

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION NOMINATIONS (IEBC) APPEAL No 1 OF 2017

TOM OGALO OLUOCH.....APPELLANT

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...RESPONDENT

RULING

1. The instant appeal was launched on 8 June 2017 following a decision by the Respondent's dispute resolution committee rendered on 7 June 2017.

2. The appellant had on 2 June 2017 complained to the Respondent that he had been unfairly debarred from contesting the position of member of County Assembly Timbwani Ward in Mombasa County. The appellant's debarment was on the basis that the appellant had presented himself both as a candidate nominated by a political party, Orange Democratic Movement and also as an independent candidate. The appellant insisted that he was a life member of the Orange Democratic Movement and had never given up his membership through resignation or otherwise. The complaint was however dismissed by the Respondent, prompting the appellant to lodge the instant appeal.

3. When the appeal came up for hearing on 12 June 2017 in answer to a question by the court as to whether the appeal was competently before the court, Mr. Muriithi who appeared for the appellant quickly sought the court's leave to withdraw the appeal. The withdrawal would "enable him pursue the proper channel".

4. The core question is whether the appeal is competently before the court, in which event the leave to withdraw may be granted. Where however the appeal is deemed and found to be incompetent, the appeal may not be withdrawn : see **Machakos District Cooperative Ltd v Nzuki Kisilu CACA No 17 of 1997 (per Shah JA)** . An incompetent appeal is deemed an abuse of process and the court must act by striking it out.

5. The starting point is obviously the legal principle that if the power and authority of or for a court is not conferred the Constitution or statute then the court has no business to entertain a matter: see **Owner of Motor Vessel Lillian SS v Caltex Oil(K) Limited [1986] KLR 1**. The same principle would apply with equal measure to appeals. The right of appeal or power to hear appeals cannot be inferred or implied, it has to be conferred expressly by the Constitution or by statute: see **Kakuta Maimai Hamisi v Peris Tobiko & Others [2014]eKLR**.

6. The instant appeal originated from a decision of the Respondent's dispute resolution committee.

7. It is not in doubt that Article 88(4) of the Constitution donates the power to the Respondent to settle election disputes save petitions and disputes subsequent to the declaration of results. Pursuant to Article 88(4), the Elections Act No 24 of 2011 derivatively stipulates under s. 74 that the Respondent is to determine electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of results within ten days of such disputes being lodged with the Respondent.

8. Neither the Constitution nor the Elections Act provides for an appeal to the High Court from any decision of the Respondent rendered pursuant to the provisions of Article 88(4)(e) of the Constitution as read together with s.74 of the Elections Act.

9. While it is true that the High Court under Article 165 has unlimited jurisdiction in civil and criminal matters, save those reserved for the specialized courts under Article 162(2), Article 165(3)(e) of the Constitution is explicit that the court is also only to exercise such appellate jurisdiction as may be conferred by legislation. An appellate jurisdiction of the High Court may thus be exercised only where an Act of Parliament confers it: see also s.5 of the High Court (Organization and Administration) Act No 27 of 2015. My attention was not drawn to and I am not aware of any legislation which grants the High Court the power to entertain and determine appeals from the Respondent's dispute resolution committee.

10. In my view, as neither the Constitution nor the Elections Act grants any right of appeal to a party who is aggrieved or dissatisfied with a decision of the Respondent rendered pursuant to s.74 of the Elections Act, an appeal from the Respondent's disputes committee cannot properly lie and be lodged before the High Court.

11. The High Court certainly has powers to superintend bodies exercising judicial and quasi-judicial powers but not through the appellate avenue unless expressly provided for by law. In the instant case, a more appropriate avenue would be to question the decision of the Respondent by way of an application for judicial review.

12. I find that the appeal is incompetent. The appellant had no right of appeal. Likewise, the court has no jurisdiction or authority to entertain the appeal. It may not be withdrawn at the behest of the appellant. It is an abuse of the process and can only be struck out.

13. The appeal is consequently struck out but with no order as to costs.

Signed Dated and delivered at Nairobi this 13th day June of 2017

J. L. ONGUTO

JUDGE