REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 511 OF 2019

AMANI NATIONAL CONGRESS PARTY.....APPELLANT

VERSUS

HON. GODFREY OSOTSI.....1ST RESPONDENT

THE REGISTRAR OF

POLITICAL PARTIES.....2ND RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 512 OF 2019

AMANI NATIONAL CONGRESS PARTY.....APPELLANT

VERSUS

HON. GODFREY OSOTSI.....RESPONDENT

JUDGMENT

These appeals are consolidated. The appellant is a political party (ANC) which has had a running dispute with the respondent who up to now, going by the records, is a nominated Member of Parliament by the same party. At some point the appellant initiated disciplinary proceedings against the respondent which led to a recommendation that the respondent's name be removed from the register of the members of the appellant. This resolution was communicated to the Registrar of Political Parties who, by a letter dated 13th May, 2019 addressed the following communication to the secretary general of the appellant.

> **"Dear Sir,**
>
> **RE: GODFREY ATIENO OSOTSI: NATIONAL ID. CARD NO. 13504020**
>
> **This office acknowledges receipt of your letter dated 13th May, 2019 on the above subject matter, together with the Judgments delivered in the High Court at Nairobi on Civil Appeal No. 177 of 2018 and Judicial Review matter No. 97 of 2019.**
>
> **The contents therein are duly noted and the name of Hon. Godrey Atieno Osotsi has been removed from the party membership register of Amani Natinal Congress (ANC) as decided by the party. By a copy of this letter, the Hon. Member is notified of the same.**
>
> **Yours faithfully,**
>
> **SIGNED**
>
> **Ann N. Nderitu MBS**
>
> **Registrar of Political Parties**

Cc

Hon. Godfrey Osotsi, MP

Nominated

Parliament buildings

P. O. Box 41842 – 00100

Nairobi, Kenya."

That Communication triggered an application by the 1st respondent before the Political Parties Disputes Tribunal (PPDT) seeking conservatory orders. The appellant lodged a preliminary objection challenging the jurisdiction of PPDT to hear and determine the complaint. The objection was however dismissed and the appeal challenging that dismissal is still pending under Civil Appeal No. 397 of 2019.

The PPDT heard the dispute and in a judgment delivered on 16th August, 2019 declared that, the decision of the Registrar of Political Parties dated 13th May, 2019 removing the name of the respondent from the registrar of members of ANC party was made in breach of the Registrar's functions under Section 34 (a) and (g) of the Political Parties Act. A declaration was also made that the removal aforesaid was in breach of the appellants right to fair administrative act under Sections 3 and 4 of the Fair Administrative Action Act and the actions thereof were unlawful and invalid.

Following that declaration, an order was issued quashing and or setting aside the decision of the Registrar of Political Parties dated 13th May, 2019. It is that decision of PPDT that triggered Appeal No. 511 of 2019 and Appeal No. 512 of 2019.

Because of the cross cutting factual and legal issues involved in the two appeals, considering that the appellant and the respondent are the same in the two appeals, I shall address the same holistically. In Civil Appeal No. 511 of 201 the Registrar of Political Parties is the 2nd respondent for the reason that, it is her decision that aggrieved the 1st respondent who then moved to the PPDT to challenge that decision.

Civil Appeal No 511 of 2019 addressed the issue of whether or not the Registrar of Political Parties was right in accepting the resolution of the ANC party to remove the 1st respondent from the party register. On the other hand, Civil Appeal No. 512 of 2019 related to whether or not the appellant was right to expel the respondent and whether or not such an act following the disciplinary proceedings was made in abuse of process, misrepresentation of material facts or otherwise procedurally unfair. To that extent the two appeals are co-related.

Parties have filed extensive submissions and cited several authorities. I shall also be guided by the grounds set out in the respective grounds of appeal. In the event I do not make specific reference to the cases referred to, this should not be construed to be wanting in substance.

The appellant has implored the court to find that, the Registrar of Political Parties having removed the name of the respondent from the party register, the move to appeal the decision could not stand. The only option was to file for Judicial Review. The conservatory order was therefore misplaced in the circumstances. Several decisions have been cited in that regard.

The cumulative approach in the cited authorities is that, where a party demonstrates a prima facie case, with a likelihood of success a conservatory order should be issued. A conservatory order was adequately defined in the case of **Judicial Service Commission vs. Speaker of the National Assembly & Another (2013) e KLR** in the following terms,

> **"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in realm as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."**

This is the import of the finding in the case of **Muslims for Human Rights (MUHURI & 2 others vs. Attorney General & 2 others Petition No. 7 of 2011** where the court stated,

> **"A conservatory order would enable the court to maintain the status quo or situation or set of facts and circumstances so that it would be still possible that the rights and freedoms of the claimant would still be capable of protection and enforcement upon determination of the petition and the trial was not a futile academic discourse or exercise."**

See also Attorney General vs. Sumair Bansraj (1985) 38 WIR 286.

