Khalif v Farah & 8 others (Civil Appeal E765 of 2024)
[2025] KEHC 6097 (KLR) (Civ) (21 March 2025) (Judgment)

Neutral citation: [2025] KEHC 6097 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E765 OF 2024

JM OMIDO, J

MARCH 21, 2025

BETWEEN

ABUBAKAR MOHAMED KHALIF ..... APPELLANT

AND

MOHAMMED ABDI FARAH ..... 1ST RESPONDENT

THE SPEAKER, GARISSA COUNTY ASSEMBLY ..... 2ND RESPONDENT

THE CLERK, GARISSA COUNTY ASSEMBLY ..... 3RD RESPONDENT

AHMED ABDIRAHMAN SHEIKH ..... 4TH RESPONDENT

MAHAT ABDIKADIR IBRAHIM ..... 5TH RESPONDENT

ONE KENYA COALITION PARTY ..... 6TH RESPONDENT

ORANGE DEMOCRATIC MOVEMENT ..... 7TH RESPONDENT

ABDI IBRAHIM DAAR ..... 8TH RESPONDENT

OMAR ABDI HASSAN ..... 9TH RESPONDENT

(Being an appeal from the Ruling of the Political Parties Disputes Tribunal at Nairobi (Hon. Desma Nungo, Hon. Stephen Musau, Hon. Abdirahman Abdikadir and Hon. Muzna Jin) delivered on the 14th June, 2024 in: POLITICAL PARTIES DISPUTES TRIBUNAL PPDT COMPLAINT NO. E002 OF 2024)

JUDGMENT

A. Background

1. This appeal emanates from the Ruling of the Political Parties Disputes Tribunal delivered on 14th June, 2024 in PPDT Complaint No. E002 of 2024; Abubakar Mohamed Khalif v Mohamed Farah & others.

2. The proceedings before the Tribunal were commenced by way of a Statement of Complaint dated 22nd April 2024 ("the Complaint"), whereby the Appellant (the Complainant before the Tribunal) sought to challenge his ouster as the Leader of Majority in the County Assembly of Garissa and sought the following reliefs:

    a. A declaration that the meeting irregularly convened on 3rd September, 2023 at Rabaat Conference Hall in Garissa without communication and/or notice from the Majority Whip, the 3rd Interested Party be declared null and void.

    b. A declaration that the letter dated 3rd September, 2023 addressed to the Speaker of Garissa County Assembly communicating the removal of Hon. Abubakar Mohamed Khalif as the Leader of Majority in the County Assembly of Garissa and in his place communicating the election of Hon. Mohammed Abdi Farah as the new Leader of Majority be declared illegal, null and void.

    c. The Honourable Tribunal do issue an order revoking and/or rescinding the letter dated 3rd September, 2023 addressed to the Speaker of Garissa County Assembly communicating the removal of Hon. Abubakar Mohamed Khalif as Leader of Majority in the County Assembly of Garissa and in his place communicating the election of Hon. Mohammed Abdi Farah as the new Leader of Majority.

    d. A declaration that the communication from the 2nd Respondent on 5th September, 2023 in the County Assembly of Garissa communicating the change in leadership of the 1st Interested Party be declared a nullity.

    e. A declaration that any communication to the Speaker of Garissa County Assembly from the 4th Respondent purporting to communicate change in leadership of the 1st Interested Party arising from the irregularly convened meeting of 3rd September, 2023 at Rabaat Conference Hall Hotel in Garissa be declared null and void.

    f. The Honourable Tribunal do issue an order prohibiting and/or restraining the 1st, 4th and 5th Respondents from acting as and/or discharging the functions of the Leader of Majority, the Majority Whip and Member of the County Assembly Service Board respectively pending the hearing and determination of the Complaint herein.

    g. A declaration that the removal of the Complainant, the 3rd Interested Party and the 4th Interested Party as the leader of Majority, the Majority Whip and Member of the County Assembly Service Board respectively was unprocedural and unlawful.

    h. A declaration that Hon. Abubakar Mohamed Khalif is the Lawful Leader of Majority in the County Assembly of Garissa.

    i. Any other orders that the Tribunal May deem fit.

    j. Costs of the Complaint.

3. Contemporaneous with the Statement of Complaint, the Complainant filed an application by way of motion on notice dated 22nd April, 2022 in which he sought for the following interim reliefs:

    1. [Spent].

    2. That this Honourable Tribunal do issue an interim order of stay on the implementation of the of the communication by the Speaker of the County Assembly of Garissa of 3rd September, 2023 on the purported change of the leadership in the 1st Interested Party in the County Assembly pending the hearing and determination of this application.

    3. That this Honourable Tribunal do issue an interim order of stay on the implementation of the of the communication by the Speaker of the County Assembly of Garissa of 3rd September, 2023 on the purported change in the leadership of the 1st Interested Party in the County Assembly pending the hearing and determination of the Complaint.

    4. That this Honourable Tribunal do issue an interim order restraining the 1st, 4th and 5th Respondents from assuming the office, discharging the functions of or in any manner conducting themselves as the Leader of Majority, the Majority Whip and the Member of the County Assembly Service Board respectively pending the hearing and determination of this application.

    5. That this Honourable Tribunal do issue an interim order restraining the 1st, 4th and 5th Respondents from assuming the office, discharging the functions of or in any manner conducting themselves as the Leader of Majority, the Majority Whip and the Member of the County Assembly Service Board respectively pending pending the hearing and determination of the Complaint herein.

