



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 253 OF 2017

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10 AND 85 (a) OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF SECTION 33 (1) (a) (b) (c) (d) OF THE
ELECTION ACT OF KENYA 2011**

AND

**IN THE MATTER OF ARTICLES 2, 3, 22, 23, 99 (c) (i) AND 165 (ii) OF THE CONSTITUTION
OF KENYA 2010 AUGUST 2017**

BETWEEN

**GORDON SEWE OKELLO (suing on his capacity as a resident of Kisumu west constituency –
Kisumu County.....PETITIONER**

VERSUS

JACKTON NYANUNGO RANGUMA.....1ST RESPONDENT

KENNEDY ONYANGO OBIERO.....2ND RESPONDENT

REGISTRAR OF POLITICAL PARTIES.....3RD RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....4TH RESPONDENT

THE HON ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. According to the Petition herein, the Petitioner is an adult Kenyan citizen of sound mind residing and working for gain in Kisumu County in the Republic of Kenya.
2. The 1st Respondent, on the other hand is the current Governor of Kisumu County on an Orange Democratic Movement Party (hereinafter referred to as “the Party”) ticket while the 2nd Respondent is

currently an independent candidate for the Kisumu West Constituency.

3. The 3rd Respondent is described as a public office holder conferred with the duty of registering and regulating political parties in the Republic of Kenya while the 4th Respondent is an Independent Regulatory Agency mandated to conduct/regulate and or supervise referenda and elections of any elective office in the Republic of Kenya.

4. According to the Petitioner, the 1st and 2nd Respondents were life members of the Orange Democratic Movement Party which nominated the 1st Respondent as its gubernatorial candidate in the general elections of 2013 which the 1st Respondent won with a landslide. However on 24th April, 2017, the said Party's nominations were held in which **Prof Peter Anyang' Nyong'o** emerged victorious and was declared the winner thereof. It was pleaded that following an unsuccessful attempt by the 1st Respondent to challenge the results of the said nominations, the 1st Respondent opted to participate in the forthcoming general elections as an independent candidate to the Kisumu County gubernatorial race. Similarly, the 2nd Respondent who is also a life member for the party and who participated in the nominations decided to participate in the elections for Kisumu Town West Constituency as an independent candidate.

5. It was however averred that according to the law independent candidates had till 7th May, 2017 to resign as members of any political party hence the 1st and 2nd Respondent ought to have tendered their resignation letters to cease being members of the Party by that date.

6. The Petitioner's case was however that the 1st and 2nd Respondents are still life members of the Orange Democratic Movements by dint of failure to resign and as such not eligible to contest as Independent Candidates for the Gubernatorial and Constituency Seats respectively. To him, the 3rd and the 4th Respondents contravened the Constitution of Kenya 2010 and the **Elections Act** 2011 by dint of accepting and receiving the 1st and the 2nd applications for Independent Candidates despite the aforesaid facts.

7. The Petitioner therefore sought the following orders:

a. A declaration that the 1st, 2nd, 3rd and 4th Respondents have violated Articles 10 and 85 (a) of the Constitution of Kenya 2010.

b. A declaration that the 1st, 2nd, 3rd and 4th Respondents have contravened Sections 33(1) a, b, c and d of the Elections Act 2011.

c. A declaration that the 1st and 2nd Respondents are not eligible to vie as Independent Candidates.

d. A declaration that the 1st and 2nd Respondents are not independent candidates and therefore their names should not be printed on the ballot papers in preparation for the 8th August 2017 as such.

e. The cost of this application be borne by the Respondents.

8. Before the Petition could be heard, however, the Respondents took preliminary objections based on the fact that this Court has no jurisdiction to entertain this Petition. According to **Mr Mwamu**, learned counsel for the 1st Respondent, whose submissions the rest of the counsel for the Respondent associated with and adopted, this Petition violates Article 88(4)(e) of the Constitution, section 74 of the **Elections Act, 2012** and sections 40 and 41 of the **Political Parties Act**.

9. It was submitted that both Article 88(4)(e) of the Constitution and section 74 of the **Elections Act, 2012** vest in the **Independent Elections and Boundaries Commission** (hereinafter referred to as "the Commission") the jurisdiction to hear and determine this dispute. It was further submitted that the instant

dispute falls within sections 40 and 41 of the *Political Parties Act*.

10. Based on *Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Ltd [1989] KLR 1*, *Samuel Kamau Macharia vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR*, *Peter Ochara Anam and 3 Others vs. Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No. 3 of 2010*, *Diana Kethi Kilonzo & Another vs. Independent Electoral & Boundaries Commission & 2 Others, Constitutional Petition No. 359 of 2013* and *Republic vs. Political Parties Tribunal & 2 Others ex parte Susan Kihika and 2 Others [2015] eKLR*.

11. On the part of the Petition, **Mr Mokuu** who held brief for **Mr Odinga**, learned counsel for the Petitioner left the matter to the Court.

Determinations

12. Having considered the issues raised in the instant application, this is the view I form of the matter.

13. The challenge to the jurisdiction of this Court was premised on Article 88 of the Constitution of Kenya as read with section 74 of the *Elections Act*. Article 88(4)(e) of the Constitution provides:

The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(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;

14. Section 74(1) of the *Elections Act* provides:

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.

