



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA, AT NAIROBI
ELECTION PETITION APPEAL NO. 57 OF 2017

MWANGI WA IRIAAPPELLANT

VERSUS

JAMLECK KAMAU 1ST RESPONDENT

MAINA W. GATUNDU.....2ND RESPONDENT

FRANCIS MUTHEE 3RD RESPONDENT

PAUL KURIA 4TH RESPONDENT

FELISTA MURIGI5TH RESPONDENT

JUBILEE PARTY6TH RESPONDENT

(Being an appeal against the Judgment of the Political Parties Dispute Tribunal, (Kyalo Mbobu, James Atema & Hassan Abdi, Tribunal Members) dated 19th May, 2017

in

Complaint No. 250 of 2017)

JUDGMENT

1. MWANGI WA IRIA “the Appellant” and **JAMLECK KAMAU, MAINA W. GATUNDU, FRANCIS MUTHEE, PAUL KURIA AND FELISTA MURIGI** “the 1st – 5th Respondents respectively” are members of Jubilee Party (6th Respondent). The 6th Respondent held its party primary nominations for the post of Governor Murang’a on 26th April, 2017.

2. The Appellant and 1st Respondent were candidates in the said nominations. At the close of the said exercise the Appellant was declared the winner and was issued with the Nomination Certificate dated 9th May, 2017, having paid for it on 1st May, 2017. The 1st Respondent then filed a complaint with the 6th Respondent’s National Appeals Tribunal (NAT) on 1st May, 2017 but the complaint was dismissed on 10th May, 2017 for lacking in merit. The 1st – 5th Respondents thereafter moved to the Political Parties Disputes Tribunal (PPDT) vide the complaint dated 13th May, 2017. An Amended complaint dated 17th

May, 201 was filed on 17th May, 2017 without leave of the Court.

3. The parties were heard by the PPDT and a Judgment rendered on 19th May, 2017 directing the 6th Respondent to conduct fresh nominations for Governor, Murang'a County within 48 hours from the date of Judgment. It is this judgment that is the subject of this appeal.

4. The Appellant raised the following grounds;

1. That the Tribunal erred in law and in fact in failing to find that the 1st Respondent's complaint was incomplete and wholly defective for lack of supporting affidavit duly sworn by the 1st Respondent as mandatorily required by the PPDT Procedure Rules, and further in failing to find that the 2nd to 5th Respondents did not have a locus standi to lodge a complaint before it or the Jubilee Party Appeals Tribunal for they were not candidates in the impugned nomination exercise as required by the Jubilee Party Constitution and Nomination Rules.

2. That the Tribunal erred in law and in fact in arrogating on itself a jurisdiction to hear and determine a complaint on the issue of the party register used in the impugned nomination exercise notwithstanding that this was not a ground raised in the appeal to the Jubilee Party Appeals Tribunal contrary to the express provisions of section 40 (2) of the Political Parties Act. Consequently, this issue had not been adjudicated and could not have the adjudicated upon the Jubilee party internal appeals Tribunal and therefore could not properly lie on appeal before the Tribunal.

3. That the Tribunal erred in law and in fact in its apparently biased finding that the affidavits by the 1st – 5th Respondent's witnesses were uncontroverted by the Appellant while entirely and absolutely ignoring the Appellant's detailed Replying Affidavits filed in the matter.

4. That the Tribunal erred in law and in fact in finding that a dispute arising from a party primary between a member of a political party and a political party is not one to which the rule on exhaustion of internal party appeal mechanisms under section 40 (2) of the Political Parties Act applies, thereby conferring on itself original jurisdiction that it does not enjoy.

5. That the Tribunal erred in law and in fact in finding that the 2013 register of Jubilee party members from the Office of the Registrar of Political Parties [ORPP] was the proper register contemplated under section 28 and 31 (2D) of the Elections Act, while ignoring a caution from the ORPP that the proper register for purposes of the Jubilee party primaries is submitted to the IEBC and not ORPP.

