



Shimenga v Amani National Congress (ANC) Party & 2 others (Civil Appeal 1 of 2022) [2022] KEHC 10318 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 1 OF 2022
WM MUSYOKA, J
MAY 27, 2022**

BETWEEN

DAVID KUBASU SHIMENGA APPELLANT

AND

AMANI NATIONAL CONGRESS (ANC) PARTY 1ST RESPONDENT

**AMANI NATIONAL CONGRESS NATIONAL ELECTIONS
BOARD 2ND RESPONDENT**

RAMADHAN BUTICHI 3RD RESPONDENT

(An appeal from a decision of the Political Parties Disputes Tribunal, sitting at Kakamega, in PPDT Complaint No. E002 OF 2022, of 14th May 2022)

JUDGMENT

1. The complaint before the Political Parties Disputes Tribunal had been brought by the appellant, who was a member of the 1st respondent. His case was that he, and 3rd respondent, had participated in party nominations, conducted by the 1st respondent, on 20th April 2022, for the position of Member of National Assembly for Ikolomani Constituency, for the party ticket of the 1st respondent. When the results were announced, the appellant was declared the winner. Subsequently, the 1st and 2nd respondents issued the nomination certificate to the 3rd respondent, rather than the winner, the appellant. The appellant was aggrieved, and lodged the complaint at the Political Parties Disputes Tribunal, seeking a declaration that the issuance of the certificate to the 3rd respondent to be declared illegal, an order restraining the interested party from receiving the certificate issued to the 3rd respondent and an order directing the 1st and 2nd respondents to issue a certificate to him.
2. The 1st and 2nd respondents responded to the complaint, essentially arguing that the appellant joined the party just two days before the deadline of joining, which was 26th March 2022, he was not a fully



paid up member of the 1st respondent, he did not meet the threshold of 2000 signatures required for nomination, his clearance to participate in the election contravened the 1st respondent's Rule Book and Constitution, he was never announced the winner of the nomination, the forms he presented in court were different from those used by the 1st and 2nd respondents, the person he cited as returning officer was not the returning officer, and that there were irregularities and illegalities involving Cleophas Malala and Mr. Shimenga. They stated that after considering those factors, they decided to award the certificate to the 3rd respondent, citing Article 17.2 h and 18.2 of *the Constitution* of the 1st respondent. It was further averred that the deadline for internal dispute resolution mechanism was 22nd April 2022, and that the appellant filed his complaint in the afternoon of 22nd April 2022, which made it impossible for them to deal with the complaint. They aver that the appellant could not be allowed to benefit from a process that was so flawed that it could not meet the required standards.

3. The 3rd respondent does not appear to have responded to the complaint.
4. The interested party, in its response, stated that it was a stranger to the nomination process conducted by the 1st and 2nd respondents.
5. The Political Parties Disputes Tribunal framed two issues, which it went on to determine. One, whether jurisdiction had been properly invoked, and, two, whether the nomination of the appellant was proper.
6. On the first issue, the Political Parties Disputes Tribunal considered the fact that it was not contested that both the appellant and the 3rd respondent were members of the 1st respondent. Next it considered the provisions of section 40(2) of the *Political Parties Act*, which requires that the Political Parties Disputes Tribunal should not determine a dispute under section 40(2) (a) (b)(c) or (e), unless a party to the dispute adduces evidence of an attempt to subject the matter to the internal political party dispute resolution mechanisms. The Political Parties Disputes Tribunal noted that the appellant had been declared winner so he had no complaint to make, but when the certificate was issued to another, he made an attempt, within reasonable time, to seek recourse within the party, and, therefore, the Political Parties Disputes Tribunal had jurisdiction. On the second issue, the Political Parties Disputes Tribunal stated that there was no dispute that the 1st and 2nd respondents conducted nominations as claimed, but was their dispute was whether the forms the appellant was relying on were authentic. It was noted that the 1st and 2nd respondents had acknowledged that the officials present at the impugned nomination exercise were their officials. The Political Parties Disputes Tribunal also noted that no aspirant contested the outcome of the nomination exercise. The only issue was the authenticity of the forms used. The Political Parties Disputes Tribunal further noted that the appellant was not invited to any party internal dispute resolution mechanism, and the respondents had not made any effort to show that he was invited, and the respondents had not attempted to show why they issued the certificate to the 3rd respondent. The Political Parties Disputes Tribunal found that the appellant had been properly nominated. In the end, in its judgment delivered on 28th April 2022, the Political Parties Disputes Tribunal nullified the decision to award the certificate to the 3rd respondent, and directed that the appellant be issued with a nomination certificate.
7. The 1st and 2nd respondents were aggrieved by the judgment of 28th April 2022, and filed a notice of appeal of even date. They also filed an application, of even date, seeking stay of execution of the orders made in the judgment. The application for stay of execution was subsequently dismissed. The appellant then filed an application, seeking to have the 1st and 2nd respondents cited for contempt of court. In a considered ruling, delivered on 4th May 2022, the Political Parties Disputes Tribunal found that the Secretary-General of the 1st respondent, Simon Mwangi Kamau, was in breach and contempt of the orders made in the judgment of 28th April 2022.



