



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

E. P. A NO. 28 OF 2017

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 1, 2, 3, 10, 12, 19, 24, 33, 38, 47, 90(2)
AND 90(3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: CONTRAVENTION OF SECTIONS 39 AND 40 OF THE POLITICAL
PARTIES ACT**

AND

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNT ELECTIONS)
PETITION RULES 2013**

AND

IN THE MATTER OF THE POLITICAL PARTIES DISPUTES TRIBUNAL

AND

**IN THE MATTER OF THE NOMINATION PRIMARIES FOR THE JUBILEE PARTY GILGIL
CONSTITUENCY PARLIAMENTARY SEAT**

BETWEEN

SAMUEL MATHENGE NDIRITU.....APPELLANT

-VERSUS-

MARTHA WANGARE WANJIRA.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

**(Being an Appeal of the Judgment and Decree of the Political Parties Disputes Tribunal at Nairobi
(Hon. Mr. Kyalo Mbobu, Mr. James Atemo and Mr. Hassan Abdi) delivered on 12th May 2017 in
Political Parties Disputes Tribunal Complaint No. 180 of 2017)**

JUDGMENT

Background

The Appellant filed this Appeal on 13th May 2017 together with a Notice of Motion under certificate of urgency seeking stay of execution of the decision of the Political Parties Disputes Tribunal (“PPDT”) delivered on 12th May 2017. The Notice of Motion was supported by an Affidavit of the Appellant sworn on the same date, 13th May 2017. Ex parte orders were granted pending the hearing and determination of the Notion of Motion and this Appeal.

The Appellant is the current sitting Member of the National Assembly for Gilgil Constituency. He is a member of the Jubilee Party the 2nd Respondent in this Appeal. He is an aspirant for nomination on 2nd Respondent’s ticket for the position he is currently holding for the 8th August 2017 General Elections. He participated in the just concluded nomination process conducted by the 2nd Respondent on 26th April 2017 in Gilgil Constituency. He was declared the winner by the Returning Officer.

The 1st Respondent, also a member of the 2nd Respondent and aspirant for the same position as the Appellant, was aggrieved by that declaration. She appealed the decision before the 2nd Respondent’s National Appeals Tribunal (NAT). NAT ruled against the Appellant. He filed a Claim at the PPDT. In a judgment delivered on 12th May 2017 PPDT declined to grant the orders sought by the Appellant and affirmed the decision of the NAT. It is against this decision that this Appeal has been preferred.

Memorandum of Appeal

The Appellant has raised the following grounds of appeal in his Memorandum of Appeal filed on 13th May 2017:

1. That the Honourable Tribunal erred in law and in fact by failing to put into consideration all material facts laid before it.
2. That the Honourable Tribunal relied on irrelevant consideration in arriving at the impugned decision.
3. That the Honourable Tribunal erred in law by departing from a High Court decision declaring sovereignty of the people as the golden thread running through the constitution.
4. That the Honourable Tribunal erred in law by acting in excess and contravention of its statutory powers.
5. That the Honourable Tribunal erred in law and fact by deciding to disenfranchise the people of Gilgil Constituency and imposing on them their desired representative not democratically elected.
6. That the Honourable Tribunal erred in law by introducing amendments to the constitutionally guaranteed political rights.

The Appellant seeks eleven (11) prayers from this court. They are as follows:

- (a) That this matter be certified urgent and service be dispensed with at first instance and heard ex parte.
- (b) That execution of and all proceedings to enforce the ruling/judgment of the Honourable Political Parties Disputes Tribunal in this matter delivered on 12th May 2017 be stayed and/or arrested pending the hearing and determination of this application and Appeal.
- (c) That execution of and all proceedings to enforce the ruling/judgment of the Honourable Political Parties Disputes Tribunal in this matter delivered on 12th May 2017 be stayed and or arrested pending the hearing and determination of this Appeal.

(d) That the Honourable Court does see fit to declare the Appellant herein the winner and duly elected Nominee of the 2nd Respondent's Gilgil Constituency Parliamentary Nomination Primaries.

(e) That in the alternative, the Honourable Court does order fresh primaries be conducted within 48 hours of a ruling by this Honourable Court.

