



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO 52 OF 2017

PROF. RICHARD OTIENO MUGA.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

EVE OBARA2ND RESPONDENT

DAVID OBONYO MIRERI 3RD RESPONDENT

(An appeal against the Judgment & order of the Political Parties Disputes Tribunal at Nairobi (Hon. Kyalo Mbobu, Hon. James Atemi and Hon. Hassan Abdi) delivered on 12th May, 2017 in PPDT complaint NO. 144 of 2017)

BETWEEN

DAVID OBONYO MIRERICOMPLAINANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

EVE OBARA.....2ND RESPONDENT

AND

PROF. RICHARD OTIENO M.....INTERESTED PARTY

JUDGMENT

1. Political parties plays a very important role in the democracy. Without political parties, a modern representative democracy is not conceivable since it is only the parties that ensure that the citizens are permanently capable to act politically. It is therefore a team of men and women seeking to control political apparatus by gaining office in a dully constituted election. So important are political parties that Article 38 of constitution of Kenya 2010 provides as follows:-

38 (I) Every citizen is free to make political choices which includes the right-

- a) To form and participate in forming a political party**
- b) To participate in the activities of or recruit members for a political party or**
- c) To campaign for a political party or cause.**

2. So important is the political party to the Democratic process in Kenya that parliament has enacted the Political Parties Act No. 11 of 2011 to govern the activities of political parties and in part V there of establishes the political parties Dispute Tribunal whose Judgment is the subject matter of this Judgment.

3. The appellant **Prof. Richard Otieno Muga**, The 2nd Respondent **Eva Obara** and 3rd Respondent **David Obonyo Mireri** are all members of the 1st Respondent **Orange Democratic Movement** (herein referred to as the party) and together with other not before the court took part in the party primaries commonly known as party nomination election which was expected to be conducted in line with PART III of party election and nomination Rules as amended and adopted on 5/12/2014 enacted in compliance with section 19 of political parties Act and section 24 (I)(c) of Election Act in respect of **Kabondo Kasipul Parliamentary Seat**.

4. Being dissatisfied with the outcome of that exercise in which it is alleged that the 2nd Respondent and one **Silvance Osele** were both issued the provisional nomination certificate **David Onunda, Prof Otieno Muga** (The Appellant herein) and **David Obonyo Mireri** (3rd Respondent) filed an appeal to the party at **National Appeal Tribunal** (NAT) in which it found as a fact the following:-

- a) The tallying process at the tallying center was not conducted as in accordance with party rules and specifically Rule 18.
- b) It is unfortunate that tallying process was interfered with thereby denying MS. OBARA what according to her was an imminent victor.
- c) Our own inquiries with the returning officer confirmed this position (Emphasis added).

5. NAT therefore proceeded to make the following orders:-

- a) THAT The provisional certificate held by MS. EVA OBARA and HON SILVANCE OSELE be and is hereby withdrawn.**
- b) THAT The party to proceed and determine a party nominee for KABONDO KASIPUL constituency. Parliamentary election in a manner that is consistent with the party constitution nomination and election Rules (Emphasis added).**

6. Aggrieved by the decision of NAT the 3rd Respondent filed a claim at the **Political Parties Tribunal** being **Claim No. 144/2017** and named the 1st and 2nd Respondents as respondents respectively and sought the following orders:-

- i. A declaration that the provisional certificate held by the incumbent MP and the 2nd respondent were irregularly obtained and are therefore null and void.**
- ii. An order directing the 2nd respondent (sic) to issue the claimant the nomination certificate to the claimant herein.**
- iii. In the alternative to (ii) above an order directing the 1st Respondent to organize and conduct a nomination exercise in Kabondo/ Kasipui constituency within 48 hours**

iv. Costs are awarded to the claimant.

7. The claim was supported by an affidavit wherein it was deponed that despite numerous hitches including delay in starting the exercise in various polling stations as well as insufficient ballot papers the exercise proceeded smoothly throughout the day except in three named stations Kolweny Primary school, Abuoye Primary school and Ringa primary schools where ballot papers were burnt and therefore no polling took place.

