



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NUMBER 63 OF 2017

PETER MAKAU WAMBUA. APPELLANT

VERSUS

WIPER DEMOCRATIC MOVEMENT. 1ST RESPONDENT

HON. STEPHEN MUTINDA MULE.....INTERESTED PARTY

(An Appeal from the Decision of the Political Parties Dispute Tribunal in Case No. 50 of 2017 delivered on 16th May, 2017 by Hon. Milly Odongo, Hon. Paul Ngotho and Hon. Dr. Adelaide Mbithi and Ho. Desma Nungo)

BETWEEN

REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTE TRIBUNAL
CASE NUMBER 50 OF 2017

PETER MAKAU WAMBUA. APPELLANT

VERSUS

WIPER DEMOCRATIC MOVEMENT. 1ST RESPONDENT

HON. STEPHEN MUTINDA MULE.....INTERESTED PARTY

J U D G M E N T

This is an appeal by the Appellant Peter Makau Wambua from the decision and judgment of the Political Parties Dispute Tribunal in complaint No. 50 of 2017 delivered on 16th May, 2017 where his complaint to the tribunal dated 2nd May, 2017 was dismissed. The brief background is that the Appellant is a Member of the Respondent Wiper Democratic Party of Kenya. He desired to vie for the seat of Member of Parliament for Matungulu Constituency, Machakos County. He applied to the Respondent and paid a non-refundable fee of Ksh.200,000/-. He then filled the necessary form and supplied all the required documents which were forwarded to the Respondent. On 13th April, 2017 he received a letter which informed him that he had failed to meet the criteria for vetting of aspirants. He lodged a complaint with

the National Election Board which dismissed his complaint. He appealed to the National appeals Board which relied that the rejection was procedural and that the NEB should furnish him with valid reasons for the rejection. He then appealed to the Political Parties Dispute Tribunal. In the meantime, he learnt that the interested party had been issued with direct nomination by the Respondent as a nominee for Matungulu Parliamentary seat. The Appellant then appealed to the Political Parties Dispute Tribunal which dismissed his claim.

Dissatisfied with the judgment the Appellant through Dr. Khaminwa SC filed this appeal challenging the judgment on the following grounds: -

- 1. The Tribunal erred in law and in fact by finding that the Applicant's complaint had failed yet it had merit.***
- 2. The Tribunal erred in law and in fact by failing to clear the Appellant herein as an eligible candidate forth Wiper Democratic Party nominations for the Parliamentary seat of Matungulu Constituency.***
- 3. The Tribunal erred in law and in fact by not finding that the denial to give a reasoned decision by the National Appeals Board amounted to a denial to participate in the party's nomination exercise.***
- 4. The Tribunal erred in law and in fact by failing to find that there was great importance in the reasons that the Appellant sought form the National Appeals Board for having declared him unfit for the Nomination process for the Matungulu Constituency Parliamentary Seat.***
- 5. The Tribunal erred in law and fact by failing to adjudicate on the authenticity of the letter dated 21st April, 2017 produced before it and thereby arriving at the wrong conclusions while making their judgment.***
- 6. The Tribunal erred in law and in fact by failing to exercise its authority to adjudicate on matters of evidence brought before it.***

Dr. Khaminwa for the Appellant in support of the appeal submitted that the tribunal made the finding that he had exhausted the IDRMs and it failed to consider that he had submitted the requisite documentation to the National Elections Board. The Honourable Tribunal failed to evaluate the facts before it properly and made erroneous findings that on this basis the complaint fails. He submitted that the Appellant's political rights were violated contrary to Article 38(2) of Constitution of Kenya which is the supreme law of the land and guarantees every citizen a right to participate in political activities of a party of one's choice.

He further submits that the appellant is a fully paid up member of the party and he had paid the nomination fee. The party chose the interested party, One Stephen Mule as their preferred candidate. The party's action was in breach of the Code of Conduct governing political parties under Political Parties Act, Section 7 (g) of the first schedule of Political Parties Act which provides that every political party should respect, uphold and defend their respective political constitutions, election rules, political party nomination rules and all regulations developed under the Political parties electoral code of conduct.

Dr. Khaminwa submits that the Respondent failed to adhere to fair, transparent and just process as provided under the Constitution which states that every political party should abide to the democratic principles of good governance, promote and practice democracy through regular fair and free elections.

Dr. Khaminwa emphasized that Article 38(2) of the Constitution every political party should hold free and fair election based on universal suffrage and free expression of the will of the people. The interested party is the preferred candidate for the party and not the people favourite. The Wiper Democratic Movement under Section 6(c) of the first schedule provides that all political parties should respect, uphold and defend their political constitutions, electoral rules and party nominations rules. Wiper Democratic Movement Party Elections and Nominations Rules under Section 23.9 provide that all

individual paid up members of the Wiper Democratic Movement are eligible to participate in the primaries for parliamentary and civic nomination.

Mr. Osure for the 1st Respondent submitted that the issue of this appeal was never the subject in the tribunal and cannot be brought on appeal. That the complaint in the Political Parties Dispute Tribunal sought orders that the decision of the party's National Appeals Tribunal be adhered to. That the ruling was to the effect that reasons for the Appellant disqualification be given.

The Respondent's counsel submits further that the reliefs sought are not tenable and an order to reconvene the nomination elections it is not feasible and the appeal to the political party's tribunal did not have merit.

On jurisdiction, counsel submitted that under Section 40(2) of the Political Parties Act is clear. The Party National Elections Board disqualified the Appellant and its reasons for disqualification be given, which were given. That the reasons were never challenged anywhere, in the party mechanisms or in the Political Parties Dispute Tribunal and now the Appellant is attempting to sneak the same to the High Court disguised as an appeal.

