



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 539 OF 2016**

**ISAAC ALUOCH POLO ALUOCHIER.....APPELLANT**

**VERSUS**

**1. GIDEON MOI**

**2. JOHN LONYANG'APUO**

**3. ZIPPORAH KITTONY**

**4. NICK SALAT.....RESPONDENTS**

*(Appeal from a judgment of the political parties disputes tribunal at Milimani law courts, Nairobi (Kyalo Mbobu - chairman, James Atema-Member & Paul Ngotho- Member) dated 18<sup>th</sup> July, 2016 in complaint No. 11 of 2012)*

**JUDGMENT**

The Appellant herein Isaac Aluochier filed a complaint dated the 18<sup>th</sup> April, 2016 with the political parties Disputes Tribunal against the Respondent's herein wherein he complained that on the 9<sup>th</sup> March, 2016, he lodged with the Kenya African National Union (KANU) Disputes Resolution Committee a complaint dated 8/3/2016 against the Respondents concerning their cessation of membership in the KANU Party and their deemed resignation as members of the party.

He further states that his aforesaid complaint letter was received by the KANU Head Office secretary, a Ms Frida Keng'ara who duly signed his service copy but she did not stamp it as it is the usual procedure, for, after having sought for the stamp for a period of time, the stamp was not available as it had been taken by the KANU executive Director for use in the Kericho senatorial by-election held on the 7<sup>th</sup> March, 2016 and had not been returned to the head office by the time he submitted his complaint letter.

That notwithstanding his request that the dispute be determined expeditiously, the governing organ of the party did not deem it fit to address the matter of resolving the complaint and it carried out its operations as if the complaint did not exist. In the complaint to the political parties disputes tribunal, he expressed his frustration with the governing organ of the KANU party for failure to consider his complaint yet he could not move the Political Parties Disputes Tribunal as it was not possessed of the requisite jurisdiction until such a time that the internal political party dispute resolution mechanisms had heard the dispute. He wondered whether in such a situation the law intended that a party to a dispute could frustrate the dispute resolution mechanism by simply refusing to resolve a dispute and thereby prevent other dispute resolution organs from carrying out other dispute resolution mandate as laid down in law.

He averred that Article 91(1) (h) of the constitution of Kenya, 2010 imposes a mandatory obligation on every political party to subscribe to and observe the code of conduct for political parties. That pursuant to Sections 6(2) (e) and 7(2) (g) of the Political Parties Act, upon application for registration, political parties undertake to be bound by the political parties Act and the code of conduct set out in the first schedule of the Political Parties Act.

In his complaint he referred to Article 21(4) (b) of the KANU constitution which provides that once a dispute had been lodged the KANU NEC shall appoint a committee of five members to hear and determine the dispute and in view of the said provision, the KANU NEC should therefore have constituted the five member committee to hear his dispute which it failed to do and as at the time he filed the dispute with the Political Parties Disputes Tribunal, a period of more than a month had lapsed without the appointment of the committee and for this reason he proceeded to file the dispute with the Political Parties Dispute Tribunal notwithstanding that the same had not been heard by the KANU NEC.

The gist of his dispute which he had lodged with KANU and which he adopted at the Political Parties Disputes Tribunal was that the Respondents herein had promoted the interests of another political party namely patriotic people's party of Kenya (PPPK) during the Nyangores Ward by-election held on the 12<sup>th</sup> February, 2016 whereby they publicly campaigned for the PPPK candidate, Hon. Andrew Maritim, without the existence of a legally compliant pre-election coalition agreement between KANU and PPPK.

The Appellant contended that the Respondents by their conduct and pursuant to the provisions of Article 4(9)(g) of the KANU constitution and Section 14(5) (e) of the Political Parties Act, the Respondents are deemed to have resigned from KANU.

The 4<sup>th</sup> Respondent swore an affidavit dated 8<sup>th</sup> July, 2016 and filed in court on the 11<sup>th</sup> July, 2016 wherein he deponed that the contents of the complaint by the Appellant was malicious, frivolous and vexatious. He averred that KANU did not receive any complaint by the Appellant and therefore it was not true that the internal disputes mechanisms had ignored and/or neglected to listen to the complainant.

