



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILINMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 269 OF 2017**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 38, 47, 86 AND 90 OF THE CONSTITUTION**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 39 OF THE ELECTIONS ACT**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE JUBILEE PARTY NOMINATION RULES, 2016**

**BETWEEN**

**KENNEDY JOHN**

**ACHOKI.....PETITIONER**

**VERSUS**

**THE SECRETARY GENERAL JUBILEE**

**PARTY.....1<sup>ST</sup> RESPONDENT**

**THE CHAIRMAN JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF ELECTIONS JUBILEE**

**PARTY.....3<sup>RD</sup> RESPONDENT**

**THE JUBILEE PARTY OF KENYA.....4<sup>TH</sup> RESPONDENT**

**THE JUBILEE PARTY NATIONAL ELECTIONS**

**BOARD.....5<sup>TH</sup> RESPONDENT**

**AND**

**CHARLES MONGARE ONGOTO.....1<sup>ST</sup> INTERESTED PARTY**

INTERESTED PARTY

THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION.....3<sup>RD</sup> INTERESTED PARTY

RULING

Before me for determination is a preliminary objection filed on 9<sup>th</sup> June 2017 by counsel for the third interested party challenging the jurisdiction of this honorable court to entertain this petition. The preliminary objection was supported by counsels for the first and second Respondents.

The objection is premised on the provisions of Article 88 (4) (e) of the constitution of Kenya 2010, Section 4 (e) of the Independent Electoral and Boundaries Commission Act<sup>[1]</sup> and Section 74 of the Elections Act.<sup>[2]</sup>

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; *a fortiori* 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.<sup>[3]</sup>

The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*<sup>[4]</sup> 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 downs 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"<sup>[5]</sup> 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 third interested party correctly pointed out that this petition was filed on 31<sup>st</sup> May 2017. The petition was accompanied by a notice of motion under certificate of urgency. Before the matter could be heard *inter partes*, the petitioner proceeded to challenge the same decision before the

Independent Electoral and Boundaries Commission Dispute Resolution Committee on 7<sup>th</sup> June 2017. The I.E.B.C. dispute Resolution Committee dismissed the matter on 8<sup>th</sup> June 2017. Thus, this petition was filed before approaching the IEBC which is improper.

Counsels for the petitioner opposed the preliminary objection stating that this court has jurisdiction to hear and determine the matter since the I.E.B.C. Dispute Resolution committee was constituted on 3<sup>rd</sup> June 2017 after this petition had been filed. Counsel argued that this court has jurisdiction to hear and determine this matter under article 165 of the constitution. The decree rendered by the I.E.B.C. Dispute Resolution committee is annexed to the petitioners Response to the preliminary objection filed on 16<sup>th</sup> June 2017. It states that the Committee dismissed the complaint on grounds that the same was not a "complaint envisaged to be dealt with by the committee."

From the documents annexed by the petitioner, it is evident that this dispute was first heard by the Jubilee Party National Elections Appeals Tribunal,[6] the Political Parties Dispute Tribunal[7] in which the P.P.D.T. found that the petitioner had been validly elected. The first and second interested parties appealed to the High court and the High court ordered a repeat nomination.[8]

The I.E.B.C. Dispute Resolution Committee's decision rendered on 8<sup>th</sup> June 2017 shows that the petitioner herein had previously lodged a claim against the first interested party in the high court.

### **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*[9] 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*[10] 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*[11] 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:-[\[12\]](#)

*"..... 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.[\[13\]](#) 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.[\[14\]](#)

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[\[15\]](#) and Section **74** of the Elections Act.[\[16\]](#) The said provisions are reproduced below.

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;*

Flowing from the above provisions is section **4 (e)** of the Independent and Electoral Boundaries Commission Act[\[17\]](#) 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;*

The above provisions are replicated in section 74 (1) of the Elections Act[18]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.*

*In my view, the objection before me is premised on points of law and qualifies to be a preliminary objection.*

#### **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*,[19] 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.[20]

In the words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-[21]

*"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*. [22] 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[23] 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*[24]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 petitioner opted to file it before this court before proceeding to the I.E.B.C. dispute Resolution committee, thereby by-passing the laid down mechanism. The petitioner ought to have utilized the mechanism provided under the above provisions before approaching the High court.