6. That the Tribunal erred in law and in fact in ordering a repeat nomination exercise on the basis of an outdated 2013 Jubilee party register with 276,811 members despite the updated register consisting of more than 514,000 members and which has been statutorily submitted to the IEBC under section 28 and 31 (2d) of the Elections Act. Use of the outdated register would disenfranchise more than 240,000 bona-fide members of Jubilee Party contrary to Articles 38 (1) (b) and 83 of the Constitution.

7. That the Tribunal erred in law and in fact in ordering Jubilee party to conduct a repeat nomination exercise despite the fact that the party already has a subsisting validly nominated candidate in the name of the Appellant since his nomination and the certificate thereof has not been nullified or cancelled by the Tribunal.

8. That the Tribunal erred in law and in fact in failing to appreciate sufficiently or at all that the Appellant's nomination having been submitted to the IEBC, the Tribunal lacks jurisdiction over the matter.

9. That the Tribunal erred in law and in fact in proceeding to determine the complaint on its

merits despite having found that the 6th Respondents Appeals Tribunal decision was null and void for failing to accord the 1st – 5th Respondent a hearing and hence there was no valid decision on which the Tribunal could exercise its Appellant jurisdiction.

10. That the Tribunal erred in law and in fact in failing to appreciate sufficiently or at all the written submissions made and authorities cited by the Appellant and all relevant communications made to it by the Office of the Registrar of Political Parties.

5. Directions were taken by the Counsels of all the parties on the filing of documents and submissions. The Appellant had filed and served all that they intended to rely on. Mr. Nyamu for the 1st – 5th Respondents who had not filed any documents was given upto 23rd May, 2017, 12 noon to file and serve all papers in preparations for hearing at 1.30 pm.

6. When the Court convened on 23rd May, 2017 at 2.30 pm, Mr. Nyamu informed the Honourable Court that he had not filed any documents in Court following instructions from his clients. The 1st Respondent had sent him an email dated 23rd May, 2017 with instructions to the effect that he had no further interest in the matter before this Court. This he said followed his decision not to run for the gubernatorial contest in Murang'a County (Email print out produced in the Court).

7. He further notified the Court that the 2nd – 5th Respondents who were supporters of the 1st Respondent had also opted out of the proceedings before this Court. The Appellant and 6th Respondents through their counsels graciously accepted the decision by the 1 – 5th Respondents.

The Court accordingly discharged the 1st – 5th Respondents from these proceedings.

8. I have before me the record of appeal, the ruling by the NAT, the Judgment by PPDT, the two volumes of the declaration forms and the Appellant's submissions.

I have considered them and the issue I have to determine is whether the nomination of the Appellant was free, fair and in compliance with the law and procedures.

9. The issue of jurisdiction was raised by the Appellant at the PPDT and before this Court.

The PPDT correctly addressed the issue and this Court confirms that the said Tribunal has both original and appellate jurisdiction stemming from Section 40 of the Political Parties Act which provides;

(1) The Tribunal shall determine—

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and a political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners; and

(f) appeals from decisions of the Registrar under this Act;

(fa) disputes arising out of party primaries.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal

political party dispute resolution mechanisms.

Under Section 40 (2), it's clear that Section 40 (1) (fa) is not one of the disputes that ***must*** be handled by the Internal Political Party Resolution mechanisms before coming to the PPDT. The 1st – 5th Respondents who had not complained to their NAT could not therefore be barred from filing their complaint at the PPDT. It is however always advisable to first exhaust any internal dispute resolution mechanisms where the same is available. The Respondent's dispute arose from party primaries Under Section 40 (1) (fa) which is not mentioned under Section 42 Political Parties Act as one of those disputes which must originate from NAT.

10. The 6th Respondent in its Nomination Rules at Rule 37.2 states that ***“an appeal may be lodged without undue formalities.”*** The Appellant's argument that the appeal at NAT was time barred is a technicality which is curable under Article 159 (2) (d) of the Constitution and I so hold.

11. The major issue that was raised by the 1st – 5th Respondents both at NAT and PPDT was that the number of the votes cast exceeded the registered voters. At the PPDT, they relied on the letter from the Registrar of Political Parties dated 17th May, 2017 (Page 200 of the Record of Appeal). It was the case of the 1st – 5th Respondents based on the above letter, that the number of registered voters in Murang'a County stood at 276, 811 yet the number of votes cast was 330,425 being 53,614 in excess of the registered votes. It was alleged that the figures had been escalated through corruption.

