



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**ELECTION PETITION APPEAL NO 111 OF 2017**

FESTUS TAMAA MUTUKU.....APPLICANT/APPELLANT

VERSUS

RETURNING OFFICER – KITUI EAST CONSTITUTENCY.....1<sup>ST</sup> RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....2<sup>ND</sup> RESPONDENT

(Being an appeal against the decision of the Dispute Resolution Committee on Complaint No. 266 of 2017 at Nairobi delivered on 9<sup>th</sup> June, 2017)

BETWEEN

FESTUS TAMAA MUTUKU..... CLAIMANT

VERSUS

RETURNING OFFICER –KITUI EAST CONSTITUENCY.....1<sup>ST</sup> RESPONDENT

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

**RULING**

This is a ruling to a preliminary objection dated the 22<sup>nd</sup> day of June, 2017. The objection has been raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and is premised on the following grounds that;

1. This hounorable court lacks jurisdiction to hear and determine the Appeal.
2. The Appeal is incompetent.

In his submissions, counsel for the Respondents argued that the court has no jurisdiction to hear an appeal arising from the decision of the Independent Electoral and Boundaries Commission sitting as a Dispute resolution committee in a nomination dispute.

That appellant herein filed complaint number 266 of 2017 before the IEBC dispute resolution committee

who gave their decision on the 9/6/2017. The said decision was given pursuant to the powers granted to the IEBC in Article 88(4) (e) of the constitution and section 74 of the Elections Act. That both the constitution and the Elections Act do not give this court jurisdiction to hear appeals from the decisions of the dispute resolution committee.

He urged the court to dismiss the Appeal as having been incompetent.

On his part, the Appellant/Respondent, submitted that he filed the Appeal because he was not satisfied with the decision by the dispute resolution committee. That the committee dismissed his complainant alleging that he presented his papers late, yet according to him, and the exhibits annexed to the application, he did it on time.

He insisted he is properly before the court and argued that the court has jurisdiction to hear any matter and that he followed the due process in filing the Appeal and if the appeal is dismissed, his constitutional rights will be violated.

The court has duly considered the submissions by the parties with regard to the preliminary objection. The essence of a preliminary objection was given by law ***JA old Sir Charles Newbold P, in Mukisa Biscuits Manufacturing Co. Limited Vs. West End Distributors (1969) E.A. 696 at page 700*** Law JA 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. Examples are an objection to the jurisdiction on the basis that the parties are bound by the suit to refer the dispute to arbitration”.***

Sir Charles Newbold P added as follows on page 701;

***“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 assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of Judicial discretion”.***

The appeal herein arises from a decision of the IEBC dispute resolution committee pursuant to a complaint by virtue of Article 88 (4) of the constitution which defines the responsibilities of the IEBC one of which is to settle electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declarations of election results.

Section 74 of the Elections Act gives IEBC jurisdiction to hear and determine disputes. Section 74 (1) which is a replica of Article 88 (4) of the constitution provides;

***“Pursuant to article 88 (4) (e) of the constitution, the commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results”.***

It is trite law that jurisdiction of the court is conferred by either the constitution or by a statute and if the court has no jurisdiction to handle a matter, it should down its tools. See the case of ***owners of the motor vessel “Lilian S” vs. Caltex Oil (Kenya) Ltd (1989) KLR 1.***

The Elections Act and the constitution are both silent on whether this court has jurisdiction to entertain appeals arising from the IEBC Dispute Resolution Committee. There is no specific provision for Appeal to this court either in the constitution or in the Elections Act.

In the result, I find that this court does not have appellate jurisdiction over decisions of the 2<sup>nd</sup> Respondent’s dispute resolution committee. The preliminary objection is upheld. The Appeal is hereby struck out as the same is incompetent. No orders as to costs.

Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of June, 2017.

.....

**L. NJUGUNA**

**JUDGE**

*In the presence of*

..... *for the Appellant.*

..... *For the Respondent.*