    6. That this Honourable Tribunal do issue directions on the expeditious disposal of the application and Complaint.

    7. THAT the costs of this application be provided for.

4. In response to the Appellant's Complaint, two Notices of Preliminary Objection dated 11th April, 2024 and 9th May, 2024 were filed. The first Notice of Preliminary Objection was filed by the 2nd and 3rd Respondents while the second was presented by the 1st, 4th and 5th Respondents.

5. Both Preliminary Objections challenged the Tribunals jurisdiction to hear and determine the Complaint presented before it, by virtue of provisions of the *Political Parties Act*. The Respondents also challenged the Appellant's locus to file the Complaint.

6. The points raised in the 1st, 4th and 5th Respondents' Notice of Preliminary Objection dated 9th May, 2024 were as follows:

    i. That this Honourable Tribunal has no original jurisdiction to hear and determine this suit in view of the provisions of Section 39, 40(1) (a), (b), (c), (e) and (fa) and Section 41 of the *Political Parties Act* No. 11 of 2011 which vests jurisdiction to hear and determine disputes relating to political parties first to the Internal Political Party Disputes Resolution Mechanisms.

    ii. That the Complainant/Applicant herein lacks locus standi to institute these proceedings, the dispute herein being a dispute relating to Coalition Parties under a Coalition Agreement.

    iii. That for the foregoing, the Complainant/Applicant's application is incompetent, legally untenable and ought to be struck out with costs.

7. The second Notice of Preliminary Objection presented the following points:

   i. This Honourable Tribunal does not have jurisdiction to hear and determine this matter by virtue of Section 40(2) of the *Political Parties Act*, 2011. The dispute has not yet been heard and determined by the Internal Political Party Dispute Resolution Mechanism (IDRM) thus the complaint filed herein is premature.

   ii. The Applicant lacks locus standi within the context of Section 40 of the *Political Parties Act* to institute these proceedings and can only move this Honourable Tribunal through the Orange Democratic Party (ODM) in any event.

   iii. The matter intended to be injuncted has already taken effect, thus rendering the instant application moot.

   iv. The Complainant has failed to enforce his right of IDRM through mandamus and is therefore estopped from pleading frustration. Lack of quorum in the IDRM or otherwise does not operate as a waiver or estoppel against the *Political Parties Act* statutory requirements.

8. The Tribunal directed that responses to the Complaint be filed and that the Preliminary Objections be heard first. That, of course was for good measure, because once the issue of jurisdiction is raised, a court or tribunal is under judicial duty to determine it first before delving into any other issues (see Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited [1989] eKLR) and Nairobi City Water & Sewerage Co. Ltd v Rufus (Civil Appeal E767 of 2021) [2024] KEHC 11156 (KLR) (Civ) (24 September 2024) (Judgment).

9. The Preliminary Objections were canvassed before the Tribunal by way of written submissions and parties were accorded ample opportunities to highlight their respective submissions.

10. After considering the respective positions of the parties herein on the two sets of Preliminary Objections, the Tribunal set out the issues for determination as follows:

   a. Whether the Preliminary Objections are proper?

   b. Whether the Tribunal has jurisdiction to hear and determine the Complaint.

   c. What are the appropriate reliefs to grant?

11. In its ruling rendered on 14th June, 2024, the Tribunal found in favour of the Respondents that the Preliminary Objections as presented in the two Notices of Preliminary Objections were proper as they were premised on pure points of law and that the Tribunal did not have jurisdiction to hear and determine the Complaint filed before it. With that inclination, the Tribunal proceeded to make the following final orders:

   1. The Preliminary Objection dated 9th May, 2024 filed on behalf of the 1st, 4th and 5th Respondents and the Preliminary Objection dated 11th May, 2024 filed on behalf of the 2nd and 3rd Respondents are both hereby upheld.

   2. The Complaint herein be and is hereby struck out.

3. The costs of these proceedings are awarded to the 1st to 5th Respondents as against the Complainant.

12. Being aggrieved with the decision of the Tribunal, the Appellant preferred the present appeal, premised on fifteen (15) grounds of appeal vide the Memorandum of Appeal dated 28th June, 2024, which grounds may be summarised as follows:

a. That the Tribunal erred and misdirected itself in law in allowing the Preliminary Objections dated 9th May, 2024 and 11th May, 2024 by determining the objections that were not premised on pure points of law but on disputed matters of fact.

b. That the Tribunal erred in law and misdirected itself on the application of the provisions of Section 40(2) of the *Political Parties Act* requiring evidence of an attempt to subject the dispute to Internal Dispute Resolution Mechanisms (IDRM) prior to the Tribunal assuming jurisdiction which could not be determined on the basis of Preliminary Objections.

c. That the Tribunal erred in law in purporting to create a new test not provided for under Section 40(2) of the *Political Parties Act* to the extent that the Appellant ought to have undertaken all Internal Dispute Resolution Mechanisms provided under the 6th Respondent's Deed of Agreement prior to approaching the Tribunal and that in so doing, the Tribunal was not interpreting the statute but legislating from the bench.

d. That the Tribunal erred and misdirected itself in law in usurping the role of the 6th Respondent as a Coalition Party in purporting to propose the ideal Internal Dispute Resolution Mechanism which the Appellant ought to have used contrary to the provisions of the *Political Parties Act* and the 6th Respondent's Deed of Agreement.

