



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION NOMINATION APPEAL NO 25 OF 2017

JUBILEE PARTY OF KENYA.....APPELLANT

VERSUS

VICTOR KIPLAGAT.....1ST RESPONDENT

WILLIAM MUTAI.....2ND RESPONDENT

CAROLINE CHEPKOECH.....3RD RESPONDENT

ELIOIN KIPKOSGEI.....4TH RESPONDENT

CLEOPHAS KIPTOO.....5TH RESPONDENT

GENALD KIMUTAI KIRWA.....6TH RESPONDENT

EDWIN KIPKOSGEI MOSBEI.....7TH RESPONDENT

POLITICAL PARTIES DISPUTES TRIBUNA.....8TH RESPONDENT

AND

MAINA KAMANDA.....INTERESTED PARTY

(Being an Appeal from the Judgment and Decree of the Political Parties Dispute Tribunal of Kenya at Nairobi made on the 2nd August, 2017 by Honourable Kyalo Mbobu, James Atema Hassan and Dr. Adelaide Mbithi in Complaint Number 333 of 2017)

JUDGMENT

The Appeal herein arises from the Judgment and Decree of the Political Parties Disputes Tribunal of Kenya at Nairobi made on the 2nd day of August, 2017 in complaint number 333 of 2017.

On the 2nd day, of August 2017, the Honourable Tribunal delivered a Judgment in which the Appellant was directed to reconstitute its party list of Nominees to the National Assembly and the County Assemblies of Nandi and Uasin Gishu. The Appellant was also directed to as much as possible afford a hearing to and to supply all the affected persons with the reasons for any decision made in compliance with the orders made by the PPDT.

Being dissatisfied with that decision, the Appellant has appealed to this court and has listed 8 grounds of Appeal in its Memorandum of Appeal dated the 15th day of August, 2017 as follows:

1. The Honourable Tribunal erred in Law and in fact in ordering total re-constitution of the Party lists of nominees to the National Assembly and the County Assemblies of Nandi and Uasin Gishu respectively.
2. The Honourable Tribunal erred in law and in fact in failing to appreciate the provisions of the Constitution of Kenya, 2010, the Independent Electoral and Boundaries Commission Act (No.9 of 2011), the Elections Act (No. 24 of 2011), the Elections (General) Regulations, 2012, the Elections (Party Primaries and Party Lists) Regulations, 2017 with respect to compiling and submission of Party Primaries and Party Lists in ordering re-constitution of the Party list of nominees to the National Assembly, Senate and the County Assemblies of Nandi and Uasin Gishu respectively without taking into account the adverse implication of their orders to other members of the Respondents who were never a party to the proceedings before the Honourable Tribunal.
3. The Honourable Tribunal erred in law and in fact in failing to take into account the Respondent's response.
4. The Honourable Tribunal failed to take into account the fact that the nominees submitted by the party had met all the relevant criteria and were selected in a fair and credible process in accordance with the law obtaining.
5. The Honourable Tribunal erred in law and in fact in failing to take into account the fact that the Appellant/applicant complied with the law and regulations in constituting the list of nominees to the party list.
6. The Honourable Tribunal erred in Law and fact in ordering the Appellant/Applicant to re-constitute the party lists in a particular manner while it has no Jurisdiction to do so.
7. The Honourable Tribunal erred in law and in fact in failing to appreciate the fact that all interested categories including special interest groups were catered for in the list submitted by the Appellant to the Independent Electoral and Boundaries Commission (IEBC.)
8. Other grounds and reasons to be adduced at the hearing hereof.

The Appellant has sought the following orders;

That the Appeal be allowed and that the Judgment and the Decree of the Political Parties Dispute Tribunal delivered on 2nd August, 2017 be set aside. It has also sought the cost of the Appeal and for the proceedings before the PPDT.

This court has had an opportunity to peruse the proceedings before the PPDT, and in the Respondents' Amended complaint dated 30th July, 2017 the gist of their complaint was based on the procedure of constitution and submissions of the party lists by the Appellant, for MCA, National Assembly and the Senate under Articles 97(l) ©, 98 (l)(b), (c), (d), and 177 (l) (b) (c) (2) of the Constitution and Section 34, 35, 36 and 37 of the Elections Act 2011 and Article 12 of the Jubilee Party Constitution, County Assembly (Gender) Party lists Guidelines parameters and the Elections (Party Primaries and Party List) Regulations, 2017.

In the amended Complaint, the Respondents herein contended that the Appellant Contravened the aforesaid provisions of the law in that it constituted Party list for Uasin Gishu County behind closed doors without the participation of the members and without regard to the Elections (Party Primaries and Party lists) Regulations, the Political Parties Code of Conduct, the Elections Act and the Constitution.

It was further alleged that the party list as constituted did not reflect the representation of women, youth

and persons with disabilities and marginalized groups in Uasin Gishu and Nandi counties as provided under Article 27 (4) 38, 53, 54, 55,56,57 and 260 of the constitution.