(f) That the 2nd Respondent be restricted from awarding on to the 1st Respondent the nomination certificate pending the hearing and determination of this suit.

(g) That without prejudice to prayer (f), this Honourable Court be pleased to quash any nomination certificate issued to the 1st Respondent or any other person apart from the Appellant.

(h) That the Honourable Court be and is hereby pleased to order a recount, re-auditing and/or a re-tally of the votes cast in Gilgil Constituency on the 2nd Respondents nomination carried out on the 26th May 2017.

(i) That this Honourable Court be and is hereby pleased to set aside, review and/or quash the decision by the Political Parties Tribunal declaring the 1st Respondent as the winner of the nominations.

(j) That the costs of this application be in the cause.

(k) Any other order that this Honourable Court deems just and fit.

Prayers (a), (b), (c) and (f) are prayers that are suited for an application and not this Appeal. The remaining prayers, (d), (e), (g) (h), (i), (j) and (k) are, in my view the ones relevant in this Appeal.

The Appeal was canvassed on 17th May 2017. Mr. Omari, counsel for the Appellant, identified the following issues in his written submissions for determination:

- i. Whether the PPDT disregarded the evidence on record.
- ii. Whether the PPDT acted in brazen violation of the Constitution.
- iii. Who should bear the costs of this Appeal.

He submitted that PPDT disregarded the evidence on record and that it did not satisfactorily analyze the evidence presented to it especially making a comparison of the copies of Form 4B and Forms JP3 with the original tally sheets held by the 2nd Respondent; that as a result of that failure PPDT relied on the improper, misguided and totally mistake decision of the 2nd Respondent's NAT.

He submitted that PPDT violated the Constitution in failing to observe its provisions that all sovereign power belongs to the people of Kenya and is exercised either directly by the people or through their democratically elected representatives. He submitted that by adopting the decision of the NAT, PPDT misconstrued the law and the principle of sovereignty of the people and ignored reach jurisprudence on this issue. Mr. Omari cited the case of **Richard Kalembe Ndile & another v. Musimba Musau & another Petition No. 7 of 2013, Ferdinard Waititu v Independent Electoral & Boundaries Commission & 8 others Election Petition No.1 of 2013** as some of the authorities where courts have pronounced themselves on the principle of sovereignty of the people.

It was further submitted on behalf of the Appellant that there were irregularities and electoral malpractices in 8 polling stations during the nomination exercise conducted in Gilgil Constituency and that the 2nd Respondent's NAT expunged from the total tally the results from these 8 polling stations which action is an affront to the voters of Gilgil; that the voice of the electorate of Gilgil was not heard

due to the action of the 2nd Respondent's NAT; that there was no evidence of malpractices and that ballot boxes were intact yet votes were not re-counted. It was submitted that the certificate of nomination was issued to the Appellant by the Returning Officer appointed by the 2nd Respondent; that all the results in the forms had no alterations and have been signed by all the agents; that the decision to cancel results from the 8 polling stations was therefore arbitrary and was aimed at disenfranchising the electorate; that the voters expressed their will and this cannot be challenged and that the evidence adduces before the 2nd Respondent's NAT did not meet the threshold of the standard of proof. Counsel cited **Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 others Election Petition No. 12 of 2013** to support his argument on the issue of standard and burden of proof. Lastly Mr. Omari submitted that the costs of this Appeal are payable to the Appellant.

The 1st Respondent, through her advocate Mr. Kithi, also prepared written submissions in which four issues have been pinpointed, namely:

- i. Whether the Appellant is guilty of election offences to wit inter alia fraud?
- ii. Whether the PPDT was justified in upholding the decision and order of the 2nd Respondent's NAT dated 3rd May 2017 nullifying the results of 8 polling stations and ordering their exclusion in the final tally.
- iii. Whether the Appellant can introduce new or extraneous evidence at this stage without leave of the Court.
- iv. Who should bear the costs of this Application and Appeal?