8. It was further deponed that the incumbent member of the National Assembly raided the tallying centre with a contingent of armed GSU personnel and therefore made it impossible for tallying to be done until the next morning when they forced the returning officer to announce the incumbent as the winner and to be issued with a provisional nomination certificate. It was however his contention that he was the winner with a total of 8,000 votes while the 2nd Respondent was second with 4,000 votes.

9. The 2nd Respondent filed the statement of defence and a replying affidavit in which it was deponed that she was at the end of exercise declared the winner with 7191 votes in an exercise which she described as free and fair save for the incident at Ringa polling center where the 3rd Respondent discharged his fire arm and kicked a ballot box in an attempt to swap it with another stuffed with ballot papers marked in his favour and where the incumbent held the returning officer hostage.

10. The Appellant joined the proceeds as an interested party and urged the tribunal to uphold the decision of NAT.

11. Based upon the stated pleadings the tribunal rendered its Judgment on the following terms:-

11. No sufficient grounds have been given for impugning the NAT decision. We note that NAT withdrew the first provisional certificates issued to EVE OBARA and HON OSELE hence there is nothing worth revoking in regards to Hon. Osele. It was submitted that the provisional certificate MS. Obara currently hold was given to her after the delivery of NAT decision hence, it was issued by the party in compliance with order (b) of the NAT decision. Accordingly, we find that the compliant has not been given sufficient evidence to warrant the certificate being revoked (Emphasis added)

12. We make the following orders:

i) Statement of claim contained dated 8/5/2017 is dismissed.

ii) The nomination certificate issued by the 1st Respondent to the 2nd Respondent is hereby affirmed.

iii) Each party to bear its own cost.

12. The 3rd Respondent on 12/5/2017 moved the tribunal under order 45 of CPR to review its Judgment herein on the ground that the same was born out of fundamental error apparent on the face of record on the grounds that the certificate issued to the 2nd Respondent on 29th April 2017 apparently on the basis of the NAT Judgment delivered on 5/5/2017 and was therefore fundamentally erroneous since it could not come earlier than the decision of the NAT nor was there evidence to the fact that the said certificate was issued by the party in exercise of their right to issue direct nomination.

13. The 2nd Respondent filed a reply to the said application for review in which she stated that what was withdrawn by the party Tribunal was the provisional nomination certificate and not the final nomination certificate issued to her on 29th April 2017 and therefore the recommendation by the party Tribunal in clause (2) of its Judgment had been overtaken by events and were not capable of enforcement..

14. On 17/5/2017 the Tribunal rendered its decision on the following terms:-

“We agree with the above position of Law (Nyamongo & Nyamogo 2007 EA 174) The Applicant may very well have a ground of Appeal against our decision of 12/5/2017. However, we are of clear and firm view that the facts of the case cannot support Application for review of the decision issued on 12/5/2017”

APPEAL

15. On the 19/5/2017 the current appellant who took part on the application for review through Mr. Ayieko Advocate by supporting it filed this Appeal together with a notice of motion under certificate of urgency and in his Memorandum of Appeal raised the following grounds:-

- 1. The Honourable Chairman and members of the Tribunal erred in Law and in fact when they upheld and affirmed the nomination certificate issued by the 1st Respondent to the 2nd Respondent.***
- 2. The Honourable Chairman and members of the Tribunal erred in Law and in fact when they held that nomination certificate issued by the 1st Respondent to the 2nd Respondent was in full compliance with the Judgment of the National Appeals Tribunal (NAT) yet there was no evidence adduced to support or confirm that assertion.***
- 3. The Honourable Chairman and members of the Tribunal erred in Law and in fact by failing to appreciate that the 1st Respondent party had not executed or complied with the Judgment and recommendations of the NAT hence no valid nomination certificate could issue.***
- 4. The Honourable Chairman and the members of the Tribunal erred in Law and in fact in failing to find that the nomination certificate allegedly issued to the 2nd Respondent was dated 29th April, 2017 way before the Judgment of the NAT could be delivered hence incapable of being construed as a valid and final nomination certificate in terms of the Judgment NAT.***
- 5. The Honourable Chairman and the members of the Tribunal erred in law and in failing to consider the Appellant’s defence and submission thereby arriving at the impugned Judgment.***

He sought the following prayers.