e. That the Tribunal erred in law in conflating the Complaint before it with an election dispute falling under Article 9 of the Deed of Agreement which dispute would require to be handled by the Coalition Elections Board in the first instance and thereafter the Coalition Elections Appeals Board.

f. That the Tribunal misdirected itself in law on the jurisdiction of the Dispute Resolution Panel provided under Article 16 of the 6th Respondent's Deed of Agreement and as a result arrived at a wrong determination in law that the Dispute Resolution Panel was not the first point of call for the Appellant.

g. That the Tribunal erred in law in determining an issue not before it on the genuineness and/or validity of the letter by the 6th Respondent dated 15th April, 2024 which could not be determined at the hearing of the two Preliminary Objections.

h. That the Tribunal abdicated its role as an impartial arbiter of a dispute between members of a Coalition Party and made narrow, biased and partisan decision which is not anchored in law.

13. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* to reassess, reanalyze and reconsider the positions that the parties presented before the Tribunal and draw my own conclusions on the issues presented on appeal. I will therefore proceed to discharge that duty.

B. Submissions Made Before The Tribunal In Support Of The Preliminary Objections On The Issue Of Jurisdiction.

14. The first limb to this issue, as proffered by 1st, 4th and 5th Respondents, was that the Tribunal did not have jurisdiction to entertain and determine the Appellant's Complaint. The three parties sought to rely on Sections 39 and 40 of the *Political Parties Act*. Section 30 of the Act establishes the Political Parties Disputes Tribunal while Section 40 provides for the jurisdiction of the Tribunal as follows:

> 40. Jurisdiction of Tribunal
>
> (1) The Tribunal shall determine—

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and the political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners;

(f) appeals from decisions of the Registrar under this Act; and

(fa) disputes arising out of party nominations.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs *(a)*, *(b)*, *(c)*, *(e)* or *(fa)* unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.

(3) A coalition agreement shall provide for internal dispute resolution mechanisms.

15. The three Respondents took the position that under Section 40(2) of the statute, unless the Tribunal is satisfied that parties to the dispute had exhausted the concerned party's or coalition's internal dispute resolution mechanisms, the Tribunal is not clothed with jurisdiction to entertain a dispute that is presented before it in the form of a Complaint.

16. They submitted that the Appellant, as a Complainant, was mandatorily required under the above provision to provide evidence that an attempt had been made to subject the dispute to the internal dispute resolution mechanism of the 6th and 7th Respondents for the Tribunal to have jurisdiction to consider his Complaint.

17. The three Respondents relied on their replying affidavit (filed in response to the Complaint) and stated that the Appellant purported to have initiated internal dispute resolution mechanism but pointed out that the same was done through the 7th Respondent but in exception to the other affiliate parties of the 6th Respondent Coalition, to wit Wiper, KANU, UPIA and Jubilee Political Parties, which were all parties to the 6th Respondent/Coalition's Agreement, contrary to the said agreement.

18. On their part, the 2nd and 3rd Respondents submitted that the Complaint filed by the Appellant before the Tribunal dispensed a dispute relating to the leadership of the 6th Respondent's (Azimio la Umoja One Kenya Coalition) in the County Assembly of Garissa, and thus was a dispute between coalition partners under Section 40(1)(e) of the *Political Parties Act*.

19. The view then that the two Respondents took is that the proper forum for resolution of the dispute that the Appellant presented through his Complaint, as the first port of call, was as provided for under Article 16 of the 6th Respondent's Coalition Agreement dated 12th March, 2022, which was annexed to the replying affidavit filed by the 2nd and 3rd Respondents, sworn on 21st May, 2024 by Hon. Abdi Idle Gure.

20. The two Respondents stated that Section 40(1), (2) & 3 of the Act was clear that the Appellant ought first to have attempted to subject the dispute to the internal political party dispute resolution mechanisms before filing it as a Complaint in the Tribunal.

21. The two Respondents further submitted that for the jurisdiction of the Tribunal to be properly invoked, the Appellant was obligated by statute under Section 40(2) to adduce evidence of an attempt

to subject the dispute to the internal political party dispute resolution mechanisms and that in the absence of such evidence, the Complaint was a non-starter as the Tribunal had no jurisdiction to determine it.

22. The two Respondents invited the Tribunal to consider letters annexed to the affidavit of Hon. Abdi Idle Gure which in their view did not amount to an attempt at refence to internal disputes resolution mechanisms.

23. The 2nd and 3rd Respondents relied on the authority of Godfrey Murithi Muchiri v Speaker, Tharaka Nithi County Assembly & 2 others where this court (Limo J) held as follows:

> "
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> > " 21. The Plaintiffs have invoked the jurisdiction of this court under Article 165(3) (a) which grants this court unlimited jurisdiction in both criminal and civil matters. It is however trite that *the Constitution* of Kenya requires wholesome interpretation because one Article thereof cannot be read in isolation. Under Article 165(5) for example the jurisdiction of this court is ousted on matters reserved exclusively for the Supreme Court, and issues touching on Article 162(2) of *the Constitution*. A further reading of Article 159(1)(c) indicates that one of the principles guiding this court in the exercise of its judicial authority is the promotion of alternative forms of disputes resolution mechanisms. So where a Statute clearly states that such a dispute should first be handled by a Statutory body, it is not proper for the court to usurp jurisdiction. In this instance the Statute clearly grants this court appellate jurisdiction over political disputes involving either members of Political Parties or members of a political party and the party itself.
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> The law cited above has clearly stated that the first port of call is the internal party organ then the Tribunal itself. It is only then and upon Tribunal making a decision that the appellate jurisdiction of this court can be invoked. The original jurisdiction to deal with party affairs rests in other avenues as cited in the *Political Parties Act* and unless a party can demonstrate that the other avenues provided is an impediment to right to access justice, or any other fundamental rights there is no basis to invoke inherent jurisdiction of this court under Article 165(3) of *the Constitution* of Kenya. I do not find basis for the Plaintiff/Applicants to invoke the said jurisdiction because no basis has been laid before me."

