



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NUMBER 20 OF 2017

BETWEEN

MACHARIA PATRICK MWANGI.....APPELLANT

AND

MARK NDUNGU NGANGA1ST RESPONDENT

JUBILEE PARTY OF KENYA.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....AMICUS CURIAE

(Being an appeal from the ruling and order of the Political Parties Disputes Tribunal (M.O. Lwanga- Presiding, Desma Nungo, Paul Ngotho and Dr. Adeleine Mbithi) dated 9th and 10th May, 2017 respectively, in Tribunal Cause Number 94 of 2017)

JUDGMENT

1. Once again due to the apparent urgency inherent in this appeal, I heard the parties on a non-official working day. A Saturday. This was also pursuant to the Honourable the Chief Justice's directive of 13 April 2017 authorizing honourable judges to sit outside the ordinary working hours in appeals emanating from the Political Parties Disputes Tribunal ("the PPDT").
2. I hasten to add that all the parties who had appeared before me on Friday 12 May 2017 also agreed to the hearing being conducted on Saturday, the 13 day of May.
3. At the conclusion of the oral hearing, I *ex tempore* dismissed the appeal with no orders as to costs. I reserved my reasons to be rendered on 15 May 2017. These are now my reasons.
4. The Appellant and the 1st Respondent are politicians. They are both members of the 2nd Respondent, a political party registered in accordance with the laws of Kenya. The Appellant and the 1st Respondent were both engaged in a contest for the 2nd Respondent's ticket to contest in the forthcoming national elections as candidate for the Member of County Assembly Maringo- Hamza Ward. The nominations exercise was held on 26 April 2017. It was conducted by secret ballot at seven polling stations within the Ward. Ultimately the Returning Officer declared the 1st Respondent the winner in the suffrage and the 2nd Respondent's nominee as candidate for the Member of County Assembly Maringo-Hamza Ward.
5. Dissatisfied, the Appellant moved to 2nd Respondents internal dispute resolution mechanism and apparently the 2nd Respondent overturned the decision of the Returning officer and favoured the 1st Appellant with the win. Matters did not end there. The 1st Respondent quickly moved to the Political Parties Dispute Resolution Tribunal and obtained orders restraining the 2nd Respondent from granting the ticket to the Appellant. An interim interdict was obtained and the complaint listed for hearing on 8 May 2017. On 9 May 2017, the PPDT rendered its decision. The PPDT allowed the complainant. The PPDT made the following orders

a. The decision reached by the Jubilee Party National Elections Appeals Tribunal on 5 May 2017 be and is hereby set aside.

b. The Complainant's victory as announced by the Returning Officer be upheld

c. The Jubilee Party(the 2nd Respondent) is hereby ordered to present the complainant to the IEBC as the Jubilee Party Candidate for the seat of Member of county assembly for Maringo-Hamza Ward in Makadara Constituency

d. The Jubilee Party (the 2nd Respondent) be and is hereby restrained from presenting the name of the 1st Respondent to the IEBC as the Jubilee Party candidate for the seat of member of County Assembly for Maringo- Hamza Ward in Makadara Constituency

e. There be no order as to costs.

6. Aggrieved with the PPDT's decision the Appellant has now moved to this court by way of an appeal under Section 40(2) of the Political Parties Act, No. 11 of 2011.

7. Even though the Memorandum of Appeal lists some odd mine grounds of appeal, it is easy to isolate the grounds to only two substantive ones. This was evident even as the Appellant's and Respondents' counsel respectively argued their cases.

8. The Appeal largely contests the fact that the Appellant was condemned unheard. The appeal also urges that the decision of the PPDT be set aside as the PPDT did not have any evidence before it to review and decide the matter as it did.

9. I have looked at the record. I have also received the evidence as contained in the record before the PPDT. The original file of records from the PPDT was availed to me. The record of appeal before me contained various documents as well as affidavit evidence which was not before the court below. This should not have been so. I however, at the preliminary stage, took the view that as the Appellant had not been heard it could be worth-the-while seeing if there was additional evidence that he could have presented before the PPDT assuming that I agreed with him that he had not been served.