The Respondents further contended that the Appellant did not issue a notice in accordance with Article 12(3) of its constitution and that there was no Public participation.

They sought orders that the Tribunal do revoke/cancel the party list re-submitted by the Appellant.

The Appellant moved this court by way of certificate of urgency and in its Notice of Motion dated 15th August, 2017; it sought a stay of execution of the Judgment and Decree of the Honourable Tribunal pending the hearing and determination of the Application and/or Appeal.

On the 17/8/2017, Mr. Maina Kamanda was enjoined in the Appeal as an interested Party following his Application to be so enjoined dated 16/8/2017.

On the 18/8/2017 the court gave directions on the hearing of the Appeal and due to the urgency of the matter, parties agreed to dispense with the hearing of the Application and go straight to the Appeal. An order for stay of execution pending the hearing and determination of the Appeal was also issued on the same date.

The Appeal came up for hearing on the 22/8/2017 when parties made oral submissions in support of their respective positions. In his submissions, Counsel for the Appellant collapsed his grounds of Appeal into two to wit;

1. Whether the political parties Dispute Tribunal had jurisdiction to entertain the complainant before it.
2. Whether the Appellant's list of Nominees to the National Assembly and County Assemblies of Nandi and Uasin Gishu complied with the statutory and constitutional provisions regarding the composition of the party list.

In his submissions, he told the court that the jurisdiction of the PPDT is limited in that it can only hear disputes after they have been heard by the internal disputes resolution organs of the parties. In support of this submission, Section 40(2) of the Political Parties Act was cited. He argued that the PPDT erroneously assumed Jurisdiction because the party organ's mechanism had not heard the dispute first. He made reliance on Elections nomination Appeal No. 18/2017 (**Jubilee Party of Kenya versus Stella Rotich & another**) where Ongudi Judge held that failure to seek the intervention of the internal organ rendered the PPDT devoid of Jurisdiction.

With regard to the 2nd limb on the issue of Jurisdiction, he submitted that there was an initial list sent to the IEBC by the Appellant on the 24/6/2017 which the IEBC sent back, requiring the Appellant to amend, to comply with the law and which the Appellant complied with as required and upon re-submitting the same, it was accepted by the IEBC who published the same on the 18/7/2017. This was before the complaint by the Respondents was lodged with the PPDT.

Counsel contended that once the IEBC accepted and published the list, any disputes arising therefrom were to be heard by the IEBC Disputes Resolution Committee in accordance with Article 88 (4) of the constitution and Section 74 of the Elections Act and not by the PPDT. He relied on the case of **Jubilee Party of Kenya versus Mohammed Abdikadir Salah, Election Nomination Appeal No 22 of 2017** where Wakiaga Judge upheld that position.

On the 2nd issue, he argued that the party list was compliant, in that the IEBC accepted the same after the amendments were done by the Appellant and that, looked at wholesome, the list complied with legal provisions and regulations and that it included all the categories of persons required to be nominated under Article 177 (l) (L) and (c) of the constitution and that in coming up with its findings, the PPDT failed to appreciate the provisions of Article 90 (l) of the constitution. The court was also told that the

finding by PPDT that the Uasin Gishu and the Nandi County are predominantly Kalenjin did not take into account the constitutional provisions aforesaid.

He further submitted that the PPDT failed to consider that in any administrative action that affects an individual, he needs to be heard before any orders can be made against him and in the complaint, the various interested persons were not granted an opportunity to be heard yet the decision by the PPDT affected them.

On behalf of the interested party, it was submitted that he was not granted an opportunity to be heard and that the PPDT did not have jurisdiction to hear the complaint with regard to the party list. That her client Maina Kamanda was affected by the orders of PPDT to the effect that the list is to be re-constituted and his name be removed and be replaced with that of a qualified person from Uasin Gishu and Nandi Counties. He was not served with any papers and he was not heard before the decision was made.

That the interested party submitted his application for nomination by the Appellant following which, his application was considered and his name was put on the list. It was argued that the decision of PPDT was unfair and Contrary to Article 50 (1) of the constitution as it violated his right to a fair hearing, which right cannot be limited under the law. She submitted that the PPDT was alive to that fact as it directed that a hearing should be offered to the affected parties and that they should be supplied with a copy of its decision which right to hearing was granted post the hearing.

On the issue of jurisdiction, she submitted that the PPDT did not have jurisdiction to hear the complaint under section 40 (1) (b) of the Political Parties Act in that the internal Party Dispute mechanism had not been exhausted.

With regard to the 2nd limb on the issue of jurisdiction, she argued that under Article 88 (4) of the constitution and Article 90(2), its only the IEBC that has jurisdiction to hear disputes arising from nomination.