15. Section 40(1) of the *Political Parties Act* provides in part as follows:-

(1) The Tribunal shall determine—

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

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

(c) disputes between political parties;

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

(e) disputes between coalition partners; and

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

16. It is my view that Article 88(4)(e) is clear in its terms. It uses the phrase “*the settlement of electoral disputes, including disputes relating to or arising from nominations*”. Therefore the Court has to determine whether the issues the subject of this petition are electoral disputes since the powers of the Commission are not restricted to nomination disputes but includes them. This issue was dealt with by a 5-judge bench of this Court in *International Centre for Policy and Conflict & Others vs. The Hon. Attorney-General & Others Petition 552 of 2012 as consolidated with Petitions 554, 573 and 579 of 2012 [2013] eKLR* where the Court held as hereunder:

“The Petitioners urge that this is not a dispute on the nomination of the 3rd, 4th and 5th Respondents, but rather, their non-compliance with Chapter Six of the Constitution. We have also taken into consideration the arguments set out by the Respondents with regard to jurisdiction of other statutory bodies in a matter such as this. All the parties in this petition acknowledge the High Court’s unlimited jurisdiction under Article 165(3)(a) of the Constitution. This unlimited original jurisdiction however, cannot be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the petitioners. See *Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425*, which held that:-

“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

Even if it was to be argued that the 3rd, 4th and 5th Respondents do not meet the integrity and leadership qualification as spelt out under Article 99 (2) (h) and Chapter Six of the Constitution, then the institution with the Constitutional and statutory recognition would be the IEBC under Article 88(4)(e) of the Constitution and Section 74 (1) of the Elections Act and Section 4(e) of the IEBC Act. This then divests the court of its original jurisdiction and places an exclusive mandate on IEBC. Matters would be different if IEBC had failed and/or refused to carry out its Constitutional mandate. It has not been demonstrated that the petitioners or any other person for that matter presented their grievances regarding the nomination of 3rd, 4th and 5th Respondents to IEBC and it failed or refused to act. Indeed in the case of *Narok County Council v Trans Mara County Council [2000] 1 EA 161* at page 164 it was stated

“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse.”

17. It is therefore my view that the subject matter of this petition was not beyond the jurisdiction of the Commission pursuant to Article 88(e) of the Constitution as read with section 74 of the *Elections Act*.

18. With respect to the *Political Parties Act*, its preamble loudly screams that it is “AN ACT of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes.”

19. As this Court appreciated in Republic vs. Political Parties Tribunal & 2 Others ex parte Susan Kihika and 2 Others (supra):

“...the intention of enacting the Act was to provide a mechanism with which disputes arising between members of political parties or between political parties or between coalitions can be expeditiously resolved taking into account the need to respect the internal party governance and to resolve the same in a specialised Tribunal without the necessity of subjecting them to the time consuming process of litigation. Political issues, it is usually prudent that they as much as possible be sorted outside the arena of the Courts due to their inherent nature. Therefore Parliament in its wisdom decided that such disputes be in the first instance resolved within the party itself and if for any reason such a resolution cannot be found at that level by the Political Parties Tribunal and only thereafter may the parties approach the Court.”

20. This spirit was correctly captured by Mumbi Ngugi, J in Stephen Asura Ochieng & 2 Others vs. ODM & 2 Others [2011] eKLR when the learned Judge expressed herself as follows:

“The question that arises is this: can it be properly argued that a dispute cannot be referred for determination to the Political Parties Tribunal because the political party has failed or

refused to activate the internal party dispute resolution mechanism, thus leaving an aggrieved party with no option but to turn to the High Court for redress? I think not. To hold otherwise would mean that parties could, by failing to resolve disputes internally, frustrate the operations of the Tribunal and render it totally redundant. [12] To my mind, the intention behind the establishment of the Political Parties Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunals established under the constitution and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between members of political parties amongst themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases. [13] To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners' grievance and the parties involved."

21. This Court ought to adopt an interpretation that favours the spirit of the Act rather than one which renders the Act stillborn or ineffective. As was held in Diana Kethi Kilonzo vs. IEBC and 2 Others (supra):

"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

22. I am also aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004 that where there is a means of redress that is inadequate, the Court should not exercise restraint. The Court stated that:

"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship's words:

"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power.

Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of

justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights”.

23. More recently, in **H.C.Petition No. 203 of 2012 - Kapa Oil Refineries Limited vs. The Kenya Revenue Authority, The Commissioner of Customs Services and The Attorney General, Lenaola, J** (as he then was) had this to say at page 15:

“I am also aware that even if this Court has jurisdiction to determine a violation of fundamental rights and freedoms, it must also first give an opportunity to other relevant bodies established by law to deal with the dispute as provided in the relevant statute. This rule was well articulated by the Court of Appeal in Narok County Council –v- Transmara County Council (2000) 1 EA 164 where it stated that;

“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister....refuses to give direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision at page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”

24. It is similarly my view that bodies which have been established by Parliament especially those tasked with resolution of political disputes ought to be allowed to grow and the Courts should only step in to ensure that they carry out their mandate in accordance with the Constitution and the legislation.

25. Adopting, as I hereby do, the purposive approach to statutory interpretation rather than the literal interpretation one, my view is and I hold that the dispute of the nature herein falls squarely within the jurisdiction of the Independent Electoral and Boundaries Commission as the first port of call.

Order

26. Accordingly, the order which commends itself to me and which I hereby grant is that this petition is incompetent and is hereby struck out with costs to the Respondents.

27. It is so ordered.

Dated at Nairobi this 13th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Butoi for Mr Odinga for the Petitioner

Mr Munje for Mr Mwamu for the 1st Respondent

Mr Nyamori for 3rd Respondent

Mr Odhiambo for the 4th Respondent

CA Mwangi