12. This is what the Registrar of Political Parties stated in her letter dated 17th May, 2017.

“Further to our letter dated 16th May, 2017 and a letter from Jubilee Party dated 17th May, 2017 herein attached, seeking an urgent clarification, this office states as follows;

a. The Jubilee Party membership for Muranga County stands at 276,811 based on the 2013 voter register.

b. That the requirement under Section 28 and 31 of the Election Act, 2011 clearly states that the party membership list are to be submitted by political parties to the Independent Electoral Boundaries Commission (IEBC), but this office maintains a party membership register as submitted by political parties under Section 7 of the Political Parties Act.”

The letter of 16th May, 2017 forwarded to the Deputy Registrar a copy of the Jubilee Party list of members in respect of Murang'a County.

13. The letter by the Registrar dated 17th May, 2017 was qualifying the position of the party list forwarded to the PPDT. This list was a 2013 list. It meant that the Registrar of the Political Parties did not have the current list of registered members who are potential voters for 2017.

14. Section 35 of the Elections Act, Revised Edition 2015 [2012] provides;

(1) A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Articles 97(1)(a) and (b), 98(1)(a) and 177(1)(a) of the Constitution.

It is correct to state that since the last elections of 2013, many new voters have been registered. Does it mean that these new voters were to be locked out of the nominations if their names are not in the 2013 register? These lists are submitted to the Independent Electoral Boundaries Commission (IEBC) as per Section 35 of the Elections Act 2015. Section 7 of the Political Parties Act Revised Edition 2015 deals with conditions of full registration. The party list mentioned is the one submitted to the Registrar of Political Parties at the time of registration. That is the party list that the Registrar submitted to the PPDT which used it as the basis to castigate the Appellant for malpractices and manipulation of the party list.

15. There is nothing that stopped the PPDT from directing the IEBC to avail to it the Party list submitted to it by the Jubilee Party. It had directed the Registrar of Political Parties to do the same.

16. Rules 15 – 17 of the Jubilee Party Nomination Rules 2016 provides for the Register of party voters: it provides;

“15. Principal Register of Party Voters

15.1 The National Elections Board shall prepare the Jubilee Party Principal Register of Voters which shall comprise of;

15. 2 Poll register in respect of every polling station;

15.3 Ward register in respect of every ward;

15. 4. Constituency register in respect of every constituency;

15. 5 County register in respect of very county; and

16 Content of Party Register

The Jubilee Party Principal Register of Voters shall contain such information as shall be determined by the National Executive Committee.

17 Registration of Party Voters and Amendment of Party Voters Register

17.1 Registration of party voters and revision of the register of voters under these regulations shall be carried out at all times, save the registration of party voters shall close one month or such other time as the NEC determine but before the date on which parties are required to submit party membership list to the IEBC.

17. 2 Any person who has attained the age of eighteen years and is a holder of a national identity card or a Kenyan passport and whose name is not in the party membership and or register of voters of any other party may be registered as a voter under these rules upon application.

17.3 All applicants for registration under this section shall be registered in the appropriate register by the Board.

17. 4 The Board shall cause the Principal Registrar and constituent registers of Voters to be opened for a period of 14 days after the date of closing of registration of voters, for inspection by applicants during official working hours for the purpose of confirming and rectifying the particulars therein.

17. 5 The Board shall, upon expiry of the period for inspection specified herein above, compile the amendments to the register of voters and publish a notice at the County offices of the Party to the effect that such compilation has been completed; and

17. 6 The Principal Register of Voters shall be kept at the headquarters of the party and copies of the constituent part of the Principal Register of Voters relating to the respective electoral areas described in Rule 6 and shall be kept at all the County offices of the party.”

17. This having been a party nomination exercise and the party having registered new voters since the last general elections, could the party (2nd Respondent) be expected to rely on the 2013 register at the Political Parties Registry in conducting its own primaries or its own Party Register which is also with the IEBC?

