



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION PETITION APPEAL NO. 114 OF 2017
IN THE MATTER OF KISUMU EAST CONSTITUENCY
IN THE MATTER OF NOMINATION OF MEMBER OF PARLIAMENT, KISUMU EAST
CONSTITUENCY

BETWEEN

KELVIN OSELU OBONDO.....COMPLAINANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

ODM NATIONAL ELECTIONS BOARD.....2ND RESPONDENT

NICHOLAS ORICHO.....3RD RESPONDENT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....INTERESTED PARTY

(Being an appeal from the Decision of the Independent Electoral and Boundaries Commission Dispute Resolutions Committee in Complaint No. 109 of 2017)

JUDGMENT

1. The appellant Kelvin Oselu Obondo was aggrieved by the decision of the Independent Electoral and Boundaries Commission’s Dispute Resolution Committee which was rendered on 8th June 2017. His complaint before the Committee was that he had won in the nomination held on 25th April 2017 for the seat of Member of the National Assembly for Kisumu East Constituency within Kisumu County by the National Elections Board (the 2nd respondent) of the Orange Democratic Party (the 1st respondent). Nonetheless, the 3rd respondent Nicholas Oricho had been given the nomination certificate and eventually cleared by the Independent and Boundaries Commission (the interested party). In between, the 1st respondent’s National Appeals Dispute Tribunal and the Political Parties Disputes Tribunal had, following complaint, ordered the 2nd respondent to determine the Party’s nominee in a manner consistent

with its constitution and Election and Nomination Rules, but the Party had not determined the nominee by either repeating the nomination or by direct nomination.

2. Both the 3rd respondent and the interested party raised, as part of their opposition to the appeal, the issue whether this court had jurisdiction to hear and determine this appeal. Their contention was that neither the Constitution of Kenya 2010 nor the **Elections Act, 2011** allowed for an appeal from the Independent Electoral and Boundaries Commission's Dispute Resolution Committee; that what was open to the appellant, if aggrieved by the decision of the Committee, was to approach the Court by way of judicial review. The 3rd respondent was represented by Mr. Oruenjo and the interested party by Mr. Malonza. The appellant was represented by Mr. Murunga. His view was that the court had jurisdiction; that, what was sought was not the quashing of the decision of the Committee's decision but an appeal against the decision; and that, this court had, in any case, unlimited original and appellate jurisdiction.

3. It is trite that where the jurisdiction of the court is questioned the issue has to be resolved before the merits of the dispute is determined (**Owners of the Motor Vessel "Lillians" –v- Caltex Oil (Kenya) Ltd [1989] KLR 1**).

4. Under **Article 165 (3)(a)** of the Constitution of Kenya 2010 this Court has unlimited original jurisdiction in criminal and civil matters. The jurisdiction, however, is subject to **Articles 162 and 165(5)** which establish courts which, although have the status of the High Court, deal with matters exclusive to them. **Article 165(3)(e)** provides that the High Court shall have –

“any other jurisdiction, original or appellate, conferred on it by legislation.”

5. It is my understanding that the High Court's appellate powers cannot be inferred or implied. The powers have to be conferred by the Constitution or legislation (**Tom Ogalo Oluoch –v- Independent Electoral and Boundaries Commission, Election Nominations (IEBC) Appeal No. 1 of 2017**).

6. The interested party has been created under **Article 88(1)**. Under **Article 88(4)(e)** the 1st interested party is 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.”

7. Pursuant to **Article 88(4)(e), section 74(1) and (2)** of the **Elections Act** provides that the interested party shall determine the electoral disputes above within 10 days of the lodging of the disputes with it.

8. There is no provision for appeal to the High Court, or at all, either under the Constitution or the **Act**.

9. I find that this court has no appellate jurisdiction over the decisions of the interested party's Dispute Resolution Committee. Consequently, the appellant's appeal is incompetent and is struck out. I make no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 22ND day of JUNE 2017.

A. O. MUCHELULE

JUDGE