



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 572 OF 2018**

**WIPER DEMOCRATIC MOVEMENT KENYA.....APPELLANT**

**-VERSUS-**

**FRANCIS MWANIKI NGUNGA.....RESPONDENT**

**(Being an appeal from the judgement and orders of the Hon. Ms. Milly Lwanga, Ms. Desma Nungo and Mr. Paul Ngotho, Political Parties Disputes Tribunal delivered on 1<sup>st</sup> November, 2018 in PPDT Cause No. 11 of 2018)**

**JUDGEMENT**

1) Wiper Democratic Movement, Kenya, the appellant herein, the majority party in the County Assembly of Machakos County, appointed Francis Mwaniki Ngunga, the respondent herein, as its representative in the County Assembly Services Board vide a letter dated 18<sup>th</sup> September 2017 signed by the majority whip of NASA Coalition. The aforesaid appointment was done pursuant to the provisions of Section 46 of the County Assembly Services Act as read with section 12 of the County Governments Act.

2) Complaints against the respondent to wit *inter alia* that the respondent had renounced the appellant party were made to the appellant party. The appellant's National Executive Council is alleged to have met on 5.5.2018 and resolved to constitute an ad hoc sub-committee to investigate, hear, determine and resolve the dispute.

3) In the month of July 2018, the appellant proceeded to have the respondent removed as the majority leader in the Assembly when he failed to honour summons requiring him to appear before the sub-committee to amicably resolve the dispute. On 24<sup>th</sup> August 2018, the appellant further decided to have the respondent discharged and withdrew the respondent's appointment to the County Assembly Services Board of Machakos.

4) The respondent being aggrieved, filed a complaint before the Political Parties Tribunal hereinafter referred to as '**the Tribunal**' arguing that he was not accorded a right of hearing and further that the appellant had no jurisdiction to remove him from the Board. The Tribunal heard and determined the complaint in favour of the respondent.

5) The appellant being aggrieved preferred this appeal and put forward the following grounds:-

***i. The honorable Tribunal erred in law and in fact in holding that the respondent party has no power, authority or mandate to remove the complainant from the membership of the County Assembly Service Board.***

***ii. The Tribunal erred in law and in fact in failing to make a clear finding on the matter whether their holding that the respondent party has no power, authority or mandate to remove the complainant from the membership of the County Assembly Services Board was a conclusive finding on the basis of law applicable to such matters or exclusive to the complaint before it thus resulting in an apparent ambiguity.***

***iii. The Tribunal misdirected itself and erred in law and fact in failing to apply its mind to the sub-stratum of the complaint and the real issues in controversy by making a finding on the misapprehended basis that the proceedings before the Tribunal were in respect of the respondent's power to discharge the complainant from the County Public Service Board as opposed to the County Assembly Services Board.***

***iv. The Tribunal erred in law by abrogating itself jurisdiction in respect of the complaint as filed and presented before it yet the enabling positions of the law do not bestow such jurisdiction upon it.***

***v. The Tribunal erred in law and in fact in failing to hold that the complainant was presented with an opportunity and/or offered a fair chance to make representations before the respondent's decision.***

*vi. The Tribunal misdirected itself and thereby erred in law and fact in relying on extraneous evidence and material not adduced in evidence in reaching the conclusion that the respondent as a party had no authority to discharge the complaint from the County Assembly Services Board in view of purported Coalition Agreements.*

*vii. The Tribunal erred in law in purporting to rely on facts of a case cited as an Authority in complainant's submissions in reaching the conclusion that the respondent has no power to discharge the complaint as opposed to relying only on the ratio decidendi therein.*

*viii. The Tribunal misdirected itself and erred in fact in finding that the letter dated 12<sup>th</sup> September, 2018 from the alleged Secretary General of Chama Cha Uzalendo was not contested against clear evidence to the contrary.*

*ix. The Tribunal erred in fact and in law in finding that the meeting resolving to remove the complainant from his position was the meeting indicated in the minutes of 19<sup>th</sup> June, 2018 and therefore basing its final orders on the wrong premise.*

*x. The Tribunal erred in failing to consider the respondent's averments and their oral and written submissions in their entirety and only highlighting portions of the same sparingly.*

*xi. The Tribunal erred in law and in fact in finding that the claimant has no authority to discharge the complainant from his position without a clear statement or finding as to the basis or legal premise relied upon in reaching that conclusion thereby occasioning an ambiguity and inexactness.*

*xii. The Tribunal misdirected itself and erred in holding that there was no contest on the jurisdiction of the Tribunal based on the provisions of Section 40(2) of the Political Parties Act.*

*xiii. All in all, the Tribunal erred in law and in fact thereby occasioning a miscarriage of justice.*

6) When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the complaint that was before the Tribunal and further considered the rival submissions. Though the appellant put forward a total of 13 grounds of appeal those grounds may be collapsed to three main grounds:

**First**, whether the Tribunal had jurisdiction to entertain the dispute?

**Secondly**, whether Tribunal erred in holding that the appellant party did not have the authority to remove the respondent from his position in the County Assembly Services Board.

