



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

VERSUS

WIPER DEMOCRATIC PARTY.....1ST RESPONDENT

WIPER DEMOCRATIC PARTY

NATIONAL ELECTIONS BOARD.....2ND RESPONDENT

ERIC MOGIRE.....3RD RESPONDENT

Being an appeal from the Judgment of the Political Parties Disputes Tribunal at Nairobi delivered on the 13th day of May, 2017 in Dispute No. 223 of 2017 the parties being VINCENT NGW'ENO MANYINSA VS WIPER DEMOCRATIC PARTY & 2 OTHERS).

JUDGMENT

1. On 23rd April 2017 the Wiper Democratic Party (1st respondent) through the Wiper Democratic Party National Elections Board (2nd respondent) conducted its party nominations in Kisii County. One of the areas affected was Masige East Ward in Bobasi Constituency. The Party sought to nominate a candidate for the County Assembly seat to vie during the General Elections to be held on 8th August 2017. The appellant Vincent Ngw'ono Manyinsa was one of the candidates in the nomination. When he filed his complaint to the Political Parties Disputes Tribunal on 10th May 2017, his case was that he had won in the nomination and issued with a notification of election result pending the issuance of a final certificate by the 2nd respondent. On 9th May 2017, he claimed, he had been called through a text message to go and collect the final certificate from the 2nd respondent. On reaching there, he was informed that the 2nd respondent had decided to issue the certificate to another candidate. He unsuccessfully sought that his complaint be dealt with by the Party, and that was why he had approached the Tribunal. He sought that the Returning Officer Eric Mogire (3rd respondent) be compelled to appear before the Tribunal and produce the original final tallying sheet as entered during the counting process and that he be declared the duly elected nominee for the 1st respondent.

2. The 1st respondent swore a replying affidavit through its Executive Director Dr. Jared Sosi to challenge the jurisdiction of the Tribunal, saying that the appellant had not exhausted the Party's dispute resolution

mechanism. He stated that the notification of result annexed by the appellant had been tempered with, and that, in any case, was not the final decision on the nomination. He annexed a copy of the notification of result which he stated was the correct one. He discounted the alleged text communication between the appellant and the Party. To this, the appellant filed a further affidavit annexing the alleged text message asking him, as the nominee, to go and collect the final certificate. The Tribunal discounted the notification of result produced by the 1st respondent.

3. The Tribunal heard the complaint. On 13th May 2017 it rendered a judgment in which it found that, on the material placed before it, it was not able to determine who had won the nomination. It observed that, whereas the appellant had claimed to be the winner the respondents had attacked the credibility of the exercise as there had been disappearance of ballot boxes from some polling stations only to resurface after midnight. The Tribunal nullified any certificate issued by the 1st respondent following the nomination, and ordered a fresh nomination to be conducted forthwith in accordance with the Party Constitution and the election and nomination rules, taking into account the interests of all parties. The appellant was aggrieved by this determination and appealed to this court.

4. The Memorandum of Appeal basically alleged that the Tribunal erred and misconducted itself by making reference to a defence and/or reply to complaint that was never filed and served on the appellant; that the complaint was not opposed and that, therefore, the Tribunal ought to have found that he had been duly nominated and was entitled to a certificate.

5. Mr. Anyoka prosecuted the appeal before me. The respondents were represented by Mr. Sore who opposed the appeal. Mr. Anyoka took issue with the fact that the response (to the appeal) contained in the sworn affidavit of Dr. Jared Maaka Sosi (Executive Director of the 1st respondent) was not properly before the court. This was because, although it was stamped as received on 19th May 2017 by the Judicial Review Division it was not accompanied by a payment receipt to show it had been filed. It should be noted that the proceedings were delayed for a while to get Mr. Sore to file the document. He explained that the receipt was still being held by the registry; that payment had been done. When the court adjourned, after hearing the appeal, the Deputy Registrar immediately handed over the receipt which is now in the file. I find that the response to the appeal was properly on record.

6. I have considered the complaint that the respondents did not defend the complaint before the Tribunal; that there was no defence and/or reply filed; and served; and, therefore, the Tribunal fell into error when it made reference to the reply that the appellant had no notice of. The response by Dr. Jared Maaka Sosi was as follows:

“3. THAT first I wish to state that the record of appeal dated 18th May 2017 is not correct and wish the Court to rely on the file from the Tribunal which will clearly show that the replying affidavit of the respondent is clearly part of the record.

4. THAT the advocate for the respondent informs me which information I believe to be true that when he received the pleadings he had less than 3 hours to put in a reply and attend the Tribunal for hearing. As a result he quickly prepared the replying affidavit which I signed and while it was being filed at the registry the matter was being called out in court.

