



IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MISC. ELECTION PETITION APPEAL NO. 1 OF 2020

ALPHONCE MBINDA MUSYOKI.....APPELLANT

VERSUS

THE PARTY OF NATIONAL UNITY (PNU).....1ST RESPONDENT

SEINA LEKISAAT (Sued as the Chairperson of the

1st Respondent's National Election Board).....2ND RESPONDENT

JOHN ANUNDA.....3RD RESPONDENT

THE REGISTRAR OF POLITICAL PARTIES.....4TH RESPONDENT

RULING

1. The Appellant, Alphonce Mbinda Musyoki, filed an undated Memorandum of Appeal on 10th February, 2020, asserting his dissatisfaction with the Judgment delivered on 30th August, 2019 at Nairobi by the Political Parties Disputes Tribunal ('the Tribunal') in PPDT Case No. 5 of 2019. Through his pleadings the Appellant urges this Court to allow the appeal and set aside the Judgment in its entirety with costs.
2. The appeal is based on the grounds that the members of the Tribunal *inter alia* erred in law, fact and discretion by dismissing the claim against the 1st Respondent, the Party of National Unity (PNU) and the 2nd Respondent, Seina Lekisaat, on the ground that the 3rd to 27th respondents in the proceedings before the Tribunal had not been served. Furthermore, it is contended that the members of the Tribunal erred in law, fact and discretion by failing to hold that a suit against the 1st and 2nd respondents being the necessary parties cannot be dismissed for absence of non-necessary parties.
3. In response to the appeal the 2nd Respondent raised a preliminary objection dated 23rd April, 2020 asserting that the application and the appeal filed on 10th February, 2020 were filed in contravention of Section 79(G) of the Civil Procedure Act, Cap. 21 and Rule 34(1) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017. It is the 2nd Respondent's case that even though the Judgment of the Tribunal was delivered on the 30th August, 2019 and proceedings certified on 11th September, 2019, the Memorandum of Appeal was filed before this Court on 10th February, 2020 more than five months after the delivery of the impugned Judgment.
4. It is additionally the 2nd Respondent's assertion that there is no application on record by the Appellant seeking the leave of this Court to file the instant appeal out of time.
5. The Court is urged to dismiss the application and Memorandum of Appeal with costs for being frivolous, vexatious and an abuse of the court process.
6. The 3rd Respondent, the Registrar of Political Parties, is yet to file a response to the appeal.
7. The Appellant filed grounds of opposition dated 17th July, 2020 claiming that the 2nd Respondent's objection offends the Appellant's right to access justice under Article 48 of the Constitution. It is further claimed that the objection is scandalous, an afterthought, vexatious and premature and that it should be dismissed.
8. The issue that emerges from the pleadings and submissions of the parties is whether the Appellant's application and appeal should be

struck out for being filed out of time.

9. Through submissions dated 7th July, 2020 the 1st and 2nd respondents submit that the Appellant defied Section 79G of the Civil Procedure Act, Cap. 21 and Rule 34(1) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 by filing the appeal 152 days after the delivery of the Judgment and not within the 30 days as required by the cited provisions.

10. The 1st and 2nd respondents assert that the Appellant has not filed an application seeking leave to file his appeal out of time as required by Section 79G of the CPA, and has also failed to satisfy this Court that he has good and sufficient cause for the delay in filing the appeal. The 2nd Respondent submit that equity aids the vigilant and not those who slumber on their rights as the Appellant did. The submissions are supported by the decisions in the cases of **Yunuke Gesare Monda v Josephat Onserio Ochoki, Kericho HCCA 4 of 2015**; **Joseph Michael Mwenja v Woolmatt Limited, Nakuru HCCA 163 of 2017**; and **Ransa Company Limited & 2 others v Manca Francesco, Civil Appeal 46 of 2014**.

11. It is urged that the Appellant's appeal is fatally defective, incompetent and a nullity *ab initio*. This is supported by the holdings in **Madison Insurance Company Limited v Peter Mutunga Musila & another, Nakuru HCCA 50/2005**; **Joseph Kangethe Kabogo & Benson Mburu Kangethe v Micheal Kinyua Ngari [2012] eKLR**; **Joseph Michael Mwenja v Woolmatt Limited [2019] eKLR**; and **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others** (citation not provided).

12. The 1st and 2nd respondents contend that the appeal is a manifest abuse of the court process as it has been made in blatant disregard of the mandatory rules and procedures. They place reliance on the decision in **Paolo Murri v Gian Battista Murri & another [2000] eKLR** and urge this Court to strike out or dismiss the appeal with costs.

13. The Appellant in his submissions dated 28th July, 2020 states that the Tribunal, with no objection from any of the respondents, granted stay pending appeal and the duration of the stay was not specified. The Appellant contends that due to this unspecified period of stay, the appeal cannot be said to be time barred.

14. It is further submitted that the instant application is a plot to deny the Appellant his constitutional right to access justice under Article 48 of the Constitution.

15. The Court determines this matter as follows. According to Section 79G of the Civil Procedure Act:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

16. Additionally, Rule 34 of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 state that:

(1) A person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.

(2) The law applicable to appeals before the High Court in civil matters shall, with the necessary modifications, apply in appeals before the Tribunal.

(3) A decision of the High Court shall be final.

17. I have perused the annexures to the Appellant's Memorandum of Appeal and application, and in particular, the Judgment rendered by the Tribunal on 30th August, 2019 dismissing the complaint of the Appellant. It is evident that the Appellant failed to file his Memorandum of Appeal within 30 days being the time frame provided under the already cited provisions. Moreover, I cannot find any proof of the Tribunal granting stay pending appeal. In any case, an order staying execution pending appeal is not equivalent to a grant of leave to file an appeal out of time. The existence of a stay order, if any, did not therefore grant the Appellant leave to appeal out of time.

18. Not only did the Appellant fail to file his appeal within the legally mandated time frame, but he has also not provided the Court with any reasonable explanation as to why he delayed in filing his appeal. Despite my preceding statement, I appreciate that it is during the hearing of an application to file an appeal out of time that the reasons for the delay are given. In this case there is no evidence that the Appellant applied for the extension of the time for filing his appeal and neither does he suggest that he asked for leave to file the appeal out of time.

19. It is apparent to this Court that the Appellant slept on his right of appeal for five months and has not even attempted to seek the Court's authority to appeal out of time. It is therefore unreasonable and a clear abuse of the court process for the Appellant to attempt to prosecute an appeal that was filed out of time and without the leave of the Court. There is therefore no proper appeal before this Court.

20. There being no properly filed appeal before this Court, I allow the application to strike out the Appellant's pleadings.

21. Having struck out the appeal, it is no longer necessary to determine the application filed together with the notice of preliminary objection by the 1st and 2nd respondents.

22. No reason has been advanced in this matter to make me depart from the principle that requires that costs should follow the event. In the circumstances the Appellant is condemned to meet the 1st and 2nd respondents' costs for the proceedings.

Dated, signed and delivered virtually at Nairobi this 25th day of February, 2021.

W. Korir,

Judge of the High Court