



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 11 OF 2017

**IN THE MATTER OF ARTICLES 22, 33, 35, 38, 47, 45, 50, 73 & 232 OF THE CONSTITUTION
OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION AND/OR APPREHENDED
CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOM UNDER ARTICLES 29, 33(1)
(a), (3), 36(1), 37, 38, 39, 47 (1) (2) (3), 48, 50, 84 & 88 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF S. 58, 60, 61, 62, 63, 64, 65, 67, 72, 73, 74 OF THE ELECTIONS ACT
(CHAPTER 24 OF 2013)**

AND

**IN THE MATTER OF S. 41, 45 & 47 OF THE POLITICAL PARTIES ACT (CHAPTER 11 OF
2011)**

AND IN THE MATTER OF S. 1A, 1B, 3(a) & 63 OF THE CIVIL PROCEDURE ACT

BETWEEN

MAGERO GUMO PETITIONER

VERSUS

POLITICAL PARTIES DISPUTE TRIBUNAL 1ST RESPONDENT

INTERNAL DISPUTES

RESOLUTION COMMITTEE 2ND RESPONDENT

AMANI NATIONAL CONGRESS PARTY..... 3RD RESPONDENT

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC) 1ST INTERESTED PARTY

RULING

1. Application for determination before me is a Motion dated 18th May, 2017 filed on the same day under certificate of urgency.

2. Application is brought pursuant to Sections 1A, 1B & 3A of the Civil Procedure Act, Section 5(1) of the Judicature Act, Article 1(1) (2), 2(2), 3(1), 4(2), 1 & 21 (1), 22(1), 38(3) c, 47, 92, 48, 81 & 82(2) (b), 84, 86, 81(2), 38 (5), 165 (3) (a) and (e), 18(1) of the Constitution of Kenya and Section 75 and 80 of the Elections Act 2011 and Legal Notice No. 126/2012 seeking:

1. That the application be certified urgent and same be heard exparte.

2. That leave be granted to the applicant herein to commence contempt of court proceedings against the Chairman, Secretary General and Treasurer of Amani National Congress Party.

3. That the honourable court pleases to have the Chairman, Secretary and Treasurer of Amani National Congress committed to civil jail for disobeying the order dated 15th May, 2017 forthwith.

4. That a declaration do issue that Magero Gumo the winner of the party elections conducted on 24th April, 2017 in Dagoretti North Constituency be given the party ticket forthwith.

5. That a declaration do issue that Bernard Shilibwa the interested party herein whose participation and election is questioned was not validly elected on 24th April, 2017 and 17th May, 2017 respectively as the party's nominee for parliamentary seat for Dagoretti North Constituency.

6. That a declaration do issue that the degree and extent of electoral malpractices perpetuated by and or attributed to the 3rd respondent in conduct of the party's primary elections conducted on 24th April, 2017 and 17th May, 2017 invalidate the said election.

7. That a declaration do issue that the degree and extent of the electoral malpractices perpetuated by or attributed to the agents of the 3rd respondent in the conduct of Dagoretti North Constituency primary party elections for ANC is in breach of and violated Article 86 of the Constitution.

8. That an order do issue cancelling the certificate of declaration of results of Dagoretti North Constituency ANC party elections and party certificate issued to Bernard Shilibwa an interested party herein and a certificate of declaration of results forthwith.

9. That this honourable court pleases to restrain IEBC and or its agents from gazetting or issuing the confirmation certificate to Amos Bernard Shilibwa forthwith.

10. That costs be awarded to the applicant.

3. Application herein is supported by grounds on the face of it and affidavit in support sworn by Magero Gumo but which is not dated and a further affidavit jointly sworn by Baba Ndege, Dickson Wandiri, Magero Gumo and Machayo Handley sworn on the 19th May, 2017.

4. On 15th May, 2017, this honourable court delivered a judgment and made orders to the effect that: "the 2nd respondent (Amani National Congress Party through its Executive Committee members (officials) in particular the Chairman, Secretary and Treasurer, and or anybody charged with the responsibility of initiating, calling for, conducting or managing elections affairs of the party be and are hereby directed to initiate, call for and/or conduct a nomination exercise for the seat of National Assembly Dagoretti North

Constituency on Amani National Congress Party ticket within 72 hours from today”.

5. That pursuant to the said orders, the 3rd respondent (ANC Party) did conduct afresh repeat nomination exercise on 17/5/2017 without sufficient notice to the aspirants save for Shilibwa (2nd interested party herein) who was declared the winner and given a nomination certificate.

6. The applicant together with three other aspirants who have jointly sworn a further affidavit claimed that they did not participate in the exercise because they were not involved in preparation of the same. The applicant averred that, he and the other aspirants were notified via email which message was accessed at 8.00am of 17th May, 2017 yet the exercise had already started at 6.00am. He contended that, the repeat exercise was a sham marred with electoral malpractices and in contravention of ANC party constitution and elections and nomination rules.

