REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTIONS PETITION APPEAL NO. 9 OF 2017

PETERSON MITTAU.....APPLICANT

VERSUS

WIPER DEMOCRATIC

MOVEMENT KENYA.....1ST RESPONDENT/APPELLANT

DANIEL MUANGE.....2ND RESPONDENT

NATIONAL APPEAL BOARD.....3RD RESPONDENT

R U L I N G

1. The application before this Court is an *ex parte* Notice of Motion dated 15th May 2017 brought under a Certificate of Urgency **under Article 159(2) (d) of The Constitution, Sections 1A, 3A, 63C and 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules 2010 and Section 42(4) of the Political Parties Act**. The Applicant seeks in the main that the court do issue a temporary stay of execution of the judgment and orders it issued on 10th May 2017. In addition, that the judgment and orders delivered on 10th May 2017 be reviewed and/or set aside. Lastly, he seeks that the costs of the application be in the cause.

2. The Applicant claims that the judgment and orders delivered on 10th May 2017 were as a result of material non-disclosure of facts by the Appellant. He also claims that the court was misled that the provisions of the Nomination rules of the Appellant were misinterpreted by the PPDT, particularly Rule 6.2 and in addition, that the PPDT had not fully heard their application for review.

3. It is claimed that during the appeal the Appellant did not disclose to the court that the PPDT did hear and fully determine the application for review on merit and deliver the suitable ruling on 6th May 2017. Lastly, the Applicant also claims that the Appellant misled the court that the PPDT declined its jurisdiction to review its decision contrary to **Order 45 Rule 1** of the **Civil Procedure Rules** as read with **Section 41(4) of the Political Parties Act 2011**. The application is supported by an Affidavit, filed on 15th May 2017 which was sworn by Petterson Mittau the Applicant in this matter.

4. Mr. Sore learned counsel for the Appellant submitted that the application is for Review and should be guided by **Order 45** of the **Civil Procedure Rules**. That the Applicant was at the PPDT when the proceedings were going on and he was also in this court at the hearing which gave rise to the judgment

they seek to review.

5. Counsel argued that the Applicant has not explained how it was not within their power to bring to the attention of the court what they say the Respondent misled the court in. That the grounds of appeal in the Memorandum of Appeal were derived from the ruling of the PPDT.

6. Counsel further argued that the Appellant did not mislead the court as in its ruling the PPDT stated that the decision of NAB was final and closed out Review. He maintained that they were indeed heard by the PPDT and their prayers dismissed. He denied that the appeal stated that the Tribunal did not hear them.

7. Counsel contended that the PPDT's in its ruling declined jurisdiction stating that they had been asked to consider non disclosed evidence which was beyond the scope of Review yet where material non-disclosure is apparent the court ought to review its decision. He asserted that the Judgment was entered *exparte* and when the Appellant applied to have it reviewed or set aside so that they could put in an answer and place material before the PPDT, they were shut out by the ruling.

Background of the Application

8. This dispute arose out of the nominations of the Wiper Democratic Movement of Kenya for the Changamwe Parliamentary seat which were held on 19th April 2017. The initial complaint was premised upon grounds that the Wiper National Elections Tribunal declared the 2nd Respondent Daniel Muange, who got 900 votes the winner and issued him with the provisional nomination certificate instead of the 1st Respondent Petterson Mittau who got 1069 votes.

9. The Applicant appealed to the 3rd Respondent on 21st April 2017 which heard the appeal and recommended that the Applicant be declared the winner and a nomination certificate be issued to the Applicant on 25th April 2017.

10. The 2nd Respondent approached the 3rd Respondent for review on 26th April 2017 on the grounds that new evidence of violence and other electoral malpractices had been uncovered. The Board re-opened the case and heard it inter partes. Subsequently the Board reviewed its earlier decision and recommended the 2nd Respondent as the winner.

11. Meanwhile, pending determination of the proceedings before the NAB the Applicant moved to the Political Parties Dispute Tribunal (PPDT) on 27th April 2017 seeking a declaration that he was the winner of Wiper nominations for Changamwe Parliamentary seat and that a certificate of nomination awarded to the 2nd Respondent was null and void. The DPPT agreed with him and in an *exparte* judgment granted all the prayers that he had sought.

12. The 2nd Respondent approached the PPDT on 6th May 2017 seeking a review of the decision obtained by the Applicant. The PPDT held that there had been good service and declined to allow the 2nd Respondent to produce the new evidence. The application was denied.

