REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.461 OF 2018

HON. MARK K. MUENDO......................1ST APPELLANT

HON. TARIQ MULATYA........................2ND APPELLANT

VERSUS

HON. FRANCIS MWANIKI NGUNGA......RESPONDENT

(Being an appeal from the Ruling of the Political Parties Dispute Tribunal (Kyalo Mbabu, James Atema & Adelaide Mbithi) dated 26th September 2018, in Dispute No. 7 of 2018)

JUDGMENT

The Appellants herein, who were the Respondents in the Political Parties Disputes Tribunal Complaint/Dispute number 7/2018, filed the complaint dated the 29th July, 2018 against the Respondent seeking the following orders:

1. That the meeting held on the 16th April 2018 with the effect of the removal of complainant/Respondent herein as the majority leader and the election of the 1st Respondent/Appellant as the majority leader be declared illegal, null and void.

2. That a declaration that the 1sRespondent/Appellant was not validly elected as the leader of majority in the County Assembly of Machakos.

3. That the communications made to the speaker of the County Assembly of Machakos on the 17th April, 2018 on the removal of the complainant/Respondent and/or election of the 1st Respondent/Appellant as the leader of majority for the County Assembly of Machakos be and is hereby declared illegal, null and void.

4. That any other relief that this Honourable Tribunal may find appropriate in the circumstances.

5. Costs of the complaint.

The basis of the complaint was that the Respondent herein who was the leader of the majority in the County Assembly of Machakos, representing coalitions formed with his political party Wiper Democratic Movement – Kenya, Ford Kenya, Muungano and CCU, was in a meeting held on 16th April 2018 removed from the said position.

That in the same meeting, the 2nd Appellant was elected as the leader of the majority to replace the Respondent.

It was his contention that there was no notice issued convening the meeting held on the 16th April 2018 during which, deliberations on his removal were made, and that there were no minutes showing the person who convened the meeting, the number of Honourable members who voted against his removal, those who voted for and against the election of the 2nd Appellant as the leader of the majority, the number of candidates who were interested to be elected to the position of leader of the majority and the votes garnered by each, and an Agenda for the removal of the leader of the majority in the County Assembly.

The Respondent averred that, the election of the leader of majority in the house, is a democratic process within the party, that requires adequate notices to be given to all members including himself and that the removal and election of the leader of majority in the County Assembly cannot be done simultaneously with the election of a new leader of the majority.

It was also alleged that, some of the persons who purportedly attended and voted in the said meeting were not members of the Wiper Democratic Party or indeed any party forming majority coalition in the County Assembly of Machakos and hence the purported meeting was

not purposely constituted.

The Respondent contended that the alleged communication of his removal was not received, stamped and recorded by the County Assembly and as such there was nothing for the Speaker to act upon and hence her actions raises some questions on the authenticity of the entire process.

He averred that he was not served with a notice to show cause outlining the allegations of misconduct on acts that warranted his removal and he was not given opportunity to be heard before he was removed.

Simultaneously with the filing of the complaint, the Respondent filed a Notice of Motion dated the 27th July, 2018 in which he sought several orders, the main ones being that;

a. Pending the hearing and determination of the claim, the resolutions made on the 16th April, 2018 with the effect of the removal of the complainant as the majority leader at the County Assembly of Machakos, be suspended and the *status quo* obtaining *ante* be maintained.

b. The communications made by the Speaker of the County Assembly of Machakos on the 17th April, 2018 and further on 17th July, 2018 relating to the change of majority leader, County Assembly of Machakos be suspended, pending the hearing and determination of the complaint.

In response to that application, the Appellants filed Grounds of opposition dated the 8th day of August, 2018 on the grounds that;

1. The Respondent failed to first refer the dispute to internal Political Party dispute resolution mechanism.

2. The decision to remove the Respondent as a majority leader is in compliance with the Machakos County Assembly standing orders.

3. There is no cause of action disclosed against the 1st Appellant.

4. The application is Res-*judicata,* a similar complaint having been addressed and a finding made on all the grounds, by the High Court at Machakos in Judicial Review number 134/2018.

5. That the Tribunal could not sit as Appellate Court on High Court decision which dismissed a similar claim for lack of merits.

In addition to the grounds of opposition, the Appellants filed a notice of preliminary objection dated 8th day of August, 2018 based on the ground that;

The Tribunal has no jurisdiction to hear and determine the claim before it for the reason that;

1. The claimant/Applicant has not referred the dispute to the internal political party Dispute Resolution mechanism being an elected member of the Wiper Democratic Movement which is a member of NASA Coalition.

The Appellants prayed that the Application and the complaint be dismissed with costs.