7. In submission, Mr. Wachakana for the applicant submitted that by sending email messages at 7.02pm on 16/5/2017 inviting aspirants for repeat nomination exercise scheduled for 6.00am the following day was not sufficient notice and the same was intended to favour one Mr. Shilibwa who was notified earlier enough hence mobilized his supporters for the exercise leading to his alleged victory.

8. In reply, the 2nd and 3rd respondents filed a replying affidavit sworn by Godfrey Osotsi, Secretary General ANC Party on the 19th May, 2017 in which he stated that the 2nd and 3rd respondents fully complied with the court order as directed and that it was the appellant and his co-aspirants who decided to boycott the exercise. He further stated that, given the exigency of time in conducting the exercise within 72 hours, they had no time to waste by giving long time notices.

9. In submission, Mr. Mukele appearing for the respondents urged the court to dismiss the application for contempt as it is misplaced taking into account that the respondents have complied with the order. Mr. Mukele further submitted that this honourable court has no jurisdiction to hear this case under Section 40 of the political parties Act as it concerns a dispute arising out of party primaries to which the applicants are not happy with. He referred the court to the case of **Hon. Eng. Ephraim Mwangi Maina vs Hon. AG & 2 others (2013)eKLR** in which the court held that any party dispute between a member and a member of a party and a member and a party, should first go through an internal party dispute resolution mechanism.

10. Learned counsel urged the court to dismiss the application and let the appellant exhaust the party internal disputes resolution mechanism first before coming to court.

11. I have considered application herein, affidavit in support, replying affidavit, further affidavit and submissions by both counsels. It is not in dispute that on 15/5/2017 this court did order a repeat of ANC Party nomination exercise for Dagoretti North Constituency for the seat of National Assembly within 72 hours.

12. The applicant admits that the nomination exercise was conducted but not freely and fairly as the appellant and other candidates were not notified in good time and that the email notification to candidates notifying them of the exercise arrived at 8.00am on 17/5/2017 while the exercise had already started by 6.00am. The applicant alleged that the exercise was marred with electoral malpractices to which he and the other aspirants are apprehensive may not be addressed adequately by the party's internal dispute resolution mechanism.

13. The purpose of the court order of 15/5/2017 was ANC Party to call for a repeat of nomination exercise. The said exercise was conducted albeit several alleged electoral malpractices. To that extent, the court order was obeyed save for the irregularities.

14. Is this court the right forum to address such irregularities? Have the said irregularities generated a fresh election dispute which must be addressed under Section 40 of the political parties Act? Section 40 Sub-Section (1) provides as follows:

“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 independent candidate and a political party.**
 - e. Disputes between coalition partners and**
 - f. Appeals from decisions of registrar under this Act**
- (fa) Disputes arising out of party primaries”.**

“Section 40(2) further provides:

“notwithstanding subsection (1), the tribunal shall not hear, or determine a dispute under paragraphs (a) (b) (c) and (e) unless the dispute has been heard and determined by internal political party dispute resolution mechanisms”.

15. From the wording of Section 40 (2), the applicant is bound to follow internal party dispute resolution mechanism if he feels aggrieved under Section 40(1) (a) or (b). He also has an option to go to the tribunal under Section 40(1) (fa) but not to the court directly.

16. It is now settled law that where the constitution or statute or a party provides for internal dispute resolution mechanism, the same must be exhausted first before approaching the court. This position has been adequately addressed in the case of **Maina Ephraim Mwangi vs the AG above quoted, Chirchir vs Kipkalya Kones HCC Misc Civil Appeal No. 129/2003, Nairobi and Speaker of National Assembly vs Njenga Karume (2008) Eklr Pg 425.**

17. In this case the nomination exercise was conducted and results announced showing that Shilibwa Bernard got 9,796, Baba Ndege 221, Magero Gumo 225, Khalwale 75, and Handley Machayo 63.

18. If there were any irregularities or electoral malpractices in contravention of ANC Party Constitution or nomination rules, the forum is the internal party dispute resolution mechanism or tribunal but not the court. To that extent, I do agree with Mr. Mukele that the respondents did comply with the court order and any complaint arising out of it should go to internal party disputes resolution mechanism or generally addressed by Section 40 of the Political Parties Act.

19. For Mr. Wachakana to ask the court to declare the applicant the winner based on the results of 24th April, 2017 which the court had already declared a nullity and the certificate issued to the applicant and 2nd interested party thereof nullified is untenable. To do that will amount to a resurrection of the already determined and closed issues.

20. For the above reasons stated, it is my finding that application herein is unfounded and a non starter hence the same is dismissed. However, considering the circumstances and nature of this case I will not make any order as to costs.

DATED AND DELIVERED THIS 20TH DAY OF MAY, 2017.

J. N. ONYIEGO (JUDGE)

In the presence of:

.....Counsel for appellant

.....Counsel for respondent