**Thirdly**, whether the Tribunal erred in holding that due process was not adhered to when removing the respondent from his position in the County Assembly Service Board.

7) On the first issue as to whether the Tribunal had jurisdiction to entertain the dispute. Before determining this issue, I think it is important to first understand the dispute which arose between the appellant and the respondent. The respondent's woes started when the appellant party received several complaints accusing the respondent of being disloyal. It was alleged that there was a video clip which was widely in circulation in the social media where the respondent is said to have pledged loyalty to the Maendeleo Chap Chap Party Leadership in which he is alleged to have pleaded to be accepted back as a prodigal son having politically gotten lost.

8) The respondent was further accused of failing to work with the appellant party leaders in Machakos County Assembly in advancing the party Agenda. Armed with the aforesaid accusations inter alia, the appellant party set up a disciplinary sub-committee which committee summoned the respondent to respond to those complains. The respondent is alleged to have ignored the summons forcing the appellant's sub-committee to recommend to the appellant that the respondent can no longer represent the party interest in the Machakos County Assembly.

9) By a letter dated 24<sup>th</sup> August 2018, the appellant's acting Secretary General wrote to the speaker, Machakos County Assembly requesting for the respondent to be immediately discharged as the appellant's representative to the County Assembly Service Board. This communication prompted the respondent to file a complaint before the Tribunal arguing inter alia that the appellant did not accord him a right of hearing and that the decision to remove him from the Board should be taken by the majority coalition which include NASA, Chama Cha Uzalendo and Muungano party instead of the appellant party.

10) In the end, the Tribunal came to the conclusion that the communication made to the speaker of the County assembly was illegal, null and void. The Tribunal further stated that the appellant had no power or authority to remove the respondent from the membership of the County Assembly Service Board. It is also apparent from the decision of the Tribunal that the Tribunal expressly stated that the dispute is between the respondent as a member of a political party and a political party and therefore the dispute falls under Section 40(1) (b) of the Political Parties Act hence it has jurisdiction to hear and determine it.

11) In a nutshell, the dispute is that between the appellant as a political party and the respondent as a member of the appellant party having been appointed to represent the political party as a member of the County Assembly Service Board.

12) The Tribunal's jurisdiction is set out under Section 40(1) of the Political Parties Act as follows:

*i. Disputes between members of a political party.*

ii. Disputes between a member of a political party and a political party.

iii. Disputes between political parties.

iv. Disputes between an independent candidate and a political party

v. Disputes between coalition partners.

vi. Appeals from decisions of the Registrar under the political parties act 2011, and

vii. Disputes arising out of party primaries.

13) Under Section 40(2), disputes covered in (i), (ii), (iii) and (v) above can only be entertained by the Tribunal after those disputes have been subjected to internal political party dispute resolution mechanisms.

14) It is the submission of the appellant that the Tribunal did not have jurisdiction to entertain the dispute since the same was not a dispute between a member of a political party and its member perse since the dispute spans more than the appellant and the respondent's relationship. The appellant further pointed out that the decision by the speaker constituted an administrative action which cannot be subject to challenge before the Tribunal.

15) The appellant argued that a dispute touching on the removal of a member of the County Assembly Services Board where that member is an appointee of a political party is not a dispute as between a member of a political party and a political party within the meaning contemplated under Section 40(1) of the political Parties Act for which the Tribunal has jurisdiction.

16) According to the appellant the dispute is an issue between a member of the Board, the appointing authority and the Board itself. The appellant further argued that the dispute concerning the removal of a member in his capacity as a Board member and the appointing authority under the County Assembly Services Act as well as the County Governments Act. The appellant was quite emphatic that the Tribunal erred in holding that the dispute is one between a member of a Political Party and a political party under Section 40(1) (b) of the Political Parties Act.

