



Agoro & 2 others v Amollo & 3 others (Miscellaneous Civil Application E300 of 2022) [2022] KEHC 11526 (KLR) (Civ) (29 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E300 OF 2022**

JK SERGON, J

JULY 29, 2022

BETWEEN

**PETER AGORO 1ST APPLICANT
GEORGE BUSH 2ND APPLICANT
ERICK OTIENO ONYANGO 3RD APPLICANT**

AND

**OTIENDE AMOLLO 1ST RESPONDENT
INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT
ETHICS AND ANTI-CORRUPTION COMMISSION 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. Peter Agoro, George Bush and Eric Otieno Onyango, the 1st, 2nd and 3rd applicants herein respectively, took out the motion dated May 26, 2022 whereof they sought for the following orders
 - i. An Order barring the 1st respondent from holding any public office in the Republic of Kenya.
 - ii. An Order directing the 2nd and 3rd respondent to disapprove the clearance of the 1st respondent to vie for any public office.
 - iii. An Order directing the 3rd respondent to investigate and prosecute the 1st respondent on the facts detailed under the auditor's report dated the 11th of February 2022.



- iv. An Order declaring that any clearance of the 1st respondent by the 2nd and 3rd respondents must comply with the mandatory provisions of chapter 6 of the Constitution, Public Ethic Laws and Corruption laws.
 - v. Costs of this application
 - vi. Any other orders or directions this honourable court deems fit and just to grant.
2. The applicants filed an affidavit they jointly swore in support of the application. When served, Dr. Otiende Amollo, the 1st respondent herein, filed a replying affidavit he swore to oppose the motion. He also filed a notice of preliminary objection dated June 10, 2022.
3. The 2nd, 3rd and 4th respondents did not deem it fit to file any response to the applicant. This court gave directions to have the motion disposed of by written submissions. At the time of writing this ruling, the 1st respondent was the only party who had filed his submissions.
4. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting affidavit. I have equally considered the grounds stated in the notice of preliminary objection and the facts deponed in the replying affidavit.
5. In the instant motion, the applicants are seeking for four main orders. First, is an order seeking to have the 1st respondent barred from holding any public office in the Republic of Kenya. Two, an order directing IEBC and EACC being the 2nd and 3rd respondents respectively to disapprove the clearance of the 1st respondent to vie for any public office. Three, an order directing EACC to investigate and prosecute the 1st respondent on the facts detailed under the auditor's report dated the 11th February 2022 and Fourthly, an order declaring any clearance of the 1st respondent by IEBC and EACC must comply with the mandatory provisions of Chapter 6 of the Constitution, Public Ethics Law and Corruption Laws.
6. The applicants stated that the 1st respondent is not fit to hold a public office because of the following reasons:
 - i. Looting of public funds in Rarieda Constituency under his watch to enrich himself.
 - ii. Inconsistencies in accounting for public funds in Rarieda constituency.
 - iii. Unsupported withdrawals made from the CDF account under his watch and express authority.
 - iv. Loss of money and irregular expenditure in Rarienda constituency.
 - v. Irregular and unclear award of tender for the construction of the administration block in the constituency.
7. The applicants further pointed out that the 1st respondent is still holding office even after a very adverse report was made against him by the Auditor General in her report dated February 11, 2022. The applicants further alleged that the 1st respondent has failed the integrity test set by the Constitution of Kenya and is not fit to hold any public office.
8. In response to the applicants' allegations, the 1st respondent averred that the applicants have filed the instant application with ulterior motives meant to deter him from running for office in the upcoming August 9th General elections. He stated the application is an abuse of the court process and a waste of judicial process.



9. It is pointed out that this court lacks the requisite jurisdiction to entertain the application as it fails to adhere to the doctrine of exhaustion of remedies provided for in the [Constitution](#) and by various statutes.
10. The 1st respondent further stated that the Auditor General's report is specific to the financial statements of Rarieda constituency which is a statutory mandate of the Fund Account manager seconded from the Board as prescribed under section 24(10) of the [CDF Act](#).
11. He also pointed out that in exercise of his oversight role and in light of the report he wrote to the Fund Account Manager seeking that he takes all necessary remedial steps. He further stated that the applicants have failed to tender evidence to support their assertions and that they have also failed to demonstrate the filing of any complaint requiring E.A.C.C to investigate the complaint under article 252(1) (a) of the [Constitution](#).
12. Having considered the material placed before this court, it is clear to this court that the applicants filed the instant application before this court as a first port of call. In other words, the applicants did not approach other channels for the available remedies. Under article 47 of the [Constitution](#) as read with section 4 of the [Fair Administrative Actions Act, 2015](#) a litigant is required to only approach a court of law after he has pursued internal mechanisms for appeal or review and all remedies under any written law.
13. Under article 88(4)e of [the Constitution](#), IEBC the 2nd respondent is given jurisdiction to deal with electoral disputes as alluded in paragraphs 3, 4 and 5 of the applicants' supporting affidavit. A close look at section 74 of the [Elections Act, 2012](#) shows that there is a procedure for instituting a complaint and settlement of such disputes. It is apparent that the applicants have failed to exhaust such an avenue.
14. Section 49 of the [Constituencies Development Fund Act, 2013](#) (CDF ACT) provides for the resolution of disputes emanating from the Act as alluded to in paragraph 5 of the supporting affidavit. It is clear that complaints and disputes like those of the applicants should be forwarded to the CDF Board.
15. I am convinced that the applicants failed to observe the doctrine of exhaustion as provided for by the [Constitution](#) and the relevant statutes. The applicants had the option of approaching any of the above mentioned alternative dispute resolution mechanisms to ventilate their concerns and thereafter await a determination before approaching this court.
16. One of the remedies the applicants have sought vide the instant motion is for an order to bar the 1st respondent from holding public office. The applicants have urged this court to base its decision on the allegations inter alia that the 1st respondent has adversely been mentioned in the Auditor General's report.
17. This court has also been asked to issue an order to direct E.A.C.C and the A.G to investigate the allegations made against the 1st respondent in the Auditor General's report. There is no iota of evidence showing that the applicants have approached the aforesaid institutions to investigate the alleged complaints before approaching this court.
18. The applicants having failed to demonstrate that they approached the above mentioned institutions prior to coming to this court, I doubt whether this court has jurisdiction to entertain this action. I am not convinced that the applicants' action is justiciable. The same offends the doctrine of ripeness. In my view the dispute is premature.
19. It is apparent from the record that the instant application is a stand alone pleading. It is not based on any substantive pleading as envisaged under Order 3 of the [Civil Procedure Rules 2010](#). The applicants have



therefore failed to adhere with the rules of commencement of proceedings, therefore the application dated May 26, 2022 is incompetent and is fatally defective. It is clear that out of nothing comes nothing.

20. In the end the application dated May 26, 2022 is found to be incompetent and to be without merit. The same is ordered struck out and dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the 1st and 2nd Respondents

