



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(R. MWONGO, PJ)
ELECTION PETITION APPEAL NO 24 OF 2017

WIPER DEMOCRATIC MOVEMENT.....APPELLANT /APPLICANT

VERSUS

CORNELIUS NGUMBAU MUTHAMI.....1ST RESPONDENT

JUDGMENT

Brief Background

1. This is an appeal by the Wiper Democratic Movement Party (“the Party” or “Wiper”) against the judgment dated 8th May, 2017 of the Political Parties Dispute Tribunal (PPDT) in PPDT Complaint No 46 of 2017.
2. The Respondent was a candidate in the Wiper nominations for Member of the County Assembly, Mui Ward in Mwingi Central Constituency, Kitui County elections. The Party nominations which are the subject of this matter were held on 24th April, 2017, and results declared on 26th April, 2017. However, according to the Respondent in its complaint before the PPDT, no elections were held in seven of ten wards. Further, that in the three wards where the election was conducted, there were serious irregularities.
3. At the PPDT the Respondent asserted that it filed a complaint before the Party internal appeals tribunal, and was orally advised on 29th April, 2017, that his appeal had been unsuccessful.
4. In its determination, the PPDT found, inter alia, as follows:
 - a. That the Party nominations carried out for the position of Member of County Assembly for Mui Ward in Mwingi Central Constituency on 24th April, 2017 is null and void and was thereby cancelled;
 - b. That the respondent ensures, in accordance to its constitution and Party Rules that the interests of the claimant and all the members in the 7 polling stations that did not vote be taken care of in the party nominations exercise in a transparent and democratic process.
5. The appellant appeals against the decision of the PPDT. Its Memorandum of appeal has the following grounds:

“a) THAT the honourable Tribunal erred in fact and in law the Honourable Tribunal erred in fact and law by hijacking the proceedings of the Appellant’s internal dispute resolution mechanisms contrary to section 40(2) of the Political Parties Act.

b) THAT the Honourable Tribunal erred in fact and law by finding that there were factual inconsistencies in the facts underlying the preliminary objection when it was not disputed that the appellant’s tribunal’s decision was due on 05.5.2017 even as observed at the last two lines of paragraph 3 of the Ruling.

c) THAT the Honorable Tribunal erred in fact and law in accepting the respondent’s claim that the Appellant’s final ruling on the 29.4.2017 was given orally without adducing any evidence to that effect when it is clear that the Appellant’s Appeals Tribunal’s decisions are in writing. In any event the appeal to the appellant’s Appeals Tribunal had just been lodged a day earlier on 28.4.2017 and it was practically impossible to have heard the complaint with all the parties involved and deliver a ruling the following day.

d) THAT the Honourable Tribunal erred in fact and law by failing to consider or address itself on the preliminary objection in its judgment of 8.5.2017 as indicated in paragraph 4 of the Ruling of 4.5.2017 on what it termed as “factual inconsistencies” in the underlying facts of the preliminary objection.”

Parties’ submissions

6. The Appellant complains that the PPDT, contrary to section 40(2) of the Political Parties Act, hijacked the appeal which had been filed before the Party National Appeals Tribunal on 26th April, 2017. The letter of appeal is exhibited at page 117 of the record of appeal. According to the appellant, Rule 6.2.10 of the Party’s Election and Nomination Rules provides for the National Appeals Tribunal to consider and determine the appeal within ten (10) days of receipt of the appeal. However, the PPDT took jurisdiction before the obligatory party appeal process was complete, despite the fact that the party’s tribunal had scheduled the hearing for 5th May, 2017.

7. Secondly, the appellant urged that the PPDT had no factual basis for accepting the respondent’s allegation that the Appellant’s tribunal’s final ruling was given orally on 29th April, 2017.

8. Finally, it was urged that the PPDT failed to properly address itself to the preliminary objection of the appellant. That the party’s internal processes had not been exhausted, and in finding that instead of proceeding on the preliminary objection, it would ***“proceed to full determination during which the factual inconsistencies will be subjected to the required evidentiary test”***

9. In opposition to the appeal, the Respondent filed a Replying Affidavit. He pointed out inconsistencies in the Party Election and Nomination Rules which rendered it impossible for an applicant to await the outcome of the National Appeals Tribunal determination without prejudicing his constitutional right to franchise. The inconsistencies are in Rule 6.2.10 and Rule 12.3 wherein the former obligates the National Appeals Tribunal to determine an appeal within 10 days whilst the latter requires determination within 24 hours. Given these inconsistencies, he argued, the respondent had no choice but to approach the PPDT to exercise its general statutory jurisdiction. In particular, he took into account the oral advice that his appeal had been unsuccessful, a fact that had never been controverted by the Party.

10. Secondly, the respondent asserted that the Party had, to date, not released any written decision.

11. Thirdly, the respondent urged that the PPDT judgment clearly shows that the PPDT had made a finding that the complainant was orally informed that his complaint had not succeeded. As a result, the PPDT correctly entertained the respondent’s plea that its constitutional right to franchise would be curtailed in the circumstances.

