



**Munene & another v Muturi & 7 others (Civil Appeal  
E350 of 2022) [2022] KECA 912 (KLR) (22 July 2022) (Reasons)**

Neutral citation: [2022] KECA 912 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E350 OF 2022  
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA  
JULY 22, 2022**

**BETWEEN**

**DANIEL K MUNENE ..... 1<sup>ST</sup> APPELLANT**

**KING'ORI CHOTO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ESAU KIONI ..... 1<sup>ST</sup> RESPONDENT**

**JUSTIN B MUTURI ..... 2<sup>ND</sup> RESPONDENT**

**JACOB HAJI ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH MUNYAO ..... 4<sup>TH</sup> RESPONDENT**

**JOSEPH MATHAI ..... 5<sup>TH</sup> RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES ..... 6<sup>TH</sup> RESPONDENT**

**DEMOCRATIC PARTY OF KENYA ..... 7<sup>TH</sup> RESPONDENT**

**KENYA KWANZA ..... 8<sup>TH</sup> RESPONDENT**

*(An appeal against the part of the judgment and orders of the High Court of  
Kenya at Nairobi (Sergon, J.) dated 6th June 2022 in HCCA No. E348 of 2022)*

**REASONS**

1. On 29<sup>th</sup> June 2022 we peremptorily dismissed the appeal and reserved the reasons for the decision to be given today owing to the strict timelines in dealing with appeals arising from decisions of the Political Parties Disputes Tribunal “PPDT” on appeal from the High Court. When we heard the appeal only a few days were left for determination of all such pending appeals in this Court, hence the drastic decision



to issue a judgment without reasons. We now proceed to give reasons for our decision pursuant to Rule 34(7) of the Court of Appeal Rules.

2. But first, the brief facts leading to this appeal are that the 1<sup>st</sup> and 2<sup>nd</sup> appellants are director of elections and member, respectively of the 7<sup>th</sup> respondent, a political party founded in 1991. The appellants together with one, **Wambugu Nyamu**, the assistant secretary general of the 7<sup>th</sup> respondent (not a party to this appeal) approached the PPDT with a complaint dated 11<sup>th</sup> April 2022 that,

“On 9<sup>th</sup> April 2022, the respondents herein, without any colour of right, justification or authority of the members and contrary to the resolutions of the National Delegates convention held at the Bomas of Kenya purported to form a coalition agreement with the 3<sup>rd</sup> interested party herein.

The appointment of the 1st respondent as party leader of the democratic party by the National Delegates Convention was in contravention with the party constitution which provides that no person, except with the leave on application granted by a majority decision of the outgoing National Executive Council, shall be eligible to be elected if such a person had not been a party member for the period of one year proceeding such election, he is hence ineligible and is yet to pay the requisite fee for appointment to such position hence cannot purport to act for the party in any given forum.....”

3. In a nutshell, the appellants’ complaints were that on 20<sup>th</sup> February 2020 the 7<sup>th</sup> respondent held a special National delegates convention at the Bomas of Kenya where several resolutions were passed including the appointment of the 1<sup>st</sup> respondent as the party leader of the 7<sup>th</sup> respondent and that he would contest for the presidential seat on its ticket. That the party would not engage in pre-election agreements and or coalitions but would only do so post-election. Those resolutions did not sit well with the appellants for the reasons that the 1<sup>st</sup> respondent did not qualify to be a party leader in accordance with the party constitution as he had not been a member of the party for a period of one year preceding such election. Subsequently, and contrary to the resolution of the party, on 9<sup>th</sup> April 2022 the 7<sup>th</sup> respondent entered into a coalition agreement with the 8<sup>th</sup> respondent.
4. They thus prayed for the PPDT to declare that the coalition agreement between the 7<sup>th</sup> and 8<sup>th</sup> respondents was null and void and equally, the appointment of the 1<sup>st</sup> respondent, who had hardly been a member of the party for barely two months as party leader face the same fate.
5. In response, the 1<sup>st</sup> to 5<sup>th</sup> respondents filed a notice of preliminary objection dated 6<sup>th</sup> May 2022 in which they stated that the PPDT did not have jurisdiction to hear and determine the complaints pursuant to Section 40 (2) of the *Political Parties Act* 2011 and Article 38 of the Constitution of the 7<sup>th</sup> respondent, that the appellants had disregarded the Constitution of the 7<sup>th</sup> respondent and in particular the provisions in Article 28 (b) & (c). Further, they filed a joint replying affidavit dated 10<sup>th</sup> May 2022, in which they deposed that that Section 40 of the *Political Parties’ Act 2011* provided for disputes covered in sub-section 2 (a), (b), (c), and (e) to be subjected to internal political party dispute resolution mechanisms before being escalated to PPDT, if need be. That the Constitution of the 7<sup>th</sup> respondent provided for internal dispute resolution mechanism “I.D.R.M” under its Article 28(b), which the appellants were obliged to invoke but which they did not. That the complaints were time barred since Section 7(1) of the *Political Parties Act* provided that such complaints be lodged with the PPDT within thirty days from the date of decision complained of. That since the election of the 1<sup>st</sup> respondent as the party leader was on 20<sup>th</sup> February 2022, the complaint was time barred as it ought to have been lodged latest by 19<sup>th</sup> March 2022. In sum, the respondents’ two-pronged preliminary



