



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**ELECTION PETITION APPEAL NO.14 OF 2017**

**ISAAC ALUOCH POLO ALUOCHIER.....APPELLANT**

**VERSUS**

**UHURU MUIGAI KENYATTA.....1<sup>ST</sup>RESPONDENT**

**RAILA AMOLO ODINGA.....2<sup>ND</sup>RESPONDENT**

**JOSEPH WILLIAM NTHIGA NYAGAH.....3<sup>RD</sup>RESPONDENT**

**WILLIAM SAMOEL RUTO.....4<sup>TH</sup>RESPONDENT**

**STEPHEN KALONZO MUSYOKA.....5<sup>TH</sup>RESPONDENT**

**DALMAS OTIENO ANYANGO.....6<sup>TH</sup>RESPONDENT**

**JUBILEE PARTY.....7<sup>TH</sup>RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....8<sup>TH</sup>RESPONDENT**

**FORUM FOR THE RESTORATION OF DEMOCRACY KENYA.....**

**....9<sup>TH</sup>RESPONDENT**

**KENYA AFRICAN NATIONAL UNION.....10<sup>TH</sup>RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES**

**COMMISSION.....11<sup>TH</sup>RESPONDENT**

**JUDGMENT**

The Appellant, Isaac Aluoch Polo Aluochier lodged a complaint before the Independent Electoral and Boundaries Commission Nomination Disputes Resolution Committee seeking to have the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents barred from contesting as candidates of their respective political parties (and in respect of the 6<sup>th</sup> Respondent, as an independent candidate) on essentially the grounds that the six Respondents had not met the constitutional moral and ethical threshold to enable the 11<sup>th</sup> Respondent accept their nominations as candidates properly qualified to contest in the election scheduled for 8<sup>th</sup>

August 2017. The Appellant also sought the disqualification of all candidates presented by the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Respondent political parties, because in his view, the said political parties had failed to abide by the constitutional and statutory imperatives that required the said political parties to hold periodic elections every five (5) years to determine its office bearers. The Appellant argued that since the 7<sup>th</sup> – 10<sup>th</sup> Respondent political parties had not conducted any elections to determine its office bearers as required by the law, they could not be considered to be political parties capable of offering candidates for the various elective seats that will be contested in the forthcoming general elections.

The Appellant's complaint was dismissed by the said committee. In the material part of the decision, in respect of the 1<sup>st</sup> – 5<sup>th</sup> Respondents, the committee stated thus:

***“This committee takes cognizance of the fact that Article 73 of the Constitution, Leadership and Integrity Chapter requires that all state officers and public officers as well as those who vie for political seats including the President must meet the ethical, moral and integrity morals of the law. However, this committee further notes that the issues raised by the complainant ought to be filed with the Ethics and Anti-Corruption Commission and or the High Court as well as other bodies responsible for implementation of moral and ethical requirements of the law.”***

In respect of the 6<sup>th</sup> Respondent, the committee stated that:

***“The committee only deals with issues that arise from nomination of candidates, particularly those issues raised against the Returning Officers. Complaints such as the one raised by the complainant herein should be raised in other forums.”***

In respect of the 7<sup>th</sup> and 10<sup>th</sup> Respondents, the committee, *inter alia*, held that:

***“The primary mandate of this committee is donated by sec 74 of the Elections Act and which is primarily the resolution dispute related to or arising from the nominations. The jurisdiction to interpret any provisions of the Constitution is not a mandate of this committee.”***

The Appellant was aggrieved by these decisions and duly filed an appeal to this court. In the appeal, the Appellant faulted the committee for failing to assume jurisdiction and exercise its mandate as provided by **Constitution**. The Appellant argued in *extenso* the alleged breaches of the moral and ethical standards by the 1<sup>st</sup> - 6<sup>th</sup> Respondents. He also questioned the legal competence of the 7<sup>th</sup> – 10<sup>th</sup> Respondents to offer candidates in the forthcoming elections. The Appellant served the Respondents to appear before court. None of the Respondents save for the 6<sup>th</sup> Respondent appeared before the court. This court was satisfied that all the Respondents were properly served hence its decision to hear the appeal. The 6<sup>th</sup> Respondent's counsel Mr. Ng'ani submitted that this court did not have jurisdiction to entertain the appeal because the issue raised by the Appellant in this appeal were issues which the committee did not have jurisdiction to deal with. He urged the court to dismiss the appeal on the question of jurisdiction with costs to the 6<sup>th</sup> Respondent.

This court has carefully considered the rival submission made before it. In any case that is presented before the court, the issue that the court must first address before it hears the case is the question whether it has jurisdiction to hear the case. As was held in the landmark case of **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** per Nyarangi, JA:

***“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an***

*inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.....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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.*

In the present appeal, the Appellant is appealing against a decision of the Independent Electoral and Boundaries Commission Nomination Disputes Resolution Committee which declined to assume jurisdiction in respect of the matters that the Appellant raised before it. The committee was of the view that the issues raised by the Appellant were issues which ought to be raised before other forums or the High Court as mandated by the **Constitution** and statute. There is no doubt that the Appellant is challenging the candidature of the 1<sup>st</sup> – 6<sup>th</sup> Respondents and the competence of the 7<sup>th</sup> – 10<sup>th</sup> Respondents to offer candidates to contest the various seats that are on offer during the 8<sup>th</sup> August 2017 general elections.

This court has carefully evaluated the arguments presented before the court on the question of jurisdiction. The committee heard the dispute presented to it in exercise of its mandate as provided for under **Article 88(4)(e)** of the **Constitution** which provides that:

*“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.”*

The literal interpretation of that Article of the **Constitution** implies that the Electoral Commission’s mandate in hearing election disputes is restricted to nomination disputes that do not raise any other legal or constitutional questions. In the considered opinion of this court, the Electoral Commission’s mandate is circumscribed to determining whether a candidate was validly nominated to contest in the forthcoming general elections. The Electoral Commission does not have mandate to inquire into questions such as the moral or ethical qualification of a candidate when the **Constitution** and statute created independent constitutional commissions, such as the Ethics and Anti-Corruption Commission to deal and address such questions. Further, if a party is aggrieved by the manner in which a political party is conducting its affairs, such party is at liberty to lodge a complaint before the Political Parties Dispute Tribunal provided it fits the mandate specified under **Section 40** of the **Political Parties Act**. All other disputes must be presented to the High Court which has unlimited jurisdiction under **Article 165(3)** of the **Constitution** to hear such claims. A five-Judge Bench in **International Centre for Policy and Conflict & 5 Others –vs- The Hon. Attorney General & 4 Others [2013] eKLR** held *inter alia*, that where the Constitution creates bodies or commissions to implement certain aspects or mandates in the **Constitution**, then the first port of call for anyone who is aggrieved by the particular aspect or mandate specified by the **Constitution** is that body created by the **Constitution**.

In the present appeal, the issues raised by the Appellant before the committee were issues that committee did not have jurisdiction to hear or consider. Similarly too, the Appellant cannot raise the very same issues before this appellate court because, in that capacity, this court has no jurisdiction to entertain the issues raised by the Appellant. In the premises therefore, this court upholds the objection by the 6<sup>th</sup> Respondent on the question of the jurisdiction of this court. The appeal cannot be allowed because the Independent Electoral and Boundaries Commission’s Nomination Disputes Resolution Committee correctly interpreted its mandate and declined to hear the Appellant. The Appeal is hereby dismissed but with no orders as to costs. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**