



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 11 OF 2017**

*IN THE MATTER OF ARTICLES 22, 33, 35, 38, 47, 45, 50, 73 & 232 OF THE CONSTITUTION OF KENYA, 2010*

**AND**

*IN THE MATTER OF ALLEGED CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOM UNDER ARTICLES 29, 33(1)(a), (3), 36(1), 37, 38, 39, 47 (1) (2) (3), 48, 50, 84 & 88 OF THE CONSTITUTION OF KENYA*

**AND**

*IN THE MATTER OF S. 58, 60, 61, 62, 63, 64, 65, 67, 72, 73, 74 OF THE ELECTIONS ACT (CHAPTER 24 OF 2013)*

**AND**

*IN THE MATTER OF S. 41, 45 & 47 OF THE POLITICAL PARTIES ACT (CHAPTER 11 OF 2011)*

*AND IN THE MATTER OF S. 1A, 1B, 3(a) & 63 OF THE CIVIL PROCEDURE ACT*

**BETWEEN**

MAGERO GUMO ..... PETITIONER

**VERSUS**

POLITICAL PARTIES DISPUTE TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT

INTERNAL DISPUTES

RESOLUTION COMMITTEE ..... 2<sup>ND</sup> RESPONDENT

AMANI NATIONAL CONGRESS PARTY ..... 3<sup>RD</sup> RESPONDENT

**AND**

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC) ..... 1<sup>ST</sup> INTERESTED PARTY

## RULING

1. Pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, Section 5(1) of the Judicature Act, order 45 Rule 1 of the Civil Procedure Rules, and Articles 36 and 38 of the Kenyan Constitution, the appellant/applicant herein Magero Gumo through a Notice of Motion dated 25<sup>th</sup> May, 2017 filed the same day sought for court orders as hereunder:

**(1) That this application be certified as urgent and the same be heard exparte in the first instance.**

**(2) That this Honourable Court pleases to review its orders dated 15<sup>th</sup> and 17<sup>th</sup> May, 2017 as Mr. Benard Shilibwa failed to disclose to the court that he was already confirmed as an independent candidate for Dagoretti North Constituency.**

**(3) That a declaration to issue that the nomination was not fair and free as Benard Shilibwa was already registered as an independent candidate.**

**(4) That a declaration to issue that the nomination was fundamentally flawed, and thus null and void ab initio.**

**(5) That the nomination result be nullified and the Election of Amos Bernard Shilibwa be reserved as he was not validly and/or lawfully elected and instead Magero Gumo be presented to IEBC as party candidate.**

**(6) That this honourable court pleases to restrain IEBC and or its agency from gazetting or issuing the confirmation certificate to AMOS BENARD SHILIBWA forthwith as he has registered himself as an Independent Candidate.**

**(7) That this Honourable Court pleases to have the Chairman, Secretary and Treasurer of Amani National Congress committed to jail for disobeying the order dated 15<sup>th</sup> May, 2017 and violating electoral laws and section 14 (4) of the Political Parties Act.**

**(8) That a declaration do issue that the degree and extent of electoral malpractices perpetuated and by or attributed to the agents of the 3<sup>rd</sup> Respondent in the conduct of Dagoretti North Constituency primary party elections for ANC are breach of and violated Article 86 of the Constitution.**

**(9) That an order cancelling the certificate of declaration of results of Dagoretti North Constituency ANC party elections and party certificate issued to BERNARD SHILIBWA 3<sup>rd</sup> Respondent herein and a certificate of declaration of results do issue forthwith.**

**(10) That costs be awarded to the applicant.**

2. Application is supported by grounds on the face of it and a supporting and further affidavits deponed by the appellant in person on the 25<sup>th</sup> May, 2017 and 29<sup>th</sup> May, 2017 respectively.

3. It is the applicant's contention that, following the honourable court's judgment and orders dated 15<sup>th</sup> May, 2017 directing for a repeat of nomination exercise for the seat of National Assembly Dagoretti North Constituency on ANC ticket, the same was held on 17<sup>th</sup> May, 2017 without

involving the appellant hence the 3<sup>rd</sup> respondent was elected irregularly.

4. That by 17<sup>th</sup> May, 2017 when the repeat nomination exercise was conducted, the purported winner one Bernard Shilibwa had already defected from ANC Party to being an independent candidate hence his participation in the exercise and the declaration by ANC party (1<sup>st</sup> respondent) that he had won was illegal and contemptuous to the court order.