24. Reliance was also placed on the decision of this court in Republic v Speaker, West Pokot County Assembly & 2 others Exparte David Pkeu Kapeliswa & another; Kenya African National Union (Kanu) (Interested Party) [2020] eKLR in which Sitati J observed as follows:

> 43. In the instant case, I hold the firm view that the real combatants in this case are the Petitioners on the one hand and the 2nd and 3rd Respondents on the other hand. It is conceded by the Petitioners that all of them got into the County Assembly on KANU tickets, the party with the majority in the West Pokot County Assembly. The Petitioner's entry into the County Assembly preceded their elevation to the positions of majority leader and chief whip. Without their party, none of them would have tested the trappings of power of those positions. Their case thus falls squarely within the provisions of section 40(1)(a) and (b).
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> 44. It is clear from the various decisions cited by the Respondents and the Interested Party, and in particular the case of Born Bob Maren Case (above) that the election of the majority leader and the chief whip is a prerogative of the members of West Pokot County Assembly and

in particular Standing Order Number 17 which falls under the heading "County Assembly Political Leadership." The positions are firmly held in the hands of the members who are ready to give them to whomsoever they choose and also take the positions away any time they see fit. The speaker of the assembly in my view, is a convenient bridge by which the combatants herein intended to get at each other's throats. The speaker does not choose who becomes majority leader or chief whip. The choice lies with the party members. It is as clear as daylight that the officers over which the Petitioners' and the 2nd and 3rd Respondents are fighting constitute the political leadership of West Pokot County Assembly.

45. As stated by the judge in Born Bob Maren Case (above), I wish to echo those words in making a finding that the Petitioners suit is not for this court because they failed to observe the doctrine of exhaustion. The Petitioners have also misapprehended the provisions of section 40(2) of the *Political Parties Act*, No. 11 of 2011. The learned judge said, and I wholly concur with the view:-

"I too find that the questions relating to the process and the decision by the Minority Party to remove the Petitioner from the position of the leader of Minority Party and to replace him with the 3rd Respondent is a political matter involving the internal affairs of the Minority Party or parties. The minutes of the meeting of 9/9/14 demonstrate this fact starkly. Parliament, in recognition that such disputes will occur within political parties, has provided a mechanism for dealing with them. Hence the provisions of Sections 39 and 40 of the *Political Parties Act*. Section 39 provides for the establishment of the Political Parties Disputes Tribunal while Section 40 sets out its jurisdiction."

25. The second limb to the issue of jurisdiction as urged by the 1st, 4th and 5th Respondents is that as the Appellant was a member of the Orange Democratic Movement (the 7th Respondent herein), which political party was an affiliate party of the Azimio la Umoja One Kenya Coalition Party (the 6th Respondent in this appeal), the Complaint could only lawfully be addressed through the 7th Respondent as a political party, and not through or by the Appellant as an individual.

26. As such, the three Respondents took the view that the Appellant had no locus to present the Complaint as an individual, and that by itself presented a challenge to the Tribunal's jurisdiction to determine the dispute.

27. In that regard, the three Respondents relied on the decision of the Political Parties Disputes Tribunal in Maendeleo Chap Chap & another v Registrar of Political Parties & another; Maendeleo Chap Chap (Interested Party) (Complaint E060 (NRB) & E016 of 2022 (Consolidated) [2022] KEPPDT 976 KLR (10 May 2022) (Judgement) in which the Tribunal held as follows:

"

" 61. Further as regards the Complaint in PPDT E016/2022, we agree with the RPP and the coalition party that the Complainant being a member of the party cannot directly and by himself seek claims in relation to matters involving the coalition agreement. He ought to have first moved his party's IDRM with a view to the party taking up the matter. In fact we note from the record that a party not before us (the Vice Chairman of Maendeleo Chap Chap) previously moved the Maendeleo Chap Chap party's IDRM (the Internal Dispute Resolution Tribunal) which rendered a decision and further directed the party to take up the matter and write to Azimio la Umoja One Kenya Coalition in the first instance. This has not happened in this case.

62. In PPDT Complaint No 12 of 2021 Hon Senator Cleophas Malala vs. ODM & Others, the Tribunal observed as follows in respect to IDRM where coalitions are concerned:

> "....This Tribunal has previously taken the position that interests of individual members of political parties that have entered into a coalition agreement are within the protection of their respective political parties. Accordingly, such individual members can have their grievances in the coalition arrangement addressed through their political party vide the dispute resolution mechanisms provided for in the coalition agreement that their party has entered into. Indeed in the case of PPDT Complaint No 15 of 2020 Hon. Patrick Musili vs ODM & Others, we stated as follows:
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> "...in order to determine whether the Complaint is or can be described as a partner in the said coalition we have looked at the NASA coalition agreement that is attached to the Complaint and was referred to by all the parties in the course of their submissions. Article 2 of the said agreement defines the parties to coalition as Amani National Congress; Forum for Restoration of Democracy-Kenya; Orange Democratic Movement; Wiper Democratic Movement. Article 7 of the said NASA coalition agreement provide for the decision making process including at the county level. It thus emerges that interests of the members of the various political parties that form the coalition are protected by their political party."

