



**Gachomo v Wacira & another (Civil Appeal E375 of 2022)
[2022] KEHC 12419 (KLR) (20 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL APPEAL E375 OF 2022

JK SERGON, J

JUNE 20, 2022

BETWEEN

PERIS WANGUI GACHOMO APPELLANT

AND

SIMORA MWAURA WACIRA 1ST RESPONDENT

UNITED DEMOCRATIC ALLIANCE 2ND RESPONDENT

*(Being an appeal against the judgment and decree of the
Political Parties Tribunal on 4th May 2021 PPDTC E046/2022)*

JUDGMENT

1. On May 4, 2022, the Political Parties Disputes Tribunal hereinafter referred to as the ‘tribunal’ delivered its judgment dismissing the complaint filed by Peris Wangui Gachomo, the appellant herein.
2. Being dissatisfied the appellant filed this appeal and put forward the following grounds of appeal:
 - i. The honourable tribunal erred in fact and law in holding that the 1st respondent was not irregularly declared the winner of the nominations based on results that were not part of the court/tribunal record.
 - ii. The honourable tribunal erred in fact and law by considering the 1st respondent’s replying affidavit dated April 30, 2022 and filed on May 2, 2022 after the hearing of the matter was concluded on May 1, 2022, and the complainant/appellant not given a chance or respond to the same.
 - iii. The honourable tribunal erred in fact and law by considering the 1st respondent’s replying affidavit dated April 30, 2022 which replying affidavit the tribunal had expressly ruled was not a part of the court record, and further



directed the complainant/appellant to go back and amend her responses and submissions so as to disregard the 1st respondent's replying affidavit.

- iv. The honourable tribunal erred in fact holding that the appellant contended that the 2nd respondent in conducting party primaries employed the use of a party register instead of IEBC list of members which claims are illegitimate and inconsistent with the law when the opposite is true.
 - v. The honourable tribunal erred in fact and law by holding that there is no merit in the complaint without appreciating the overwhelming evidence tendered by the appellant.
3. When the appeal came up for hearing, this court issued directions to have the appeal disposed of by written submissions. Samora Mwaura Wacira, the 1st respondent herein filed a notice of preliminary objection dated June 14, 2022 in which he averred that this court lacks jurisdiction to entertain the appeal because it was filed more than 30 days from the date of delivery of judgment contrary to the provisions of regulation 34(1) of the [Political parties Disputes Tribunal \(Procedure\) Regulations, 2017](#).
 4. I have re-evaluated the case that was before the tribunal. I have further considered the rival submissions and the authorities cited and relied upon by the parties. I find it appropriate at this stage to set out the background of this appeal.
 5. On April 14, 2022, United Democratic Alliance party (UDA), the 2nd respondent herein, convened and held party primaries for Clay City Ward where both the appellant and the 1st respondent participated. At the conclusion of the exercise, the 1st respondent was declared the winner and was issued with a provisional nomination certificate.
 6. The appellant felt aggrieved therefore she appealed to the UDA Electoral and Nomination Disputes Resolution Committee (EDLC) alleging that the primaries were not conducted properly. The appeal was heard and dismissed thus prompting the appellant to lodge a complaint before the tribunal.
 7. In her complaint the appellant urged the tribunal to issue an order to restrain the 2nd respondent from issuing a final nomination certificate to the 1st respondent.
 8. She further sought for the nullification of the decision of the 2nd respondent which declared the 1st respondent as the duly nominated candidate to vie for the position of Member of County Assembly (MCA) for Clay Ward under UDA party. She also sought for an order directing the 2nd respondent to conduct fresh party nomination. The tribunal heard the complaint and had it dismissed by its ruling delivered on May 4, 2022 thus prompting the filing of this appeal.
 9. The 1st respondent has raised a preliminary objection which is to the effect that this appeal was filed out of time thus violating regulation 34(1) of the [Political Parties Disputes Tribunal \(procedure\) Regulations, 2017](#). The appellant did not address this court over the preliminary objection. The aforesaid regulation provides that a person who is aggrieved by a decision of the tribunal may within thirty (30) days from the date of the decision or order appeal to the High Court.
 10. The recorded proceedings indicate that the tribunal delivered its judgment on May 4, 2022. The appellant filed the memorandum of appeal dated June 4, 2022. In his submissions the 1st respondent avers that the appellant filed the appeal on June 5, 2022 which means that 32 days had lapsed from the date of judgment by the tribunal.
 11. I have perused the record and it appears the appellant actually filed the appeal on June 4, 2022, being the 30th day from the date of delivery of the tribunal's decision. I am therefore satisfied that the appeal was



filed on time hence it is competently before this court. I find the preliminary objection to be without merit. The same is therefore overruled.