Parties canvassed the Application by way of written submissions which they later highlighted, and in a ruling dated the 26th day of September, 2018 the Tribunal made the following orders;-

a. That the preliminary objection on point of law dated the 8th August, 2018 lacks merit. The same is hereby dismissed with costs to the complainant in any event.

b. That the Notice of Motion dated the 27th July 2018 and filed on the 31st July, 2018 which is now unopposed by the Respondent, is hereby allowed with costs.

The Appellants having been dissatisfied with the said ruling, have appealed to this court and have listed 5 grounds of Appeal in its Memorandum of Appeal dated the 2nd day of October, 2018. In summary, the following are the grounds of Appeal:

1. The Tribunal erred in law and in fact in finding that the complainant’s notice of motion dated the 27th July, 2018 was unopposed and consequently allowing it with costs yet the Respondent had filed grounds of opposition.

2. The Tribunal erred in law in abrogating itself jurisdiction in respect of the complaint yet the enabling provisions of the law did not grant such jurisdiction upon it.

3. The Tribunal erred in law and in fact in failing to find that the complaint before it was re-judicata a similar application having been dismissed on merits by the High Court in Machakos in Judicial Review Application Number 134/2018

4. The Tribunal erred in failing to consider the Respondent's written and oral submissions on the grounds of opposition which attacked the merits of the application.

5. All in all, the Honourable tribunal erred in law and in fact thereby occasioning a miscarriage of justice.

The Appeal proceeded by way of written submissions with the parties' Counsel appearing for oral high lights before the court on the 25th October, 2018.

The court has considered the submissions by the learned counsel for the respective parties.

On the first ground of Appeal, the Appellants submitted that when the Tribunal gave its ruling on the complainant's Notice of Motion dated the 27th July, 2018, at paragraph 34(b), it noted that the same was unopposed despite the Appellants having filed grounds of opposition. That the tribunal also failed to consider the written submissions by the Appellants in opposition to the application, which showed open bias and miscarriage of justice. Counsel submitted that the Appellants were condemned unheard contrary to the rules of natural justice.

On the part of the Respondent, it was submitted that the grounds of opposition raised by the Appellants were duly considered by the Tribunal in its ruling. Counsel referred to various pages of the ruling wherein the issues raised in the grounds of opposition were addressed.

The court has perused the record of the Tribunal and the proceedings thereof and it's true that the Appellants herein filed grounds of opposition to the Notice of Motion dated 27th July, 2018.The court in its introductory part of this judgment set out the said grounds of opposition and I do not wish to repeat them here. The court has looked at the said grounds and the ruling by the Tribunal. In the said ruling, some of the issues it considered are whether the complainant ought to have referred the dispute to the internal political party dispute resolution mechanism, whether the application was *Re-judicata* and whether the Tribunal can sit as appellate court on the High Court decision that dismissed the claim.

The court, however, notes that the Tribunal failed to consider whether the decision to remove the complainant/Respondent was in compliance with the standing orders of Machakos County Assembly. The Tribunal also failed to consider whether there was a cause of action against the 2nd Respondent/Appellant. On the first issue which the Tribunal failed to consider, standing order 15(3) is clear that the leader of majority party may be removed by a majority of votes of all the members of the larger party or coalition of parties in the Assembly, but from the complaint, the Respondent has raised the issue of the procedure used to remove him and the fact that he was not given any notice or a hearing. These are matters that could only be determined during the hearing of the complaint and not at a preliminary point.

On whether there is a cause of action against the 2nd Appellant, standing order 15(6) provides as follows;

> **"The whip of the largest party or a coalition of parties in the Assembly shall forthwith upon a decision being made under the standing orders communicate to the Speaker in writing the decision together with the minutes of the meeting and the list of the members who were present"**

Looking at paragraph 3 of the complaint, the Respondents/Appellants were sued in their official capacities as members of the County Assembly of Machakos duly elected under the Wiper Democratic Movement Kenya under the NASA coalition. Under the standing order number 15(6) supra, it is the duty of the 2nd Appellant to communicate the decisions made under the standing orders, to the speaker.

In the circumstances, he may be a necessary party and in any event, the Civil Procedure Rules are clear on the right party to sue and what happens if a party is in doubt from whom redress is to be sought. See Order 1 rule 7 of the Civil Procedure Rules which provides:

> **"where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendant is liable, and to what extent, may be determined as between all parties".**

In view of the aforegoing, and in dealing with grounds 1, 4, and 5 of the Memorandum of Appeal, I find that the Tribunal erred in failing to consider some of the grounds of opposition.