The Applicant's political party in this case is Amani National Congress (the 2nd Respondent). Save to associate themselves with the submissions of the Applicant, the 2nd Respondent neither stated nor demonstrated that they made any attempt to address the Applicant's concerns through the mechanisms provided for in the Coalition Agreement. As we stated in the case of Patrick Musili already referred to above, it is an unfavorable approach to fail to sort out or attempt to sort out political party issues, which are largely negotiation issues, within the context provided for (such as the coalition documents), and instead ask this Tribunal to act..."

28. The 2nd and 3rd Respondents reiterated the submissions of the 1st, 3rd and 4th Respondents on the second limb, that member of a political party has no capacity or locus to directly file a Complaint to the Tribunal and that any such dispute or complaint can only be addressed under the relevant coalition agreement through the political party to which such an individual is a member.

29. The two Respondents relied on decisions of the Political Parties Disputes Tribunal rendered in PPDT Complaint No. E012 of 2021 Hon. Senator Cleophas Malala v Orange Democratic Movement & others and PPDT Complaint No. 15 of 2020 Hon. Patrick Musili v Orange Democratic Movement & others, both of which were cited in the Tribunal's decision of Maendeleo Chap Chap & another (supra), which the 1st, 4th and 5th Respondents relied upon (see above).

C. SUBMISSIONS MADE BEFORE THE TRIBUNAL IN OPPOSITION TO THE PRELIMINARY OBJECTIONS ON THE ISSUE OF JURISDICTION.

30. The Appellant stated in his submissions that the two Notices of Preliminary Objections that were filed did not meet the test as set out in the case of Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] EA 696 in that no pure point(s) of law emerged from the same

that was or were capable of being determined as such. The relevant passage in that decision, as per the judgement of Law, JA is as follows:

> "....so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit.".

31. In his concurring opinion in the same case, Sir Charles Newbold added in part that:

> " A preliminary objection is in the nature of what used to be called 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." (Sir Charles Newbold).

32. The Appellant took the position that the issue as to whether he undertook or engaged the 6th Respondent's internal disputes resolution mechanism as required under Section 40(2) of the *Political Parties Act* was a contested issue that could not be determined through a preliminary objection as the same required the interrogation of evidence and/or facts.

33. To that end, the Appellant relied on the Tribunal's decision in Muchiri Kariuki & 6 others v Jubilee Party; Raphael Tuju, Acting Secretary General Jubilee Party (Interested Party) & 2 others [2021] eKLR, where it was held that:

> " 28. We note that the determination on the issue as to whether IDRM was instituted, from the circumstances presented in the instant case contain factual issues that have to be ascertained and therefore do not constitute pure points of law. In the circumstances, the preliminary objection in respect of section 40(2) of the PPA fails."

34. To that end, the Appellant submitted that the Notices of Preliminary Objections as filed were not tenable as they were not based on pure points of law and that in any event, he had tendered evidence that he invoked or attempted to invoke the 5th Respondent's/coalition's internal dispute resolution mechanism before moving to the Tribunal. The Appellant's position on this question is that indeed, contrary to the positions taken by the proponents of the Preliminary Objections, he presented evidence to demonstrate attempts that he made to have the dispute subjected to the 6th Respondent's internal disputes resolutions mechanisms.

35. As to whether the Tribunal had the jurisdiction to entertain his complaint, the Appellant urged that the only statutory ouster of the Tribunal's jurisdiction is to be found under Section 40(2) of the Act which provides that:

> (2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs *(a)*, *(b)*, *(c)*, *(e)* or *(fa)* unless a party to the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.

36. The Appellant referred the Tribunal to Article 16 of the 6th Respondent's Deed of Agreement dated 12th March, 2022 which provided for the internal disputes resolution mechanisms, and Article 16(1) thereof which established the Dispute Resolution Panel comprising 5 members appointed by the Coalition Panel.

37. The Appellant pointed out to the Tribunal that the position that was communicated vide a letter dated 15th April, 2024 was that the 6th Respondent's Dispute Resolution Panel was not at the time quorate and was therefore not sitting.

38. The Appellant submitted that he had adduced evidence, vide letters dated 9th October, 2023, 12th April, 2024 and 15th April, 2024 annexed to the affidavit sworn on 15th May, 2024 to show that he had continuously made attempts to have his dispute first resolved internally through the party mechanisms prior to approaching the Tribunal but to no avail as the Dispute Resolution Panel had not been constituted, which fact was confirmed by the 6th Respondent vide the letter of 15th April, 2024.

39. With that, the Appellant urged that the Tribunal had the jurisdiction to hear and determine his Complaint as he had attempted to have his dispute resolved by the 6th Respondent's internal disputes resolution mechanisms, save that such was not available for as the body charged with determining the dispute within the party had not been empaneled.