objection was that the 1<sup>st</sup> complaint had been filed out of the thirty days required by the law and further that the 2<sup>nd</sup> complaint bordered on an issue that had not been subjected to I.D.R.M.

6. The PPDT heard the dispute and overruled the preliminary objections and any other objections, in their entirety. It further ruled that the purported Coalition agreement entered into with 8<sup>th</sup> respondent by the 1<sup>st</sup> respondent on behalf of 7<sup>th</sup> respondent was null and void and finally that, the appointment of the 1<sup>st</sup> respondent as party leader of the 7<sup>th</sup> respondent was equally null and void.
7. Dissatisfied with the said decision of the PPDT, the respondents filed an appeal against the said decision in the High Court on the grounds that the tribunal had erred in not upholding the preliminary objection; and erred in failing to establish whether it had jurisdiction to entertain the complaint before it, and that, by invoking Section 40(2) of the Political Parties Act *suo moto* the tribunal erred.

Sergon, J. after considering the appeal allowed it stating thus:-

“Having evaluated the material placed before the tribunal, it is not in dispute that the complaint was filed on 11th April 2022 before the tribunal where the respondent’s sought to challenge the resolution of the National Delegates Convention held on 20th February at the Bomas of Kenya. It is also not in dispute that under Regulation 7(1) of the Political Parties Disputes regulations, 2017 that complaints must be filed within 30 days from the date of the decision complained of. The tribunal appears to have acknowledged that the respondent’s complaint was filed outside the thirty (30) days fixed by the regulations. The tribunal went at length to explain the circumstances which gave rise to the late filing of the complaint. It also went ahead to state that the preliminary objection was filed too late in the proceedings. I am convinced by the appellants’ argument that the tribunal fell into error in overruling or in dismissing the preliminary objection dated 12th May 2022. There was no application made before the tribunal to extend time to file and admit the complaint out of time. It is trite law that a preliminary point of law can be raised at any time of the proceedings. It was therefore wrong for the tribunal to hold that the appellants’ preliminary was raised too late in the proceedings.

It is also trite law that the complaint was filed outside the 30 days prescribed by the regulations. It cannot be said that the preliminary objection is a procedural technicality. I am persuaded to allow the appeal on this singular ground.”

8. Dissatisfied with the judgment of the High Court, the appellants have appealed to this Court on the grounds that the learned judge erred in law by; allowing the appeal on the basis of the preliminary objection raised pursuant to Regulations 7 (ii) of the PPDT Regulations 2017, whilst failing to consider Regulations 8(3), 40 and 37 of the of the same Act; failing to distinguish the complaints raised in the PPDT on the basis of the intervals of the timelines in which they happened and failed to note some complaints were filed within 30 days from when the decisions complained of were made and lastly that the learned judge by allowing the preliminary objection introduced a ground that was not raised by the 1<sup>st</sup> to 5<sup>th</sup> respondents during trial, regarding lack of an application for extension of time filed by the appellants before the PPDT.
9. The appeal proceeded by way of written submissions with limited oral highlights.
10. In their submissions, the appellants conceded that indeed as per Regulations (7) (i) of the PPDT Regulations 2017, the 1<sup>st</sup> complaint should have been filed within 30 days from the date of the impugned decision which they did not comply with. However, they submitted that the PPDT had discretion to extend time as provided for under Regulations 8(3) of the Act. Further, that the PPDT



was not bound by technicalities or rules of procedure and may waive any such rule of procedure if need arises as was in this case. That there were no typed proceedings presented before the High Court and as a result the learned judge erred in holding that there was no application to extend time. While relying on the High Court case of *Samuel Mathenge Ndiritu v Martha Wangare Wanjira & Another* [2017] eKLR, the appellants submitted that without a complete record of appeal being filed before the High Court, the appeal became incompetent and ought to have been struck out. That the learned judge failed to notice that there were two complaints arising from decisions which had occurred at different times and a decision ought to have been made on each separately.