5. In support of his claim, the applicant attached a list containing names of candidates alleged to be Nairobi Members of National Assembly independent candidates marked "M3".

6. The applicant therefore urged the court to find that he is the validly nominated candidate and ANC had acted in contempt of the court's orders by declaring Bernard Shilibwa the winner and also presenting his name to IEBC as ANC nominated candidate for Member of National Assembly Dagoretti North.

7. Applicant further averred that the nomination exercise conducted on 17/5/2017 was flawed and marred with irregularities hence was not free and fair.

8. In attempt to prove that the 3<sup>rd</sup> respondent had ceased being an ANC party member, the applicant/appellant attached a Kenya Gazette notice of 19<sup>th</sup> May, 2017 containing a list of independent candidates in which the 3<sup>rd</sup> respondent is reflected as No. 139 of the independent candidates.

9. In reply, the 1<sup>st</sup> respondent through its secretary general one Godfrey Osotsi, filed a replying affidavit deponed on 26<sup>th</sup> May, 2017 denying the claim and all allegations contained in the supporting affidavit.

10. The 1<sup>st</sup> respondent contended that the application is fatally defective since the same was filed by the firm of Kinuthia and Associates who had not properly come on record in place of Wachakana contrary to Order 9 rule 9 of the Civil Procedure Rules which requires leave from the court before coming on record in circumstances where there is already a judgment and yet there was a counsel on record.

11. Further, the 1<sup>st</sup> respondent averred that, by 17<sup>th</sup> May, 2017 when the repeat exercise for nomination of member of National Assembly Dagoretti North was conducted, the first respondent was a life member and therefore properly issued with nomination certificate after being declared the winner hence by ANC party forwarding his name to IEBC did not amount to an act of contempt.

12. The 3<sup>rd</sup> respondent equally denied the allegation that he had ceased being a member of the 1<sup>st</sup> respondent. He filed a replying affidavit deponed by himself on the 30<sup>th</sup> May, 2017 in which he claimed that he is a life member of ANC party having properly won and been declared the winner on a repeat nomination exercise held on 17/5/2017 as directed by the court on 15/5/2017. He attached a life membership certificate marked 'BSA-2' as proof of his membership.

13. In submission, Mr. Wachakana urged the court to declare the nomination exercise held on 17/5/2017 a sham as the same was irregularly held and in any event, the purported winner (3<sup>rd</sup> respondent) having left the ANC party in favour of being an independent candidate should have his name already submitted to IEBC removed and instead the applicant's name be submitted as the validly elected nominee.

14. Counsel contended that, there is new evidence and material facts based on the gazette notice of 19<sup>th</sup> May, 2017 that Shilibwa (3<sup>rd</sup> respondent) is no longer a member of ANC party and that the second most favourable candidate in the repeat nomination exercise in this case the applicant should be declared the winner.

15. Mr. Mukele for the 1<sup>st</sup> respondent submitted that there is nothing before court capable of being reviewed as a similar application had been filed on 18<sup>th</sup> May, 2017 and a ruling dismissing the same delivered on 20/5/2017 in which the court advised the applicant/appellant to direct his dispute to the party's internal dispute resolution mechanism or the political parties disputes tribunal.