In answer to these issues, it was submitted that there were glaring irregularities; that results in 8 polling stations were delayed for 2 days; that the official tallying documents being forms 4(B) (ii) and all the JP 3 forms for the 8 polling stations had been altered to favour the Appellant; that the Appellant was not declared the winner; that the purported certificate allegedly issued to him by the Returning Officer is a forgery which matter has been reported to the police and is under investigation.

It was submitted in respect to the second issue that in nullifying the results in the 8 polling stations and ordering their exclusion from the total tally, the NAT and PPDT were dealing with a serious issue of electoral fraud; that the 2nd Respondent submitted at the PPDT that the Appellant engaged in electoral malpractices in the 8 polling stations by rigging the nomination in his favour and that it is false and inaccurate to state that the Appellant was declared the winner in the Party Primaries. It was submitted that an order for re-count or re-tally cannot be ordered without laying the proper basis to warrant such an order. On the issue of recount this court was referred to **Masinde v. Bwire & another (2008) 1 KLR EP 47**.

Mr. Kithi further submitted that in excluding the results of the 8 polling stations both the NAT and PPDT applied the doctrine of materiality which was appropriate.

On the 3rd issue it was submitted that the Appellant is introducing new issues in this Appeal that were never canvassed at the earlier stage; that the Appellant did not question the authenticity of the letter written by the Nakuru County Election Board Member, Mr. Eliud Ndegwa, or contest the validity of Mr. Eliud Ndegwa as a Member of this Board; that by introducing new evidence without leave of the court, Appellant is in contravention of Section 78 (1) (d) of the Civil Procedure Act which is the substantive law on the matter and Order 42 Rule 27 of the Civil Procedure Rules. On this issue this court was referred to **Joseph Kinyanjui Mwai t/a Sandworth Printing & Packaging v Kenya Power & Lighting Co Ltd [2014] eKLR**.

Finally, this court was urged to follow the principle that costs follow the event and grant costs to the 1st Respondent.

In addition to the written submissions which have been highlighted, Mr. Kithi orally raised issues with the Appeal by submitting that the Appeal is incompetent for the reason that there is no Record of Appeal filed; that proceedings upon which the appeal is preferred were not attached and therefore the court will not be properly constituted as a court of appeal to adjudicate this matter; that it was the duty of the Appellant to bring the proceedings of the PPDT before this court and that a Notice of Change of Advocates was not filed in respect of the current counsel for the Appellant who was not his counsel at the PPDT.

Mr. Omuganda for the 2nd Respondent submitted that after the Party nominations glaring malpractices were discovered by the 2nd Respondent's NAT regarding the 8 polling stations in terms of alterations on the face of all forms that had not been countersigned and that inclusion of the results from the 8 polling stations would have altered the results substantially; that the Appellant admitted the irregularities before the NAT; that the NAT had no option but to cancel the results in the 8 polling stations and declare the 1st Respondent the winner in accordance with Articles 38 and 91 of the Constitution and Section 31 of the Elections Act. It was further submitted that according to the 2nd Respondent, the 1st Respondent is the rightful nominee of Gilgil Constituency because this is the wish of the people. Mr. Omuganda associated himself with submissions of the 1st Respondent.

In response to the submissions by the respondents, Mr. Omari told the court that the Appellant comes to this court under Order 42 of the Civil Procedure Act and that this court is sitting as a special court within specific timelines; that Article 159 of the Constitution is adequate to cure any technical anomalies. He submitted that the proceedings from the PPDT were not easy to get due to strict timelines within which to file the Appeal; that Article 165 of the Constitution clothes this court with powers to supervise the PPDT and can call for the file. He submitted that the Appellant has not introduced any new matters to this Appeal; that the Appellant was not found guilty of any electoral malpractice because he has not been subjected to due process before a court of law; that he did not issue himself with the provisional certificate but it was issued to him by the Returning Officer; that the 2nd Respondent relied on the doctrine of materiality in total disregard of universal suffrage; that repeat nomination ought to have been ordered by the 2nd Respondent to avoid disenfranchising the voters of Gilgil Constituency; that the forms were not altered as claimed and that the applicable standards in respect of elections and nominations are the same because both must conform to the Constitution and the law.