5. THAT counsel further informs me that he rushed to the Tribunal and found the matter had been called and thereafter requested the file to be mentioned and he orally applied for leave to put in a replying affidavit which was being filed at that time.

6. THAT Counsel informs me that he informed the Tribunal that I had pleaded both facts and law in the replying affidavit due to the strict time limits that had been given by the Tribunal and understandably so.

7. THAT leave was granted and a few minutes later the replying affidavit was put in the file. The file in the Tribunal can confirm this.”

7. I called for and perused the original record held at the Tribunal. It contains a replying affidavit dated 13th May 2017 and received at the registry on the same day. The fact that the Tribunal considered it in its judgment that was delivered on the same day is evidence that it was indeed on record.

8. I note that the typed proceedings that form part of the record of appeal do not indicate that there was attendance by the respondents, or appearance by Mr. Sore. Mr. Sore informed this court during the appeal that he attended the proceedings at the Tribunal. Mr. Anyoka did not dispute this attendance. The proceedings of Milly Lwanga (presiding member) shows that on 13th May 2017 Mr. Anyoka prosecuted the complaint, and there was no appearance or attendance by the respondents or their counsel. At the conclusion it was ordered that decision would be at 4.00 pm. This is followed by Mr. Sore telling court that “**filing affidavit at registry**”. This appearance by Mr. Sore has been omitted from the typed record contained in both the record of appeal and in the original file. It would appear that the replying affidavit was indeed filed, and that is why the judgment reflects it. Mr. Anyoka submitted that the replying affidavit was not served on him, and suspected that the one now on record may have been sneaked in.

9. I am mindful of the fact that it goes against the rules of natural justice for a court to rely on an affidavit which has been filed but has not been served (**Judicial Service Commission –v- Mbalu Mutava & Another [2015]eKLR**). The rule of *audi alteram partem* which is the right to a fair hearing includes the following:-

- (a) the right to know adverse evidence;
- (b) the right to present case;
- (c) the right to rebut evidence;
- (d) the right to cross examine;
- (e) the right to legal representation; and
- (f) the right to a reasoned decision.

The importance of service is to notify the opposing party the evidence that is against him, so as to prepare a defence. Under **Article 50 (1)** of the Constitution of Kenya 2010 –

“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

It is the duty of the party that filed the matter in court to serve the opposing party. If the court relies on an affidavit that has not been served it shall be infringing on the rights of the party to be served. Under **Article 25(c)** the right to a fair trial cannot be limited.

10. In this case, Mr Anyoka knew that Mr. Sore was in court during the complaint before the Tribunal but chose to deny it in the submissions. He was aware of the existence of the replying affidavit on record but chose to say otherwise. The Tribunal could not have relied on it if it did not exist. I find that, in these circumstances, the appellant was aware of the replying affidavit and its contents and cannot therefore be allowed to deny it. I consider it trite that an affidavit that is properly on record has to be considered in reaching a decision even when the maker or owner of the affidavit does not attend the proceedings leading to the decision. In this case, however, Mr Sore attended the proceedings following the filing of his clients’ replying affidavit.

11. In the circumstances of this appeal, and considering the time constraints that are attendant to such matters, I make a finding that the Tribunal was correct to consider this replying affidavit which was on record. In reaching his decision, I have considered the following provisions of **section 41(4)** of the **Political Parties Act No. 11 of 2011:-**

“(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.”

12. There is a further reason why this matter has caused me a lot of anxiety. When the appellant went to the Tribunal he was complaining that his victory had been taken away and given to another candidate. The candidate that the party was giving the final nomination certificate was not made a party in the case before the Tribunal. The appellant was therefore seeking that a decision be made in his favour against a party who was not in the proceedings, and who was going to be gravely affected. The repeat of the nomination was ordered. All the candidates who participated in the nomination for the Ward were not made parties to the complaint. Now that the Tribunal found that as between the appellant and the respondents there was insufficient evidence to show who had won in the nomination, I find that the repeat of the nomination was the only fair remedy in the circumstances. I am fortified in this finding by the fact that the appellant had asked the Tribunal to order the 3rd respondent to produce the final tallying sheet to prove that he had won in the nominations. Without the tallying sheet therefore, and none was produced, the Tribunal was correct to find that the winner could not be determined.

13. The result is that I do not fault the Tribunal. Its decision shall stand. However, because of the passage of time, I ask that 1st respondent does conduct the repeat nomination to elect its candidate for Masige East Ward, Bobasi Constituency, Kisii County within 48 hours from today.

14. The appeal is consequently dismissed with costs.

DATED, DELIVERED and SIGNED at NAIROBI this 19TH day of MAY 2017.

A. O. MUCHELULE

JUDGE