Counsel for the Respondents submits further that the Appellant never asked the Political Parties Dispute Tribunal to clear him. That clearing and vetting is the work of the National Elections Board and the appeals from the decision of the National Election Board lie at the party National Appeals Tribunal, that the Appeals from the party NAT lie to Political Parties Dispute Tribunal.

Counsel submits that the appellant had the opportunity to verify the authenticity or lack thereof of the letter. He could verify at the party office. He had not done so. It is the Respondent's letter and the Respondent stands by the letter.

Mr. Ayiro for the Interested Party submitted that the Appellant having subscribed to the party, he should respect the decisions of its institutions. He submitted that the Appellant did not pass the Party vetting process Wiper Democratic Party where he was found unfit. He submits that the party has mechanisms of appeal but the Appellant was indolent as he did not appeal within 48 hours but 11 days later. He submits that the Applicant in this appeal is seeking judicial review of the decision of the National Election Board and not appeal which are two different processes. He finally submits that the Interested Party is the validly nominated Member of Parliament on Wiper Democratic Ticket having obtained the direct ticket since he was unopposed.

In Reply Dr. Khaminwa submitted that it is a High Court which under Article 23 has jurisdiction of judicial review and appeal from subordinate courts or tribunals.

The gist of Dr. Khaminwa S.C's submission is that the Respondent, Wiper Democratic Party's National Elections Board acted unconstitutionally when they failed to provide reasons for their decision in respect of the Appellant's appeal and as a result the Appellant suffered prejudice. He submits that to date, he has not been served with the reasons but admits seeing a letter, purporting to give reasons whose authenticity was unknown and which was never addressed to the Appellant. The letter referred to is the one dated 21st April, 2017 by One M/s A. N. Solitei, Chairperson Wiper Democratic Party National Elections Board. It is addressed to the National Appeals Tribunal. The letter purports to give reason for rejection as: -

“The candidate Mr. Peter Makau Wambua was measured against this criteria and he did not demonstrate the following criteria: -

a) In his application, the Aspirant failed to articulate how he has contributed to growing the party and in party activities.

b) Investigations carried out by the NEB showed that his loyalty to the party, its leadership and organs was questionable as he was frequently associated with persons who were known to be working against party interests.

c) The NEB received correspondence that alleged that the aspirant had committed sexual offences. While there was no evidence of conviction on the same, the NEB felt that this pointed towards lack of integrity from the aspirant.

d) The WDM-K has stood for what is right and just in society and the NEB believed that the aspirant would not ably represent the party's policies and ideologies."

The authenticity of this letter was challenged by the Appellant at the Political Parties Dispute Tribunal. The Tribunal on this issued and stated: -

"We note, however, that a reasoning was availed through an annexure to the Respondent's affidavit though a letter dated 21st April, 2017. The claimant disputes the authenticity of this letter. This Tribunal notes that this is not an ideal situation as the Respondent should have filed and served the letter to the Complainant in advance. This Tribunal stresses that the Respondent at all times should be responsive to its member issues. Be that as it may, this Tribunal is not well placed to inquire as to the authenticity or otherwise of the letter. In this regard, the claimant has recourse in law elsewhere. Having said so, we find that the delay in giving the reasons is not likely to have any greater impact on the complaint in the circumstances of this candidacy having been rejected by the appropriate party organ."

The Tribunal having made a finding that the tribunal would not establish the authenticity or otherwise of the letter, then it means that the Respondent had not established that the National Elections Board gave reasons for its decision. The National Elections Board had the burden of proof to demonstrate to the tribunal that the Appellant was served with reasons. In **Miller Vs Minister of Pensions (1947)** on burden of proof Denning J held that: -

"That degree is well settled. It must carry a reasonable degree of probability, but no so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable that not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance of preponderance of probabilities means a win, however, narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

Even if this court were to find that the letter dated 21st April, 2017 provided reasons by National Elections Board, were the reasons served on the Appellant? The Political Parties Dispute Tribunal found:

-

"We note, however, that a reasoning was availed though an annexure to the Respondents affidavit though letter dated 21st April, 2017."

This letter was addressed to the National Election Board and not the Appellant. It is not even copied to the Appellant. The filing of the letter as an annexure to the Respondent's affidavit does not amount to effective service of the reasons on the Appellant.

The reason for a tribunal's obligation to provide reasons for its decision are to enable the party to know the issues for determination, and the reasons thereof. This is necessary not only for accountability but also enable the party to elect whether to challenge the decision or if satisfied to live with it. Any failure to comply with this requirement is in my view be an act of unfairness and arbitrariness by the body. The National Elections Board was directed by the Respondents National Appeals Tribunal to serve the Appellant with reasons for its decision. There is no evidence that it did, either personally or by letter addressed to him. This was the finding of the Political Parties Dispute Tribunal too. From the submissions I am satisfied as Dr. Khaminwa submitted that the Appellant was not served with reasons.

Where a decision making body is under duty to give reasons it ought to do so. A departure from this requirement will require sound justification. Where it fails to give reasons as in this case and the decision is challenged, the failure to give reasons may cause the court to presume that there were no rational reasons for that decision. For this failure, the court will quash the tribunal's decision and orders.

In the analysis, I find that the Political Parties Dispute Tribunal was clearly wrong in dismissing the Appellants complaint in their judgment dated 6th May, 2017. I find that the Respondent's National Elections Board did not provide reasons to the Appellant for its decision to find him unsuitable. I consequently, thereof allow the appeal, quash the decision of the National Elections Board and direct that the Respondent, Wiper Democratic Movement do consider the Appellants application for nomination in accordance with the party's constitution and nomination rules, within 48 hours from time of delivery of this judgment. I make no orders as to costs.

Dated, signed and delivered at Nairobi this 29th day of May, 2017.

.....

S N RIECHI

JUDGE