



REPUBLIC OF KENYA



KENYA LAW
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**Guyo & another v Guracha & 9 others (Civil Appeal E309 of 2024)
[2025] KECA 261 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 261 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E309 OF 2024
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
FEBRUARY 21, 2025**

BETWEEN

HON ABDI GUYO 1ST APPELLANT

HON JOHN LOWASA 2ND APPELLANT

AND

GUYO ALI GURACHA 1ST RESPONDENT

MOHAMMED WARIO JATTANI 2ND RESPONDENT

TEDDY M MUTURI 3RD RESPONDENT

STEVEN KIHONGE NDUNG’U 4TH RESPONDENT

UNITED DEMOCRATIC ALLIANCE 5TH RESPONDENT

REGISTRAR OF POLITICAL PARTIES 6TH RESPONDENT

**INDEPEDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 7TH RESPONDENT**

THE HON. ATTORNEY GENERAL 8TH RESPONDENT

JUBILEE PARTY OF KENYA 9TH RESPONDENT

AZIMIO LA UMOJA ONE-KENYA COALITION 10TH RESPONDENT

(Being an appeal against the ruling of the High Court at Nairobi (Ngaah, Chigiti and Mugambi JJ.), delivered on 4th April, 2023 in High Court Constitutional Petition No. E195 of 2023)



JUDGMENT

1. In the proceedings before the High Court from which this appeal arises, the petitioners were Guyo Ali Guracha, Mohamed Wario Jattani, Teddy M. Muturi and Stephen Kihonge. The respondents were Hon. Abdi Guyo, Hon. John Lowasa, United Democratic Alliance, Registrar of Political Parties, Independent Electoral & Boundaries Commission (IEBC) and the Hon Attorney General. Jubilee Party of Kenya and Azimio La Umoja One-Kenya Coalition were named as interested parties.
2. According to the petitioners before the High Court, the appellants were respectively candidates for the County Governor and Deputy Governor of Isiolo County during the General Election held on 9 August 2022 under the banner of Jubilee Party of Kenya; that following the said election, the appellants were announced as having been respectively elected as the Governor and Deputy Governor of Isiolo County; that the Jubilee Party which nominated the appellants to contest for the said gubernatorial seat is one of the constituent members of the Azimio la Umoja One Kenya Coalition under whose banner and manifesto all the Jubilee Party candidates campaigned and that it was under the same platform that the appellants campaigned and were elected; that the election of the appellants as Governor and Deputy Governor of Isiolo County enjoined them to subscribe to Jubilee Party and Azimio Coalition and, in the same breath, prohibited them from supporting any other political party or political coalition including the United Democratic Alliance and the Kenya Kwanza Coalition, during their five-year tenure as the Governor and Deputy Governor of Isiolo County; that on 2nd June 2023, the appellants unlawfully defected from Jubilee Party and joined the United Democratic Alliance, the 5th respondent; that by inducing, soliciting, aiding and abetting the defection of the appellants to the 5th respondent, the 5th and 6th respondents violated *the Constitution* and subverted multiparty democracy in Kenya; that in defecting to the 5th respondent, the appellants have ceased to be members of the Jubilee Party and, consequently, they are deemed to have resigned from their positions as Governor and Deputy Governor of Isiolo County; and that as a result of her actions and omission, the Registrar of Political Parties is unfit to continue holding that position.
3. Based on the foregoing, the petitioners sought the following orders:
 - a. A declaration be issued to declare that the 1st and 2nd Respondents resigned from their positions as governor and deputy governor of Isiolo County upon defecting from Jubilee Party to the United Democratic Alliance Party on 2nd June, 2023.
 - b. A declaration be issued to declare that in defecting from Jubilee Party to United Democratic Alliance the 1st and 2nd Respondents breached and severed their socio political contract with the electors of Isiolo and members of the Jubilee party to continue serving as Governor and Deputy Governor of Isiolo County.
 - c. A declaration be issued to declare that within the meaning of Articles 1, 38 and 81 of *the Constitution* all elected officials are delegates and trustees of their electors in discharging their functions and duties in their respective positions during their terms of office.
 - d. An order of permanent injunction be issued to restrain the 1st and 2nd Respondents from discharging any function or duty as Governor and Deputy Governor of Isiolo County.