16. Mr. Mukele termed the application herein an abuse of the court process with no clear direction as to which orders the appellant wanted reviewed. Counsel urged the court to dismiss the application and direct the appellant to lodge his dispute before the tribunal or internal party disputes resolution mechanism.
17. Mr. Ngaira for the 3<sup>rd</sup> respondent submitted that, his client has not resigned from ANC and as at 17/5/2017 when the nomination exercise was conducted, his client was a life member of ANC party. He associated himself with the submissions of the 1<sup>st</sup> respondent.
18. I have considered the application herein, supporting and a further affidavit, replying affidavits by both the 1<sup>st</sup> and 3<sup>rd</sup> respondents plus submissions by both counsels.
19. On 15/5/2017, this court ordered a repeat of the nomination exercise Dagoretti North Constituency on ANC party. In obedience to the court order, the 1<sup>st</sup> respondent conducted the exercise on 17/5/2017 and the 3<sup>rd</sup> respondent won and his name subsequently forwarded to IEBC.
20. Aggrieved by the outcome, the appellant filed an application dated 18/5/2017 seeking orders declaring the whole exercise a nullity as it was flawed with electoral malpractices. The court however overruled the appellant/applicant by dismissing the application on grounds that the dispute fell squarely under Section 40 of the Political Parties Act in which the applicant had recourse to either the internal dispute resolution mechanism or the political parties disputes tribunal.
21. Dissatisfied with that finding, the appellant/applicant came up with the instant review application dated 25/5/2017 seeking a declaration that the appellant having ceased being a member of ANC, was irregularly declared as the winner of the 17<sup>th</sup> May, 2017 nomination exercise.
22. From the gazette notice dated 19<sup>th</sup> May, 2017, the 3<sup>rd</sup> respondent is indicated as an independent candidate. However, by 15<sup>th</sup> May, 2017 when I delivered the judgment ordering a repeat exercise which was done on 17/5/2017, the 3<sup>rd</sup> respondent was still a member of the ANC party. The discovery made on 19<sup>th</sup> May, 2017 that the 3<sup>rd</sup> respondent had ceased being a member of ANC party cannot apply retrospectively. As admitted by Wachakana, the new evidence arising on 19/5/2017 cannot be referred to as new evidence or material facts under Order 45 of the Civil Procedure rules so as to apply in respect of the orders of 15<sup>th</sup> May, 2017 hence cannot affect the repeat exercise.
23. In any event, there is no evidence to show that by 17<sup>th</sup> May, 2017 when the election was held, the 3<sup>rd</sup> respondent was not a member of ANC party.
24. I do agree with Mr. Mukele and Mr. Ngaira that the issues raised in this application with regard to any irregularities arising out of the 17<sup>th</sup> May, 2017 elections is a dispute which should be addressed by the party dispute resolution mechanism or PPDT and not the court directly. This position was succinctly spelt out in my ruling of 20/5/2017 hence nobody should be cited for contempt or at all. The application herein is to a large extent a replica of the application dated 18/5/2017 which was dismissed on 20/5/2017.
25. As to whether there is a new development that after the election exercise the 3<sup>rd</sup> respondent ceased being a member, that is also a fresh dispute between the party and a member which should be handled in accordance with Section 40 of the Political Parties Act and not the court in the 1<sup>st</sup> instance. **(See the case of Stephen Asura Ochieng and 2 others vs ODM (2011)eKLR)**. If the party wrongly cleared an unqualified person to run as a candidate on 17<sup>th</sup> May, 2017, that is a dispute between a party and a member (appellant) hence curable under Section 40 of the Political Parties Act. If the 3<sup>rd</sup> respondent ceased being a member of ANC party after his nomination on 17/5/2017, that is purely a fresh suit which this court cannot entertain in the manner and style presented.
26. In any event, this court was exercising appellate jurisdiction under Section 4 1((2) of the Political

Parties Act. The issue being raised now calls for this court to exercise original jurisdiction on an issue that was not the subject of appeal right from the tribunal.

27. I do not see any order before me capable of being reviewed under Order 45 of civil procedure rules. There is no error or mistake apparent on the face of record. Equally, there is no new evidence nor material facts or sufficient cause to warrant review of the orders dated 20/5/2017. Mr. Wachakana admitted that there was nothing to review in respect of the orders made on 15/5/2017 yet the entire application is anchored on those orders. The applicant is not sure of the orders is seeking to review.

28. Lastly, the instant application was filed by the firm of Kinuthia advocate who filed a notice of change of advocate without any formal application to come on record in place of Wachakana advocate as required under Order 9 rule 9 of Civil Procedure Rules which is couched in mandatory terms. Although Mr. Wachakana tried to hide under Article 159(1) (d) of the Constitution, he did not explain why Kinuthia Advocate did not come on record formally in his place nor did he disclose that he was holding brief for Kinuthia. Accordingly, application herein is a nonstarter and fatally defective as it is drawn and filed by an advocate who had not come on record formally.

29. For the above stated reasons, the application herein is dismissed with costs to the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> MAY, 2017.

**J.N. ONYIEGO**

**(JUDGE)**

In the presence of

.....counsel for appellant

.....counsel for 1<sup>st</sup> respondent

.....counsel for 3<sup>rd</sup> respondent