- 1. This Appeal be allowed and the Judgment of the political parties Dispute Tribunal decided on 12/5/2017 be set aside.**
- 2. The 1st Respondent be directed to implement and comply with the Judgment of NAT dated 5/5/2017.**
- 3. Cost be provided for**

16. By reasons of the urgency of this matter taking into account the timelines under the Election Act, Directions were issued for the Respondents to file their Responses and skeleton submissions for hearing of the main Appeal which has been complied with through Replying Affidavits sworn by the 2nd Respondents and one JOTHAN OKIDI the Returning officer appointed by the 1st Respondent and grounds in support of the appeal by the 3rd Respondent in which he sought for an order that the Judgment of the tribunal be set aside and replaced with an order for fresh nomination exercise within a time to be stated by the court.

SUBMISSIONS

17. On behalf of the Appellant Mr. Laichena Advocate submitted that the PPDT agreed with NAT in respect to the cancellation of the provisional certificate which Judgment it was submitted had not been challenged anywhere and was therefore still valid and in force. It was therefore submitted that the

Tribunal failed to interrogate, analyze and appreciate whether or not the second limb of the Judgment and order of NAT was complied with or executed. It was submitted that the Judgment of NAT ought therefore to be implemented by the 1st Respondent. The following cases were submitted in support:-

a) MOMBASA MISS APP NO 3/2013 THE REGISTERED TRUSTEES OF BAPTIST CONVENTION OF KENYA T/A KIEMBENI BAPTIST CHURCH PRIMARY SCHOOL VS. THE MINISTRY OF EDUCATION & ANOTHER

b) NAIROBI HIGH COURT CIVIL CASE NO. 711/1999 MURATA FARMERS SAVINGS AND CREDIT SOCIETY VS MUGAMA FARMERS COOP UNION

18. Mr. Juma for 3rd Respondent in support submitted that the nomination exercise did not comply with Rule 18.8 of the party nomination Rules. It was submitted that the PPDT upheld the Judgment of NAT cancelling provisional certificate but noted that the party has failed to comply with part 'B' of the said decision which required the party to nominate a candidate through the provisions of the party nomination Rules which it was submitted in respect of Kabondo/Kasipul must be by universal suffrage as per Rule 18 which puts the constituency in Zone 'A'. It was submitted that the certificate that 2nd Respondent was holding was not given after NAT decision as per Judgment of PPDT:

19. On behalf of the 2nd Respondent Mr. Osiemo submitted that the 3rd Respondent had preferred a review against the decision of the tribunal which the Appellant participated in support. It was therefore submitted that parties could not team up and agree that one party files an application for review and when the same fails the other party files appeal to defeat the provisions of **Order 45 Rule 6 CPR**. It was submitted that the tribunal had a right to set aside, vary or uphold the decision of NAT. It was submitted that the certificate the 2nd Respondent is holding was not awarded on the basis of the decision of the party tribunal of 5/5/2017.

ANALYSIS AND DETERMINATION

20. This appeal is grounded on only one fundamental issue whether the PPDT was right in upholding the decision of NAT withdrawing the provisional certificate earlier issued and affirming the certificate issued to the 2nd Respondent allegedly on the ground that it was given to her after the delivery of the said decision and in compliance the order (b) thereof while the said certificate was issued on 29/4/2017 before the said decision was delivered.

21. As stated herein this was the complaint in the Application for Review which from the records the Tribunal dismissed without giving much thought thereto and thereby falling in error. Once the Tribunal had been notified that the certificate upon which their decision was based was allegedly issued to the second Respondent before the Judgment which was the subject matter before them, I am of the considered opinion and find that the Tribunal should have reviewed their decision on that ground alone. It is therefore clear that the Tribunal fell into error for which their decision is subject to be upset by this court on appeal.

22. Having said that I must therefore consider the effect of the Application for review filed by the 3rd Respondent and supported by the Appellant on this Appeal. Once the Appellant had taken part in the Application for Review under order 45 rule 1 (1) (a) which provides as follows:-

45 1(1) Any person considering himself aggrieved;

a) By a decree or order from which no appeal has been preferred or

b) By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidenceor on account of some mistake or error apparent on the face of the records or for any other sufficient reason, desires to obtain review of the decree or order, may apply for review of Judgment to the court which passed the decree and made the

order without unreasonably delay.