10. The record of appeal was also lacking some documents which constituted part of the record before the PPDT. This smacked of a defect due to the provisions of Order 42 Rule 13(4) of the Civil Procedure Rules. However, I also deemed the defect not fatal as the original file had been availed to me and the circumstances of the case dictated that I impose some urgency and determine the dispute on merit. I consequently admitted the appeal without any reservation and fixed it for hearing once the parties agreed to abandon the interlocutory application.

11. At the hearing, the Appellant did not pursue the issue of not having been served with a hearing notice and having been condemned by the PPDT unheard, with any vigor. The 1st Respondent however pointed out that the Appellant had been served pursuant to the directions of the PPDT.

12. I have seen an affidavit of service filed before the PPDT on 8 May 2017. The Appellant was notified through the medium of a cellphone as well as the social network forum of WhatsApp on 7 May 2017. He was also called by the process-server. The Appellant did not deny the contents of the affidavit of service and neither did he challenge the same.

13. The essence of service is to bring to the attention of any party likely to be affected by the proceedings or order to be made in the proceedings, the existence of the proceedings. The notification serves this purpose and no more. Depending on the circumstances of each case service ordinarily ought to take the personal form. Where the court directs otherwise then once the court is satisfied that the party's attention was drawn to the proceedings, then the proceedings may continue a party's absence notwithstanding. This approach helps to avoid spurious applications which allege non-service and insist on personal delivery rather than awareness.

14. In the instant case, I am satisfied that on the evidence before the court as well as on the basis of what was before the PPDT, the Appellant was aware of the proceedings and simply sought to evade, if not ignore, the same. The PPDT may not be faulted for having condemned the Appellant unheard. In the circumstances of this case, the opportunity to be heard was afforded but not taken.

15. With regard to the limb of the appeal that faulted the PPDT for overturning the decision of the 2nd Respondent's National Elections Appeals Tribunal, it must be stated that this court's approach should be that of an appellate court of first instance. The duty is to review the evidence that was before the court below and make a conclusion and determination.

16. The Appellant like the Respondents did not contest or allege that the nominations exercise was riddled with any irregularities that warranted interference by the court or the PPDT. The parties did not also contend that the nominations had been conducted contrary to the 2nd Respondents' Constitution or the laws of the land. The contest was simply on the members.

17. The Appellant however contends that the total number of votes cast in favour of both the Appellant and the 1st Respondent had been manipulated. While the 1st Respondents votes had been added, the Appellants votes had allegedly been deducted. The 2nd Respondents National Elections Appeals Tribunal seems to have bought this narrative. The PPDT did not. It thought otherwise.

18. The evidence availed before the PPDT revealed a discrepancy. The discrepancy was that the total number of votes cast at one polling station being St. Michael should have read much more than the 451 reflected. There is also no evidence to support the allegation that the 1st Respondent participated in the alleged alterations. Instead, the 1st Respondent availed before the PPDT various forms signed by the candidates agents. The forms, Form 3(e), were for all the seven polling stations.

19. The PPDT may not have exhaustively analysed and reviewed the evidence but was right in its approach to the dispute. The documentary evidence favoured the position of the 1st Respondent as it could not be shown that the 1st Respondent was at fault. The Appellant had not shown that the Forms were indeed altered and even before this court reliance had been placed by the Appellant on certain unsigned forms which held no probative value, in my view. If the 2nd Respondent had found as a fact that the nominations were marred with irregularities, it

made little sense to then overturn the Returning Officer's verdict. The entire process should have either been left to stand or completely overturned.

20. The PPDT correctly held that the 1st Respondent had discharged the burden cast upon him and on a balance of probabilities that he had rightfully been declared the winner of the nominations and the 2nd Respondent could not upset the same save upon clear reason but not on conjecture and allegations, un-proven, of vote tampering.

21. The evidence before the PPDT and also before me dictated that I dismiss the appeal. The appeal for the above reasons stays dismissed. The circumstances dictate that each party bears its own costs. And it is so ordered.

Dated, signed and delivered at Nairobi this 15th day of May, 2017.

J.L.ONGUTO

JUDGE