



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 266 OF 2017

John Orwa.....Petitioner

versus

Independent Electoral and Boundaries Commission.....1st Respondent

Orange Democratic Movement Party.....2nd Respondent

RULING

Introduction

The petitioner challenges the Respondents' failure and or refusal to enforce a decision rendered in his favour by the Political Party's Dispute Tribunal (hereinafter referred to as the P.P.D.T.) in complaint number 241 of 2017 in which the P.P.D.T. inter alia ordered the second Respondent to issue the petitioner with the nomination certificate to contest the position of Member of County Assembly for North Kanyamkago Ward, Migori County. The second Respondent was also ordered to include the petitioners name in the list of I.E.B.C nominees within 12 hours effective from the pronouncement of the said decision.

The petitioner seeks a declaration that failure to effect the said decision is a violation of his constitutional rights and also asks this court to compel the first Respondent to receive his credentials and clear him to contest the said seat in the forthcoming general elections.

Despite the clear victory in the said case, and notwithstanding the clear provisions of the law, what followed is in my humble opinion is a clear misunderstanding of the law and in particular the procedure to be followed in enforcing a decision rendered by the P.P.D.T. Before addressing my mind to the merits or otherwise of the preliminary objection before me, I propose to spare some time and ink to address the said issue, and in particular re-state what I believe is law and correct procedure of enforcing decisions rendered by the P.P.D.T. because there appears to be some misapprehension of the law and procedure on this issue. In my view, this misapprehension of the law and procedure is what eventually led to the unfortunate situation that the petitioner now finds himself in.

Enforcement is the last stage of the judicial process after the legal right, claim or interest has ended in a judgment or order which remains to be enforced. It is the process whereby a judgment or order is enforced or to which it is made effective according to law.

When a [court](#) or a Tribunal renders a judgment, it may state that the successful party has a right to recover money or property or make orders compelling the defendant to perform a certain act. However, the court will not enforce the decision on behalf of the successful party without further action. In [common law](#) legal systems, judgment enforcement is regulated in [civil law](#) legal systems through the *Code of Civil Procedure*.

It is trite that every successful litigant is entitled to the fruits of his judgment. It is also a truism that the overriding function of the judicial process of enforcement is to enable the judgment creditor reap the fruits of his judgment with a view to obtaining for him due satisfaction, compensation, restitution, performance or compliance with what the court has granted by way of remedy or relief. The process of enforcement is broadly referred to as execution. Lord Denning aptly summarized the process thus:-

"Execution means quite simply the process for enforcing or giving effect to the judgment of the court....."[\[1\]](#)

Executory judgments are those judgments which declare the respective rights of the parties and then proceed to order the defendants to act in a particular way; for example to pay damages or refrain from interfering with the plaintiff's rights.[\[2\]](#) Such judgments are enforceable by execution if disobeyed.[\[3\]](#)

After the decision of the P.P.D.T., the petitioners counsel filed an application for execution at the P.P.D.T. which in my view was the first of a series of mistakes. Upon filing the application for execution, the petitioners counsel states that he was referred to the High court by the P.P.D.T. Clearly, counsel did not take cognizance of the meaning and correct interpretation of the clear provisions of section 41 (3) of the Political Party's Act[\[4\]](#) which provides that:-

41. Determination of disputes

(3) A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court.

The procedure for executing a decision of a Magistrates court is clearly stipulated in the Civil Procedure Rules, 2010. A decision of the a magistrates court is enforced by filing an application for execution in the Magistrates court in which the decree was passed, not in the High court as the petitioner attempted to do. The above section refers to the magistrates court not the High court.

My understanding of the above provision is that all that the petitioner was required to do was to extract the decree and apply for execution in the magistrates court. Instead, the petitioner filed High court miscellaneous application No. 10 of 2017 in the high court seeking to enforce the decision in the High court instead of the magistrates court. This to me was the second mistake. The High Court on 25th May 2017 held that it lacked original jurisdiction to entertain the application citing provisions of section 10 of the Magistrates Courts Act[\[5\]](#) which grants the Magistrates Courts powers to enforce its own orders. In short, the High court affirmed that the application for execution ought to have been filed in the magistrates court as provided under the above section.

On 29th May 2017, the petitioner filed a complaint at the first Respondents Dispute Resolution Committee. To use his own words he did this "in order to exhaust internal dispute resolution mechanism." He also stated that a "challenge through contempt of court proceedings is unavailable." As at the time of hearing this objection, the said matter was still pending before the first respondents Dispute Resolution Committee.