12. Having disposed of the preliminary objection, I now turn my attention to the substance of the appeal. Though the appellant put forward a total of five grounds of appeal, those grounds can be disposed of by three main grounds. The first ground is to the effect that the tribunal erred when it held that the 1st respondent was not irregularly declared the winner of the nomination based on results that were not part of the tribunal record.
13. According to the appellant there had been no formal declaration, announcement or communication on the total votes at the tallying centre therefore the 1st respondent was irregularly declared the winner and issued with a provisional certificate based on the 2nd respondent's agent's unilateral decision. The appellant further argued that the 1st and 2nd respondents had failed to file a replying affidavit thus failing to adduce any evidence to show that the 1st respondent was regularly declared the winner by a formal declaration.
14. The respondent on the other hand is of the submission that the appellant concealed material facts from the tribunal in her appeal. It is pointed out that the appellant prepared her documents and omitted the 1st respondent's replying affidavit dated April 18, 2022 that had been filed at the UDA Appeals Committee.
15. The appellant further stated that the 1st respondent's replying affidavit was exposed in the judgment of UDA EDRC Appeal No 259 of 2022 which judgment reproduced the contents of the 1st respondents replying affidavit therefore the tribunal would not shy away from making a finding it held even without looking at the replying affidavit.
16. The appellant further argued that the appellant's advocate could not claim to be ambushed yet the affidavit was in the proceedings and was served with a copy. In its judgment, the tribunal stated that the 1st respondent presented evidence of results clearly showing that the appellant garnered 96 votes whereas the 1st respondent garnered 513 votes and emerged the winner.
17. The tribunal expressly stated that the 1st respondent had annexed to his affidavit the results showing the figures mentioned hereinabove. The tribunal further referred to the decision of UDA's EDRC No 59 and 62 of 2022 where the 1st respondent's win was upheld.
18. I am persuaded by the arguments of the 1st respondent that the tribunal rightly considered the material placed before it, and particularly the decision of the UDA EDRC which decision was a subject of the complaint before the tribunal. It cannot therefore lie in the mouth of the appellant to allege that the tribunal relied on results which were not presented before the tribunal. The material was already before the tribunal courtesy of the decisions from the Political Parties Internal Dispute Resolution forums.
19. The second and third grounds are closely related to the first ground of appeal. It is the submission of the appellant that the tribunal erred by considering the 1st respondent's affidavit dated April 30, 2022 and filed on May 2, 2022 after the hearing of the matter was concluded on May 1, 2022 and for failing to give the appellant a chance to respond to the same.
20. The appellant further stated that the tribunal had expressly ruled that the same was not part of the court record and directed the appellant to go back and amend her responses and submissions so as to disregard the 1st respondents replying affidavit.



21. This court was urged to set aside the tribunal's decision on the basis of this ground. The appellant further stated that the 1st respondent cannot purport to rely on an affidavit which has not been formally filed at the date of hearing.
22. The appellant further pointed out that it would be gross miscarriage of justice for the tribunal to issue orders or directions confirming that the tribunal had not received any replying affidavit from any of the respondents and further directing the appellant to disregard the same and amend her submissions accordingly, then proceeding to admit the same and make it the basis of its determination. The appellant urged this court to set aside the decision of the tribunal since the replying affidavit was filed out of time and hence did not form part of the record.
23. It is the submission of the 1st respondent that the appellant intentionally omitted the 1st respondent's affidavit dated April 18, 2022 that had been filed at the UDA Appeal committee and that the deponed facts were reproduced in the UDA Appeal's committee's ruling delivered on April 16, 2022 vide EDRC App No 59 of 2022 where the 1st respondent's replying affidavit's dated April 18, 2022 which is factually similar to the one dated April 30, 2022 was referred.
24. The 1st respondent averred that the appellant's advocate could not be said to have been ambushed by the said affidavit. Having considered the rival submissions and having re-evaluated the case that was before the tribunal, I am persuaded that the appellant's advocate was actually aware of the contents of the 1st respondent's aforesaid replying affidavit. There is also admission on the part of the appellant that he submitted on the same affidavit in her submissions before seeking for leave to amend.
25. After a careful perusal of the proceedings leading to this appeal, I am convinced that with the material non-disclosure of all the facts in this appeal to the tribunal, the tribunal could still make the same determination owing to the fact that a reproduction of the contents of the replying affidavit of April 18, 2022 in the ruling of EDRC and in the submissions of counsel therein. Having come to the above conclusion, then I find no merit in the 3rd ground of appeal.
26. In the fourth and final ground of appeal, the appellant submitted that the tribunal erred in holding that the appellant contended that the 2nd respondent in conducting the party primaries employed the use of party register instead of IEBC's list of members which claims are illegitimate and inconsistent with the laws when the opposite is true.
27. It is the submission of the appellant she proved that the IEBC register was used by the appellant instead of approved party register. The appellant argued that the register was largely in use was the IEBC register which included all voters registered to vote in Clay City Ward both registered UDA members and registered members.
28. In response, the 1st respondent is of the submission that the contents of the replying affidavit of the 1st respondent ought to have been used. Having re-evaluated the case that was before the tribunal, it is clear that none of the allegations were specifically proved to the required standard.
29. In the end, the tribunal arrived at the correct decision to dismiss the appellant's complaint since the appellant had failed to establish her claim. The appeal is hereby found to be without merits. The same is ordered dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
20TH DAY OF JUNE, 2022.**

.....

JK SERGON



JUDGE

In the presence of:

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