11. On the other hand, the 1<sup>st</sup> to 5<sup>th</sup> respondents submitted that the Record of Appeal filed in the High Court was complete hence the appeal was competent. That the appellants had intentionally and deliberately left out some documents in the record hence, it was their record that was incomplete and ought therefore to have been struck out pursuant to Rule 87(1) of the Court of Appeal Rules. The respondents further submitted that the preliminary objections were based on law and in particular, regulations 7 (i) of PPDT regulations 2017. That the preliminary objection went to the root of jurisdiction and cannot be said to have been a mere technicality as matters jurisdiction do not fall in the province of procedural technicalities. They relied on the Supreme Court case of *Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* Civil Appl. No. 2 of 2011 (UR) for the proposition that even if the PPDT had to exercise discretion, the same ought to have been exercised judiciously. That the PPDT erred as rightly held by the High Court when it entertained a dispute that was filed outside the time prescribed by law.
12. It was further submitted that by the appellants conceding that they had filed the dispute outside the set timelines, they ought therefore to have filed an application before the PPDT for extension of time. That reliance on Regulations 8(3) for extension of time does not help as the regulation deals with party primaries which was not the case here. The respondents thus prayed that the appeal be dismissed.
13. The 7<sup>th</sup> respondent equally filed its submissions, in which it urged this Court to expressly pronounce itself on the contested fact of whether some officials had the authority in the absence of any NEC or NDC resolutions to sign the purported coalition agreement. To this respondent, the act was done in contravention of Article 10 of *the Constitution* that provides for national values including rule of law, transparency and equity.
14. We have carefully considered the record of appeal, rival submissions and authorities cited by all parties. As this is a second appeal, the mandate of this Court is limited to deciding matters of law only. This is the essence of Section 41(2) of PPDT Act which inter alia provides: -

“ 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 Supreme Court.”
15. To us, the issue of law that falls for our determination is jurisdictional. We have to determine whether, based on the facts on record and the law, PPDT indeed had jurisdiction to hear the complaints placed before it and whether the High Court was right in upholding the preliminary objection in allowing the appeal.
16. Jurisdiction is a fundamental question that goes directly to the root of the competence of a body to adjudicate over a dispute and can be raised at any point.



17. The landmark authority on the question of jurisdiction is the case of '[\*Lillian S v Caltex Kenya Limited\*](#) [1989] KLR 1 in which Nyarangi, J.A. stated as follows: -

“I think that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction .....

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court not be heard to raise the issue after the matter is heard and determined.....”

18. The jurisdiction of the PPDT is donated by Section 40 of the [\*Political Parties Act\*](#) which provides as follows: -

#### 40. Jurisdiction of Tribunal

(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;
- (g) disputes arising out of party primaries.

2. Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms ”

#### 75. Filing of disputes

1. A dispute to the Tribunal shall be commenced by filing a complaint within thirty days from the date of making the decision complained of, if the dispute is between—

- (a) the members of a political party;
- (b) a member of a political party and a political party;
- (c) political parties;
- (d) an independent candidate and a political party;
- (e) coalition partners; or
- (f) appeals from decisions of the Registrar of Political Parties.