8. The respondents then lodged an application dated 7th May 2022, principally seeking stay of execution of the orders made in the judgment of 28th April 2022, review of the said judgement and of the orders of 4th May 2022 with respect to contempt of the Tribunal. Their case was essentially that the appellant had misrepresented to the Political Parties Disputes Tribunal that he had initiated internal dispute resolution mechanism with the 1st respondent, but he was not heard. They aver that the reason he was not heard was because he had not paid the requisite fees, which was something he hid from the Political Parties Disputes Tribunal. They averred that at the time of the hearing they were not possessed of that information, and, therefore, they could not possibly lay the same before the Political Parties Disputes Tribunal. Regarding the orders of 4th May 2022, they averred that at the time the respondents had already filed an application for arrest of the ruling. They also averred that they had discovered that the appellant was not a paid up member of the 1st respondent, and the Political Parties Disputes Tribunal should not have assumed jurisdiction over a dispute between them and a person who was not a party member.
9. In response to that application, the appellant averred that the same was incompetent and an abuse of process, as the respondents had lodged an appeal, and a review application and an appeal cannot run together, and that it was filed by a firm of Advocates that had not properly taken over from the previous law firm. He also averred that the application had not met the threshold for a review, as it did not show discovery of new evidence or an error on the record. It was averred that if the respondents were unhappy with the judgment the best course of action available to them was appeal.
10. The Political Parties Disputes Tribunal, thereafter, made a decision, dated 14th May 2022, headed both “Directions” and “Ruling,” in which it stated that the respondents had established that they had made a discovery of new and important evidence that was not in their possession when the judgment was made, and, on the basis of that, proceeded to set aside the judgment, and to direct the parties to file and serve further replies and skeletal submissions. An order was made to restrain the 1st and 2nd respondents from submitting the name of the 3rd respondent to the interested party.
11. It is the ruling and directions of 14th May 2022 that sparked the filing of the instant appeal. The appellant raises two grounds. One, that the Political Parties Disputes Tribunal failed to take into account the provisions of Order 45 Rule 1 of the Civil Procedure Rules, which forbade pursuit of an appeal and a review at the same time. Two, that the provisions of Order 9 Rule 9 of the Civil Procedure Rules, on a new Advocate coming on record after delivery of a judgment Had not been complied with.
12. The 3rd respondent filed a cross-appeal, dated 23rd May 2022, raising three grounds. One, that upon the setting aside of the judgment of 28th April 2022, by the ruling of 14th May 2022, the Political Parties Disputes Tribunal did not have jurisdiction to entertain the complaint further and the matter had transitioned into a nomination dispute, since the name of a candidate had been forwarded to the interested party, and under Article 88(4) e and section 74(1) jurisdiction lay with the interested party and not the Political Parties Disputes Tribunal. Two, that the Political Parties Disputes Tribunal should have dismissed the complaint once it found new evidence that went into jurisdiction. Three, the Political Parties Disputes Tribunal made adverse orders without the involvement of the 3rd respondent who was to be directly affected by the orders.
13. The 1st and 2nd respondent also filed an application, dated 23rd May 2022, seeking stay of orders/ directions of the Political Parties Disputes Tribunal of 19th May 2022; and to have an application, dated 7th May 2022, pending before the Political Parties Disputes Tribunal, admitted to the High Court, to be heard and determined by this court. That application seeks stay of execution of the judgment of



28th April 2022 and the ruling of 4th May 2022, and review of the judgment of 28th April 2022 and the orders of 4th May 2022.

