



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTIONS APPEAL NO. 9 OF 2017

WIPIER DEMOCRATIC MOVEMENT KENYA.....APPEALANT

VERSUS

PETERSON MITTAU1ST RESPONDENT

DANIEL MUANGE2ND RESPONDENT

NATIONAL APPEAL BOARD 3RD RESPONDENT

NATIONAL ELECTIONS BOARD4TH RESPONDENT

J U D G M E N T

1. This appeal emanates from a dispute which arose out of the nominations of the Wiper Democratic Movement Kenya for the Changamwe Constituency Parliamentary seat. The initial complaint was premised upon grounds that the Wiper National Elections Tribunal declared the 2nd Respondent Daniel Muange, who got 900 votes the winner and issued him with the provisional nomination certificate, instead of the 1st Respondent Peterson Mittau (Complainant) who had garnered 1069 votes. The 1st Respondent appealed to the 3rd Respondent the National Appeals Board (hereinafter the NAB) which heard the appeal and recommended that the 1st Respondent be declared the winner and a nomination certificate be issued him.

2. The 2nd Respondent approached the NAB for Review on grounds that new evidence of violence and other electoral malpractices had been uncovered. The Board re-opened the case for review and subsequently reviewed its earlier decision recommending the 2nd Respondent as the winner.

3. Meanwhile the 1st Respondent also moved the Political Parties Dispute Tribunal (hereinafter the PPDT) by a statement dated 27th April 2017 seeking a declaration that he was the winner of Wiper nominations for Changamwe Parliamentary seat and that a certificate of nomination awarded to the 2nd Respondent was null and void. Further that the 3rd and 4th Respondents be directed to issue the 1st Respondent with a certificate for nomination. On the 28th April 2017 the 1st Respondent filed a Notice of Motion under certificate of urgency seeking an injunction to restrain the 4th Respondent from issuing the said nomination certificate to the 1st Respondent. The PPDT agreed with him and granted all the prayers that he had sought.

4. On 6th May 2017 the 2nd Respondent approached the PPDT seeking a Review of that decision. The PPDT held that it had no jurisdiction to entertain an application for Review of its decision. The

application was denied.

5. Wiper Democratic Movement Kenya has now come on appeal raising several grounds. Contemporaneously with the appeal the Party has filed a Notice of Motion under certificate of urgency and prayed for stay of execution of the exparte orders given by the PPDT on 2nd May 2017 and upheld on 6th May, 2017. Due to constrains of time the court opted to bypass the application herein and hear the appeal itself.

6. The grounds in the Memorandum of appeal are that the PPDT erred in fact and law by:

(i) finding that it does not have jurisdiction to review its decision and yet **Order 45(1) of the Civil Procedure Rules 2010** as read with **Section 41(4) Political Parties Act 2011** allows it to review its orders and decision on the basis of new evidence or crucial material facts being discovered.

(ii) relying on the supporting affidavit of Daniel Muange which had been expunged.

(iii) failing, ignoring, neglecting, refusing to address itself on the prayer of the appellant to set aside its earlier judgment;

(iv) believing in an unsworn statement by the 1st Respondent's Advocate that his client did not participate in the review proceedings disregarding an

(v) finding that there was effective service and rejecting the explanation of the Appellant's advocate.

(vi) failing to recognize the internal political party dispute resolution mechanism and proceeding when the internal mechanism had not been exhausted.

(vii) acting in excess of its jurisdiction in determining this matter and failing to recognize NAB's jurisdiction to review its decision like any other tribunal.

(viii) breaching the rules of natural justice.

(ix) preventing the Appellant from adducing evidence of material non-disclosure in relation to the 1st Respondent's violence and other elections malpractices.

(x) misinterpreting the provisions of Rule 6.2.11 of the Wiper Democratic Movement's Constitution which says that NAB's decision is final and that it has limited powers to review its decisions.

7. The party also alleges that when the 1st Respondent went to the PPDT he did not disclose that the case at the NAB had been re-opened nor did he disclose that he had participated in that case which was in fact pending ruling as at 28th April 2017. The Appellant further opines that the subsequent NAB ruling which recommended the disqualification of the 1st Respondent and reinstated the 2nd Respondent was final under **Section 40(2) Political Parties Act**.

8. On 10th May, 2017 Mr. Sore and Mr. Maanzo Ayiro for the Appellant made oral submissions and reiterated the foregoing grounds. They also told the court that the position of the Appellant in this matter is also the position of the 3rd and 4th Respondents. Further that it is also the position of the 2nd Respondent whom they said should ideally be called an Interested Party in this matter and not a Respondent.

9. In response Mr. Asembo for the 1st Respondent submitted that the appeal is unmeritorious on grounds that parties were served and elected not to go before the Tribunal. That the different criteria adverted to

by the Appellant departs from the known democratic exercise. That an exercise is being created to depart from the real issue of who won the nomination and the person whom the Party is trying to award a certificate to, finished second with 900 votes while the 1st Respondent got 1069 votes. That when the Returning Officer tried to be mischievous as to declare the 2nd Respondent as the winner, the 1st Respondent exercised his right by going to the NAT and he was declared the winner.

10. Mr. Asembo urged that a letter from the NAB to one Agatha Solitei at their National Elections Board states that the 1st Respondent engaged in malpractices. The proceedings which gave rise to that letter are however not signed and bear no coram. He urges that the burden was upon the NAB to prove why they changed their decision, as there is no police report or proof of injury, or medical report to support their findings. He asserts that the decision of PPDT is merited and prays that the 1st Respondent be granted his legitimate expectation by having his certificate released to him as he won the elections in Changamwe.