13. The Appellant came to the High Court through a Notice of Motion under a Certificate of Urgency on 9th May 2017. It also filed a Memorandum of Appeal on the same day in which it sought to have the ex parte orders issued by the PPDT stayed. It relied on the grounds that the PPDT erred in fact and law by:

> i. Finding that it does not have the jurisdiction to review its decision, while Order 45(1) of the Civil Procedure Rules 2010 as read with Section 41(4) of the Political Parties Act 2011 allows it to review its orders and decisions on the basis of new evidence or crucial material facts being discovered.
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> ii. Relying on the Supporting Affidavit of Daniel Muange which had been expunged.

iii. Failing, ignoring, neglecting, and refusing to address itself on the prayer of the appellant to set aside its earlier judgment.

iv. Believing in an unsworn statement by the 1st Respondent's advocate that his client did not participate in the review proceedings, disregarding an averment in an affidavit by the Appellant's executive director demonstrating that the 1st Respondent participated.

v. Finding that there was effective service and rejecting the explanation of the Appellant's advocate.

vi. Failing to recognize the Internal Political Party Dispute Resolution Mechanism and proceeding when the internal mechanism had not been exhausted.

vi. Acting in excess of its jurisdiction in determining this matter and failing to recognize NAB's jurisdiction to review its decision like any other tribunal.

vii. Breaching the rules of natural justice.

viii. Preventing the Appellant form adducing evidence of material non-disclosure in relation to the 1st Respondent's violence and other elections malpractices.

ix. Misinterpreting the provisions of Rule 6.2.11 of the Wiper Democratic Movement's Constitution which says that NAB's decision is final and that it has limited powers to review its decisions.

14. The High Court heard arguments from both sides in the appeal and delivered a judgment on 10th May 2017 in which it found that the appeal was meritorious. The High Court allowed the appeal and set aside the orders issued by the PPDT on 2nd May 2017.

Courts Determination

15. The issue for determination in this matter is whether the grounds raised by the Applicant are sufficient to warrant the review and/or setting aside of the judgment of the court delivered on 10th May, 2017.

16. It is still my firm construction of the relevant law that the PPDT had no jurisdiction to hear the Applicant in the first instance, before the NAB had finalized the proceedings before it, in which the Applicant had participated. According to **Section 40(1)** of the **Political Parties Act** 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.

17. Section 40(2) however provides in mandatory terms that, notwithstanding subsection (1) above 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 mechanism. In other words, Political Parties Dispute Tribunal cannot hear diputes relating to Section 40(1) a, b, c or e until the internal political party resolution mechanism which is the National Appeals Board has had and determined the matter.

18. **Section 19** of the **Political Parties (Amendment) Act No. 21 of 2016** however, amended **Section 40** of the **Political Parties Act** by adding subsection **(fa)** to the Section. This has resulted in some confusion as to what parliament intended. **Section 40(1) (fa)** states that the Tribunal shall determine disputes arising out of party primaries. Hence it now appears at glance that the PPDT has the jurisdiction to hear disputes arising out of party primaries in the first instance without the disputes going through the IDRM exhaustively or at all.

19. In a purposive interpretation however, one who is a member of a party is bound by its rules and cannot run away from the processes or mechanism that have been put in place for internal dispute resolution. In any case IDRM's are in line with **Article 159** of the **Constitution**, and are not inconsistent with Article 22. The Applicant in this case submitted himself to the jurisdiction of the IDRM and should have pursued it exhaustively before taking his dispute to the PPDT.

20. It is trite law that where the Constitution or statute provides for alternative dispute resolution mechanisms, these must in the first instance be fully exhausted before the aggrieved party moves to the High Court. See - **Orie Rogo Manduli vs Catherine Mukite Nobwola & 3 Others [2013] eKLR**.

21. The question before the court in the current application, and the only one which begs an answer however, is whether the Applicant has satisfied the conditions of order **45(1) CPR rules of 2010** to merit a review of the judgment of the court. Any person considering himself or herself aggrieved and seeking review from a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or a decree or order from which no appeal is hereby allowed, must satisfy the following conditions:

> i. That there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made;
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> ii. That there is some mistake or error apparent on the face of the record,
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> iii. or for any other sufficient reason,

such an application for a review of judgment to the court which passed the decree or made the order must be made without unreasonable delay.

22. Those principles were restated in the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR in which** the Court of Appeal stated as follows:-

> **"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."**

23. The Applicant was disqualified according to the Party Nomination and Election Rules in a contested process where malpractices were said to have been proved before the NAB. There is no dispute that the Judgment was entered *exparte* and when the 2nd Respondent applied to have it reviewed or set aside so that he could put in an answer and place material before the PPDT, he was shut out by the ruling of the PPDT.

24. I have anxiously considered the application before me and find that there is no evidence of any apparent error on the face of the judgment of the court, or new evidence which is said to have been discovered or any other sufficient reason for the court to review its judgment of 10th May, 2017. The application is therefore denied.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF May 2017.

L. ACHODE

JUDGE