



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO. 104 OF 2017

FEREDERICK ODHIAMBO OYUGI.....APPELLANT

VERSUS

JANE WANGUI.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....3RD RESPONDENT

RULING

This is a ruling to determine whether the appeal filed herein is competent and whether this court has jurisdiction to entertain it. The appeal was filed on 15th June 2017 together with a Notice of Motion seeking to restrain the 3rd Respondent from publishing the name of the 1st Respondent in the Kenya Gazette as the 2nd Respondent's candidate for Embakasi North Constituency. On 15th June 2017 the Appellant was directed by this court to serve the respondents and all parties to appear before this court today.

When proceedings commenced, the court directed the parties to address it on the issue of jurisdiction and the competency of the appeal as filed. The 1st and 2nd Respondents did not attend court although duly served. The 3rd Respondent was represented by Ms Olao instructed by L. M. Kambuni & Associates, Advocates. The Appellant was represented by Mr. Ogutu instructed by M/s Ochieng Ogutu & Company Advocates.

Mr. Ogutu submitted that the Appeal arises from a decision of the IEBC Dispute Committee dated 9th June 2017 and that this court has powers under Article 165 (8) of the Constitution to supervise bodies exercising quasi-judicial jurisdiction. He submitted that the Appellant is contesting the decision of the Committee for dismissing his Complaint on the ground that it ought to have gone before the PPDT and that the framers of the Constitution did not intent to have a party left without judicial remedy.

Ms Olao submitted that this court does not have jurisdiction to hear this appeal because it has come to this court by way of an appeal and that appeals from the IEBC Dispute Committee are not allowed.

In reply, Mr. Ogutu submitted that Ms Olao has failed to address Article 88 (4) (e) of the Constitution and

the public notice issued by the IEBC that parties who had disputes file them with IEBC because the PPDT was no longer sitting. He said that the Appellant is bringing this appeal on merit and that the dispute arose when the Appellant went to present his nomination papers to IEBC.

I have considered the submissions. The matter before me is simple. Is this appeal competent and does this court have jurisdiction to entertain it?

The IEBC Dispute Committee derives its jurisdiction from 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 provisions do not vest any jurisdiction to this court to hear appeals from this committee. It is trite law that power and authority of the court is derived from the Constitution or statute. This is in respect of determination of disputes in the first instance or on appeal. The power of appeal cannot be inferred or implied but must be conferred expressly. Article 88 (4) of the Constitution and Section 74 of the Elections Act do not 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.”***

The issue of jurisdiction has been addressed in various authorities. 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**

In Election Nominations (IEBC) Appeal No. 1 of 2017 the court, in dismissing a similar appeal, stated that:

“While it is true that the High Court under Article 165 has unlimited jurisdiction in civil and

criminal matters, save those reserved for the specialized courts under Article 162 (2), Article 165 (3) (e) of the Constitution, is explicit that the court is also only to exercise such appellate jurisdiction as may be conferred by legislation. An appellate jurisdiction of the High Court may thus be exercised only where an Act of Parliament confers it.”

I am live to the fact that the High Court has powers to exercise supervisory powers over other bodies exercising quasi-judicial function like this Committee but certainly not by way of Appeals. This addresses the issue that no party to a dispute should be left without legal remedy. I wish to state that in my view and going by the Constitution and the Elections Act no appeals lies to this court from decisions of the IEBC Disputes Committee. This appeal is therefore incompetent and must be and is hereby struck out. I make no order as to costs. Orders shall issue accordingly.

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

S. N. MUTUKU

JUDGE