



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION PETITION APPEAL NO. 38 OF 2017

BETWEEN

VINCENT NGW'ONO MANYINSA..... APPELLANT/RESPONDENT

VERSUS

WIPER DEMOCRATIC PARTY.....1ST RESPONDENT/RESPONDENT

WIPER DEMOCRATIC PARTY NATIONAL

ELECTIONS BOARD.....2ND RESPONDENT/RESPONDENT

ERIC MOGIRE3RD RESPONDENT/RESPONDENT

JAPHET MWANIKI ACHOCHI.....INTERESTED PARTY/APPLICANT

RULING

1. On 22nd May 2017 the applicant Japhet Mwaniki Achochi filed two applications, both dated 21st May 2017. In the first application he sought to be joined in this appeal as an interested party, and in the second application he asked that this court does set aside the orders issued on 19th May 2017. The orders confirmed the decision made by the Political Parties Disputes Tribunal (“the Tribunal”) on 13th May 2017. The Tribunal found that it could not determine who had won the nomination conducted by the Wiper Democratic Party (1st respondent) on 23rd April 2017 to determine its candidate for Masige East Ward in Bobasi Constituency in Kisii County to vie in the forthcoming general elections. The appellant Vincent Ngw’ono Manyinsa had complained to the Tribunal that the he had won in the nominations but that the win had been, as it were, taken away by the 1st respondent and handed over to another candidate. He wanted the Tribunal to determine that he had been duly nominated and was entitled to a certificate to present to the Independent Electoral and Boundaries Commission as the candidate for the Party. The Tribunal had ordered that there be a repeat nomination within 48 days. This court confirmed that order, but time begun to run from 19th May 2017. This means that the 48 hours expired on 21st May 2017. This is the order that the applicant sought to be set aside.

2. What is the applicant’s case? He stated that he was the other candidate in the nomination; that he was the one who emerged the winner and was issued with the nomination certificate by the 1st respondent; that he was not aware that the applicant had complained, which led to this appeal; that the decision of the appeal was going to affect him, and yet he had not been made a party to be able to state his side of the

story. He, therefore, wanted to be made a party to the appeal, the orders set aside and he be allowed to respond to the appeal. Otherwise, he stated, he would be condemned unheard. He stated that if he is allowed into the appeal he will be able to demonstrate that the nomination was properly conducted, and that he was the valid winner.

3. The appellant filed a relying affidavit to state that the application was incompetent as the appeal had been heard and determined, and the 48 hours lapsed, and therefore there were no proceedings pending that were capable of being joined; that under **section 40** of the **Political Parties Act, No. 11 of 2011** the applicant could not come directly to this court; and that, in any case, it had been found that the nomination that the applicant stated he won in had been tainted with irregularities, and incapable of producing a winner. The 1st, 2nd and 3rd respondents did not file any response.

4. Mr. Oonge represented the applicant, Mr. Anyoka represented the applicant and Mr. Sore represented the 1st, 2nd and 3rd respondents. Mr. Oonge and Mr. Anyoka filed written submissions which I have considered.

5. The resolution of election disputes is governed by **Article 87(1)** of the Constitution of Kenya, 2010. It states that Parliament shall enact legislation to establish mechanisms for timely settling of election disputes. The provision has been operationalised by the **Elections Act, 2011**, the **Independent Electoral and Boundaries Commission Act, 2011** and the **Political Parties Act, 2011 (Francis Gitau Parsimei & 2 Others –v- National Alliance Party & 4 Others [2012]eKLR)**. Under **section 40** of the **Political Parties Act** any party member who has a dispute with a fellow member or any party member who has a dispute with his party has to file the dispute at the Tribunal for hearing and determination. But before he can approach the Tribunal, he has to show under **section 40(2)** of the **Act** that the dispute has been heard and determined by the party's internal dispute resolution mechanism (**Michael Wachira Nderitu & 3 Others –v- Mary Wambui Munene [2013]eKLR**). Appeals from the Tribunal shall then lie to the High Court under **section 41 (2)** of the **Act**. It follows that the nomination rights of the applicant can only be realised within this structured process. He cannot be allowed to come straight before this court, however much he feels aggrieved.

6. In any case, this court is *functus officio*. It confirmed the decision of the Tribunal. The Tribunal's decision was supposed to be effected within 48 hours. There was no appeal, or enlargement of time. The time came and passed. The appeal is therefore incapable of being reopened.

7. Lastly, this application was brought under **sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 22 rule 22** of the **Civil Procedure Rules** and **Order 10 rule 11** of the **Civil Procedure Rules**. **Order 10** deals with *ex parte* orders or judgments and the jurisdiction to set them aside. **Order 22 rule 22** deals with stay of execution pending appeal. The two scenarios do not obtain in this application. I am aware of **section 41(4)** of the **Political Parties Act** that provides that:-

“4. The Tribunal shall apply the rules of evidence and procedure under the Evidence Act and the Civil Procedure Code, with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.”

However, for the provision to apply the Tribunal should, in the first place, have jurisdiction to deal with and determine the matter. In the same breath this court can only apply the provision if it has the jurisdiction to deal with the matter in question.

8. I hope I have said enough to show that this court lacks the jurisdiction to hear and determine the applications by the applicant. The same are consequently dismissed with costs.

DATED, DELIVERED and SIGNED at NAIROBI this 23RD day of MAY 2017.

A. O. MUCHELULE

JUDGE