- e. A declaration be issued to declare that the United Democratic Alliance - the 3rd Respondent herein- violated Articles 1 and 4 of *the Constitution* in soliciting for, in aiding and abetting the defection of the 1st and 2nd Respondents from Jubilee Party of Kenya and Azimio la Umoja One Kenya Coalition to the United Democratic Alliance.
- f. A declaration be issued to declare that the Registrar of Political Parties - the 4th Respondent herein - has violated Article 3, 38 and 180 of *the Constitution* in condoning, aiding, abetting and accepting the registration of the 1st and 2nd Respondents as members of the United Democratic alliance before they have resigned from their positions as Governor and Deputy Governor of Isiolo County.
- g. A declaration be issued to declare that by dint of Articles 1, 4 and 38 of *the Constitution* an elected official sponsored by a political party cannot join another political party until he or she has resigned from his or her elective position.
- h. A declaration be issued to declare that the 1st and 2nd Respondents cannot lawfully resign from Jubilee Party to join the United Democratic Alliance unless and until they have resigned from their positions as governor and deputy governor of Isiolo County.
- i. An order of mandamus to compel the 4th Respondent to notify the 5th Respondent about the resignation of the 1st and 2nd Respondent as members of the Jubilee Party.
- j. An order of mandamus to compel the Independent Electoral and Boundaries Commission - the 5th Respondent herein to degazette the 1st and 2nd Respondent as the governors and deputy governor of Isiolo County.
- k. A declaration be issued to declare that the incumbent Registrar of Political Parties, Madam Anne Nderitu has violated Articles 1, 3, 4, 10, 38, 73 and 75 of *the Constitution* which renders her unfit to continue serving as the registrar of Political Parties.
- l. A declaration be issued to declare that the 3rd Respondent has violated Articles, 1, 3, 4, 38 and 91 of *the Constitution*.
- m. An order of mandamus to compel the 4th Respondent to commence an inquiry into the deregistration of the 3rd Respondent on account of its willful violation of Article of Article 91 of *the Constitution*.
- n. An order of compensation of the Petitioners for violation of their constitutional rights within the meaning of Articles 10, 27, 38 and 50 of *the Constitution*.
- o. Costs of this Petition be borne by the Respondents.”



4. In opposition to the petition, the appellants filed a preliminary objection dated 13th June 2023 based on the grounds that:
 - “ 1. This Honourable Court lacks the requisite jurisdiction to hear and determine the instant petition and application on the basis of Section 40 of the *Political Parties Act*, 2011; and exhaustion of remedies in compliance with Section 40 (2) of the *Political Parties Act*, 2011.
 2. This Honourable Court lacks the requisite jurisdiction by dint of Articles 181 and 182 of *the Constitution* of Kenya, 2010 read together with Section 33 of the *County Governments Act*, 2012.
 3. The Application is bad in law for seeking to restrain the Governor and Deputy Governor from discharging their constitutional mandate.”
5. According to the appellants, the dispute between a political party and its members is one suited for Political Parties Disputes Tribunal, in the first instance, as stipulated in section 40 of the *Political Parties Act*, 2011 and, secondly, that the removal of a Governor can only be pursued through the provisions of Articles 181 and 182 of *the Constitution* of Kenya, 2010 as read with Section 33 of the County Government Act, 2012.
6. The preliminary objection was opposed by the 9th and 10th respondents.
7. In their decision which is the subject of the appeal, the learned Judges of the High Court found: that the appellants’ argument that the dispute before the court was between members of a political party and hence subject to the Political Parties Disputes Tribunal assumed that the appellants were members of the Jubilee Party; that since, in their submissions, the appellants prevaricated or flip-flopped and denied that they are such members, the question of whether the appellants were members of the same party as the petitioners was a question of evidence which could only be interrogated at the hearing of the petition and not at the preliminary stage; that from the fifteen prayers the petitioners sought, none specifically sought the removal of the Governor; that if, at the close of the hearing of the petition the petitioners were vindicated in this regard or the court found that the appellants violated *the Constitution* in any way, the violation might be a ground for their removal, in which event, section 33 of the *County Governments Act* would kick in and the process of their removal might be commenced; that even if it was to be assumed that the petitioners have, in one of their fifteen prayers, sought for removal of the Governor, that alone would not be fatal to the petition since it would only render the prayers sought against the appellants unmerited while leaving the prayers against the rest of the respondents in the petition intact; that the 3rd ground that the petition was bad in law for seeking to restrain the Governor and Deputy Governor from discharging their constitutional mandate was misconceived and could not be a ground for seeking to strike out the petition in limine.
8. Based on the said findings, the learned Judges dismissed the preliminary objections but directed the costs thereof to abide the outcome of the petition.
9. We heard the appeal on the Court’s virtual platform on 20th January 2025 when learned counsel, Mr Eric Theuri, appeared with Ms Kitonga for the appellants, learned counsel, Mr Kibe Mungai, appeared for the 1st to 4th respondents, while learned counsel, Mr Ochieng Oginga, appeared for the 10th respondent. The appeal was prosecuted on the basis of written submissions which we directed the parties to file by close of the day on 27th January 2025. By the end of that day, only the appellants and the 10th respondents had filed their submissions as directed.