I find backing 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*[25] 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*[26] where it was held that the constitution was not meant to replace statutes that provide remedies to those concerned. Consequently, I find that the preliminary objection succeeds.

As stated above, during the pendency of this petition, the petitioner filed his complaint at the IEBC Dispute Resolution committee where he lost. Clearly, this shows that the petitioner was pursuing two parallel court processes at the same time hoping to succeed in one or both. This raises a fundamental question of whether or not the act of pursuing more than one court processes at the same time constitutes abuse of court process.

### **Abuse of court process**

Given the striking similarity of the reliefs sought in this petition and the matter before the I.E.B.C. Dispute Resolution Committee, and even in the previous court processes evidenced in the documents before this court, crucial questions do arise such as whether it is open for the petitioner to file two identical suits, namely, this petition and the complaint before the I.E.B.C. Dispute Resolution Committee seeking substantially identical reliefs and whether such conduct amounts to abuse of court process.

In *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others*[27] I observed that "It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused a position I have reiterated in numerous decisions among them *John Orwa vs Independent Electoral and Boundaries Commission & Another*.[28]

Abuse of process is defined as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."[29]

In the above cited cases I observed that the concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[30] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

**(a)** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*

**(b)** *Instituting different actions between the same parties simultaneously in different court even*

though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[\[31\]](#)

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. [\[32\]](#)

Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous, vexatious and oppressive.[\[33\]](#) Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[\[34\]](#) Justice Niki Tobi JSC of Nigeria observed that abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[\[35\]](#)

It's settled law that a litigant has no right to pursue *paripassu* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amount to abuse of court/legal process.[\[36\]](#)

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[\[37\]](#) The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.[\[38\]](#) Turning to this case, I find no difficulty in concluding that the two cases, that this petition and the similar matter before the IEBC by the same petitioner, arising from the same set of facts and circumstances and seeking substantially the same reliefs amount to gross abuse of court process and on this ground alone I am inclined as I hereby do, to strike out this petition for being an abuse of court process.

In my view, the jurisdiction conferred upon this court by article 165 of the constitution cannot be invoked to aid a party who is out rightly abusing court processes or forum shopping hoping to succeed in one way or the other.

### **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 85. The constitution cannot contradict itself. I see no contradiction myself. The provision 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.<sup>[39]</sup> The constitution is an effective document that is the basis of our laws.

Secondly, as stated above, the petition is an abuse of court process. The orders sought, if granted will amount to inviting this court to overturn the decision the IEBC yet the same is not being challenged in this petition. Such a scenario will be improper and a mockery of justice.

Accordingly, I up hold the preliminary objection and dismiss this petition with costs to the interested parties.

Orders accordingly.

**Signed, Delivered, Dated at Nairobi this 21<sup>st</sup> day of June 2017**

**John M. Mativo**

**Judge**

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[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] Appeal no. 537 & 538 of 2017

[7] Complaint No. 218 of 2017

[8] aPPEAL NO. 33 OF 2017

[9] Pet No. 38 of 2017

[10] {1969} E.A 696 AT PAGE 700

[11] {2001} KLR 579; [2001] 1 EA 177

[12] **Oraro vs. Mbaja [2005] 1 KLR 141**

[13] 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](#).

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

[15] Act No 9 of 2011

[16] Act No 24 of 2011

[17] Act No. 9 of 2011

[18] Act No. 24 of 2011

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

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

[21] 19 U.S. 264 (1821)

[22] {2008} 1KLR 425

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

[24] {2008} 3 KLR (ER) 296).

[25] {2015}eKLR

[26] {2011}eKLR

[27] Succ Cause no 920 of 2009

[28] Petition No. 266 of 2017

[29] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[30] Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415

[31] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[32] (2007) 16 NWLR (319) 335.

[33] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[34] Ibid

[35] Supra Note 1

[36] Supra note 1

[37] Ibid

[38] Ibid

[39] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3