The petitioner filed this petition citing alleged violation of his constitutional rights and asks this court to compel the first Respondent to receive his credentials and clear him to view for the said seat in the forth coming general elections scheduled for 8th August 2017 and this attracted the preliminary objection now under consideration.

Notice of preliminary objection

On 5th June 2017, counsel for the first Respondent filed the preliminary objection now under consideration stating that the petition is incompetent and ought to be struck out on grounds that this court lacks jurisdiction to hear this petition. She cited the provisions of Article 88 (4) (e) of the constitution of Kenya 2010, Section 4 (e) of the Independent Electoral and Boundaries Commission Act[6] and Section 74 of the Elections Act.[7] All these provisions vest jurisdiction on the first Respondent's Dispute Resolution Committee to hear and determine matters arising from nomination of candidates for elections.

The first Respondent also filed a Replying affidavit sworn by Ruthie Makuthu in which she averred that the petitioner filed a complaint before the first Respondents Dispute Resolution Committee which was listed for hearing on 5th June 2017, and was adjourned to 6th June 2017, the same day this matter appeared before me. This position was confirmed by counsel for the petitioner and the court posed the question to the petitioners counsel whether it is appropriate for a party to pursue two identical processes premised on substantially the same issues, which to me is the third mistake which I turn to address.

Abuse of court process

Given the striking similarity of the reliefs sought in this petition and the matter before the IEBC Dispute Resolution Committee, crucial questions do arise such as whether it is open for the petitioner to file two identical suits, namely, this petition and the complaint before the I.E.B.C. Dispute Resolution Committee seeking substantially identical reliefs and whether such conduct amounts to abuse of court process.

In *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others*[8]I observed that "It is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."[9]

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[10] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
- (c) Where two similar processes are used in respect of the exercise of the same right.*
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[11]*
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a*

conceived right.

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first. [12]*

Abuse of judicial process is a term generally applied to a proceeding which is wanting in *bona fides* and is frivolous, vexatious and oppressive.[13] Abuse of process can also mean abuse of legal procedure or improper use of the legal process.[14] Justice Niki Tobi JSC of Nigeria observed that abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[15]

It's settled law that a litigant has no right to pursue *paripassu* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously. The pursuit of the two processes at the same time constitutes and amount to abuse of court/legal process."[16]

Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[17] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.[18] Turning to this case, I find no difficulty in concluding that the two cases, that this petition and the similar matter before the IEBC by the same petitioner, arising from the same set of facts and circumstances and seeking substantially the same reliefs amount to gross abuse of court process and on this ground alone I am inclined as I hereby do, to strike out this petition for being an abuse of court process.

Determination of the preliminary objection

I find it absolutely necessary to start by defining what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

In *Dismas Wambola vs Cabinet Secretary, Treasury & Others*[19] I observed that it may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can save a lot of time and costs.[20]

Discussing what constitutes a preliminary objection, Law JA in *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd*[21] said:-

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

In the words of Sir Charles Newbold P at page 701, B:-

"...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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."(Emphasis added)

Useful guidance can be obtained from the decision in *Omondi vs. National Bank of Kenya Ltd & Others*[22] where it was held that:-

*"The objection as to the legal competence of the Plaintiffs to sue.....and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion."*

Also relevant is the decision by *Ojwang, J* (as he then was) where he expressed himself as follows:-[23]

"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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined 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, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."(Emphasis added)

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.

In **law**, a **question of law**, also known as a **point of law**, is a question that must be answered by applying relevant legal principles to interpretation of the law.[24] Such a question is distinct from a **question of fact**, which must be answered by reference to facts and **evidence** as well as inferences arising from those facts.

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to facts and **evidence** as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "**finding of fact**") usually depends on particular circumstances or factual situations.[\[25\]](#)

The preliminary objection in this case is premised on the clear provisions of Article **88 (4) (e)** of the constitution, Section 4 (e) of the Independent Electoral and Boundaries Commission Act[\[26\]](#) and Section 74 of the Elections Act.[\[27\]](#) Article **88 (4) (e)** of the constitution provides that:-

(4) 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;

Flowing from the above provisions is section **4 (e)** of the Independent and Electoral Boundaries Commission Act[\[28\]](#) provides as follows:-

4. Functions of the Commission

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the 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;

The above provisions are replicated in section **74 (1)** of the Elections Act[\[29\]](#) which provides that:-

74. Settlement of certain disputes

(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

In opposition to the preliminary objection, the petitioner's counsel submitted that before the court is a petition premised on violation of constitutional rights, that the petitioner has exhausted the laid down mechanism (even though as discussed above a similar dispute was at the time this matter was before me pending before the IEBC Dispute Resolution Committee) and explained how the petitioner unsuccessfully attempted to enforce the PPDT decision and urged the court to dismiss the preliminary objection.