11. In a brief rejoinder both Mr. Ayiro and Mr. Sore stated that the issues referred to by Mr. Asembo are not before this court and should have formed their grounds when they went before the PPDT for Review.

12. In my view upon assessment of the afore-going arguments the issues for determination in this matter are:

(i) Whether the NAB has powers to review its own decision

(ii) Whether the PPDT has powers to review its own decision,

(iii) Which of the two decisions one by the NAB and the other by the PPDT should stand;

13. On the first and second issues above, the **Political Parties Act Section 41(4)** provides that the Tribunal shall apply the rules of evidence and procedure under the **Evidence Act** and the **Civil Procedure Code** with the necessary modification, while ensuring that its proceedings do not give undue regard to procedural technicalities.

14. I note that **Rule 6.2.11** the **Wiper Democratic Movement Kenya Constitution** provides that the decision of the NAB shall be final. It is my view that, although there is no express provision that the proceedings of the NAB are to be guided by the **Civil Procedure Act**, in this regard **Order 45** of **Civil Procedure Rules** ought to apply. Individual political rights cannot be divorced from, nor are they exempt from the rules of natural justice.

15. In my view individuals who are aggrieved by the decision of the NAB have no recourse to appeal, but should be heard on a Review on the same conditions as provided under **Order 45(1) Civil Procedure Rules 2010** which provides that:

“Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order may appeal for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

An aggrieved party ought therefore to approach the court for Review whether an appeal is allowed from

the decision complained of as is with the PPDT, or it is not allowed as is with the NAB.

16. The principles as to whether a Court can review its own decision are well established. In the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR** the Court of Appeal set out the following guidelines. The Court held that;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

The court finds that there was material non-disclosure before the PPDT as to the circumstances leading up to the award of the nomination certificate to the 1st Respondent.

17. In sum therefore, I find that the 2nd Respondent was quite in order to return to the NAB for Review of its decision once new evidence was discovered. In the same breath I find that the PPDT erred by divesting itself of the mandate conferred upon it by **section 41(1) of Political Parties Act and Order 45(1) of the Civil Procedure Rules** to hold that it had no jurisdiction to entertain a Review application by the 2nd Respondent.

18. On the third issue as to which of the two decisions rendered by the NAB and the PPDT respectively should stand, the two bodies exercise separate mandates. The NAB provides an internal dispute resolution mechanism to the respective parties while the PPDT which exercises original jurisdiction is the beginning of the judicial process. The proceedings from the PPDT are not on appeal from the NAB. By virtue of Rule 6.2.11 of the Appellant’s Constitution the decision of the NAB shall be final. It is for that reason that an appeal from the decision of the PPDT shall lie to the High Court on both points of law and fact and to the Court of Appeal and the Supreme Court on only points of law.

19. According to **Section 40(1) of the Political Parties Act** 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 an independent candidate and a political party;
- (e) disputes between coalition partners; and
- (f) appeals from decisions of the Registrar under this Act.

In the recent amendment in 2016 under (fa) the PPDT may also determine disputes arising from party primaries.

20. Section 40(2) however provides in mandatory terms *inter alia* that, notwithstanding **subsection (1)** above 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. In this case therefore the PPDT erred when it decided to entertain the 1st Respondent’s initial application when there were on-going proceedings before the NAB as this means that the internal mechanism for dispute resolution had not been exhausted.

21. I am in agreement with Majanja J in **Francis Mutuku vs Wiper Democratic Movement Kenya & 2 others Constitution Petition No. 597 of 2014** when he stated as follows:

“The law is clear with regard to circumstances such as are now before me, and courts have expressed themselves quite succinctly on this point; where there are specialised procedures provided by law or the Constitution for the resolution of disputes they should be followed. See in this regard the case of *Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Other (2008)3 KLR (EP)*; *Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP)*; *Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP) 425* and *Alphonse Mwangemi Munga & 10 Others vs African Safari Club Ltd Petition No. 564 of 2004*.

In the case of George Okode & Others vs Orange Democratic Movement & Others Petition No. 294 of 2011, in directing the parties to present their grievances before the Political Parties Tribunal, observed as follows:

“I have considered this matter and it deals with political party activities. There is now a Political Parties Tribunal established under the Political Parties Act that is intended to resolve such issues. This is in line with Article 159 of the Constitution which provides that judicial power vests in Courts and Tribunals. It is therefore not inconsistent with Article 22 of the Constitution to refer such a matter to a body constituted for that purpose.”

22. I have re-evaluated the arguments of both parties presented in the PPDT bearing in mind that the parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law. I therefore weighed the conflicting arguments to draw my own conclusions.

23. Upon considering the material placed before the PPDT for Review I note that from the proceedings before the NAB it observed in its directions that:

“in view of the Board’s decision to re-open the appeal made on 24/04/2017 the matter shall commence de novo”

The valid decision is therefore that which followed the Review.

24. I also note that the 1st Respondent has not disputed that the PPDT relied on a supporting affidavit which had been expunged on its records and also placed reliance on the statement from the bar by counsel rather than the averments in an affidavit before the Tribunal. Election disputes are emotive matters and PPDT should not have been quick in finding that there was effective service and rejecting the explanation of the Appellant’s advocate.

25. Having anxiously considered the grounds of the appeal and the rival arguments of counsel in their submissions, I am satisfied that the appeal is meritorious. In the premise this appeal succeeds with orders that each party shall bear its costs.

DATED, SIGNED and DELIVERED at NAIROBI this 10th DAY OF May, 2017.

L. ACHODE

JUDGE

In the presence offor the Appellant

In the presence offor the 1st Respondent