17) It was also pointed out that there was communication by the chairperson, County Assembly Service Board that the appellant party has authority to discharge and or remove its appointee to the Board, therefore the Tribunal lacked jurisdiction to further entertain the dispute since such decisions can only be challenged through Judicial Review.

18) The respondent on the other hand is of the submission that the dispute before this court was one where the respondent was purportedly discharged by the appellant from being a representative to the County Assembly Service Board on the basis that the respondent had ceased to be the leader of the majority before using the available Internal Dispute Resolution Mechanisms. The respondent argued that since the matter involves party coalitions the only remedy left to the respondent was to approach the Political Parties Dispute Tribunal.

19) It is not in dispute that the respondent contested the decision by his political party, the appellant herein, to have him removed and or discharged as a member of the County Assembly Service Board of Machakos. It is also not in dispute that the respondent was appointed by a coalition of political parties known as NASA whose membership included the appellant to represent their interest in the Board as the majority party. The question is whether the dispute fell within the mandate of the Tribunal under Section 40(1) of the Political parties Act.

20) In my view, the dispute herein can be categorized as a dispute between a member of a political party and a political party, therefore the Tribunal had jurisdiction to entertain the same. The tribunal was therefore right to assume jurisdiction over the matter. Two other preliminary issues arose for determination. The first issue is whether the provisions of Section 40(2) of the Political Parties Act was complied with. Under the aforesaid provision, the law states that the Tribunal only assumes jurisdiction after the party Internal Dispute Resolution Mechanisms have been exhausted. It is clear from the material placed before this court that the appellant set-up a disciplinary sub-committee to deal with the complaints leveled against the respondent.

21) The appellant's Acting Secretary General in her letter dated 24.8.2018, stated in part as follows:

**“.....the National Executive Council (N.E.C) during their meeting held on 4<sup>th</sup> May 2018, constituted a disciplinary sub-committee in accordance with the provisions of the party constitution to investigate and advise on necessary action.**

.....  
.....

**In the spirit of fair hearing the sub-committee invited Hon. Ngunga to appear before them. On the 2<sup>nd</sup> of August 2018 ..... which he declined to attend.**

**Subsequently, he was called by the Party Executive Director (ED) to explain his failure to attend to the disciplinary sub-committee summons but his efforts were all in vain.**

**..... the sub-committee concluded that the allegations on his conduct are likely to be true and smacks of disloyalty to the party. Therefore it was resolved that Hon. Ngunga no longer represents the best interests of the party in the Machakos**

**County Assembly. Consequently, and having exhausted all the internal party conflict resolution mechanisms, we now write to request that you with immediate effect discharge Hon. Ngunga as the Wiper Democratic Movement Kenya party representative to the County Assembly Service Board.....”**

22) It is clear from the above excerpt that the appellant exhausted the internal dispute resolution mechanisms before seeking for the removal of the respondent hence the provisions of Section 40(2) of the Political Parties Act were complied with.

23) In my view, even if there was no compliance it is apparent that the coalition of political parties (NASA) involved in this dispute did not avail any iota of evidence that the coalition had an Internal Dispute Resolution Mechanism. In such a case a party is entitled to approach directly the Tribunal to hear and determine the dispute.

24) The second preliminary point is to the effect that the Tribunal purported and without jurisdiction to contradict the decision of the speaker which was communicated vide a letter dated 15.8.2019. In the aforesaid decision the chairperson of the Board who doubles up as the speaker of the Assembly stated in part as follows:

**“That while my office appreciates that under Section 46 of the County Assemblies Services Act, 2017 as read with Section of the County Government Act, 2012, it is the mandate of the political parties represented in the County Assembly to nominate two members to the County Assembly Services Board according to their proportion of their member in the Assembly and that the said political parties have the powers to remove their respective nominees to the Board, it is imperative that the process of removing the said nominees should comply with the provisions of Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act, 2015. |**

25) Though the contents of the aforesaid letter are clear on the opinion held by the speaker of the Assembly, there is no evidence adduced by the respondent to show that the speaker has already made a decision on matters touching on jurisdiction. I therefore find no merit in the preliminary issue. In other words, no binding and conclusive decision was made.

26) The second main ground on appeal is whether the Tribunal erred in holding that the appellant party had no jurisdiction to remove the respondent from his position in the County Assembly Service Board. The appellant is of the submission that there is no clear basis for the Tribunal’s holding that the appellant had no power and authority to remove the respondent as a member of the County Assembly Service Board because such an authority is exercisable by parties forming the coalition. The appellant is of the submission that the Tribunal made erroneous conclusions in that the letter appointing the respondent dated 18.9.2017 expressly states that the nomination or appointment of the respondent to the membership of the Board was by a resolution of the party (appellant).

