituency.



2. The said application offends the mandatory provisions of article 88 (4) (e) of *the Constitution* of Kenya, 2010; Section 13 and 74 (1) of the *Elections Act*, 2011; sections 38A and 38 I of the *Political Parties Act*, 2011; rules 6(2) and 12 (3) of the Orange Democratic Movement Party Appeals Tribunal (Practice and Procedure) Rules, 2022.
 3. This Honourable Court is divested of jurisdiction to hear and determine the said application in the first instance by virtue of the Doctrine of Exhaustion.
 4. Section 41(3) of the *Political Parties Act*, 2011 provides that the decision of the Political Parties Disputes Tribunal is enforced in the same manner as a decision of a Magistrate's Court.
 5. Prayer 2 of the said application is not grounded on any suit as provided for in Order 40 Rule 1 of the *Civil Procedure Rules, 2010*.
 6. There are no annexures attached to the said affidavit in support of the said application.
2. The preliminary objection was canvassed by way of written submissions.

The 1st Respondent's Submissions

a. Whether or not the application is properly before this Honourable Court.

3. Relying on the case of *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR, the 1st respondent argued that the manner of instituting a suit was not a mere technicality as it goes into jurisdiction. That since the Applicant's application as framed seeks to have parties' rights fully determined through injunctive orders, it should have been anchored on a suit or petition as provided under Order 40 of the *Civil Procedure Rules* and Rule 23(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. It was their submission that the application was not properly before court thus fatal and incurably defective.

b. Whether or not the application offends the mandatory provision of Article 88 (4) (e) of *the Constitution* of Kenya, 2010; Sections 13 and 74 (1) of the *Elections Act*, 2011; Sections 38A and 38 I of the *Political Parties Act*, 2011; and Rules 6(2) and 12 (3) of the Orange Democratic Movement Party Appeals Tribunal (Practice and Procedure) Rules, 2022.

4. To the 1st Respondent, section 13 (1) of the *Elections Act* is clear that nominations shall be done in accordance with the respective political party's constitution and nomination rules.
5. The 1st respondent submitted that the tribunal's judgment did not limit the 2nd respondent's options to conduct fresh nominations for the position of Member of Parliament, Malindi. Their argument is that section 38A of the *Political Parties Act*, 2011 and Rules 8 and 23 of the Orange Democratic Movement Party Primaries and Nomination Rules, 2021 provide for direct nominations as a method of conducting party nominations. That if the Applicant was aggrieved with the direct nomination certificate issued to the 1st respondent, he ought to have filed an appeal to the ODM Party Appeals Tribunal, under Rules 6(2) and 12 (3) of the ODM Party Appeals Tribunal (Practice and Procedure) Rules, 2022.
6. The 1st respondent submitted that the application seeks to limit the ODM Party's rights to nominate candidates and the 1st respondent's political rights in the Bill of Rights.



c. Whether or not this Honourable Court has jurisdiction to hear and determine the said application.

7. It is the 1st respondent's submission that the jurisdiction of a court is regulated by the Constitution, statute law and judicial precedent as it was held in the Matter of the Interim Independent Electoral Commission, S.C Constitutional Application No.2 of 2011 [2011] eKLR and in Samuel Kamau Macharia & another v KCB Limited & 2 others 2012] eKLR.
8. In this case, being a pre-election dispute, the applicant failed to exhaust the internal and other administrative mechanisms prior to approaching this court hence divesting this court of jurisdiction. Reliance was placed in the case of Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others [2012] eKLR.

The Applicant's Written Submissions

9. To the applicant, rules 8(b) and 23 (20) (e) of the ODM Party Primaries and Nomination Rules, 2021 could not be imported in a scenario where there already exists aspirants lined up and fully paid nomination fees awaiting the nomination exercise.
10. It was the applicant's submission that the power to punish for contempt is vested upon the High Court and Court of Appeal, under section 5(1) and (2) of the Judicature Act, therefore their application is rightfully before this court. Reliance was placed on the case of Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly [2022] eKLR where the court of appeal determined that there are instances when a litigant could be exempt from the doctrine of exhaustion where the court's intervention was necessary. And further the case of Fredrick Okolla Ojwang v ODM & 2 other [2017] eKLR on contempt of court orders.

