Obonyo v Political Parties Disputes Tribunal; Obwaka & 6 others (Interested Parties) (Judicial Review Miscellaneous Application E002 of 2024) [2024] KEHC 12949 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12949 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2024

SC CHIRCHIR, J

OCTOBER 17, 2024

BETWEEN

GEOFREY ONDIRO OBONYO ..... APPLICANT

AND

POLITICAL PARTIES DISPUTES TRIBUNAL ..... RESPONDENT

AND

EDDIE MAKOKHA OBWAKA ..... INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT ..... INTERESTED PARTY

THE SECRETARY GENERAL, ODM ..... INTERESTED PARTY

HON PHILIP MAINA ONDAKO ..... INTERESTED PARTY

THE COUNTY ASSEMBLY OF KAKAMEGA ..... INTERESTED PARTY

THE SPEAKER, COUNTY ASSEMBLY KAKAMEGA ..... INTERESTED PARTY

AZIMIO LA UMOJA ONE KENYA COALITION ..... INTERESTED PARTY

RULING

1. The Exparte Applicant, Geoffrey Ondiro Obonyo (The Applicant) moved this court by way of Judicial Review seeking for an order of certiorari to remove to this court, for purposes of being quashed, the entire proceedings and decision of the Political Parties Disputes Tribunal (PPDT) in Political Parties Disputes Tribunal complaint No. EOO4 of 2024 : Eddie Makokha Obwake -VS- ODM and Ano (Kakamega).

2. The Application is premised on the following grounds.

a. That the Respondent has assumed Jurisdiction in PPDT complaint No. E004 of 2024 (Kakamega) between the 1st interested party and an undisputed and self-explained and described member of Kenya African National Union (KANU) and the 3rd interested party the Orange Democratic Movement (ODM).

b. That section 40(1) of the political parties does not confer jurisdiction to PPDT to entertain a disputes between a member of the political party and another political party.

c. That PPDT issued orders barring the Applicant from assuming the position of the leader of the majority in the County Assembly of Kakamega without any iota of jurisdiction.

d. That the issue of Jurisdiction was raised but the PPDT has assumed jurisdiction over a member of KANU and the ODM party.

3. The Application attracted a preliminary objection (The objection) from the 1st and 5th interested parties. The 1st interested party's preliminary objection is on the following grounds:-

a. That the Application is res judicata.

b. That the Notice of Motion lacks merit and amounts to an abuse of court process.

c. That the Notice of motion has been filed prematurely as there is no decision made to be quashed.

d. That the Notice of motion is an afterthought having been filed after the Applicant subjected himself before the Political Parties Tribunal Court and lost his preliminary Objection a decision which the applicant never appealed against.

e. That the applicant participated in the hearing on the complaint and only institute this proceedings after the hearing.

f. That the Political Parties Tribunal Court has jurisdiction to handle the dispute and is the only forum through which the dispute at hand can be resolved.

g. That members of KANU and ODM belong to the same larger party known Azimio La Umoja One Kenya Coalition the 7th interested party herein and cannot be said to belong to different parties in so far as the dispute at hand goes.

h. That the issue of Jurisdiction was raised by the Applicant at the Political parties and Tribunal Court and was properly dismissed and no appeal filed against dismissal.

4. The 5th interested party's objection on the other hand is on the following grounds:-

a. That the Application offends the provision of section 41 (2) of the *political parties Act* Cap 7D Laws of Kenya (the Act) as read with regulation 34 of the political parties tribunal (procedure) regulations 2017 (''the regulations'') for the manner and procedure of challenging decisions from the Political Parties Disputes Tribunal.

section 41 (2) provides that:-

> '' An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court''

Regulation 34 of the Regulation provide as follows:-

i. 34 (1) A person aggrieved by a decision of the tribunal may, within thirty days from the date of the decision or order appeal to the High Court.

ii. The Law applicable to Appeal before the High Court in civil matters shall, with the necessary modification apply in appeals before the tribunal.

b. The Application before court being in the nature of Judicial Review does not accord with section 41 (2) of the Act and Rule 34 of the Regulations, as it is not in the form of Appeal contemplated under the Act.

c. The Honourable Court therefore does not have jurisdiction to hear and determine the application by virtue of section 41 (2) of the Act and Regulation 34 of the Regulation.

d. The Application is also premature as the Applicant has snot annexedprovided the decision from the tribunal which he seeks to have the honourable court question the Application before court.

e. The Application is incompetent, lacks merit and ought to be dismissed with costs.

5th Interested Party written submissions

5. The 5th interested party is the only party that filed written submissions in respect to the objection, the other parties made oral submissions. The 5th interested party submits the Application does not accord with section 4 (2) of the *political parties Act* (The Act)and Regulation 34 thereof; as it is not by way of appeal which is the route provided by the Act and the regulations.