27) It was pointed out that the letter does not quote a coalition meeting or deliberations as the basis for the respondent’s appointment. The appellant further argued that even if meetings had been held, then they would have no basis or legal standing since the law is explicit as to who exercises the power to appoint and on what basis, that is a political party, according to proportionate representation. The appellant further argued that the law does not delegate the power to appoint a member of the Board to a coalition or coalitions under Section 46 of the County Assembly Services Act.

28) It is further the submission of the appellant that the said power and authority vested upon the party as under Section 46 to nominate/or appoint a member of the Board corresponds with the power to discharge, recall, withdraw or remove such a member from the Board.

29) It is the submission of the respondent that Section 12(5) of the County Government Act no. 7 of 2012 provides how a member of the Board can vacate office namely:

- i. At the end of the term of the County Assembly*
- ii. If the person ceases to be a member of the County Assembly or*
- iii. If a person is an appointed member, on revocation of the person’s county assembly or*
- iv. If the person is the speaker, when the person ceases to be such a speaker.*

30) The respondent pointed out that he never ceased to be a member of the County Assembly neither has the term of the County Assembly come to an end. It is also the argument of the respondent that the failure to adhere to the coalition agreement between the appellant and Chama Cha Uzalendo Party, the appellant had no authority to remove the respondent from his position.

31) The question which emerges from the submissions of the parties is whether the appellant had power to remove the respondent from serving as a member of the County Assembly Service Board. The appellant and the respondent both agree that the statute does not expressly give power to the appointing party to remove or discharge its appointee to the Board. Section 12(5) of the County Governments Act merely provides instances when a member of the Board can cease to be a member as stated hereinabove.

32) The material presented on appeal shows that by a letter dated 11<sup>th</sup> September 2017, the respondent’s appointment as the majority leader of the Machakos County Assembly was forwarded to the speaker of the Assembly after a meeting of NASA coalition was held on 11.11.2017 at Panari Hotel, where members from Wiper Democratic Party (Appellant), Orange Democratic Party, Ford Kenya, Amani National Congress, Chama Cha Uzalendo and Muungano Party voted. It is also not in dispute that the letter dated 24.8.2018 purporting to discharge or remove the respondent as a member of the County Assembly Service Board is signed by the ag. Secretary General of the appellant.

33) It is also not in dispute that the respondent was not nominated by the appellant party to serve in the Board but was nominated by NASA as a representative of the coalition in the Machakos County Assembly Service Board. I am persuaded by the arguments of the respondent that the appellant party had no authority to unilaterally seek to have the respondent removed and or discharged from the Board without involving the parties forming the NASA coalition. The Tribunal was therefore right to hold that the appellant had no right to act unilaterally.

34) The third and final ground of appeal is the question as to whether the Tribunal erred when it held that due process was not followed in removing the appellant from his position as a member of the County Assembly Service Board. The appellant is of the submission that the respondent was properly informed of the allegations facing him, the nature and substance of the disciplinary meeting.

35) It is said that the respondent understood the charges facing him, therefore the respondent was properly given notice and he chose to abscond without an apology. The appellant further argued that a party who declines to submit to a process cannot afterwards claim that he was not given an opportunity to be heard.

36) The respondent is of the submission that he was not given an opportunity to be heard in the saga. He further stated that the allegations or accusations were never served upon him save that he was merely contacted by SMS to attend a meeting whose agenda was not brought to his attention.

37) Faced with the competing facts and submissions, the Tribunal came to the conclusion that the respondent did not get a fair hearing before the appellant's sub-disciplinary committee. The Tribunal reviewed the text messages exchanged between the respondent and the appellant and came to conclusion that the same did not highlight the allegations against the respondent. I have also re-evaluated the material placed before the Tribunal and I am convinced that the Tribunal came to the correct conclusion.

38) There is no dispute that the appellant's officials informed the disciplinary proceedings/meetings vide text messages. I am convinced that the medium of communication did not provide the respondent with sufficient substance of the accusations he was to face. It is also apparent that the respondent was not given sufficient notice. I am convinced that the appellant did not follow the due process in its attempt to remove the respondent.

39) In the end, I find the appeal to be without merit. The same is dismissed with costs to the respondent.

**Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of September, 2019.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent