



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW NO. 345 OF 2017

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 73, 75, 77, 80, 160, 165 AND 179 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION ACT, NO. 9 OF 2011,**

AND

IN THE MATTER OF THE POLITICAL PARTIES ACT, NO. 11 OF 2011

AND

IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO. 17 OF 2012

BETWEEN

ADAM BARISA DHIDHA.....1ST PETITIONER

MOHAMED DADO HATU.....2ND PETITIONER

MOHAMED BWANAIDI.....3RD PETITIONER

DICKSON KOFA.....4TH PETITIONER

MKYABUCHU ALI.....5TH PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

SECRETARY GENERAL, ORANGE DEMOCRATIC

MOVEMENT PARTY.....2ND RESPONDENT

DHADHO GADDAE GODANA.....3RD RESPONDENT

RULING

[1] The 1st Petitioner, **Adam Barisa Dhidha**, filed the Petition dated **13 July 2017** seeking declaratory and other orders against the Respondents in the following terms:

[a] **A declaration that the 1st and 2nd Respondents have abdicated, neglected and/or failed to uphold their duties as envisaged under Article 3, 10, 38, 47, 50, 81 and 84 of the Constitution of Kenya, 2010.**

[b] **A declaration that the Respondents have failed to comply with, and/or breached the provisions of the Constitution, Elections Act and the County Government Act in the conduct of their duty, and thus in gross violation of the law.**

[c] **A declaration that the gazettelement of the 3rd Respondent by the 1st Respondent as the duly nominated candidate by the 2nd Respondent for the Tana River County gubernatorial election is unlawful and therefore null and void.**

[e] **An order of Certiorari to remove into the High Court and quash the decision of the 1st Respondent duly nominating the 3rd Respondent as the gubernatorial aspirant for Tana River County.**

[f] **That the Court does issue an order directing the 1st Respondent to clear and gazette the 1st Petitioner as the candidate duly nominated by the 2nd Respondent to vie for the gubernatorial position for Tana River County.**

[2] Along with the Petition, the 1st Petitioner filed the Notice of Motion of even date seeking orders that, pending the hearing and determination of the Petition, the candidature of the 3rd Respondent as the duly nominated gubernatorial candidate for the Tana River County in the forthcoming **August 8, 2017** General Elections be suspended. The application was supported by the affidavit annexed thereto, sworn by the 1st Petitioner together with the annexures thereto, which I have perused and considered. The 1st Petitioner's main ground for complaint is basically that the 3rd Respondent does not possess the requisite academic qualification to vie for the elective officer of Governor.

[3] It is noteworthy that whereas the Petition and the application bear the names of all five Petitioners, there seems to be no specific reference to the 3rd to 5th Petitioners either in the body of the Petition or the application. Accordingly, I would proceed on the basis that the application is that of the 1st Petitioner's.

[4] In response to the application, the 1st Respondent filed the Replying Affidavit sworn by its Legal Officer, **Mr. Douglas Bargorett** on **26 July 2017**. The contention of the 1st Respondent was that, if indeed the 1st Petitioner felt aggrieved by the clearance of the 3rd Respondent to vie, then he ought to have pursued his grievance through the dispute resolution mechanisms set out in **Section 40** of the **Political Parties Disputes Act** as well as the **Elections (General) Rules**; and therefore that the 1st Petitioner is guilty of laches.

[5] On behalf of the 3rd Respondent, a Notice of Preliminary Objection was filed on **25 July 2017** on the grounds that:

[a] The Court has no jurisdiction to hear and determine the matter or grant the prayers sought as stipulated under **Section 40(1)(fa)** of the **Political Parties Act**;

[b] The Notice of Motion application dated **13 July 2017** and the Petition filed herein are *res judicata* as the issues raised therein have been raised and determined in **Petition No. 152 of 2017: Mohamed Dado Hatu vs Dhadho Gaddae Godana and 2 Others**; and **Petition No. 188 of 2017: Adam Barisa Dhidha vs. Dhadho Gaddae Godana and 2 Others**;

[c] That the Notice of Motion application and the Petition dated **13 July 2017** are an abuse of the court process as the 1st and 2nd Petitioners have since abandoned **Petitions Nos. 152 of 2017 and 188 of 2017**.

