



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION APPEAL NO. 192 OF 2017

JOHN OKEMWA ANUNDA.....1ST APPELLANT/APPLICANT

PARTY OF NATIONAL UNITY.....2ND APPELLANT/APPLICANT

- V E R S U S -

ALPHONSE MBINDA MUSYOKI.....1ST RESPONDENT

REGISTRAR OF POLITICAL PARTIES.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND .

BOUNDARIES COMMISSION.....3RD RESPONDENT

(Being an Appeal from the judgement and decree of the Political Parties

Dispute Tribunal of Kenya at Nairobi delivered on 21st April,, 2017

by Hon. Kyalo Mbobu, James Atema and Hassan Abdi dismissing

the Appellants' Preliminary objection dated 13th April 2017))

JUDGEMENT

1. Alphonse Mbinda Musyoki, the 1st respondent herein, filed a complaint before the Political Parties Tribunal, (hereinafter referred to as the Tribunal) to challenge the convention of a National Delegates Conference and National Governing Council meeting of the Party of National Unity, the 2nd appellant herein on 28.10.2016 and all the resolutions arrived thereat. On 13th April 2017, John Okemwa Anunda, the 1st appellant herein, filed a notice of preliminary objection alleging that the Political Parties Tribunal had no jurisdiction to entertain the complaint because the 1st respondent did not invoke the 2nd appellant's Internal Dispute Resolution Mechanism pursuant to the provisions of Section 40 of the Political Parties Act. The tribunal invited learned counsels to make oral submissions over the preliminary objection. On 21st April 2017, the tribunal rendered its ruling dismissing the preliminary objection. Being aggrieved, the 1st and 2nd appellants filed this appeal.

2. On appeal, the appellants put forward the following grounds:

1. THAT the learned chairman and members of the honourable tribunal erred in law and in fact in misapprehending, misinterpreting and misapplying the proper application of Section 40(2) of the Political Parties Act (Cap 7B Laws of Kenya) and the relevant provisions of the law regarding invoking Internal Dispute Resolution Mechanism in resolving management issues for Party of National Unity(PNU)

2. THAT the learned chairman and members of the honourable tribunal erred in law and in fact in misapprehending the proper application of Article 30 of the Party of National Unity's Constitution regarding invoking Internal Dispute Resolution Mechanism wherein the disputing parties are required to suggest three (3) names of arbitrators to resolve their dispute or in the event of failing to agree, the Arbitration Act be invoked thereof.

3. THAT the learned chairman and members of the honourable tribunal erred in law in misapprehending the proper application of Article 30 of the Party of National Unity's Constitution, by solely placing the onus of resolving any party disputes upon the Party of National Unity, once a litigant has merely suggested that Internal Dispute Resolution Mechanism be invoked by the party without any basis is a justification.

4. THAT the leaned chairman and members of the honourable tribunal erred in law and in fact by allowing an advocate not appointed by the 2nd appellant to address the tribunal and misrepresent facts.

5. THAT in totality, learned members of the tribunal misapplied and totally disregarded the provisions of the Arbitration Act of Kenya.

3. When the appeal came up for hearing, this court directed learned counsels appearing in the matter to file and exchange written submissions. Learned counsels were also invited to make oral submissions to highlight their written submissions.

4. I have re-evaluated the arguments that were made before the Political Parties Tribunal. I have further considered the rival oral and written submissions presented before this court. The main issue which this court has been beseeched to determine is whether or not the political Parties Tribunal properly assumed jurisdiction to entertain the 1st respondent's complaint. It is not in dispute that the tribunal held in its ruling that the Internal Dispute Resolution Mechanism of the 2nd appellant had been invoked by the 1st respondent as required under section 40(2) of Political Parties Act and in accordance with Article 30 of the Party of National Unity's Constitution before approaching the Tribunal. The tribunal heavily relied on the 1st respondent's letter dated 13.2.2017 addressed to one John Kamama Mbugua and John Okemwa Anunda, the 1st appellant herein. The tribunal in part expressed itself as follows:

“Our take of the letter is that it is clear in paragraph 3 that the claimant has asked the interested party to invoke the party internal disputes resolution mechanism provision to resolve the dispute. Once a litigant has done that, the burden shifts to the party to do the needful.”