23. My understanding of the said provision is that once the Appellant and the 3rd Respondent had opted to attack the ruling of PPDT by way of review their right of appeal is now limited to an appeal against the decision of the Tribunal to decline to review its Judgment and not on the merit thereof. On this ground alone the appeal herein would have been dismissed.

24. I am however, alive to the fact that Article 159(1) (d) of the constitution requires the court to administer justice without undue regard to procedural technicalities and would therefore go to the merits of the appeal. From the proceeding before both NAT and PPDT all the parties save for the Appellant who did not file any affidavit are in an agreement that the elections for Kabondo/Kasipul were fairly conducted up to the tallying stage where the process was interfered with. This is the contention of the 3rd Respondent as contained in paragraph, 5,6,7,8 and 9 of the affidavit sworn on 8th May 2017. This position was further confirmed by the 2nd Respondent in paragraph 1, 12, 13, 14, 15 and 16 of the affidavit sworn on 10/5/2017 and in the Judgment of NAT which went ahead and to withdraw provisional certificates issued therefore and ordered party to conduct fresh nomination through its rule.

25. A clear reading of the decision of NAT shows that the party did not comply with part 2 of the Judgment and therefore as stated herein in holding that the nomination certificate granted to the 2nd Respondent was as a result of the said Ruling, the PPDT was in error as the same was not supported by any evidence tendered before it and further in the face of the said certificate dated 29/4/2017 before the determination of NAT on 5/5/2017. To that end the Tribunal's decision ought to be overturned by this court which I hereby do to the extent that it was not in compliance with the NAT decision aforesaid.

26. The only issue therefore for determination is the status of the certificate issued to the 2nd Respondent on 29/4/2017, Elections is a process and not a one step affair. I have noted that there was no order issued by NAT stopping the process from continuing and from the evidence placed before the court by the returning officer who was mandated to carry out the election on behalf of the 1st Respondent, it is apparent that the process continued thereafter upon which the 2nd Respondent was issued with the certificate herein dated 29/4/2017.

27. This position has not been challenged by any party either before the Tribunal or before this court. The said returning officer has not been called for cross examination on the issues of the document used to carry out the result issued herein by the 3rd Respondent or the Appellant and the validity of that certificate has not been challenged in any forum. That being the case I am unable to find fault with the order of the Tribunal affirming the said nomination certificate.

28. In an election voting is a formal expression of will or opinion by the persons entitled to exercise the right on the subject or issue in question and that right to vote means a right to exercise the right in favour of reasonable motion or persons standing for election see **Lily Thomas Vs Speaker Of Lok Sabha [1993] 4 SCC 234** where the court is able to discern that then it ought to respect it.

29. Based on the material placed before the NAT, PPDT and before this court no party placed before the court the provisional certificates withdrawn by NAT on 5/5/2017 neither has there been any evidence tendered to the extent that the certificate issued to the 2nd Respondent on 29/4/2017 was a provisional certificate which was cancelled and withdrawn by NAT and will therefore go by the affidavits by the 2nd Respondent and one **Jotham Okidi** the returning officer that it was a final certificate after the conclusion of the exercise and not by way of Direct Nomination which as submitted by the 3rd Respondent and which I confirm to be the correct legal position the 1st Respondent could not issue in respect of Kabondo Kasipul in terms of Rule 18.8 of their Nomination Rule

30. This being an appeal on both facts and Law I have reviewed the evidence tendered before the NAT and PPDT and the submissions before the court and authorities thereon and come to the following orders:

a) The certificate issued to the 2nd Respondent was not issued in compliance to the decision of NAT order (b) thereof and neither is there any provisional certificate held by the 2nd Respondent and to that extent the decision of the PPDT is hereby set aside.

b) The certificate issued to the 2nd Respondent being not a provisional certificate but the final certificate at the close of the election exercise which was described by both the 2nd Respondent and the 3rd Respondent to be fairly free and fair is hereby affirmed.

c) The 1st Respondent to pay the cost of this appeal having created the dispute herein and failing to attend court

DATED, SIGNED and DELIVERED at Nairobi this 25th day of May, 2017.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Ayieko for Laichera for the Appellant

Osiemo for the Respondent

Mr. Juma for Complainant

Tabitha court clerk