It would appear the above cases cited by both the appellant and the 1st respondent speaks to the same issue. If there is a right of appeal from the decision of the Registrar of Political Parties, in the event a conservatory order is not issued, then whatever proceedings take place thereafter would only be an academic exercise. I am therefore unable to accept the submission by the appellant that the 1st respondent's right to membership of the appellant had been extinguished following the Registrar's decision to remove his name from the party register.

The Registrar of Political Parties has powers under Section 34 (a) and (g) of the Political Parties Act which are extensive and independent.

The duty of the Registrar is to conduct independent inquiries and ensure compliance with the law. In so doing, it has been held the duty is not merely to rubber stamp decisions of political parties or their institutions. – see **Republic vs. Registrar of Political Parties & 6 others ex parte Edward Kings Onyancha Maina & 7 others (2017) e KLR.** In that case Odunga J stated as follows,

> **"Under section 34(1) of the *Political Parties Act,* one of the functions of the Registrar of Political Parties is to register, regulate, monitor, investigate and supervise political parties to ensure compliance with the Act. Accordingly, I agree that as the regulator, monitor and supervisor of political parties, it is upon the Registrar to ensure that those who purport to have entered into the merger agreement are indeed the duly authorised officials of the party or parties in question of course without purporting to micro-manage the manner in which the said parties conduct their affairs. To that extent I agree with the decision of the Political Parties Disputes Tribunal in Appeal No. 5 of 2016 - Party of National Unity & Another vs. The Registrar of Political Parties & 2 Others - that the Registrar is not simply a conduit but a critical player in determining whether parties seeking to merge have complied with the law. Where therefore the law is not adhered to those aggrieved by the decision are at liberty to invoke the jurisdiction of the Tribunal to resolve their grievances."**

Section 15 (7) of the Political Parties Act empowers political parties to expel members, but this can only be effected ***"if a member has infringed the constitution of the political party and after the member has been afforded a fair opportunity to be heard in accordance with the internal party disputes resolution mechanism as prescribed in the Constitution of the party."***

It is clear from the foregoing that the letter from the Registrar of Political Parties acknowledging communication from the appellant was, to say the least, inadequate. It is also noted that the letter from the appellant was dated on the same date and acknowledged by the Registrar on the same date. There is no reason to question the efficiency of the Registrar's office. However, the matter presented by the appellant for ratification was weighty and impacted on the 1st respondent's rights to political association.

Going by the provisions of Section 34 (a) and (g) of the Political Parties Act, the Registrar's words in the letter of acknowledgment dated 13th May,2019 stating, ***"The contents therein are duly noted"*** can hardly be said to have been in due execution of those powers and or functions. With respect, that falls short of the scrutiny required by Section 15 of the same Act cited above.

A meticulous examination of the proceedings which took place in the appellant's internal dispute resolution mechanism, and the ultimate decision was called for in this matter. The Registrar's office fell short of this.

Where an office does not execute its duties to the expected standards conferred by law, the same must be faulted because prejudice is likely to adversely affect the other parties. As to whether the appeal was properly before the PPDT, Section 40 (1) (f) of the Act is clear in that, appeals from the decisions of the Registrar under that Act fall within that jurisdiction. This court is therefore unable to fault the PPDT in its handling of the appeal.

I had observed earlier that the issues in the two appeals are cross cutting. The PPDT in that matter addressed the issue of whether or not the respondent was accorded a proper hearing towards the decision to expel him both under the Party Constitution and the Fair Administrative Action Act. It is a requirement of law and in particular the Constitution that, everyone should be afforded a fair hearing. Incidentally, this is also contained in the appellant's constitution at Article 50.7 which states,

> **"Disciplinary committee shall afford a fair hearing to such member complained against with reasonable opportunity to defend himself/herself against the charges or allegations made against him/her in accordance with the Rules of Natural Justice."**

It is instructive to note that the above provision in the appellant's Constitution is followed immediately by Article 50.8 which states as follows,

> **"Any person found guilty in a disciplinary proceedings or the complainant has the right, within a reasonable period, to appeal against the conviction or sentence, to the next higher body of the party. The NEC may direct that any appeal should be heard by a body higher than the one to which the appeal has been made."**