Issues

12. There are two issues arising for determination:

- a. **Whether the PPDT had jurisdiction to hear the respondent's complaint.**
- b. **Whether the PPDT was justified in dismissing the Appellant's preliminary objection**

Analysis and Determination

13. **Section 40** of the **Political Parties Act No 11 of 2011** (as amended) provides for the determination of disputes between a member and a party through the Political Parties Disputes Tribunal as follows:

"40 Jurisdiction of Tribunal

(1) The Tribunal shall determine -

(a)

(b) disputes between a member of a political party and a political party

(c)

(d)

(e)

(f)

(fa) disputes arising out of party nominations"

(2) Notwithstanding subsection (1), 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"

14. In this matter, it was not disputed that the Respondent did lodge a formal complaint on 26th April, 2017, to both the Party's National Elections Board and the Party's National Appeals Tribunal. The letter of appeal was identified and referred to by both counsel on page 117 of the record of appeal. **Rule 4.2** of the **Party Election and Nominations Rules** indicates the duties of the National Elections Board as including:

"b. [To] Plan, organise, co-ordinate and supervise Party elections and Nominations for the Presidential, Gubernatorial, Parliamentary and Civic Candidates"

15. On the other hand **Rule 6.2.3** of the **Party Elections and Nominations Rules** establishes the National Appeals Tribunal with the role of determining appeals arising from:

"polling stations, sub-branch, Branch party elections, elections of national officials and nominations in respect of Presidential elections, Governors, Senators, Members of the National Assembly County Women Representative and nominations in respect of County Ward representatives" (emphasis supplied)

16. These are the two organs of the Party involved in nominations and through which the Party dispute resolution mechanism can be concluded.

17. I have noted the inconsistencies in the Party Election and Nomination Rules pointed out by the respondent's counsel. **Rule 6.2.10** states:

“The National Appeals Tribunal shall consider and determine the appeal in accordance with the Constitution of Kenya, any applicable Law, Party Constitution and Election and Nomination Rules within Ten (10) days of receipt of the appeal”

18. On the other hand **Rule 12.1** and **12.3** provide as follows:

“12.1 Any candidate who is dissatisfied with the outcome of nominations or party elections has a right to appeal to the Appeals Board.

12.3 The Appeals Board shall hear and determine the appeal within 48 hours of receipt of the appeal. The decision of the Appeals Board shall be final” (emphasis supplied)

19. To my mind, these inconsistencies are inimical to the exercise of the right of a party member to appeal and receive a clear unequivocal response to any allegations that his right to a fair hearing and to participate in and exercise his freedom of choice has been infringed upon or curtailed. It is a serious threat a person’s political right of participation in the activities of a political party under **Article 38** of the Constitution that the resolution of a member’s complaint is shunted between two inconsistent dates and the party mechanism is sloven in its response to such complaint.

20. I have no doubt that, as a core principal, where a political party’s constitution or rules are internally inconsistent or are inconsistent with the law, the dispute thereon should be resolved in favour of the person whose rights are thereby infringed or threatened with the likelihood of being infringed. In this case, the beneficiary of the inconsistencies should be the respondent.

21. I therefore find and hold that the respondent was entitled at the earliest opportunity to receive an answer to his complaint. In the absence of a formal response within 48 hours as entitled by **Rule 12.3**, the respondent was entitled to appeal to the PPDT. Equally, in absence of a clear determination by the Party Appeals Board within the said timeframe, the PPDT was entitled to take up jurisdiction and make a determination on the appeal.

22. Further, it is not disputed that the National Appeals Board has not yet issued a determination of the respondent’s appeal lodged on 26th April, 2017. Indeed, the Appellant’s argument herein is that the PPDT seized jurisdiction before the Party’s National Appeals Tribunal could issue its decision scheduled for 5th May, 2017. In oral argument, Counsel for the appellant argued that there was no evidence that the National Appeals Tribunal had issued a decision in writing, to enable crystallisation of the PPDT’s jurisdiction. If it is a fact that the National Appeals Tribunal has not delivered its decision on the complainant’s appeal, then in terms of **Rule 12.4** of the **Party Election and Nomination Rules**, the National Elections Board cannot issue a nomination certificate until the appeal is determined and a decision is issued. That Rule provides as follows:

“12.4 Upon an Appeal being lodged with the Appeals Board, the National Elections Board shall not issue a nomination certificate until the appeal is determined” (emphasis supplied).

23. The upshot of the forgoing is that, on the issue of jurisdiction, I find and hold that the PPDT did have jurisdiction, and I would not disturb its determination on that account.

24. I now turn to the issue of the preliminary objection. The ruling of PPDT on the preliminary objection concerns the alleged non-exhaustion of the Party’s internal dispute mechanism. As I understand it, the ruling records that from the parties’ submissions it became clear that there were inconsistencies of a factual nature. Paragraph 3 of the Ruling reads as follows:

“...In their submissions on the objection, there were factual inconsistencies on the situation of internal party dispute resolution mechanism. However, whereas the complainant in paragraph 7 of his claim alleges that he was heard and orally informed by the respondent on 29th April, 2017 as being unsuccessful, his counsel submitted that the decision of the Respondent’s appeals

tribunal was due on 5th May 2017”.

25. In my view, the PPDT correctly dismissed the preliminary objection because it concerned underlying factual inconsistencies. That is to say, the facts had not been mutually agreed by the parties. As such, the preliminary objection rather than being premised on a pure point of law was premised on disputed facts. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the court defined a preliminary objection in the following terms:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Sir Charles Newbold in the same case aptly expounded:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.” (emphasis supplied).

26. On this issue too, the appeal fails.

Disposition

27. In conclusion, and in light of the foregoing analysis, I am not persuaded to disturb the decision of the Political Parties Dispute Tribunal on any of the grounds of appeal canvassed. Accordingly, I hereby uphold the determination of the Political Parties Dispute Tribunal dated 8th May, 2017, and dismiss the appeal.

28. There is no order as to costs as the appeal has an element of public interest.

Orders accordingly.

Dated and Delivered at Nairobi this 17th Day of May, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1. Ms Githii h/b for the Appellant/Applicant
2. Mr Musyoki for the Respondent

Court Clerk Jeff Omuse