

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 264 OF 2017

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, CHAPTER 6

AND

IN THE MATTER OF LEADERSHIP AND INTEGRITY ACT CHAPTER 182 SECTION 13

AND

IN THE MATTER OF ELECTIONS ACT

AND

IN THE MATTER OF THE ELECTIONS (GENERAL REGULATIONS) 2012

AND

IN THE MATTER OF NOMINATION OF CANDIDATES FOR THE ALEGO USONGA

CONSTITUENCY FOR THE POSITION OF MEMBER OF PARLIAMENT

AND

**IN THE MATTER OF NOMINATION OF CHARLES ACHIENG ODONGA AS INDEPENDENT
CANDIDATE**

BETWEEN

GEORGE OWINO MULANYA.....1ST PETITIONER

BERNARD ODHIAMBO.....2ND PETITIONER

JOHN OMONDI OMIDHA.....3RD PETITIONER

TOBIAS NYONJE ODERO.....4TH PETITIONER

ANDREW OTIENO OBIERO.....5TH PETITIONER

VERSUS

CHARLES ACHIENG ODONGA.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....2ND RESPONDENT

RULING

Introduction

Before me for determination is a preliminary objection raised by counsel for the second Respondent stating that this court lacks jurisdiction to hear this petition. She cited the provisions of Article 88 (4) (e) of the constitution of Kenya 2010, Section 4 (e) of the Independent Electoral and Boundaries Commission Act^[1] and Section 74 of the Elections Act.^[2]

Jurisdiction is the very basis on which any Tribunal or court tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this Court; *afortiori* the Court can *suo motu* raise it. It is desirable that Preliminary Objection be raised early on the issue of jurisdiction; but once it is apparent to any party that the Court may not have jurisdiction, it can be raised even *viva voce*. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs and to avoid a trial in nullity.^[3]

The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*^[4] where the late **Justice Nyarangi** of the Court of Appeal held as follows:-

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

John Beecroft in a treatise headed "Words and Phrases Legally Defined"^[5] states the following about jurisdiction:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to 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 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 of both 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 fact exist. Where a 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"

Counsel for the petitioner opposed the preliminary objection stating that this court has jurisdiction to hear and determine this matter. Counsel argued that before the court is a constitutional issue raised by voters touching on the integrity of the second Respondent, hence a constitutional issue within the jurisdiction of this court.

The crux of the petition is that the petitioner ought not to have been cleared as a candidate by the I.E.B.C on grounds that he has questionable integrity issues in that he allegedly presented questionable academic credentials. It is alleged in the petition that the first Respondent authored/uttered false documents and that he cheated hence failed the integrity test therefore he is unsuitable under chapter 6 of the constitution.

Nature of a preliminary objection

A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law. In *Dismas Wambola vs Cabinet Secretary, Treasury & Others*^[6] I observed that it may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd*^[7] said:-

"...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 objection may dispose of the suit. Examples are an objection to 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."

In the words of Sir Charles Newbold P at page 701, B:-

*"...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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.**"(Emphasis added)*

Useful guidance can be obtained from the decision in *Omondi vs. National Bank of Kenya Ltd & Others*^[8] where it was held that:-

*"The objection as to the legal competence of the Plaintiffs to sue.....and the plea of res judicata are **pure points of law** which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion."*

Also relevant is the decision by **Ojwang, J** (as he then was) where he expressed himself as follows:-^[9]

*"..... A **“preliminary objection”** correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."*(Emphasis added)

Thus a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is **no** proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

In **law**, a **question of law**, also known as a **point of law**, is a question that must be answered by applying relevant legal principles to interpretation of the law.^[10] Such a question is distinct from a **question of fact**, which must be answered by reference to facts and **evidence** as well as inferences arising from those facts.

In **law**, a **question of fact**, also known as a **point of fact**, is a question that must be answered by reference to facts and **evidence** as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "**finding of fact**") usually depends on particular circumstances or factual situations.^[11]

The preliminary objection in this case is premised on the clear provisions of Article **88 (4) (e)** of the constitution, Section **4 (e)** of the Independent Electoral and Boundaries Commission Act^[12] and Section **74** of the Elections Act^[13] which to me are pure points of law.