6. In this regard, it has relied on the case of Hamdia Yarov Sheikh Nuri VS Faith Tumaini Kombe & 2 others (2018) Eklr where the court reiterated the process set out under Section 41 (2) of the Act.

1st Interested Parties submissions

7. The 1st Interested party submits that the Judicial review Jurisdiction of the High Court is not exercised without control; that the Act prescribes a procedure namely an appellate process against the decision of the PPDT. It is further submitted that to the extent that the jurisdiction of the tribunal had been challenged before the PPDT and determination made, then the only recourse of an aggrieved party is through an appeal; that in any event, the Judicial review jurisdiction is about challenging the process , not the merit of a decision.

Submissions by the 4th interested party

8. The 4th interested party submits that to the extent that the Applicant participated in the tribunal proceedings, he is abusing the court process.

The Applicant's submissions.

9. The Applicant submits that he chose a Judicial Review process as opposed to an Appeal and that the statutory basis of judicial review is the *Law Reform Act*.

10. It is further submitted that there is no law that takes away the jurisdiction of the High Court; that the fact that an Appeal process has not been undertaken does not take away the Judicial Review Jurisdiction of the High Court. He argues that such an approach would be unconstitutional.

11. The Applicant further contends that it matters not that the tribunal had pronounced itself on the matter jurisdiction as all the tribunal decisions are subject to Judicial review order of certiorari.

12. It is further submitted that the Application before court is challenging both the process and the decision of the tribunal; that the question of jurisdiction remains throughout the proceedings. He further submits that the Appeal route is discretionary; that there is another procedure provided for under Section 8 the *Law Reform Act*; That when the law provides several options, a party is at liberty to choose any of those options.

13. It is further submitted that PPDT is not exempted from the provisions of the *Law Reform Act* ; that when the law provides for several options , a party is at liberty to choose any of those options.

14. The Applicant further submits that there was no Agreement on jurisdiction ,and the fact that the Applicant participated in the PPDT proceedings ,does not bar him from challenging its jurisdiction before this court. It is finally submitted that the question of jurisdiction can only be adjudicated before the High Court.

5th interested party's response.

15. In response the 5th interested party submits that section 41 of the Act , talks about the decisions of the tribunal generally , and makes no distinction on the nature of the decision, and in any event includes a decision challenging the jurisdiction of the tribunal. It is further submitted that section 41(2) should be read with regulation 34 of the regulations, which places emphasis on the manner of approaching the high court by a party who is dissatisfied with the tribunal's decision.

16. The 5th interested party further submits that there are no special circumstances that would have made the Applicant to ignore the prescribed procedure under section 41(2) of the Act; that if the options were that open , then any every party would be heading to the high court seeking for judicial review order when dissatisfied with the tribunal orders.

The 1st Interested Party's Response.

17. In response the 1st interested party submits that a party does not have the freedom to choose when a prescribed procedure has been given; that section 41(2) is all about how to challenge a decision of the tribunal and the attempt to circumvent an established procedure is futile.

Determination

18. I have considered the two objections and the respective submissions of the parties. I have identified two issues for determination, that is :-

    (a). whether the objections meet the threshold of a preliminary objection

    (b). If the answer to (a) above is in the affirmative, whether the preliminary objection should be upheld.

Whether the two objection meet the threshold of a preliminary objection

19. In the case of Mukisa Biscuit Manufacturing Company Ltd Vs West End Distributors Ltd (1969) E.A 696 the court defined a preliminary objection as follows:

> ''a preliminary objection consists of a point of law which has been pleaded or which arises from clear implication out of pleadings and which if argued as a preliminary point may

> dispose off the suit. Examples are an objection to jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to Arbitration .....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'."

20. In *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014*, [2015] eKLR, the supreme court held: 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."

21. I have considered the objection by the 1st interested party, the first plea is that this Application is res judicata. In determining the plea of resjudicata the court would have to look at the pleadings in the previous suit, and the decision made in order to ascertain if indeed the matter is resjudicata . I hasten to add that only some and not all the pleadings in the tribunal have been supplied.

22. The decision in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015*) [2021] KESC 39 (KLR) (Civ) gives a summary on what this examination entails. The court held as follows: "whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the titleclaim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

23. In short , it would entail investigation into issues of fact , not law. For an objection to meet the threshold of a preliminary objection, there should be no contest on the facts presented. If this court is to investigate whether indeed this matter is res judicata , it would be delving into investigating facts.

24. In this regard I further find support in the decision of Justice Ojwang J,(as he then was), in the case of Oraro vs. Mbaja [2005] 1 KLR 141, where while citing with approval the position in Mukisa Biscuit -vs- West End Distributors (supra) stated as follows on the operation of preliminary objection: -

> I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified 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, and 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.