Analysis and Determination

Issues for Determination

1. Whether this Court has jurisdiction to hear and determine the applicant's Notice of Motion.
2. Whether the Notice of Preliminary Objection is merited.
11. The purpose of a preliminary objection was broadly discussed in Charles Onchari Ogoti v Safaricom Ltd & another [2020] eKLR as follows:

“(9) This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696, where Law JA and Newbold P (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, JA.:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



Newbold, P.:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

- (10) The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of article 163 (7) of *the Constitution* of Kenya 2010.
- (11) In case cited by the 1st respondent, *David Nyekorach Matsanga & another v Philip Waki & 3 others* [2017] eKLR, the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

“We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In *Hassan Ali Joho & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

12. The 1st respondent’s point of objection on jurisdiction is grounded on the doctrine of exhaustion.
13. It is trite that where there is a law prescribed by either a Constitution or an Act of Parliament governing a procedure for the redress of any particular grievance that procedure should be strictly followed. (See *Speaker of the National Assembly v. Karume* [2008] 1 KLR 425) That, in essence, is the effect of articles 50(1) and 159(2) of *the Constitution* which provides that:

“50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.”
14. Under article 159(2) of *the Constitution*, in exercising judicial authority, the courts and tribunals shall be guided by the following principles:



- a) Justice shall be done to all, irrespective of status;
 - b) Justice shall not be delayed;
 - c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - d) Justice shall be administered without undue regard to procedure technicalities; and
 - e) The purpose and principles of this Constitution shall be protected and promoted.
15. The process for addressing such pre-election disputes is not disputed. Indeed, upon being aggrieved by the decision of the 2nd respondent, the Applicant filed an appeal before the Political Parties Disputes Tribunal at Mombasa (PPDT).
 16. A perusal of the Tribunal's judgment, shows that both the applicant and 1st respondent intend to vie for the position of Member of Parliament, Malindi Constituency under the 2nd respondent's ticket or certificate of nomination. That despite the 2nd respondent setting up a date for the nomination exercise, the same did not take place. Instead, the 2nd Respondent issued the 1st Respondent with a direct certificate of nomination.
 17. While I agree with the 1st respondent that section 38A of *Political Parties Act*, 2011 allows two methods of conducting nominations, it is the same direct nomination process that was challenged before the ODM Appeals Tribunal and appealed to at the PPDT. PPDT ultimately issued orders inter alia a declaration that the 2nd Respondent did not conduct the nominations in accordance with the laws, and that fresh nominations be conducted. PPDT equally nullified the certificate of nomination issued to the 1st respondent.
 18. The 2nd respondent, despite the PPDT's judgment, proceeded to re-issue a direct certificate of nomination to the 1st respondent. It is this action that prompted the filing of the Notice of Motion by the applicant. The motion substantially seeks contempt of court orders. The 1st respondent's argument on one hand is that this application should have been filed before the PPDT as opposed to this court. On the other hand, the applicant's argument is that the authority to punish for contempt is only vested on this court by virtue of the *Judicature Act*.
 19. The question that follows therefore is whether PPDT has the jurisdiction to entertain an application for contempt. The answer to this question, in my view, will determine whether this Court is clothed with jurisdiction to hear the Notice of Motion given the present circumstances.
 20. The Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited and two others* 2012 eKLR expressed itself as follows:

“ A court's Jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of Law can only exercise Jurisdiction as conferred by *the Constitution* or written law. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by Law...”
 21. Article 169(l) of *the Constitution* of Kenya defines subordinate courts as follows:
 - a) the Magistrates courts;



- b) the Kadhis' courts;
- c) the Courts Martial; and
- d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by article 162(2).

22. Article 169 (2) further provides

“Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).”

23. My understanding of clause (2) above is that the jurisdiction of the tribunals has to be conferred by parliament through an Act of parliament that creates such tribunals.

24. Section 39 of the *Political Parties Act*, 2011 establishes the PPDT and its jurisdiction under section 40 thereon. On authority to punish for contempt, section 41(3) clearly provides as follows:

“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.”

25. It is pertinent to note that ordinarily, and by virtue of section 5 of the *Judicature Act*, this Court is conferred jurisdiction to punish for contempt. This is not disputed. However, the peculiar circumstances in this case are that the decision being sought to be enforced through contempt proceedings was issued by the PPDT on May 9, 2022. It was only proper that the Applicant herein filed his application before the same tribunal that issued the orders. In *David Odhiambo Ofuo v Orange Democratic Movement Party & 2 others* (2017) eKLR, Muchelule J in an almost similar situation expressed as follows:

“I have indicated in the foregoing that the powers that this court has over matters heard under section 40 of the *Political Parties Act* are appellate. It has no powers to enforce the orders of the Tribunal. Under section 41(3) of the Act the Tribunal has powers to enforce its decisions in the same manner a magistrate's court can enforce its decisions...”

26. It is settled that jurisdiction is everything, without which a court of law must down its tools. (See *Owners of Motor Vessel Lilian 'S' v Caltex (K) LTD* [1989] KLR 1).*Having observed the foregoing, I am inclined to find merit in the notice of preliminary objection. The Notice of Motion dated 10th May 2022 is therefore dismissed with costs to the Respondents.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 21st DAY OF JUNE, 2022.

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S.M. GITHINJI

JUDGE

In the presence of; -



- 1. Mr Masake for the Applicant**
- 2. Mr Binyenya advocates for the 1st Respondent**
- 3. Muchoki, Kang'ata Njenga & Co. Advocates for the 2nd Respondent**