The Respondents raised the issue of jurisdiction and argued that the same ought to have been heard internally before it could be taken to the Political Parties Disputes Tribunal.

Another issue that was raised by the Respondents was that the appellant is not a member of KANU as his name does not appear in the list of members. Both issues were heard and determined by the Tribunal and since there is not cross-appeal, this court does not wish to delve into them as they are not issues in this appeal.

The Appellant who has appealed to this court against the decision of the Tribunal has listed five grounds of appeal. When the appeal came up for hearing, parties submitted orally. The Appellant sought leave of the court to produce additional evidence in the form of a video C.D which he wanted the court to play. The Respondent objected to the application and the court upon hearing both parties delivered a ruling on the 7<sup>th</sup> day of November, 2016, wherein it dismissed the application and disallowed introduction of new evidence by the appellant.

In the appellant's further submissions after the ruling, he urged the court to invoke Section 60(1) of the Evidence Act and take judicial notice of all matters of local and general notoriety and relied on the Court of Appeal case Number 77/2015 (**The Registered Trustees of Maximum Miracle Centre Vs Andrew Mlewa Mkare**) where the learned Judges applied the above section.

He averred that the Respondent's took part in election campaigns for the patriotic party of Kenya candidate for Nyangores Ward in Bomet County. That it was a heavily attended rally and the Respondent's attendance was a matter of local notoriety and how they campaigned for that candidate. He submitted that the rally was captured by four media houses namely the NTV, KTN, Citizen and National News in their respective news programme and the matter became one of general notoriety. That the four media houses uploaded the footage of the same by You-tube and the information is easily available for anybody to see and verify.

The appellant further submitted that in its judgment, the Tribunal acknowledged that there was a video footage and the tribunal could have verified the information had it wanted to. He asked the court to find that the Respondents had breached Article 4(1) of KANU's constitution and Section 14(5) (e) of the Political Parties Act and for that reason they are no longer KANU members and allow the appeal.

In his brief submissions, counsel for the Respondents relied on the provisions of Section 107, 108 and 109 of the Evidence Act and submitted that the burden of proof was on the appellant to prove his case before the Tribunal which he failed to do. He told the court that the decision by the Tribunal was sound and it was arrived at after hearing both parties.

On the issue of additional evidence by way of the video C.D, he submitted that the appellant ought to have gone back to the Tribunal by way of review rather than by way of appeal. He urged the court to dismiss the appeal.

The court has carefully considered the petition of appeal and the submissions by the learned counsels. In my view, the only issue for determination is whether the Respondents violated the provisions of the Political Parties Act as alleged. The appellant alleges that the Respondents while being members of KANU engaged in campaigns for a candidate sponsored by another party to wit Patriotic People's Party of Kenya (PPPK). That they campaigned for Hon. Andrew Maritim, a candidate sponsored by Patriotic People's Party of Kenya in Nyangores Ward by-election held on 12th February, 2016 in the absence of a coalition agreement between KANU and PPPK. He has sought for orders that the Respondents be deemed to have resigned from KANU pursuant to Section 14(5) (e) of the Political Parties Act. The said section provides:-

***“a person who, while being a member of a political party-***

***a) Forms another political party;***

***b) Joins in the formation of another political party;***

***c) Joins another political party;***

***d) In any other way or manner publicly advocates for the formation of another political party; or***

***e) Promotes the ideology, interests or policies of another political party;***

***Shall, notwithstanding the provisions of subsection (1) or the provisions of any other written law, be deemed to have resigned from the previous political party.”***

Section 14 (b)

***“A person will not be deemed to have resigned from his party if he advocates for the formation of another party or promotes the interests of another party where there is a coalition between two or more parties.”***

Article 4(9) (g) of the KANU Constitution provides: -

***“A member who joins , forms, or joins in the formation of another political party, or in any other manner publicly advocate for the formation of another political party, or promotes the ideology, interest or policies of another political party, shall cease to be a member of that party.”***

The Appellant's case is based on Section 15(5) (e) in that the Respondents are alleged to have promoted the ideology, interest or policies of another political party and since there is no pre-election coalition agreement between KANU and PPPK the Respondents cannot take advantage of the provisions of Section 14 (6) in defence of having retained their membership in KANU.