19. The main issue that was before the learned judge was whether the PPDT erred in dismissing the preliminary objection which touched on the jurisdiction of the tribunal to entertain the complaints. From the reading of the legal provisions above, it is clear that a dispute has only to be handled by PPDT once the internal dispute resolution mechanisms of the party has been invoked and exhausted and the complaint lodged within thirty days.
20. The appellants' first complaint arose on 20<sup>th</sup> February 2022 as per the record. This is the time a convention of the 7<sup>th</sup> respondent was held that resulted in the appellants' complaints already summarized elsewhere in this judgment. The 1<sup>st</sup> complaint was however instituted before the PPDT on 11<sup>th</sup> April 2022, the appellants having exhausted the I.D.R.M. Ideally, the complaint ought to have been filed on or before 20<sup>th</sup> March 2022. The 1<sup>st</sup> to 5<sup>th</sup> respondents raised preliminary objection touching on the issue. The PPDT in its considered view dismissed the same and granted itself the jurisdiction to handle the complaint notwithstanding the strict timelines given in the Act within which to lodge such complaints. Indeed, the provisions are couched in mandatory terms and there is no room for the exercise of discretion. Even if PPDT had discretion to extend time or waive the requirement, it cannot do so *suo moto*. It has to be moved as appropriate. Regulation 8.3 that the appellants have sought refuge in is not of any use as it deals with disputes relating to party primaries which was not the case here. We have also looked at the record and just like the High Court, we do not see any application by the appellants seeking extension of time for the filing of the complaint. The appellants cannot hide behind their own mischief of filing an incomplete record of appeal to argue that since the record was incomplete, the High Court could not reach the verdict that there was no application for extension of time. After all, they are the ones who prepared and filed the record. If indeed there was such an application, there would have been nothing easier for the appellants to say so loudly authoritatively.
21. We are satisfied that the learned judge was right in holding that the PPDT erred in law in not considering and upholding the preliminary objections that were based on law. A preliminary objection is an issue of law which can be raised at any time of the proceedings and any tribunal or court should consider and dispense with it first. Raising it late in the day cannot not be the reason not to deal with it and sweep it under the carpet as the PPDT purported to do.
22. Having filed the 1<sup>st</sup> complaint late, nearly two months after the discovery of the acts complained of and without seeking to extend the time, was a proper candidate for successful preliminary objection. This omission could not be cured by **Article 159** of *the Constitution* for it cannot be invoked to confer jurisdiction where there is none. Jurisdiction is everything and cannot be relegated to a mere procedural technicality.
23. On the 2<sup>nd</sup> complaint, we wish to render ourselves as follows. It is imperative that where I.D.R.M exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and the exhaustion doctrine is a sound one which serves the purpose of ensuring that there is a postponement of judicial intervention in matters to ensure that a party is first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords well with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.
24. As this Court held recently in the case of Dr. Lilian Gogo v Joseph M.Nyamuthe & 4 Others, Nairobi Civil Appeal No. 135 of 2017, disputes arising out of party primaries between members of a political party or between a member of a political party and a political party, or between political parties or between coalition partners were already catered for under paragraphs a, b, c, and e of Section 40(1)



of the Act. Such disputes are subject to Section 40(2) of the Act and must first be subjected to the I.D.R.M before the PPDT takes cognizance of them. As the Court stated in that case:

“A common denominator of the categories of disputes that must in the first instance be submitted to the internal political party dispute resolution mechanism is that the disputants would all be subject to the political party and therefore subject to such party’s internal party dispute resolution mechanism. It is also instructive that under Section 9 of the Act as read with paragraph 23 of the 2nd Schedule to the Act, it is a mandatory statutory requirement that every political party must have provision in its constitution and rules for “internal party dispute resolution mechanism in accordance with Article 47 and 50 of *the Constitution*.” Also noteworthy is Section 13(2A) of the *Elections Act*, No. 24 of 2011 that requires a political party to hear and determine “all intra party disputes arising from political party nominations” within thirty days.”

25. In the case the court also acknowledged that there may be disputes that fall outside the categories set out under paragraphs a, b, c, and e of Section 40(1) of the Act that can be taken up directly by the PPDT. In this case, however, the dispute is between members of the political party and the political party and falls under Section 40(1)(b) of the Act and is required, under Section 40(2) of the Act to be heard by the party’s I.D.R.M before the PPDT can take cognizance of it. There is ample authority for the proposition 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 followed. See *Speaker of the National Assembly v Hon. James Njenga Karume*, Civil Application No. 92 of 1992 [2008] 1KLR 425 and also *Kimani Wanyoike Vs. Electoral Commission & Another* [1995] eKLR
26. The complaint regarding 7<sup>th</sup> and 8<sup>th</sup> respondents entering into a pre-election pact ought to have been taken up first with the 7<sup>th</sup> respondent’s IDR.M. It was thus premature for the appellants to have moved directly to PPDT without first exhausting the Party’s I.D.R.M. It matters not that it was filed in time. As long as the appellants had not exhausted the party’s I.D.R.M, the complaint was premature and given the circumstances, we doubt whether the PPDT was clothed with the necessary jurisdiction to entertain the complaint.
27. It is for these reasons, that this Court dismissed the appellants’ appeal on 29<sup>th</sup> June, 2022. As the dispute involves wrangles within the party amongst members, we make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*



**DEPUTY REGISTRAR**