Most importantly however, is Article 50.9 which provides penalties for proven violation of the Party Constitution Principles and norms. These are said to include but not limited to

> **"Reprimand, censure, sanction, payment of compensation and/or the performance of useful tasks, temporary suspension and expulsion. A decision to expel shall be ratified by the National Governing Council."**

There is no evidence that the doctrine of exhaustion was applied to the respondent in view of the above provisions. It is also generally accepted in the rules of interpretation that the flow of words should reflect the weight associated therewith. In the present case, the appellant is said to have applied the last form of punishment, which is expulsion. There is no evidence that the preceding forms of punishment provided in the party constitution had been considered. It is difficult to depart from the finding of the PPDT that the respondent was not accorded a fair hearing in the circumstances of this dispute.

The respondent has alleged that he had never been served with a signed complaint by the appellant to which he could make any response. Further, it was his case that he has never been provided with a detailed ruling and reasons for his expulsion. In the case of **Republic vs. Firearms Licencing Board and & others exparte Julius Okeyo Owidi (2018) e KLR** the court expressed itself in the following words relating to this issue,

> **"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues". Disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds."**

I need not re-emphasise what the court said because, any decision is supposed to communicate to the parties to their satisfaction. Any decision falling short of that must be faulted.

There is also the complaint by the respondent that the Disciplinary Committee and National Executive Council were conflicted. This is a serious allegation in administrative justice system. The respondent having been removed as the Secretary General of the appellant, his successor is the one who was driving the disciplinary process. There is nowhere in the material presented that any of those members declared a conflict of interest.

The respondent would be believed when he stated the procedure under the appellant's constitution in the following manner; Disciplinary proceedings shall be commenced by the National Executive Council which writes a recommendation and written complaint to the Disciplinary committee. The Committee then sits, makes a decision and forwards it for ratification by the National Executive Council. Where the decision is to expel a member, the same must be ratified by the National Executive Committee for it to take effect. This procedure was never followed.

In any proceedings, relating to matters affecting the rights of the parties, it must be unequivocal that no doubt is left as to the clarity of the allegations so that the response required achieves the same standards. In the records presented before the court, the process was clouded as if some cards were not meant to be placed on the table. That, obviously, worked to the disadvantage of the respondent.

There was also the issue of the audit report, which the PPDT substantially relied upon in making the decision dated 16th August, 2019. That was a weighty issue which may have influenced the appellant in pushing the disciplinary action against the respondent.

The record shows that at the instance of the advocate for the respondent, the Auditor General was required to clarify the contents and impact of a letter dated 21st September, 2018 addressed to the Secretary General of the appellant citing several financial shortcomings and signed by one Kennedy Mwaniki, Audit Manager on behalf of the Auditor General.

On 10th June, 2019 the Auditor General, FCPA, Edward R.O. Ouko CBS wrote to the respondent's advocate in the following manner,

> **"I refer to your letter dated 7th June, 2019 on the above subject. But more specifically to annex a report (copy) purportedly from my office. I note that the attachment is titled, "Management Letter for compliance audit performed for two years ending 31st December, 2016 and 31st December, 2017 for the Amani National Congress Party (ANC Party)." The attachment is signed for me by a Mr. Kennedy Mwaniki. This attachment is unofficial as an audit report. Constitutionally an audit report can be quoted only if it bears the signature of the Auditor General. I am therefore a stranger to the above quoted report.**
>
> **Yours sincerely**
>
> **Signed**
>
> **FCPA Edward R.O. Ouko CBS**
>
> **AUDITOR GENERAL."**

The respondent has presented an angle in the proceedings that may have been considered adversely against him yet the document has been discredited by the head of that office. It is more likely than not that, before then, the earlier report played a significant impact in the decision to expel him from the party. In such circumstances, any perceived adverse consequence must be considered in his favour.

Before I conclude I must observe that judicialisation of political disputes has become common place in our jurisdiction. It is highly recommended that all efforts must be applied to ensure that, internal dispute resolution mechanisms address such issues to the satisfaction of the parties such that, recourse to the courts of law is minimized. Alternative disputes resolution may enhance peaceful coexistence. To apply such systems may infuse collegiality in political parties where the players need one another from time to time even after serious fall outs.

My assessment of the records presented is that the appellant fell short of the required standards in the disciplinary process and compliance with the law in addressing its differences with the respondent. There is no room to depart from the decisions reached by the PPDT in the two appeals.

I am persuaded the appeals are not meritorious and therefore should be dismissed. It is so ordered. Considering the nature of the dispute and the relationship of the parties, I order that each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2021.

A. MBOGHOLI MSAGHA

JUDGE