



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO 65 OF 2017

ASHRAF HASSAN BAYUSUF.....APPELLANT

VERSUS

JUBILEE PARTY OF KENYA 1ST RESPONDENT

YASSIR NOOR MOHAMED NOOR 2ND RESPONDENT

SANJEEV AGARWALINTERESTED PARTY

(Being an appeal from the entire Judgment & Decree of the Political Parties Disputes Tribunal Dated and delivered on the 19th May 2017 at Nairobi in complaint No.244 of 2017)

BETWEEN

YASSIR NOOR MOHAMED NOOR COMPLAINANT

VERSUS

JUBILEE PARTY OF KENYA 1ST RESPONDENT

ASHRAF HASSAN BAYUSUF 2ND RESPONDENT

RULING

1. The application before the court is a Notice of Motion under **Section 41(2) of the Political Parties Act, Order 40 of Civil Procedure Rules and Section 1A, 1B and 3A of Civil Procedure Act** in which the Interested Party sought the following orders:-

1. Spent.

2. THAT the interested party be enjoined in the proceedings herein and the firm of Ms Githinji & Associates Advocates be given leave to come on record for the Interested Party.

3. THAT pending hearing of the Application inter parties, this Honourable Court be pleased to stay its Judgment delivered on 29th May, 2017.

4. THAT this Honourable Court do issue orders in terms of prayer 2 herein above pending hearing and determination of this application.

5. THAT the Interested Party's claim be heard on its own merit.

6. THAT cost of this application be provided for.

2. The application was supported by the annexed affidavit sworn by **SANJEEV AGARWAL** applicant in which he deponed that he participated in the Jubilee Party nominations election for Nyali Constituency alongside the parties herein and being displeased with the exercise, he lodged a complaint with the party which complaint had not been heard and determined to date. It was therefore deponed that it was surprising that the parties herein ignored his presence and pending complain and chose to proceed in court without the decency to enjoin him whereas he had crucial evidence and grounds as to why he should be declared the winner.

3. It was contented that the Honourable court has inherent powers and discretion to grant the orders sought as no prejudice will be occasioned upon the Respondent.

SUBMISSIONS

4. Directions were issued that the application be served for hearing inter parties at which it was submitted by the applicant that the interested party ought to be enjoined so that his claim may be heard on its merit and that if stay is granted no party will be prejudiced. It was submitted that under **Article 159 (2) (d)**, the Court is required to administer justice without undue regard to procedural technicalities.

5. The second respondent supported the application and submitted that since there were two complaints in respect of Nyali Constituency, that was evidence enough of malpractice which the court ought to look at afresh.

6. On behalf of the Appellant/1st Respondent it was submitted that the application is incompetent since under **Section 40(1) of Political Parties Act**, the applicant ought to seek redress from PPDT first and since the court had rendered itself on the matters herein it became *functus officio*.

7. On behalf of the 1st Respondent it was submitted that the court does not have jurisdiction to hear the application since it was not an appeal from PPDT.

ANALYSIS AND DETERMINATION

8. For purposes of this ruling it must be stated that the Appellant herein (**ASHRAF HASSAN BAYUSUF**) filed an appeal from the determination of the PPDT No. 244/2017 which was heard by this court and the Judgment thereon delivered on 29th May, 2017 allowing the appeal and setting aside the judgment of the PPDT in which it had ordered the 1st Respondent to carry out fresh nominations in respect of Nyali Constituency. The intended interested party did not take part in the proceedings before PPDT neither was he a party in the Appeal that was filed before the court.

9. Section 41(2) which gives the court jurisdiction states that an Appeal shall lie from the decision of the Tribunal to the High court on points of law and fact. It is therefore clear that as regards the Applicant herein, having not filed a claim at the PPDT he therefore cannot exercise the Right of Appeal to this court even if he were to be enjoined as an interested party.

10. It is also clear that the same could only have been enjoined as party to these proceedings during the pendency of the proceedings and not after the determination has been tendered thereon. In this I find support in the decision of Nyamweya J in **LILIAN WAIRIMU NGOTHO & ANOTHER vs MOKI SAVING CO-OPERATIVE SOCIETY LTD & ANOTHER (2014) Eklr** where the judge held as follows:-

“The provision of Order 1 Rule 10(2) states that joinder of a party can be made at any stage of the proceedings. Proceedings are defined in Blacks Law Dictionary Ninth Edition at page 1324 as ‘the regular and orderly progression of a law suit including all acts and events between the time of commencement and the entry of judgment.’ A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court to effectively and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its finding on the issue arising (Emphasis added)

11. Whereas it cannot be said that the court is *functus officio* after it had rendered its judgment since the same still have powers in respect of enforcement of the judgment and Review powers, it is clear that the Applicant has not made up a case for the court to exercise post judgment jurisdiction and therefore find no merit on the application herein which is hereby dismissed with no order as to cost.

DATED, SIGNED and DELIVERED at Nairobi this 12th day of June, 2017.

.....

J. WAKIAGA

JUDGE