She also made reference to Section 74 of the Elections Act, Article 90 (2) (c) of the Constitution and Regulation 26 of the Elections (Party primaries and party lists) Regulations, 2017 and argued that under the Law, it is the duty of IEBC to determine whether the party list conforms to the law or not. She relied on the case of **Gender Equality Commission versus IEBC & Another (2013) eKLR** in support of that contention.

On the part of the Respondents, it was submitted that the PPDT has jurisdiction to hear complaints between political parties and members of Political parties and therefore it was clothed with jurisdiction to hear the complaint.

On the substance of the complaint lodged before the PPDT, he contended that it directed its mind to what was before it and made a Judgment in which it appreciated the concerns raised by the Respondents.

He averred that the issue of Jurisdiction was not raised before the Tribunal and it ought to have been raised so that the PPDT could address the same.

With regard to the right to be heard raised by the interested party, he submitted that what was before the PPDT was not a specific name but a process which was being challenged. He averred that the list was constituted without public participation, there was no transparency and that is what formed the gist of the complaint before the PPDT

Regarding the list of nominees for the Uasin Gishu and Nandi Counties, he urged that it was not compliant in that the nominees are all Kalenjins yet the counties do not belong to the Kalenjins alone but rather are cosmopolitan.

In a brief reply, counsel for the Appellant submitted that the issue of jurisdiction was not raised before the PPDT as it was overwhelmed with work.

That the Appellant has regulations for institution of Appeals but the Respondents failed to follow the same before they moved to the PPDT. He stressed that it was necessary to inform the affected parties before any decision could be arrived at.

In her rejoinder, Counsel for the interested party submitted that the issue of Jurisdiction is a point of law and it can be raised at any time even in Appeal. He averred that the interested party was specifically mentioned in the complaint and specific orders were sought against him in prayer (L) of the same and therefore it was important for him to be heard.

This court has carefully considered the grounds of Appeal and the submissions that were made by the counsels in support of their respective positions.

Counsels for the Appellant and the interested party raised an issue of jurisdiction in which they argued that the political parties Tribunal did not have jurisdiction to hear the complaint lodged before it by the Respondents herein. The same is premised on Section 40 of the Political parties Act, Article 88 (4) (d) of the constitution and section 74 of the Elections Act.

With regard to the issue of jurisdiction, I wish to rely on the celebrated case of owners of the **Motor Vessel "Lillian S "Versus Caltex Oil (Kenya) Limited Civil Appeal No. 50/1989** where the learned Judges observed;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

What then is jurisdiction?

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.

Counsel for the Respondent has argued that the issue of Jurisdiction was raised late in the day, in the Appeal as it was not raised before the PPDT. With regards to this contention, it is trite law that an issue of jurisdiction can be raised any time even in Appeal and it can be raised by a party or a court on its own motion.

Article 88 (1) of the constitution establishes the IEBC. Its responsibilities are set out under sub clause 4 (d) which provides:

The commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this constitution and any other elections as prescribed by an Act of parliament and in particular for-

- d) The regulations of the process by which parties nominate candidate for elections.
- e) The settlement of electoral disputes, including disputes relating to or arising from nominations but excluding Election petitions and disputes subsequent to the declaration of election results.

This article is reproduced verbatim in Section 74 of the Elections Act.

Article 90 (2) of the constitution provides as follows.

“The independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of Elections for seats provided under Article 90 clause 1

The seats provided for under clause (1) are those of National Assembly, the Senate and those of the County Assembly which includes those of the members nominated by parliamentary political parties according to their proportion of members of the National Assembly and the senate.

In exercise of such powers as are conferred by the constitution and the Elections Act, the IEBC is entitled to reject a party list if it does not conform to the law. This is provided for in regulation 26(l) of the Elections (party primaries and party list) regulations 2017 which provide as follows;

“The commission shall reject a party list or a name on the party list submitted by a political party where:

- a. The party list does not conform to the requirements of the constitution, the Act or those regulations; or
- b. The period for submitting revised party list has lapsed.

Submissions were made before this court to the effect that upon presentation of the first party list to the commission, it rejected the same pursuant to the provisions of regulation 26(a). The Appellant amended the list and the amended list was re-submitted to the commission who got satisfied and published the same on the 18/7/2017.

Regulation 27 of the Elections (party primaries and party lists) regulations 2017 enjoins political parties to establish an internal dispute resolution mechanism in relation to the party primaries and party list. This therefore means that such disputes can only be heard by either the IEBC or by the internal disputes resolution mechanism.

I fully concur with the submissions made by the Counsels for the Appellant and the interested party that, the PPDT did not have jurisdiction with regard to the dispute herein.

I find the Appeal to be merited and I allow it. The Judgment of the PPDT dated 4/8/2017 is hereby set aside. There shall be no orders as to costs.

Orders accordingly.

Dated, Signed and Delivered at Nairobi this 23rd Day of **August, 2017**.

.....

L. NJUGUNA

JUDGE

In the Presence of

..... for the Appellant

..... for the Respondent