On the issue of Jurisdiction

A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in *the matter of the Interim Independent Electoral Commission*,[\[30\]](#) at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner; " Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent." Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[\[31\]](#)

In the words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-[\[32\]](#)

"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure

because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

Special regard needs to be paid the following extract from **Words and Phrases Legally defined**[33] at page 1 are pertinent:-

“.....By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed. Indeed, in the case of the *Speaker of the National Assembly vs Karume*. [34] the Court stated:-

“...Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed....”

The court of appeal [35] discussing the same subject reiterated as follows:-

“.....This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes.” *Speaker of the National Assembly v. Karume (supra)*

In *Kones vs. Republic & Another Ex parte Kimani Wa Nyoike & 4 Others* [36] it was held that :-

“.....However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article (159)(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.”

The court of appeal in *Samson Chembe Vuko v Nelson Kilumo & 2 others* [37] also adopted the above

reasoning as late as 27th May 2016 while this court as late as 12th May 2017 in *Jennifer Shamalla vs The Law Society of Kenya & Others*[38] cited the above authorities with approval and arrived at the same conclusion.

In my view, the petitioner ought to have utilized the mechanism provided under the above provisions and only approach the High court by way of appeal. I find backing in the above cited provisions of the law, the cited cases and also in the decision rendered in *Boniface Mwangi vs Resident Magistrates Court, Milimani & 2 Others*[39] where it was held that to convert every issue into a constitutional issue is to undermine the importance of the process. Also relevant is the decision rendered in *Peter Ochara Anam & 3 Others vs CDFB & 3 Others*[40] where it was held that the constitution was not meant to replace statutes that provide remedies to those concerned. Consequently, I find that the preliminary objection succeeds.

Accordingly, I uphold the preliminary objection and dismiss this petition with costs to the first Respondent.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this 8th day of June 2017

John M. Mativo

Judge

[1] An Enforcement Of Judgements And Court Orders In The Nigerian Legal System By [tallp](https://topeadebayollp.wordpress.com/2011/06/09/an-enforcement-of-judgments-and-court-orders-in-the-nigerian-legal-system/), <https://topeadebayollp.wordpress.com/2011/06/09/an-enforcement-of-judgments-and-court-orders-in-the-nigerian-legal-system/>

[2] Chief R. A. Okoya & Others vs S. Santilli & Others {1990} LPELR-SC. 206/1989

[3] Ibid

[4] Act No. 11 of 2011

[5] Act No. 26 of 2015

[6] Act. No. 9 of 2011

[7] Act No. 24 of 2011

[8] Succ Cause no 920 of 2009

[9] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[10] Public Drug Co V Breyerke cream Co, 347, Pa 346, 32A 2d 413, 415

[11] Jadesimi V Okotie Eboh (1986) 1NWLR (Pt 16) 264

[12] (2007) 16 NWLR (319) 335.

[13] In the words of **Oputa J.SC** (as he then was) in (1998) 4SCNJ 69 at 87.

[14] Ibid

[15] Supra Note 1

[16] Supra note 1

[17]Ibid

[18] Ibid

[19] Pet No. 38 of 2017

[20] Ibid

[21] {1969} E.A 696 AT PAGE 700

[22] {2001} KLR 579; [2001] 1 EA 177

[23] **Oraro vs. Mbaja [2005] 1 KLR 141**

[24] Proffatt, John (1877). *A Treatise on Trial by Jury, Including Questions of Law and Fact* (1986 reprint ed.). Buffalo, NY: William S. Hein & Co. [ISBN 9780899417073](#).

[25] *"Question of fact"*. Legal Information Institute. [Cornell University Law School](#).

[26] Act No 9 of 2011

[27] Act No 24 of 2011

[28] Act No. 9 of 2011

[29] Act No. 24 of 2011

[30] Constitutional Application No. 2 of 2011 (unreported)

[31] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[32] 19 U.S. 264 (1821)

[33]**volume 3: 1-N**

[34] {2008} 1KLR 425

[35] In the case of **Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another {2015}eKLR**

[36] {2008} 3 KLR (ER) 296).

[37] {2016} eKLR

[38] Pet no. 85 of 2016

[39] {2015}eKLR

[40] {2011}eKLR