On ground number 2, the Appellants argued that the Tribunal does not have jurisdiction to entertain the Respondent's complaint. Counsel for the Appellants based her argument on Section 40 of the Political Parties Act which gives the political parties Tribunal its jurisdiction. The Appellant averred that the Tribunal lacked jurisdiction as the matter had not been referred to the internal dispute resolution mechanism as required under Section 40(2) of the Political Parties Act. She argued that under that section the Tribunal does not have jurisdiction to determine disputes between coalition's party members.

Counsel for the Respondent has not denied that the Tribunal does not have jurisdiction but seeks to rely on the case of **Joshua Kiilu & Another Vs. Alexander Nzambau Kathinzi & Another PPDT complaint No. 34/2016** in which though the Tribunal admitted that it did not have jurisdiction, it went ahead and heard the matter altogether. Counsel for the Respondent also relied on the case of **Hunker Trading Co. Limited Vs Elf Oil (K) Limited** in which the Court of Appeal discussed the oxygen principle whose aim is to re-energize the civil justice system and give the court the freedom to attain justice in each case in a manner which takes into account the special circumstances of each case. The case of **Collins V. Virginia 19 Vs. 284 (1821)** was also cited – which takes a position as follows;

> **"It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The jurisdiction cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it and because it is doubtful with whatever doubts, with whatever difficulties a case may be**

attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty"

But what is jurisdiction?

To quote the words of Justice Makau in the case of **Seven Seas Technologies Limited Vs. Eric Chege (2014) eKLR**

> **"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision"**

The limits of this Authority are imposed by a statute, charter or commission under which the court is constituted and may be extended or restricted by like means….." a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction of the inferior court or tribunal depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the facts exists. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing……" Emphasis given.

As stated in the celebrated case of **Owners of Motor Vessel "Lilian S" Vs. Caltex Oil (Kenya) Limited (1989) KLR 1** by Justice Nyarangi thus;

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. When a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"**

In its ruling, the Tribunal admitted that it does not have jurisdiction to handle the complaint but, that notwithstanding, it went ahead and heard the matter basing its argument on its own decision in the Joshua Kiilu case. With all due respect to the Tribunal, I think, that is not the correct position in law. As espoused by Justice Makau in the Seven Seas Technology Limited case, jurisdiction of the Tribunal must come from either the constitution or a statute. The jurisdiction can only be extended or restricted in a like manner, meaning, by either the constitution or a statute but a court or Tribunal cannot, on its own motion, decide to expand its jurisdiction without any legal or constitutional foundation and/or basis. Where a court takes it upon itself, to exercise a jurisdiction which it does not possess, its decision amounts to nothing. I therefore find that the Tribunal has no jurisdiction to entertain the complaint.

The last and the third ground of Appeal is on the issue of Res-judicata. Res Judicata is provided for in Section 7 of the Civil Procedure Act which provides;

> **"No court shall try, any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court"**

The Appellants herein contended that the complaint before the Tribunal is *Res-judicata* as a similar matter had been heard and determined by the High Court in Machakos in Judicial Review number 134/2018.

Before I delve into this ground of appeal, let me state that the pleadings in Judicial Review matter before the High Court at Machakos, were not availed to the court. It is only the Ruling which was filed by way of a supplementary record of Appeal and therefore, this court cannot be able to fully appreciate the issues that were before the Machakos High Court for determination and the reliefs that were sought.

The court has looked at the ruling that was delivered by the Honourable Judge and though he dealt with substantive issues that were raised in the Application that was before him, towards the tail end of the ruling, he declined jurisdiction and stated that the ex parte applicant should present his grievance before the right forum, as provided for under the Political Parties Act since, the court lacks jurisdiction to entertain the claim. He, however, dismissed the application for want of merits.

The court having found that it did not have jurisdiction to deal with the matter, it therefore follows that whatever proceedings were taken before it, were a nullity, and counts for nothing. Therefore, the court cannot be said to have conclusively decided on the matter.

On the other element of the parties, if the heading on the ruling before the High Court at Machakos is anything to go by, it is clear that the parties in the Judicial Review matter were different from those in the complaint before the Tribunal.

Having said that, I find that the matter before the Tribunal was not *Res Judicata* as alleged by the Appellants herein.

In the premises aforesaid, the Appellants having succeeded on one ground of Appeal, I do hereby allow the Appeal, and set aside the Ruling of the Political Parties Dispute Tribunal delivered on the 26th September, 2018.

Costs of the application and that of the Appeal are awarded to the Appellants.

Dated, Signed and Delivered at Nairobi this 30th day of October, 2018

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L. NJUGUNA

JUDGE

In the presence of:-

……………………………..For the Appellants

……………………………...For the Respondent