18. The 6th Respondent under Rules 15 – 17 of its party nomination Rules has an elaborate system in

place for registration of voters, verification and amendments of the register. That register was never availed to the NAT nor PPDT for verification. It is common knowledge that the Party Register would have the most current number of party members as compared to the 2013 party list kept by the Registrar of Political Parties.

19. The Jubilee NAT in its ruling states that, upon perusal of the appeal, it established that the appeal did not meet the threshold of proof to overturn an Election. It referred to the Supreme Court case of **Raila Odinga –vs- IEBC & 3 Others Election Petition No. 5 of 2015** where it was held;

“a petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden. The threshold of proof should in principal, be above the balance of probability, though not as high as beyond reasonable doubt.....

Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondents bear the burden of proving the contrary. This emerges for a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omni a praesumitur rite et solemniter esse acta “all acts are presumed to be done rightly and regularly”. So the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”

20. I therefore find that the NAT approached this issue with a deeper insight having known from their own machinery how many registered voters were in Murang’a County. The PPDT did not interrogate this issue with the seriousness it deserved. It failed to evaluate the evidence from both sides to enable it arrive at a balanced decision over the matter.

21. On the issue as to whether the 1st Respondent was denied a hearing at the NAT, I still go back to the Ruling of the NAT in Appeal No. 512 of 2017. This is what it stated;

“The appeal was listed for hearing on 5th May, 2017. The parties were notified of the hearing date through a cause list uploaded on the 2nd Respondent’s website on 4th May, 2017 as well as Mobile SMS. Despite being notified of the hearing date, the complainant did not attend the hearing. The Tribunal moved suo moto to peruse the appeal and established that the appeal did not meet the threshold of proof to overturn an election and as envisaged in the case of Raila Odinga –vs- IEBC & 3 Others. Election Petition No. 5 of 2015

22. The PPDT did not make any finding on whether the 1st Respondent was served or not as stated by the NAT. The issue of not having been heard was not contested. What was in contention was whether they were notified of the hearing in the manner stated in the Ruling.

23. Section 109 of the Evidence Act provides;

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In the case of **Ben Njoroge & Another –vs- Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR**. The Court held;

“The burden of proving any allegation of election breach, misconduct and/or irregularity lies squarely upon the Petitioner. The legal principle is that ‘he ho alleges must prove’. In the case of Gideon Mwangi Wambua vs IEBC & 2 Others EP 4 of 2013, it was held that it is a presumption of law that elections were properly conducted and as such the burden is always upon the petition to prove otherwise. This was further buttressed in the case of Joho vs Nyage &

Another [2008] 3 KLR E.P, where the Court in upholding the position that the burden of proof lies with the petitioner, held that ‘election petitions are no ordinary suites but disputes in rem of great public importance’. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence The burden of proof in Election Petitions lies with the petitioner as he is the person who seeks nullify an election”

The position in law is that he who alleges a fact must prove it. The 1st Respondent did not prove that he was not notified of the hearing at NAT.

24. My analysis of the material before me leads me to the conclusion that the issue of over voting was never established to the standard required for overturning an election. Secondly, the 1st Respondent was accorded an opportunity to be heard at the NAT but he did not utilize it. He did not go back to Tribunal to have the Orders set aside. He instead elected to go to the PPDT which was his own choice and he cannot then blame the NAT for that.

25. At the end of the whole exercise, the Appellant was declared the winner by the County Returning Officer and was issued with a Nomination Certificate which rightfully belongs to him. It will not be taken away from him. It’s also borne in mind that this appeal was not opposed.

26. My finding is that the appeal has merit and I allow it and grant the following prayers;

(i) Appeal is allowed.

(ii) The decision and decree of the Political Parties Disputes Tribunal delivered on 19th May, 2017 is hereby set aside.

(iii) The declaration of the Appellant **MWANGI WA IRIA** as the duly nominated Jubilee Party candidate for the position of Governor Muranga County by the County Returning Officer is hereby upheld.

(iv) Each party to bear his/its own costs.

Orders accordingly.

Delivered, signed and dated this 24th day of May 2017 at NAIROBI

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HEDWIG I. ONG’UDI

HIGH COURT JUDGE