40. The Appellant relied on the Political Parties Disputes Tribunal decision in Nairobi PPDT Complaint No. E002 of 2022 John Mworia Nchebere & others v The National Chairman Orange Democratic Movement & others, which was quoted in the case of Maendeleo Chap Chap & another (supra), where the Political Parties Disputes Tribunal issued guidelines on what would amount to an attempt at IDRM, thus:

> " Our pre-amendment position that a party must demonstrate bona fides (an honest attempt) in pursuing IDRM remains good law. Furthermore, the party to a dispute should also show that, among others:
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> a. The unavailability of the organ to resolve disputes;
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> b. If the same is available; it is inoperative, fraught with conflict of interest, obstructive, in perpetual paralysis or subject to inordinate delays which may compromise the subject matter of the dispute;
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> c. Reasonable time is afforded to the party to respond, constitute or activate an IDRM organ and deal or determine the dispute;
>
> d. Due consideration should be given to the urgency and public interest in the subject matter of the dispute; and
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> e. The reliefs sought should be proportionate, and if alternative remedies suffice to mitigate the harm likely to be suffered, the same should be considered. In essence, the utilitarian or proportionality of the process and remedies should be considered so as to achieve an equilibrium. The foregoing list is by no means exhaustive, but is a useful compass for navigating the frontiers delimited by section 40(2) of the *Political Parties Act*, 2011."

41. With regard to the question whether he had the locus to file the Complaint before the Tribunal, the Appellant referred the Tribunal to the definition of a Political Party under Section 2 of the *Political Parties Act*. Let us read it:

> " political party"—

a. means an association of citizens with an identifiable ideology or programme that is constituted for the purpose of influencing public policy of nominating candidates to contest elections; and

b. includes a coalition political party;

42. The Appellant submitted that the Preliminary Objections were misconceived as they were based on a wrong pretext that the Complaint was one under Section 40(1)(e) of the Act involving a dispute between coalition partners.

43. He submitted that the dispute was one that sought to challenge his illegal ouster as the Leader of Majority in the County Assembly of Garissa and the unsanctioned change in the 6th Respondent's leadership in the Assembly. In his view thus, the dispute was one that squarely fell within the realm of Section 40(1)(a) of the Act that involved members of a political party (the coalition party) and 40(1)(b) that involved a member of a coalition party and the coalition party.

44. The Appellant took the stand that as the aggrieved ousted Leader of Majority in the County Assembly of Garissa, he had a right to lodge his Complaint with the Tribunal to challenge the resolutions for his ouster, which he deemed unlawful and irregular and having been made without due process.

45. The Appellant placed reliance on the authority of Republic v County Assembly of Garissa & 2 others; Farah & 4 others (Interested Parties); Khalif & 3 others (Ex parte Applicants) [2024] KEHC 3496 (KLR) where the High Court Onyiego, J held as follows:

> "41. It is not controverted that the dispute before this court emanated from the members of Azimio la Umoja Coalition. The said Azimio la Umoja Coalition must be noted as a constituency of various political parties. To support their case, the respondents herein placed reliance on a case previously filed by the ex parte applicants herein before the PPDT via, PPDT Complaint No. E017 of 2023 which this court has since ably perused.
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> 42. The PPDT in the said case ruled that it lacked jurisdiction to determine the complaint before it for the reason that the applicants had not explored the IDRM. The PPDT went further to consider the letters by the applicants which alleged the exploration of the IDRM. The finding of the PPDT which finding I am in agreement with is that the said letters did not amount to a resolution of the dispute as the same only raised concern on the complainants being ejected from their respective positions in the Assembly. In short, the PPDT struck the complaint out and further noted that the complaint was filed prematurely before it. The ex parte applicants did not deny the same but rather urged that this court be guided by Section 9 of the Fair Administrative Act and article 165 on the inherent powers of the High Court.
>
> 43. If the applicants were aggrieved by the decision of the tribunal, they should have appealed to the high court as provided for under Section 41(2) of the *Political Parties Act* and in the converse proceed to their coalition party for redress. The applicants should not have abandoned the process provided under the *Political Parties Act* and proceed to the High Court. It would amount to abuse of the court process in my view.

44. The applicants argued that as individuals, they had no recourse to directly approach the Azimio coalition party for redress. The definition of apolitical party is provided under Section 2 of the *Political Parties Act* as;

    (a) an association of citizens with an identifiable ideology or programme that is constituted for the purpose of influencing public policy of nominating candidates to contest elections; and

    (b) includes a coalition political party.

45. The word election under the same section is defined as the act of selecting by vote, of a person or persons from among a number of candidates to fill an office or to membership of any political party and includes a presidential, parliamentary or county election.

46. There is no dispute that the dispute herein arose out of an election contest between members of Azimio coalition party. A political party whether as a single party or a coalition party is a party for all purposes and intents. Therefore, an aggrieved person can under Section 40(a) move the relevant party seized of the power to hear the dispute and make a determination. Although I did not get the opportunity to peruse the Azimio coalition party's agreement, it must be having a dispute resolution mechanism for its members from constituent parties.

47. It is my considered view that an individual can either directly or through his constituent party, move the coalition party for redress unless the coalition party's constitution expressly provides to the contrary. The bottom line is that, the applicants must exhaust the internal dispute resolution mechanism before approaching the tribunal and subsequently the court for judicial review reliefs. See Geofrey Muriithi case (Supra) where Justice Limo held that the dispute between Jubilee Party membership in respect of the County Assembly leadership ought to have been subjected to internal dispute resolution mechanism. Similar position was held in the case of Linus Kamungo Muchina vs Speaker Embu County Assembly and Majority Leader Embu County Assembly (supra).