14. Directions were given for disposal of the appeal, cross-appeal and the Motion of 23rd May, 2022 by way of written submissions. Both sides have filed their respective written submissions. I have read them and noted the arguments made in them. I shall not recite the said submissions due to constraint of time.
15. I will start with the Motion dated 23rd May 2022, for review of the orders made by the Political Parties Disputes Tribunal on 28th April 2022 and 4th May 2022. I note that the same parties had sought review of the same judgment vide the application dated 28th April 2022. The Political Parties Disputes Tribunal entertained the review application, and delivered its ruling on it on 4th May 2022. That ruling prompted the filing of the instant appeal. The issues raised in the review application, dated 23rd May 2022, with regard to the judgement, are now water under the bridge, since the Political Parties Disputes Tribunal has already pronounced itself on those issues. Regarding the review of the orders of 4th May 2022. The issues raised are the subject of the instant appeal, and the parties are better of addressing the said issues by way of appeal rather than review. In any case, the discretion to review is with respect to a court reviewing its own orders. It would be improper for me to sit on review of the orders of the Political Parties Disputes Tribunal. I can only deal with them on appeal. I was referred to a ruling of 19th May 2022, but since the original trial records are not before me, and a record of appeal has not been filed, I cannot tell whether or not such an order exists, and I have no way vouching for its contents. The application, dated 23rd May 2022, is, therefore, misconceived.
16. Next I will consider the cross-appeal, for once I decide on the issues raised in the cross-appeal in favour of the cross-appellant/1st and 2nd respondents, there may be no need to consider merits of merits the appeal.
17. Ground 1 of the cross-appeal is to effect that the setting aside of the judgment of 28th April 2022, by the ruling of 14th May 2022, the Political Parties Disputes Tribunal became functus officio, and had no jurisdiction thereafter to continue handling the matter by way giving directions for the filing of further documents, for the dispute had transitioned to a nomination dispute, since the name of a candidate had been forwarded to the interested party, and to determine the dispute jurisdiction lay there. Firstly, the Political Parties Disputes Tribunal did not become functus officio. It was handling a review application, and it had found that there was new evidence which was likely to change its initial decision on the complaint. The Political Parties Disputes Tribunal found that it could not review or revise the said decision without first of all hearing the parties on the new evidence that the respondents were said to have discovered, hence the directions for filing of further affidavits and of skeletal submissions. The Political Parties Disputes Tribunal did not lose its jurisdiction, and was still properly seized of the matter. The issue of the matter falling within the jurisdiction of the interested party did not arise, for the Political Parties Disputes Tribunal did not, in its ruling of 4th May 2022, reinstate the parties to the position ante 28th April 2022, nor state that the certificate held by the 3rd respondent was valid. There was no basis for the name of the 3rd respondent being presented to the interested party before the litigation at the Political Parties Disputes Tribunal was over.
18. Ground 2 is about the Political Parties Disputes Tribunal dismissing the complaint, once it found that here was merit in the review application. The finding by the Political Parties Disputes Tribunal was that the 1st and 2nd respondents had found new material or evidence, but it did not hold that the new evidence or material changed the course of things. It gave the parties an opportunity to be heard on the alleged new evidence, hence the directions that the parties file further affidavits and skeletal written submissions. The setting aside of the judgement was not final. It did not mean the dismissal of the