The Appellant filed the complaint before the Political Parties Disputes Tribunal relying on the provisions of the above legal provisions. The Respondents denied the allegations leveled against them but went ahead and justified their presence at the political rally. In paragraph 11 of the 4<sup>th</sup> Respondent's Replying Affidavit, he avers that they had been invited in the said rally on a comradeship basis and their view with regard to the said party were merely an expression of their freedom of expression governed by Article 33(1) (a) (3) of the Constitution of Kenya which provides that: -

***(1) Every person has the right to freedom of expression***

***a) Freedom to seek, receive or impart information or ideas.”***

As rightly deponed by the 4<sup>th</sup> Respondent in paragraph 16 of the Replying Affidavit neither the Political Parties Act nor the KANU Constitution has defined the extent to which mere expression of remarks made by members of a party are to be construed as campaigning or promoting the ideologies, interests or policies of another party. The specific words uttered by the Respondents in the said rally have not been disclosed to help the court to decipher whether they would amount to promoting the interests and the policies of PPPK. It cannot be merely assumed that the Respondents remarks at the said rally were against their own party and so they should resign or an assumption of the same to be made.

The Respondents have invoked the provisions of Article 33 of the Constitution in that their attendance in the rally was pursuant to their freedom of expression.

Under Article 24 of the Constitution, a right to fundamental freedom in the Bill of Rights shall not be limited except by law, and only to the extent that the limitation is reasonably justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right or fundamental freedom among others, but of importance is Article 24(3) that provides: -

***“The state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of the Article have been satisfied.”***

In my view, the Appellant was under duty to justify the limitation by providing evidence before the court to support that the words uttered by the Respondents fell within Article 14(5) (e) of the Political Parties Act.

Section 107 of the Evidence Act is very clear on the burden of proof. It provides that the burden lies on a person who wishes to prove any fact. The burden in this case lay on the Appellant which he failed to discharge on a balance of probability.

The Appellant asked the court to take judicial notice of the fact that the Respondents took part in a public political election campaign for the PPPK Candidate. The Court of Appeal in Civil Appeal No. 77 of 2015 (Supra) quoting the case of **Gupta Vs Continental Builders Ltd (1976 – 80) IKLR 809** Madan J, stated:

***“The party who asks that judicial notice be taken of a fact has the burden of convincing the judge***

***a) That the matter is so notorious as not to be the subject of dispute among reasonable men or***

***b) That the matter is capable of immediate accurate demonstration by resort and ready accessible sources of indisputable accuracy.”***

In his complaint filed at the Political Parties Dispute Tribunal and in his submissions he refers to a link to media reports and video footage allegedly of the Respondents campaigning for a PPPK candidate. These video clips were not played before the tribunal as he never asked the tribunal to do so. His application for leave to adduce additional evidence was dismissed by this court as there were no good reasons given to

court why such evidence was not produced before the tribunal. As rightly observed by the Tribunal in its judgment such evidence needed to be produced in open court to give the Respondents an opportunity to respond to it. As it is now, there is no evidence before this court on the basis which it can make a finding that the Respondents breached the provisions of Section 14(5) (e) Political Parties Act and Article 4 (9) (g) of the KANU's constitution.

While Section 60(1) of the Evidence Act permits a court to take judicial notice of all matters of general and local notoriety, I do not see the basis, in the circumstances of this case, for the submission that the court should take judicial notice so as to find in favour of the Appellant.

Ultimately, I am satisfied that this appeal has no merit and the same is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 14<sup>th</sup> day of November, 2016.

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**L NJUGUNA**

**JUDGE**

**In the presence of**

..... ***for the Appellant***

..... ***for the Respondents.***