46. To that end, the Appellant urged the 6th Respondent's Deed of Agreement dated 12th March, 2022 did not, under Article 16 thereof, limit who could institute a dispute before its Dispute Resolution Panel.

47. The 6th, 7th, 8th and 9th Respondent's supported the Appellants position.

D. Issues For Determination.

48. Now to this appeal, the issues that arise that this court is tasked to determine, as discernible from the record are as follows:

    a. Whether the two Preliminary Objections were premised on pure points of law and conversely, whether they were on matters of fact or evidence?

    b. Whether the Appellant had locus to present the Complaint to the Tribunal?

E. Analysis And Findings

49. With regard to the first issue which is whether the two Preliminary Objections were premised on pure points of law or on matters of evidence, we have seen above in the celebrated case of Mukisa Biscuits (sic) what amounts to a preliminary objection.

50. A preliminary objection must be on a pure point of law whereby the court or tribunal looking to determine the issue must shun the parties' invitation to consider contested matters of fact or those requiring proof by evidence (see Oraro v Mbaja [2005] 1 KLR 141; Simba Platinum Ltd v Simba Coach Limited & Another Asha Wanjiku Ali (Interested Party) [2021] eKLR.

51. Courts have variously defined a preliminary objection as one that consists of a point which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

52. In the case of Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu High Court Civil Case No.22 of 1999, the court observed that:

> " When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".

53. In Lemitei Ole Koros & another v Attorney General & 3 others [2016] eKLR, the court made the following holding, while discussing the import of a preliminary objection:

> " Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection."

54. The jurisprudence that emerges from the above authorities is that a preliminary objection must be on a pure point of law and not on matters or issues that are contested that would otherwise require proof through evidence. Matters that are contested cannot be determined by way of a preliminary objection because they require to be ascertained beyond what the pleadings bear.

55. A pertinent observation made in Mukisa Biscuits was that parties often wrongly present matters that are not pure points of law under the cover of preliminary objections, which practice the court strongly discouraged as it unnecessarily consumes precious judicial time. The court in that case observed as follows:

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop."

56. The question that then abounds is whether the issues that were raised in the two Notices of Preliminary Objections were pure points of law that would satisfy the definition of a preliminary objection as was espoused in the case of Mukisa Biscuits.

57. The proponents of the two Preliminary Objections presented the following issues:

    i. That the Tribunal had no jurisdiction to entertain and determine the Complaint before it.

ii. That the Appellant had no locus to present the Complaint before the Tribunal.

58. In urging the point that the Tribunal did not have jurisdiction to entertain and determine the Complaint, the movers of the two objections relied on Section 40(2) of the *Political Parties Act* which provides that the Tribunal has no jurisdiction to determine some disputes under Section 40(1) of the Act, unless the Complainant in the dispute adduces evidence of an attempt to subject the dispute to the internal political party dispute resolution mechanisms. The disputes listed in this category under Section 40(1) are as follows:

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and the political party;

(c) disputes between political parties;

(d) .....

(e) disputes between coalition partners;

(f) .....

(fa) disputes arising out of party nominations.

59. It was argued by the Respondents who filed the objections that for the jurisdiction of the Tribunal to be properly invoked, the Appellant was under a legal duty to first present evidence that he made an attempt to subject the dispute to the internal political party dispute resolution mechanisms. The 2nd and 3rd Respondents referred the Tribunal to annextures to the Appellant's and Respondents' affidavits, in particular letters dated 12th and 15th April, 2024, which they stated did not demonstrate an attempt at IDRM by the Appellant.

60. The claim by the two Respondents that the annextures (letters) did not amount at an attempt at IDRM was an issue that the Appellant strongly contested.

61. One will notice that in arguing the above point, the protagonists largely referred to the filed affidavits and annextures and proceeded to present their respective positions and/or interpretations and purports of the documents, particularly the two letters referred to above and the 6th Respondent's Coalition Agreement.

62. The protest by the Appellant in this appeal is that the Tribunal fell into error by proceeding to determine the preliminary objections on matters that were contested and on material outside the pleadings, which went beyond the purview of a preliminary objection.

63. The Tribunal addressed and determined the issue as follows:

> " As we have already highlighted above, the Complainant in this case simply submitted that the contention that he did not undertake IDRM under Section 40(2) of the PPA is a contested fact that requires ascertainment, then relied on the holding in the Muchiri case to submit that the PO herein cannot 'pass muster as they are not based on pure points of law'. He went on to submit that he tendered evidence that he invoked the coalition's IDRM.
>
> We posit that it is not enough for the Complainant to simply state that the contention that he did not attempt IDRM is contested, and that therefore the POs are improper. Section 40(2) of the PPA provides that the Tribunal shall not hear or determine a dispute under Section 40(1) (a), (b), (c), (e) or (fa) of the PPA unless a party to the dispute adduces evidence

of an attempt to subject the dispute to the internal political party dispute resolution mechanisms.

In essence, in instances of objection to jurisdiction brought pursuant to Section 40(2) of the PPA, and noting that the section requires evidence of an attempt at IDRM, it would be inescapable for this Tribunal to consider evidence in arriving at a determination whether or not there was IDRM. The Complainant has already submitted and referred the Tribunal to the documents he deems of evidence of an attempt at IDRM. Section 40(2) of the PPA already invites the Tribunal to consider the same in considering the question of jurisdiction.