5. Mr. Walukhwe, learned advocate for the appellants sought to fault the tribunal's decision arguing that at the time of determining the preliminary issue, there existed a Judicial Review application before this court vide J.R. Misc. Appl. No. 642 of 2016, where the 2nd appellant had sought for the intervention of this court to compel the Registrar of Political Parties to gazette the names of the duly elected officials of the party. The learned advocate was of the view that the tribunal should have stayed its proceedings at that point. It is further argued that the 1st respondent was aware of the existence of the Judicial Review proceedings and that the tribunal was equally made aware of the same. It is the submission of the appellants that in this regard the contents of the 1st respondent's letter of 13.2.2017 were so nebulous and ill defined so that the tribunal could not assume jurisdiction over the complaint. The 1st respondent's

advocate did not respond to this issue. I have carefully perused the record of the proceedings of the tribunal. The record does not show that the issue touching on the existence of the Judicial Review proceedings was put to the attention of the tribunal. There is also no evidence that either party applied to the tribunal to stay its proceedings. What emerges from the tribunal's record is that the parties simply argued on the merits of the preliminary objection. I therefore find the appellants' argument on the existence of Judicial Review proceedings to be without merit. The tribunal cannot be faulted over this ground.

6. The main issue which the learned advocates appearing in this Appeal argued is the question touching on service. It is the submission of the appellants that service of the letter dated 13th February 2017 upon the appellant did not conform with the provisions of Order 5 of the Civil Procedure Rules. It was also pointed out that the affidavit of service of Felix Omondi Owino shows that the letter dated 13.2.2017 was given out on 10th February 2017, which is three days before it was written.

7. Mr. Awele learned advocate for the 1st respondent in his submissions admitted that there was a typographical error in the affidavit of service of Felix Omondi Owino. The learned advocate beseeched this court to consider the affidavit as a whole and not just a few paragraphs in order to find that there was an inadvertent typographical error. It is also pointed out that the 1st appellant was properly served with the aforesaid letter and instead of setting into motion the 2nd appellant's Internal Dispute Resolution Mechanism, it simply ignored the 1st respondent's request prompting the 1st respondent to approach the tribunal.

8. The record of the tribunal shows that the appellants argued the preliminary objection alleging that the 1st respondent had not exhausted the Party Internal Dispute Resolution Mechanism. The 1st respondent referred to the letter dated 13.2.2017 and the affidavit of service of Felix Omondi Owino sworn on 24th February 2017 to show that he had approached the appellants to invoke the party's Internal Dispute Resolution Mechanism. The recorded proceedings of the tribunal does not show that the appellants ever denied receiving the letter dated 13.2.2017. The recorded proceedings does not also show that the appellants objected the affidavit of service of Felix Omondi Owino. In fact and in the absence of such an objection the tribunal was entitled to proceed on the assumption that service of the letter dated 13.2.2017 was not denied. The appellants are now before this court on appeal to deny service. They also claim that service was not done in accordance with the provisions of Order 5 of the Civil Procedure Rules. With respect, those arguments cannot be entertained on appeal because they were never raised and argued before the tribunal. It is therefore difficult to find fault on the manner the tribunal dealt with the matter. I have carefully examined the affidavit of service of Felix Omondi Owino and I am convinced that there is a typographical error. The typographical error is overlooked and the affidavit of service is accepted as a valid affidavit.

9. Having come to the conclusion that the letter dated 13.2.2017 was served upon the appellants let me now determine the question as to whether the same can be said to triggered the invocation of the 2nd appellant's Party Internal Disputes Resolution mechanism. Learned counsels from both did not address this court over the issue. In **Stephen Asura Ochieng & 2 others =vs= ODM & 2 others (2011) eKLR Mumbi Ngugi** expressed herself in part as follows:

“To my mind, the provisions of Section 40 (2) of the Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the political parties tribunal where the political party has neglected or refused to activate the internal Party Dispute Resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the tribunal where the internal party mechanism has failed to hear and determine the dispute.”

10. I am in agreement with the above pronouncement. I have already stated that the appellants were requested to activate the Internal Party Dispute Resolution Mechanism under Article 30 of the 2nd appellant's constitution vide the 1st respondent's letter dated 13.2.2017 but the appellants neglected to do

so. The tribunal was therefore right to assume jurisdiction.

11. This court was also invited to determine the question as to whether or not the tribunal erred in allowing two firms of advocates i.e. Muema Kitulu & Co. and Okong'o Omogeni & Co. to represent the 2nd appellant yet the two firms held two divergent views on the question as to whether or not the tribunal could assume jurisdiction in such proceedings. The record presented to this court does not show that the issue was canvassed before the tribunal therefore, I decline the invitation to determine the issue.

12. In the end, I find no merit in the appeal. The same is dismissed in its entirety. Each party to bear 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