25. In other words the court would have to be forced to inquire into the facts . Instructively, the 1st interested party did not submit on this ground at all.

26. The rest of the grounds raised by the 1st interested party are also issuing of facts. They are grounds of opposition on issues of facts as opposed to points of law.

27. The 1st interested party's objection therefore does not meet the threshold of a preliminary objection, and it is hereby dismissed.

28. The objection by the 5th interested party address the issue of jurisdiction. It bases its objection on the provisions of Section 41 (2) of the Act. Iam satisfied that the issue of jurisdiction meet the threshold of preliminary objection as set out in Mukisa Biscuits case (supra).

Whether the Objection should be upheld.

33. The objection by the 5th interested party is that this court has no jurisdiction to entertain this suit; that the Applicants attempt to move to this court by way of judicial review offends the provisions of section 41 (2) of the Act and regulation 34 thereof.

29. It is argued that Section 4 1 (2) of PPT Act provides an avenue of challenging the decisions of PPDT, and that is by way of an Appeal to the high court. This part further argues that where a statute prescribes a particular procedure, the Applicant do not have the luxury of resorting to other procedures.

30. To the Applicant however, an Appeal is not the only way to challenge the decision of a tribunal, that other options are available e.g Judicial review like this one, or even by way of a constitutional petition; that PPDT is not exempt from the provisions of Order 53 of the civil procedure Rules.

31. Section 41 (2) of the Act provides as follows: - '' An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court''.

    while regulation 34 (i) of the regulations under the Act provides that "A person aggrieved by a decision of the tribunal may, within thirty days from the date of the decision or order, appeal to the High Court".

32. The pertinent question is, where a statute has prescribed a procedure of doing certain things, does a party have the liberty of choosing any other option, as argued by the Applicant?

33. In the case of *Speaker of the National Assembly v Karume (Civil Application 92 of 1992*) [1992] KECA 42 (KLR) (29 May 1992) (Ruling),the court of Appeal was considering the Appeal process as provided under the *Elections Act* vis-a vis the provisions of 53 of the civil procedure Rules where the Applicant had chosen the later option. The court held: Irrespective of the practical difficulties enumerated by (counsel for the Applicant) these should not in our view be used as a justification for circumventing the statutory procedure. Later on in the judgment the court went further to state:-In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions".(Emphasis added)

34. Further pursuant to the enactment of the Fair Administration action Act there is now established a procedure for seeking judicial Review remedies. Section 9 of the *fair Administrative action Act*, provides as follows:

    9. Procedure for judicial review

        (1). " Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or

to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

35. Thus it is evident that in terms of section 9 (3) of the fair Administrative Actions Act, the Applicant does not have the liberty to " choose any of the options" he considers available. He is under the obligation to exhaust the procedure provided under section 41(2) of the Act before resorting to any other option.

36. In other words, the Applicant must pay homage to the doctrine of Exhaustion. The doctrine of Exhaustion says was explained in the case Republic v National Environmental Management Authority (Civil Appeal 84 of 2010) [2011] KECA 412 (KLR) as follows:... where there was an alternative remedy and especially where Parliament has provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it"

37. I agree with the Applicant that a party can explore other options of challenging the decision of the tribunal, but as per the above decisions, he first had to demonstrate there are exceptional circumstances warranting him exemption from following the Appeal process provided under a statute. There was no such demonstration.

38. To the extent therefore that the Applicant has not exhausted the remedies under the Applicable statute, then this court has got no jurisdiction to entertain this suit. It is now settled that a court's jurisdiction flows only from *the constitution* and any other law. There is no room for arrogation of jurisdiction by a court

39. In the case of Samuel Kamau Macharia & Another versus Kenya Commercial Bank and 2 others Application No. 2 of 2011 (2012) EKLR the supreme court pronounced itself as follows in regard to jurisdiction:- '' a court's jurisdiction flows from either *the constitution* or legislation of both , thus,

a court of law can only exercise jurisdictions conferred by *the constitution* or any other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law''

40. In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011, the court held :"Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation'

41. Thus having found that this court has no jurisdiction , I must down my tools.

42. In conclusion:

    a. I find that the preliminary objection by the 1st interested party did not meet the threshold of a preliminary objection and is consequently dismissed

    b. The preliminary objection by the 5th interested party is hereby upheld and the suit herein is hereby struck off.

    c. The temporary orders given on 682024 are hereby discharged.

    d. The costs herein is awarded to the 5th interested party

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 17TH DAY OF OCTOBER 2024.

S. CHIRCHIR

JUDGE

In Presence of:-

Godwin- Court Assistant

Mr. Sore for the Applicant

Mr. Nechesa for the 4th interested party.