In light of the foregoing, and having considered the circumstances of this case, we are not persuaded by the Complainant's and the 1st, 2nd, 3rd and 4th Interested Parties' arguments that the POs before us are not proper noting that they touch on the question of our jurisdiction. The POs essentially emanate from the question of engaging the Coalition party's IDRM – a matter of law as provided for by Section 42(2) of the PPA."

64. I hear the Tribunal to say from its analysis and determination above that the definition of a Preliminary Objection in Mukisa Biscuits is in the application of Section 42(2) of the *Political Parties Act* expanded to allow parties to present contested facts and even adduce evidence on the same, for the reason that the Section provides that there must first be evidence of IDRM for the Tribunal to have jurisdiction to entertain and determine a Complaint before it.

65. With profound respect, I strongly disagree. Superior courts have not provided such an expanded definition or any other exception to the definition in Mukisa Biscuits, particularly on the aspect that a preliminary objection must present a pure point of law that is completely bereft of contested facts and matters that should be addressed in evidence.

66. In my view, by taking such a stand, the Tribunal attempted to re-write Mukisa Biscuits, a decision binding upon the Tribunal, to expand the meaning of a preliminary objection to include matters that are contested, which require an inquiry beyond the parties' pleadings. That was a wrong turn that the Tribunal took.

67. No doubt, Section 42(2) requires evidence of at attempt at IDRM for the tribunal to have jurisdiction to hear a Complaint. It must however be remembered that it is not only through a preliminary objection that a party can challenge the jurisdiction of a court or tribunal for failure to comply with a statutory provision.

68. A party who wishes to challenge a court's or tribunal's jurisdiction on such a ground may for instance file an application seeking to strike out the suit or Complaint in question, supported by an affidavit, in which case the parties can proceed and address the matter on contested issues, evidentiary material and other matters outside the pleadings. I therefore take a dissimilar view to the one that the Tribunal seemed to proffer that the only way that a Respondent to a Complaint can object upfront to its jurisdiction under Section 42(2) of the Act is through a preliminary objection.

69. Turning to the issue raised that the Appellant had no locus to approach the Tribunal, the record of the Tribunal shows that the parties urged their respective positions on the issue. However, the Tribunal did not determine the same in its ruling, ostensibly, I think, because it downed its tools upon reaching the opinion that it did not have jurisdiction. I will therefore not address it in this appeal.

70. Being of the foregoing persuasion, my finding then is that as the issue of jurisdiction under Section 42(2) of the *Political Parties Act* as was presented in the two Preliminary Objections was based on contested matters outside the pleadings, the same did not amount to a pure point of law and the Preliminary Objections ought to have failed in that respect.

71. I fully agree with the observation of the court in Muchiri Kariuki & 6 others (supra) that:

> "28. We note that the determination on the issue as to whether IDRM was instituted, from the circumstances presented in the instant case contain factual issues that have to be ascertained and therefore do not constitute pure points of law. In the circumstances, the preliminary objection in respect of section 40(2) of the PPA fails."

72. I am also on the same page with the court in the case of Lemitei Ole Koros & another (supra) in which the following holding was reached:

> "Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection."

73. It was not available to the Tribunal to consider contested and evidentiary matters outside the pleadings, and to delve into the affidavits and the annextures thereto, as it did, which were documents outside the purview of a preliminary objection. I must therefore fault the Tribunal for the stand that it took on the issue.

74. In the result, the finding that I reach is that the appeal is merited. I proceed to allow it and make the following orders:

a. The Order of the Tribunal of 14th June, 2024 allowing the Preliminary Objections dated 9th May, 2024 and 11th May, 2024 and striking out the Appellant's Complaint is hereby set aside and substituted with an order dismissing the two Preliminary Objections.

b. The Order of the Tribunal of 14th June, 2024 condemning the Appellant to pay the 1st to 5th Respondents' costs is hereby set aside and substituted with an order that costs before the Tribunal shall be determined by the Tribunal at the conclusion of the Complaint.

c. The Complaint is hereby remitted back to the Tribunal for hearing and determination by a panel that shall exclude Hon. Desma Nungo, Hon. Stephen Musau, Hon. Abdirahman Abdikadir and Hon. Muzna Jin.

d. The costs of this appeal, assessed at Ksh150,000/- are awarded to the Appellant, to be borne by the 1st, 2nd, 3rd, 4th and 5th Respondents jointly and severally. I make no order as to costs in respect of the 6th, 7th, 8th and 9th Respondents.

e. The Deputy Registrar of this court shall without delay cause the Tribunal file to be transmitted back to the Tribunal and a copy of this judgement shall be placed in the file. The matter will be mentioned before the Tribunal on 27th March, 2025 for directions. The nature of the matter demands that it be heard and concluded apace.

DELIVERED (VIRTUALLY) DATED AND SIGNED THIS 21ST DAY OF MARCH, 2025.

JOE M. OMIDO

JUDGE

For Appellant: Mr. Chege holding brief for Mr. Issa & Mr. Mbatai.

For 1St, 4Th & 5Th Respondents: Mr. Njengo.

For 2Nd & 3Rd Respondents: Ms. Amuka holding brief for Mr. Mohamoud.

For 6Th Respondent: No appearance.

For 7Th Respondent: Mr. Makori.

For 8th Respondent: No appearance.

For 9Th Respondent: No appearance.