- complaint. It was to pave way for the parties to canvass the case on the basis of the new material that the 1st and 2nd respondent had just placed before the court.
19. Ground 3 is about the Political Parties Disputes Tribunal proceeding with the matter, and issuing adverse orders without involving the 3rd respondent, yet he was affected by those orders. The 3rd respondent was named as a party to the proceedings from the beginning. I have not had the benefit of the original Political Parties Disputes Tribunal records, since they were not availed to me. The parties have also not filed a record of appeal. What is clear is that the 3rd respondent did not appear and did not participate in the proceedings, prior to the making of the order of 4th May 2022, and he cannot now blame anyone if orders were made which are adverse to him. He has not complained of not being served with the initial process.
 20. In view of what I have said above, it should be clear that there is no merit in the cross appeal.
 21. I will advert next to the appeal itself.
 22. Ground 1 is about the 1st and 2nd respondents pursuing an appeal and a review concurrently, contrary to Order 45 Rule 1 of the *Civil Procedure Rules*. Under that provision review is sought in cases where an appeal is allowed, but none has been filed; and where no appeal is allowed. So, where an appeal is allowed, a party may only seek review where the appeal has not been filed. The classical position on entertaining review where a notice of appeal has been filed is that stated in *Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR (Makhandia, Kiage & Otieno-Odek JJA), where it was asserted that there can be no place of review once an intention to appeal has been intimated by filing a notice of appeal. That is so as the notice of appeal is treated as the appeal itself. In *Multichoice (Kenya) Ltd vs. Wananchi Group (Kenya) Limited & 2 others* [2020] eKLR (Ouko P, Makhandia, Kiage, Gatembu & Sichale JJA), it was stated, by Ouko P, that the filing of a notice of notice of appeal is a mere manifestation of an intention to appeal, and the notice is not the appeal, it is not a bar to the filing of an application for review. The Court of Appeal is, no doubt, conflicted on the matter. I will go by the position stated in *Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR (Makhandia, Kiage & Otieno-Odek JJA), for, under the Court of Appeal Rules, which provide for filing of notices of appeal, the date of filing of appeal is reckoned from the date the notice of appeal was filed. Consequently, the filing of a notice of appeal is of consequence. That being the case, the 1st and 2nd respondents could not file appeal and review at the same time. They ought to have filed a notice to withdraw the notice of appeal, if they had abandoned the appeal route, and had chosen to pursue review instead. The application for review, dated 28th April 2022 was, by dint of *Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR (Makhandia, Kiage & Otieno-Odek JJA), incompetent.
 23. Ground 2 is about the filing of a notice of change of Advocates after delivery of a judgment. The Advocate coming on board is required, by Order 9 Rule 9 of the *Civil Procedure Rules*, to obtain leave of court or consent of the outgoing Advocate. As intimated above, I do not have the original trial record before me, so I cannot tell what was filed when. The parties have not filed records of appeal. I cannot, therefore, tell one way or other, whether the Advocates who filed the review application, dated 28th April 2022, had obtained leave or not, or had obtained the consent of the previous Advocates or not. I do not think I should say more on this ground beyond that.
 24. Overall, it is my finding that the appeal herein is merited, for lack of competence on the part of the review application, dated 28th April 2022, and I hereby allow the appeal. The cross-appeal is not merited, for the reasons that I have given in the body of the judgment, and I hereby dismiss it. The Motion, dated 23rd May 2022 is also dismissed. Consequently, I hereby set aside the orders in the ruling of the Political Parties Disputes Tribunal of 14th May 2022, reinstate or restore the judgment of the



Political Parties Disputes Tribunal of 28th April 2022, and direct that the appellant be deemed to be the 1st respondent's nominee and candidate for the position of Member of National Assembly for Ikolomani Constituency. The appellant shall have the costs.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....27th
.....DAY OF.....May.....2022**

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Isinta, instructed by Isinta & Company, Advocates for the appellant.

Mr. Biketi, instructed by Biketi & Company, Advocates for the 1st and 2nd respondents.

Mr. Oganga, instructed by Kinoti Kimathi & Company, Advocates for the 3rd respondent.

Mr. Bosire, instructed by Joe Ngigi & Company, Advocates for the interested party.