Determination

From the outset I wish to dispose of the pertinent issues raised by the 1st Respondent which in my view will determine whether this court has capacity to proceed to determine the other issues raised in this Appeal. It was submitted that the Appeal before this court is incompetent. The reasons for this are that the Appellant has not filed a Record of Appeal attaching proceedings from the lower court. It was submitted that without the Record of Appeal this court cannot be constituted as a court of appeal to adjudicate on the issues before it. It was further submitted that Mr. Omari, counsel for the Appellant is a stranger to these proceedings because he did not file a Notice of Change of Advocate given that the Appellant was represented by a different advocate at the PPDT. It is crucial for this court to dispose of these issues first because the decision this court will arrive at will determine whether it has the capacity to proceed with the Appeal and determine the other issues raised therein.

I have considered the issue in regard to the failure to file Notice of Change of Advocate and in my view this is not fatal to the Appellant. I consider that the Appeal is distinct from the proceedings in the lower tribunal. The Appellant chose to instruct another advocate to take on the appeal and to my mind there is no breach of the law. In the event that this court is wrong on that point, it is my belief that this is curable under Article 159 (2) (d).

I now turn to the issue of failure to prepare and file a record of appeal.

Order 42 Rule 1 (1) and (2) provide that:

“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”

“(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

It is conceded that the proceedings from the PPDT were not available. There is however the judgment of the PPDT. I have considered this matter. Indeed the judgment of the PPDT on its own will not inform this court what went on in that tribunal to inform the decision in that judgment. That is only possible after reading the proceedings. It is my considered view that without the PPDT's proceedings this court cannot exercise its appellate jurisdiction. The law requires this court sitting on first appeal to consider the evidence that was adduced before the PPDT and the decisions arrived at and make its own independent conclusion. This cannot be done unless without reading the proceedings from the tribunal which would have been sufficient, taken together with the judgment, to enable this court to determine the Appeal. This court appreciates the pressure for time under which these matters are being decided. However, it is not lost to this court that there was no attempt made to bring even the photocopies of the handwritten notes from the PPDT or even to apply for the file to be placed before this court.

Mr. Omari urged this court to sanitize that anomaly by invoking the provisions of Article 159 of the Constitution. Article 159 (2) (d) states that ***“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—(d) justice shall be administered without undue regard to procedural technicalities.”***

Is failure to provide proceedings from the lower court or in our case from the PPDT a procedural technicality? Without proceedings from PPDT this court is not able to determine what transpired before that tribunal. This court cannot determine what informed the decision of the PPDT. My answer to the question above is in the negative because the proceedings form part of the material this court is required to analyze to aid it in arriving at a decision that addresses all the issues before it.

The Appellant has prepared and filed a Memorandum of Appeal. This court would have determined this appeal had there been proceedings attached to this Memorandum of Appeal even without the proper Record of Appeal because then I would have had all the information I require to decide this Appeal.

My finding therefore is that I am not able to proceed to consider this Appeal. I am aware I was asked to invoke the supervisory powers provided under Article 165 of the Constitution and call the file from the tribunal and examine the record. Article 165 creates the High Court and its jurisdiction. The relevant sub-article under that Article for our purpose is (6). It provides that:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

The PPDT falls under this category. To my mind, the High Court, while sitting on its original jurisdiction, can call for a file from the PPDT and examine the record in order to satisfy itself on any matter raised before it. For the purposes of this matter, this court is sitting on appeal as a special court exercising appellate jurisdiction. I doubt that it is within my powers to call for the file from the PPDT.

In view of this I find that I have no alternative but to dismiss this Appeal at this point of the proceedings, which I hereby do. With that I down my tools because the consequences of a dismissal of pleadings/appeal are that the court cannot proceed to determine the issues placed before it. The Appellant has a right of appeal and on that point I hereby grant him leave to appeal this decision within the time allowed by the law. I hesitate to order costs to be paid to the respondents. Let each party bear own costs to this Appeal and the Notice of Motion. Orders shall issue accordingly.

Dated, signed and delivered this 18th day of May 2017.

S. N. MUTUKU

JUDGE

Present

Mr. Omari Danstan for the Appellant

Mr. Kithi for the 1st Respondent

Mr. Omuganda for the 2nd Respondent