Article **88 (4) (e)** of the constitution provides that:-

(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(e) 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;

My reading of the above provision is that it is wide enough to include disputes relating to or arising from nominations whether filed by a voter or a candidate. It follows that the petitioners herein notwithstanding the fact that they are voters, they could have lodged their complaint at the IEBC Dispute Resolution Committee.

Flowing from the Article **88 (4) (e)** is section **4 (e)** of the Independent and Electoral Boundaries Commission Act^[14] which provides as follows:-

4. Functions of the Commission

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(e) 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;

Again, I find nothing in the above provisions precluding a voter from approaching the IEBC Dispute Resolution Committee. The above provisions are also replicated in section **74 (1)** of the Elections Act^[15] which provides that:-

74. Settlement of certain disputes

(1) 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.

Again, I find nothing in the above provisions precluding the petitioners who are voters from approaching the IEBC Dispute Resolution Committee. It follows, that, the petitioners ought to have challenged the nomination of the first Respondent before the I.E.B.C Dispute Resolution Committee.

On the issue of Jurisdiction

A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in *the matter of the Interim Independent Electoral Commission*,^[16] at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner; "Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent." Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.^[17]

In the words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-^[18]

"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."

Whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed. Indeed, in the case of *the Speaker of the National Assembly vs Karume*.^[19] the Court stated:-

"...Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed...."

The court of appeal^[20] discussing the same subject reiterated as follows:-

".....This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes." Speaker of the National Assembly v. Karume (supra)

In *Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others*^[21] it was held that :-

".....where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159)(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms."

In my view, the dispute before this court relates to nominations. The petitioners opted to file it before this court. They did not file it before the IEBC dispute Resolution committee, thereby by-passing the laid down mechanism. The petitioner ought to have utilized the mechanism provided under the above provisions and only approach the High court by way of judicial review.

It is immaterial that this petition was filed before IEBC Dispute Resolution Committee commenced its sittings. I find guidance in the above cited provisions of the law, the cited cases and also in the decision rendered in *Boniface Mwangi vs Resident Magistrates Court, Milimani & 2 Others*^[22] where it was held that to convert every issue into a constitutional issue is to undermine the importance of the process. Also

relevant is the decision rendered in *Peter Ochara Anam & 3 Others vs CDFB & 3 Others*^[23] where it was held that the constitution was not meant to replace statutes that provide remedies to those concerned.

Determination

In view of my above findings, I find that this matter is not properly before this court. The provisions cited in support of the objection clearly vest the jurisdiction in the I.E.B.C. The drafters of the constitution were fully aware of articles 165 and article 85 (a). The constitution cannot contradict itself. I see no contradiction myself. The provisions in question are clear on the mandate of the commission. When the words used in a statute are clear as the above provisions, judicial inquiry is complete, this first canon of judicial interpretation becomes the last. Judicial inquiry is complete.

This court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.^[24] The constitution is an effective document that is the basis of our laws.

In conclusion, I uphold the preliminary objection and dismiss this petition with costs to the second Respondent

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **21st** day of **June** 2017

John M. Mativo

Judge

[1] Act. No. 9 of 2011

[2] Act No. 24 of 2011

[3] Belgore J.S.C. See *Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd*, (1992) 5 NWLR (Pt. 244) 675 at 693

[4] {1989} KLR 1

[5] Volume 3:1-N, at Page 113

[6] Pet No. 38 of 2017

[7] {1969} E.A 696 AT PAGE 700

[8] {2001} KLR 579; [2001] 1 EA 177

[9] Oraro vs. Mbaja [2005] 1 KLR 141

[10] Proffatt, John (1877). *A Treatise on Trial by Jury, Including Questions of Law and Fact* (1986 reprint ed.). Buffalo, NY: William S. Hein & Co. [ISBN 9780899417073](#).

[11] *"Question of fact"*. Legal Information Institute. [Cornell University Law School](#).

[12] Act No 9 of 2011

[13] Act No 24 of 2011

[14] Act No. 9 of 2011

[15] Act No. 24 of 2011

[16] Constitutional Application No. 2 of 2011 (unreported)

[17] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[18] 19 U.S. 264 (1821)

[19] {2008} 1KLR 425

[20] In the case of Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another {2015}eKLR

[21] {2008} 3 KLR (ER) 296).

[22] {2015}eKLR

[23] {2011}eKLR

[24] See Tinyefunza vs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3