[6] This ruling is therefore in respect of the 3rd Respondent's Preliminary Objection, which was urged by **Mr. Chenge** on **31 July 2017**. According to Mr. Chenge, the 1st Petitioner raised the very issue of the 3rd Respondent's suitability as a candidate in **High Court Petition No. 152 of 2017** and the matter, upon being placed before **Mwita, J**, it was ruled that the issue as to whether or not the 3rd Respondent had a degree certificate was for the relevant party and IEBC to determine. Proceedings of the Court in **High Court Petition No. 152 of 2017** were availed as an attachment to the Notice of the Preliminary Objection for the Court's perusal.

[7] In similar fashion, **Mr. Chenge** urged the Court to peruse the proceedings of **Mativo, J** in **High Court Petition No. 188 of 2017** to confirm his contention that similar complaints were raised therein against the 3rd Respondent, and that the Court dismissed the same on the grounds that the same ought to have been pursued within the timelines set out for the resolution of such disputes pursuant to **Section 40** of the **Political Parties Act**. Counsel urged the Court to find that the 1st Petitioner, having failed to demonstrate that he had pursued his complaint through his political party's internal dispute resolution mechanism, or that an appeal therefrom was filed to the Political Parties Dispute Tribunal, has no cause for complaint.

[8] Counsel for the Petitioners, **Mr. Mburu** and **Mr. Kago**, opposed the 3rd Respondent's Preliminary Objection, contending that the Court does have the jurisdiction to hear and determine the Petition and the application filed therewith pursuant to **Article 165** of the Constitution. They further argued that the Petition involves four other Petitioners who are not members of the Orange Democratic Party, and are therefore not subject to the procedure envisaged by Section 40 of the Political Parties Act. On the authority of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**, Counsel for the Petitioners argued that *res judicata* plea cannot be said to raise a pure point of law, as evidence would be required to demonstrate that the matter had been raised before and determined by a Court of competent jurisdiction. The case of **Henry Wanyama Khaemba vs Standard Chartered Bank (K) Ltd [2014] eKLR** was also cited to buttress the foregoing arguments.

[9] It is a well-settled principle that a Preliminary Objection is that point of law which is argued on the assumption that all the facts as pleaded by the other side are correct; and which if argued *in limine* may dispose of the suit. In the **Mukisa Biscuit Case**, the Court (per Charles Newbold, P) laid down the principle thus:

"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."

[10] It is a point of law that no court shall entertain a matter which has been in issue before a different court and which has been reflected on and determined by that court. This is the essence of **Section 7** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; which reads:

"No court shall try any suit or issue in which the matter directly and substantially in

issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

[11] I have perused the persuasive authority of **Henry Wanyama Khaemba vs. Standard Chartered Bank (K) Ltd [2014] eKLR**, but would, with due respect, disagree with the conclusion reached therein, because the whole essence of a preliminary objection is to further the overriding objective of the Civil Procedure Act and Rules thereunder, as set out in **Section 1A of the Civil Procedure Act**, namely to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. require evidence. Accordingly, my persuasion leans towards the position taken by **Ringera, J** (as he then was) in **Omondi vs National Bank of Kenya Ltd & Others [2001] eKLR** that:

"...both 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 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 ..."

[12] Thus, having perused the Petition and its supporting documents, as well as the application filed therewith, there can be no dispute that the same issues raised in the instant Petition are the very issues that were raised in **Nairobi High Court Petitions Nos. 152 of 2017** whose proceedings were attached to the Notice of the Preliminary Objection. I have further called for and perused the two Court Files for **High Court Petition No. 152 of 2017** and **High Court Petition No. 188 of 2017**, and confirmed that the issues are the same. There does not seem to be any controversy that in both matters, the respective Courts finally pronounced themselves on different dates that the question of the 3rd Respondent's academic qualifications was a matter that ought to have been taken up through the 2nd Respondent's internal dispute resolution mechanism; and thereafter the Political Parties Disputes Tribunal if necessary. Accordingly the instant application and the Petition upon which it is founded are indeed *res judicata*.

[13] The foregoing being my view of the matter, I would uphold the preliminary objection raised herein by the 3rd Respondent and find that both the application and the Petition herein filed by the Petitioners are incompetent and are hereby struck out with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST, 2017

OLGA SEWE

JUDGE