10. On behalf of the appellants, it was submitted that the High Court erred in assuming jurisdiction to hear and determine the petition over a matter it had no jurisdiction to entertain; that the learned Judges misdirected themselves as to the material question in issue in finding that the central issue for determination was whether the appellants were members of the Jubilee Party or not; that the issue that was fundamental to the entire petition was that of the resignation of the appellants; that the pure point of law raised by the appellants was grounded on whether the High Court could entertain and determine a petition seeking to determine whether the appellants could be deemed to have resigned, and whether the question of resignation was justiciable and ripe for determination; that this being the predominant question, on the authority of the cases of *Lydia Nyambua Mbugua v Diamond Trust Bank Kenya Limited & Another* [2018] KLR and *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another* [2016] eKLR, the same ought to have been determined at that stage; that the trial court's failure to properly address this primary issue of resignation before deciding on jurisdiction led to the erroneous assumption that the matter could proceed under the High Court's jurisdiction; that under sections 14 and 14A of the *Political Parties Act*, the resignation from a political party is a political process governed by a clear legal framework and does not require judicial intervention; that the issue at hand, being whether the appellants had resigned from the Jubilee Party, was a matter more appropriately dealt with by the specialised systems and bodies established under the *Political Parties Act*; that based on the decision in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 Others* [2017] eKLR, the effect of assuming jurisdiction was that the court suspended the operations of the *Political Parties Act* and denied the appellants the opportunity of being heard at the Political Party and Political Parties Tribunal; and that the petitioner attempted to frame a political dispute as a constitutional issue contrary to the decision in *Muema Mativo v Director of Criminal Investigations & 2 Others* [2017] KLR.
11. On behalf of the 10th respondent, it was submitted, citing various authorities, that the High Court had jurisdiction to entertain the matter; that Articles 180 and 182 of *the Constitution* do not divest the court of the powers and jurisdiction to hear and determine the petition; that section 40 of the *Political Parties Act* is inapplicable as the Political Parties Tribunal does not have jurisdiction to hear and determine disputes concerning an election; and that the allegations in regard to pleading with precision are factual in nature and warrant an interrogation of the facts and averments in the petition hence the objection does not constitute an objection in terms of the principles in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.
12. We have considered the submissions made. In our respectful view, the parties conflated the real issue that was before the High Court and unnecessarily submitted on issues that this Court ought not to consider in this interlocutory appeal. This being an interlocutory appeal, care must be taken to avoid expressing a conclusive view of the matters which are yet to be determined by the trial court. The practice is and has always been that at an interlocutory stage, the Court may only express its views on the matters in controversy on a prima facie basis. Otherwise, a concluded view is likely to tie the hands of the Judge(s) who would eventually hear the case, and is likely to cause embarrassment to the trial court. See *Mansur Said & Others v Najma Surur Rizik Surur* Civil Appeal No. 186 of 2005 and *Niazons (K) Limited v China Road & Bridge Corporation (Kenya)* Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA



502. A similar view was expressed by this Court in *Said Almed v Mannasseh Benga & Another* [2019] eKLR where it was appreciated that:

“...this is an interlocutory appeal, and so, like the trial court, this Court cannot make conclusive finding of fact as that would prejudice the proceedings in the main trial which is still pending.”

13. In our view, it is important, in determining this appeal, to understand the import of the impugned decision. The learned Judges, on the basis of the decision in the case of *Mukisa Biscuits* (supra) expressed themselves, inter alia, as hereunder:

“If we are to take the 1st and 2nd respondents at their own word, and we have no reason not to, the question of whether the 1st and 2nd respondents are members of the same party as the petitioners is a question of evidence which can only be interrogated at the hearing of the petition and not at the preliminary stage of these proceedings. This is because while the 1st and 2nd respondents deny that the petitioners are members of the Jubilee Party, the petitioners have themselves categorically sworn on oath that they are members of that party. We need not belabour the point save to state that there is a dispute as to the facts, such facts cannot be a basis for a preliminary objection.”

14. What we understand from that view is that the Court was not satisfied that, based on the contested factual positions adopted, the issues raised in the preliminary objection could be disposed of at that stage. In our view, the learned Judges did not rule out the possibility of determining the issues raised at a later stage of the proceedings as long as sufficient material was availed to them on the basis of which they could properly do so. We find nothing wrong with the position adopted by the learned Judges since, as held by Newbold, P. in *Mukisa Biscuits Case* (supra):

“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 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”.

15. Before us, the appellants now submit that what was placed before the trial court for determination was not whether the appellants were members of the Jubilee Party or not, but whether the appellants had resigned from the party that sponsored them during the elections. In our view, resignation is a matter of fact and just like defection, it similarly requires factual interrogation devoid of which it cannot be the subject of a preliminary objection.

16. Apart from that, the learned Judges found that even if it was to be assumed that the petitioners had sought for removal of the Governor, that alone would not be fatal to the petition since it would only render the prayers sought against the appellants unmerited, leaving the prayers against the rest of the respondents in the petition intact. As held by Law, JA in *Mukisa Biscuits Case*, for it to be upheld, the preliminary objection must be one that may dispose of the suit. No issue has been taken before us with the finding by the learned Judges, that the upholding of the preliminary objection was not capable of disposing of the suit

17. We have said enough, we believe, to show that this appeal is devoid of merit. It is dismissed with costs to the 10th respondent.

18. It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

