



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
MISC. ELECTION PETITION APPEAL NO. 7 OF 2017

ADAM BARISA DHIDHA.....PETITIONER/APPELLANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY....2ND RESPONDENT

DHADHO GADDAE GODANA.....3RD RESPONDENT

RULING

This appeal was lodged on 14th June 2017. The Appeal is challenging the decision of the 1st Respondent's Dispute Committee in Complaint No. 328 of 2017. At the time of filing this appeal, a Notice of Motion was also filed under certificate of urgency seeking restraining orders against the 1st Respondent from gazetting the name of the 3rd Respondent as the 2nd Respondent's nominee for Tana River County Gubernatorial seat pending the hearing and determination of the application. When the matter came to the attention of this court on 14th June 2017, the Appellant was directed to serve the Respondents and appear before the court today 15th June 2017 at 9.00am.

When proceedings commenced before me this morning, the Respondents did not turn up. This court was informed that the 1st and the 2nd Respondents had been served but the 3rd Respondent had not been served. Due to the time constraints, this court directed the Appellant to address me on the issue of jurisdiction of this court to entertain this appeal and whether the appeal is competently before this court.

The Appellant was represented by Mr. Abdul Agonga and Mr. Okun. Mr. Agonga addressed the court. Mr. Agonga submitted that the Appeal before this court is competent and that this court has jurisdiction to entertain the Appeal. Mr. Agonga cited Chapter 6 of the Constitution and Article 73 of the Constitution submitting that this court has jurisdiction under those provisions. He further submitted that the Appellant did not succeed in securing the decision of the IEBC Dispute Committee which was delivered on 8th June 2017 despite writing to that body.

From the outset, it appears to me that counsel for the Appellant misapprehended the issue I directed him

to address the court on. The issue at hand is whether this court has jurisdiction to entertain this appeal and whether this appeal is competently before this court. The submissions made before seem to address the court on the jurisdiction to hear and determine a competent appeal. This Court does not doubt it has jurisdiction to interpret Chapter 6 and Article 73. However, this can only be done where a competent dispute is brought to court. What I asked counsel to address me on, and which I kept on reminding him as he submitted, is whether the appeal before me is competent to enable this court determine it.

This court was not able to confirm whether any Complaint was filed before the IEBC Dispute Committee. There is no decision of the Committee attached to this Appeal. What passes as a record of appeal are some documents showing Nomination Dispute Resolution Complaint Form marked “ABD1” and what looks like an affidavit by the Appellant dated 5th June 2018. There are other documents attached to the Appeal. The Complaint Form and the Affidavit do not bear any stamp by the IEBC Dispute Committee to show that it was ever filed with that body. If it bears such stamp it is not visible to me. Assuming that there was a dispute filed with the IEBC Committee and that it was Complaint No. 328 of 2017 and that a decision in respect of the same was delivered by the Committee on 8th June 2017, that Committee would have proceeded to hear the Complaint by virtue of Article 88 (4) of the Constitution which defines the responsibilities of IEBC including the responsibility under (4) (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.”**

Section 74 of the Elections Act also gives IEBC jurisdiction to hear disputes and it is worded as follows:

(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.

(2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

These two provisions of the law do no clothe this court with jurisdiction to hear appeals from the IEBC Dispute Committee. They are completely silent on that issue. The only conclusion to be drawn from the silence of the Constitution and the statutes on the matters of appeals to the High Court from this body is that such jurisdiction does not exist. Looking elsewhere in the Constitution to see whether there is some relief in that respect this court has turned to Article 165 of the Constitution. It creates jurisdiction of the High Court to hear and determine matters specified in that Article. Again, that Article is silent on the jurisdiction of this court to hear and determine appeals from the IEBC Dispute Committee. Article 165 (3) (e) of the Constitution confers jurisdiction to this court in the following terms: **“any other jurisdiction, original or appellate, conferred on it by legislation.”**

Jurisdiction is conferred by the Constitution or by statute whether that jurisdiction is to determine a matter first instance or on appeal. Where a court lacks jurisdiction, it has not business in handling the matter before it and must lay down its tools. In **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows:

‘I think that 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.’

See also **Kakuta Maimai Hamisi v Peris Tobiko & Others [2014] eKLR.**

I think I have said enough to demonstrate that this court does not have jurisdiction to hear this appeal. It is incompetent as shown in this ruling. There is also unsettled issue as to whether any dispute was filed with the IEBC Dispute Committee. This court therefore has no alternative that but to find that the Appellant has no right of appeal to this court and that this court has no jurisdiction to hear this appeal. Consequent to those findings, this appeal is hereby struck out with no order as to costs.

Orders shall issue accordingly.

Dated, signed and delivered this 16th day of June 2017.

S. N. MUTUKU

JUDGE