



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 75 OF 2017

HERBERT SORE MAKATIANI.....1ST APPELLANT

ORANGE DEMOCRATIC MOVEMENT..... 2ND APPELLANT

- V E R S U S -

HENRY MULIMU SHILILU RESPONDENT

(Being an Appeal from the judgement and decree of the Political Parties Dispute Tribunal of Kenya at Nairobi delivered on 25th May, 2017 by Hon. Kyalo Mbobu, James Atema and Hassan Abdi vide Complaint No. 147 of 2017))

JUDGEMENT

1) Herbert Sore Makatiani and Henry Mulimu Shililu, the 1st appellant and the respondent respectively, both participated in the O.D.M, the 2nd appellant's, party primaries for Isukha South Ward, Shinyalu constituency, Kakamega county on 15.4.2017 and later repeated on 28.4.2017. The respondent felt aggrieved hence he filed a complaint with the 2nd appellant's County Appeals Tribunal seeking for the results to be announced by the returning officer. The respondent also argued that the 1st appellant had been unlawfully announced as the winner and issued with a nomination certificate in a place not designated as a tallying centre. Orange Democratic Movement County Appeals Tribunal took time to determine the complaint forcing the respondent to approach the Political Parties Tribunal on 8.5.2017 in which he sought for *inter alia* to be declared the winner of the primaries. Shortly, the respondent filed a further affidavit on 10.5.2017 claiming he had been declared the winner by the ODM County Appeals Tribunal. He then beseeched the tribunal to issue an order directing the 2nd appellant to issue him with the nomination certificate. Before the complaint could be heard, Henry Milimu Shililu (Respondent) and ODM, the 2nd appellant, on 11.5.2017 recorded a consent order before the tribunal where the 2nd appellant agreed to issue the respondent with the final nomination certificate. Herbert Sore Makathani, the 1st appellant being aggrieved filed an application for review before the tribunal. His main ground put forward in support of the application was that he was not notified of the date of hearing nor the entry of the consent order of 11.5.2017. He consequently applied for the consent orders to be set aside and for orders issued by CAT cancelling his nomination certificate issued to him on 6.5.2017 to be reviewed and set aside.

2) The application was heard by the tribunal and dismissed on 25.5.2017. Being aggrieved, the 1st appellant preferred this appeal.

3) On appeal, the 1st appellant put forward the following grounds:

- 1. That the learned members of the political parties disputes tribunal, hereinafter referred to as the tribunal erred in law and fact when they made orders on 25th May 2017 in gross breach of the fair trial anticipated in Article 50(1) of the Kenya Constitution 2010.**
- 2. That the learned members of the tribunal erred in law and fact in making orders on the 25th May 2017 without affording the appellant and or his advocate sufficient time to explain its case contrary to the rules of natural justice.**
- 3. That the learned members of the tribunal erred in law and fact in failing to consider the oral evidence presented by the 1st appellant before arriving at its conclusion.**
- 4. That the learned members of the tribunal erred in law and fact in failing to appreciate that the 2nd appellant had its internal disciplinary mechanism which it had employed to discipline the respondent and disqualify him from vying on its ticket after he was found guilty of instigating and participating in violence.**
- 5. That the learned members of the tribunal erred in law and fact in failing to consider all relevant matters pertaining to the case and considering irrelevant matters.**
- 6. That the learned members of the tribunal erred in law and fact in failing to appreciate that there were new and important matters that warranted a review of their earlier decision in the matter.**
- 7. That the learned members of the tribunal erred in law and fact in failing to properly exercise their discretion in regard to the provisions of Order 45 of the Civil Procedure Rules regard to this matter.**

4) When the appeal came up for hearing, learned counsels appearing in the matter made oral submissions. I have re-evaluated the arguments presented before the tribunal. I have also considered the rival oral submissions of learned counsels. Though the 1st appellant put forward a total of seven (7) grounds of appeal, one main grounds commends itself for determination. That is, whether or not the application for review was properly dismissed. The tribunal considered at length the arguments and the material placed before it and came to the conclusion that the 1st appellant did not prove the discovery of a new and important matter or evidence that was not within his knowledge after the exercise of due diligence. It was also pointed out that the 1st appellant had also failed to show that there was mistake or error apparent on the face of record. The tribunal went further to take into account the fact that the 1st appellant had argued that the consent order was entered in his absence since he had not been served with the application nor informed of the hearing. The tribunal rejected the 1st appellant's argument and went ahead to believe the averments in the affidavit of Kelvin Balongo that the respondent endeavoured to serve the 1st respondent through a licensed process server. The tribunal stated that it was satisfied that the 1st appellant avoided service and that he had knowledge of the proceedings before it.

5) Mr. Ochieng Oginga, learned advocate for the 1st appellant urged this court to impugn the tribunal's decision on the basis that the application for review was improperly dismissed. The learned advocate pointed out that there was clear evidence that the 1st appellant was never served and that was a sufficient ground to set aside the consent order. Mr. Wamalwa on his part was of the view that the tribunal properly dismissed the application for review.

6) I have already set out in detail the chronology of events in this matter. It is not in dispute that the consent order of 11.5.2017 was recorded in the absence of the 1st appellant. The tribunal acknowledges that the affidavit of service of Kelvin Balongo shows evidence of the efforts the process server made to serve the 1st respondent and concluded that the 1st appellant avoided service. I have also perused the aforesaid affidavit of service and I agree with the assessment of the tribunal that the 1st appellant avoided

service. However this finding complicates the matter because what is clear is that the 1st appellant was not served personally nor by substituted service. There is no evidence that there were attempts to serve the 1st appellant via substituted service.

7) It is therefore correct to state that the consent order of 11.5.2017 was recorded in the absence of the 1st appellant. It is also apparent that he was not informed of the hearing date. In my view the above grounds constitute sufficient reasons to warrant a review of the consent order.

8) In the end, I find the appeal herein to be meritorious. It is allowed. Consequently the order dismissing the motion dated 16.5.2017 is set aside and it is substituted with an order allowing the motion.

9) For the avoidance of doubt, the consequence of allowing the appeal gives rise to the following orders:

i. The consent order recorded on 11.5.2017 before the tribunal is set aside.

ii. The nomination certificate issued to Henry Mulimu shilulu pursuant to the consent order recorded on 11.5.2017 before the tribunal is ordered cancelled.

iii. The complaint and application(s) filed by Henry Mulimu Shilulu, the respondent herein are reinstated to be heard afresh by the tribunal with the participation of Herbert Sore Makatiani, the 1st appellant herein.

10) Each party to meet its own costs of the appeal.

Dated, Signed and Delivered in open court this 2nd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent