Moturi v Geni & another (Election Petition Appeal E002 of 2022) [2022] KECA 625 (KLR) (8 July 2022) (Reasons)

Neutral citation: [2022] KECA 625 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

ELECTION PETITION APPEAL E002 OF 2022

PO KIAGE, HA OMONDI & F TUIYOTT, JJA

JULY 8, 2022

BETWEEN

ZACHARY NYAYIEMI MOTURI ..... APPELLANT

AND

CHARLES MONG'ARE GENI ..... 1ST RESPONDENT

WIPER DEMOCRATIC MOVEMENT PARTY ..... 2ND RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Kisumu (Ochieng, J.) dated 7th June, 2022 in Kisumu Election Petition Appeal No. E001 of 2022)

REASONS

1 This is a second appeal arising from the judgment of the High Court of Kenya at Kisumu (F. Ochieng, J.) dated and delivered on 7th June, 2022 in Kisumu Election Appeal 001 of 2022.

2 The background of the appeal is that the appellant filed a complaint dated 6th May, 2022 at the Political Parties Disputes Tribunal at Kisumu (herein after referred to as PPDT or Tribunal) wherein he stated that on 16th and 18th April, 2022 all the 2nd respondent's candidates were invited by the National Executive Council (hereinafter referred to as NEC) and the 2nd respondent's party leader for negotiations and consensus building at the Wiper Party Headquarters. The objective of the said two-day meeting was to build consensus through negotiations and those who would not agree would then undergo party primaries.

3 The appellant stated that he diligently attended the said meeting, contributed to the discussions and, since there were no other candidates/contestants vying for the 2nd respondent's ticket for Member of National Assembly, North Mugirango Constituency, the NEC of the 2nd respondent declared him as the sole candidate for Wiper Party and communicated the same to the 1st respondent for purposes of issuance of nomination a certificate to the appellant.

4 The appellant stated that afterwards, he was called to attend further negotiations for the nomination of the 2nd respondent's ticket for Member of National Assembly, North Mugirango Constituency and, being aggrieved by the decision of the 2nd respondent to re-open the negotiations, the appellant registered his complaint with the 2nd respondent vide a letter dated 27th April, 2022 and sent it on email the same day protesting the re-opening of the negotiations as it was extremely prejudicial to his political rights and interests.

5 Since dispatching the said letter, the 2nd respondent either ignored and/or utterly refused to address the weighty contents raised therein. The said complaint was not addressed by the internal dispute resolution mechanisms which left him with no option but to seek preemptive remedies at the Tribunal.

6 Further, notwithstanding his said complaint letter dated 27th April, 2022 he established that despite the outcome of the said two-day meeting of 16th and 18th April, 2022 the 2nd respondent issued a certificate of nomination to the 1st respondent against the doctrine of legitimate expectation and logic, and no reason was advanced to the appellant for the sudden change of heart in issuing the certificate of nomination to him as was earlier agreed on 18th April, 2022.

The appellant sought for;

a. An order quashing the decision of the 2nd respondent to issue a nomination certificate to the 1st respondent in respect to elections for Member of National Assembly, North Mugirango Constituency.

b. A declaration that the appellant is the duly nominated person to fly the 2nd respondent's ticket for the Member of National Assembly, North Mugirango Constituency in the August 9th 2022 elections.

c. An order compelling the 2nd respondent to issue the appellant the nomination certificate to vie for the seat of Member of National Assembly for North Mugirango Constituency within 24 hours of the decision of the Tribunal.

d. An order compelling the 2nd respondent to forward the name of the appellant to the Independent Electoral and Boundaries Commission as the duly nominated person to vie for Member of National Assembly for North Mugirango Constituency.

e. Costs to be provided for.

7. During the hearing of the matter at the Tribunal, it was noted that there was no appearance for the 1st and 2nd respondents despite being served, as was evidenced by the appellant's affidavit of service.

8 On 15th May, 2022, the Tribunal held that the appellant's legitimate expectation was violated as he had been promised the certificate of nomination by the 2nd respondent and had placed reliance on that promise and that the 2nd respondent failed to give the appellant an explanation of the reason why it chose to go back on the earlier agreement entered with the appellant contrary to Article 47(1) of the *Constitution* and Section 4(1) and (3) of the *Fair Administrative Action Act*. In support of this limb, the appellant cited the case of *Communications Commission of Kenya & 5 Others vs. Royal Media Services & 5 Others* [2] and H. W. R. Wade & C. F Forsyth [3].

9. The Tribunal held that once a reasonable expectation exists, the administrator is required to act in accordance with that expectation and it was their view that the 2nd respondent denied the appellant his legitimate expectation to a fair and administrative action since his concerns were not taken into account and the issue of nomination for the seat had already been decided in the appellant's favour. Further,

that no other aspirant attended the meeting in which it was resolved that the appellant would fly the 2nd respondent's flag for Member of National Assembly for Mugirango Constituency; and in addition, in flagrant violation of the expectation, the 2nd respondent issued a direct nomination to the 1st respondent without any justification to the appellant. In this regard, the Tribunal held that whatever process was used had to take into account the interests of all parties involved, and the appellant's interests were clearly not considered in issuing the nomination certificate to the 2nd respondent.

10. No orders were made as to costs. The upshot was that the Tribunal found merit in the case and allowed the same and further made orders: - quashing the decision of the 2nd respondent issuance of a nomination certificate to the 1st respondent with respect to the elections for Member of National Assembly, North Mugirango Constituency; declaring the appellant as the duly nominated person to fly the 2nd respondent's ticket for Member of National Assembly, North Mugirango Constituency in the August 9th 2022 elections; that the 2nd respondent issue the appellant with the nomination certificate to vie for the seat of Member of National Assembly, North Mugirango Constituency within 24 hours of the decision; and that the 2nd respondent forward the name of the appellant to the Independent Electoral and Boundaries Commission (IEBC) as the duly nominated person to vie for Member of National Assembly, North Mugirango Constituency.

11. Thereafter, by a notice of motion application dated 19th May, 2022 the 2nd respondent sought to set aside/vacate the said judgment of the Tribunal on grounds that it was never served by the appellant and that the appellant failed to initiate an internal dispute resolution mechanism. The 2nd respondent argued that the affidavit of service had no answer as to whether there was a response on the email sent or a delivery notice and contended that it was the duty of the appellant to ensure that it was properly and effectively served and that the affidavit of service did not meet the threshold of Order 5 Rule 22B of the *Civil Procedure Rules* of 2022; and that he did not reveal where he obtained the 2nd respondent's email and number.

12. During the hearing of the said application, counsel for the 2nd respondent submitted that the appellant did not want the 2nd respondent to participate in the matter at the Tribunal and that was why he chose to send the email instead; that the appellant knew that there was an internal dispute resolution mechanism of the party but he failed to file a complaint before it. He, however, admitted that the email used to effect service upon the 2nd respondent was the email of the Party and was on the Party's website.

13. Counsel for the 1st respondent argued that the email used to effect service did not belong to the 2nd respondent; there was no proof that there was proper service; he had not been able to obtain all the pleadings in the e-filing system and that all parties should be afforded a fair hearing as provided for under Article 50 of the *Constitution*. In addition, it was the legitimate expectation of the 2nd respondent that issues be tried and determined conclusively, in which regard he had a defence which he wanted to file before the Tribunal but at the time of the hearing, he had not been able to get the pleadings thus he was not able to attach a defence.

14. On his part, the appellant opposed the 2nd respondent's application and submitted that he served all the necessary documents as confirmed by an affidavit of service and that the chairperson for the NEC Board had not filed an affidavit of service to refute service but instead, the affidavit was filed by the Executive Director of the Party. He further submitted that the grounds for setting aside had not been established and that the 2nd respondent be ordered to comply with the decree of the Tribunal.

15. In its determination, the Tribunal held that the respondents did not deny that the numbers used to effect service belonged to the people that were served and they also did not deny that the chairperson of the NEC Board was served. It was the respondent's contention that when it comes to service in the

instant case, the appellant ought to have served the party itself for service to be deemed as effective. In this regard, the Tribunal held that accepting the argument as stated would make proof of service on incredibly difficult and almost impossible undertaking. That what was uncontroverted was that the chairperson of the NEC Board was properly served and for this reason, the Tribunal held that for purposes of service, the Party Organs and the Party are the same entity and that service upon one is considered as service on the Party itself as well as its constituent organs. The Tribunal also held that it was convinced that the Party was properly served including through the email address on its website which counsel confirmed belonged to the party.

16. The Tribunal also held that both respondents did not exhibit the draft defence nor the minutes they sought to rely upon to demonstrate the viability of their respective defences and argued that the discretion of the Tribunal court could not be exercised without the 2nd respondent demonstrating that it possessed a viable defence. To suggest that a defence will be offered after the exercise of the discretion is to put the cart before the horse and the court cannot judiciously exercise this discretion in the absence of persuasive material. As such, the Tribunal held that the application had fallen way below the principles for setting aside judgment in default of appearance and defence.

17. Ultimately, the Tribunal held that the 2nd respondent did not prove to the required standard that service was not effected upon it, thus, they were properly served. As regards orders of setting aside, the Tribunal held that granting the same was discretionary and no viable defence with triable issues was filed by the 2nd respondent in the matter to demonstrate that it had a merited defence. The application was thus dismissed as it failed to meet the required standard for setting aside. Costs were awarded to the appellant herein.

18. Aggrieved, the 1st respondent herein appealed to the High Court on some five (5) grounds before seeking orders that;

    a. The appeal be allowed with costs.

    b. The Tribunal's judgment and decree dated 15th May, 2022, be set aside, overturned and/or varied and substituted with a finding of the superior court dismissing the appellant's complaint dated 6th May, 2022.

    c. In the alternative and without prejudice to prayer 2 above, the Tribunal's finding of 28th May, 2022 dismissing the notice of motion dated 19th May, 2022 lodged by the 2nd respondent with costs be set aside, overturned and/or varied and substituted with a finding of the superior court allowing the said notice of motion application with costs in the cause and the appellant's complaint dated 6th May, 2022 be heard and determined afresh on priority basis.

    d. In the alternative and without prejudice to prayers 2 and 3 above, the superior court to make its own findings.

    e. Such further relief(s) as may appear just to the superior court.

19. Suffice it to say, the superior court noted the movement of the instant file from the High Court at Nairobi, to the High Court at Kisii and Nyamira and finally to the High Court at Kisumu for the reason that the cause of action originated from North Mugirango Constituency, within Kisii County. Therefore, pursuant to the directions of the Hon. Chief Justice (or Koome, CJ), the Judges based at Kisumu would handle cases filed at the High Court at Nyamira.

20. On 6th June, 2022 the appeal was placed before theHigh Court. , Alongside the appeal, the 1st respondent had filed a notice of motion dated 30th May, 2022, seeking orders of temporary stay of execution of the ex-parte judgment and decree of the Tribunal delivered on 15th May, 2022 and

temporary stay of execution of the orders issued by the Tribunal on 28th May, 2022. Upon the learned Judge's inquiry on the time available for handling the matters before him, counsel for the 1st respondent informed him that the nomination process was to be concluded the following day. In the circumstances therefore, the learned Judge noted that it did not make sense for the court to first deal with the interlocutory application, and so the parties agreed to proceed immediately with the hearing of the appeal. The appeal was canvassed through pleadings filed by the respective parties with oral submissions.

21. Whilst canvasing that appeal, the learned Judge noted that the 1st respondent emphasized that he was never served by the appellant and cited the decision in *Elias Barre Shill vs. Aden Sugow Ahmed & 2 Others* [2003] eKLR for the proposition that where service was disputed, the only remedy was to summon the process server, in which regard counsel for the appellant pointed out that he was the person who effected service upon the 1st respondent, and he was available to answer any questions on the issue of service. On this issue, the superior court stated that it shared the 1st respondent's understanding of the applicable law and found that the issue of service could have been best resolved through cross examination of the process server. Although counsel for the 1st respondent informed the court that he was the one who effected service and that he was ready to answer any questions regarding the same, the court was not the proper forum for receiving evidence. The learned Judge held the view that the willingness of the process server to undergo cross examination on the issue of service should have been made known to the Tribunal which could have facilitated it. As matters stood, he had no basis upon which to make an informed decision on the disputed facts regarding whether or not the 1st respondent had been duly served. Thus, the court found that the appeal lacked merit with regard to issuance of service.

22. It was also the appellant's contention that there was collusion between the 1st and 2nd respondent after the Tribunal delivered its judgment. In this regard, the High Court noted that whilst the 1st respondent moved it by an appeal, the 2nd respondent filed an application before the Tribunal seeking a review of the judgment and that in the event that either application was successful, the result would most probably negate the judgment. In other words, both the 1st and 2nd respondents had taken steps which were calculated to reverse the Tribunal's judgment. The learned Judge noted that the each of them took steps to challenge the Tribunal's judgment, which was within their right, and there was nothing to suggest that it constituted collusion between them.

23. As regards the 2nd respondent's internal mechanism for resolving disputes, the court stated that the 1st respondent reiterated that the appellant did not exhaust the same prior to instituting a complaint at the Tribunal pursuant to Section 40(2) of the *Political Parties Act* No. 11 of 2011. On the other hand, the appellant stated that he had disputed the membership of the 1st respondent in the Wiper Democratic Movement Party. On this issue, court noted that the dispute was not determined.

24. In relation to the jurisdiction of the Tribunal, the appellant submitted that the internal dispute resolution was attempted, and the High Court held the view that even though the appellant disputed the 1st respondent's membership of the party, that did not alter the fact that such dispute fell within the scope of disputes which should only be placed before the Tribunal after there had been a hearing and determination by the political party's internal dispute resolution mechanism. The learned judge indicated that having perused the record of the proceedings before him, he was not able to trace any evidence of a hearing and determination by the internal dispute resolution mechanism of the party. Consequently, he held that the Tribunal lacked jurisdiction to hear and determine the complaint.

25. The court held that the Tribunal acted without jurisdiction and therefore the proceedings before it and the judgment and ruling thereof were a nullity. The appeal was thus allowed and the judgment and

decree dated 15th May, 2022, was set aside. Similarly, the appellant's complaint dated 6th May, 2022 was dismissed. Costs of the appeal and costs of the complaint were awarded to the 1st respondent herein and it was ordered that the same be paid by the appellant herein. The superior court made no orders as to costs in relation to the 2nd respondent herein as it did not participate in the proceedings.

26. The appellant being dissatisfied with the whole of said judgment filed this appeal raising six (6) grounds of appeal contending that: -

    a. The learned Judge erred in law by entertaining an appeal from the PPDT without a record of appeal.

    b. The learned Judge erred in law in making substantive determination on appeal without a record of appeal.

    c. The learned Judge erred in law by setting aside the judgment and ruling of the PPDT in PPDT E022/2022 without considering the proceedings and pleadings before the PPDT.

    d. The learned Judge erred in law in shifting the burden of proof from the appellant (who ought to have filed the record of appeal) to the respondent in the impugned judgment.

    e. The learned Judge erred in law in awarding costs to the appellant in the superior court without due regard to the substantive and procedural case history of the dispute.

    f. The learned Judge erred in law in his interpretation of Section 40(2) of the *Political Party Act*.

27. The appeal was canvassed through written submissions filed by the respective parties with oral highlighting. Both counsel relied on their submissions.

28. The appellant in his written submissions distilled the issues of determination to three (3);

    a. Whether there was a competent appeal before the superior court for determination.

    b. Whether the learned Judge erred in law by shifting the burden of proof to the appellant at the hearing of the appeal.

    c. Who should bear the costs of the entire appeal.

29. On the first issue, the appellant submitted that the High Court did not have a competent appeal for determination before it, and erred in making a substantive determination of the appeal without the record of appeal being placed before it. The appellant contended that the only documents that were filed at the superior court were the memorandum of appeal dated 30th May, 2022 and the 1st respondent's notice of motion for stay of execution wherein he attached the impugned PPDT judgment and decree dated 15th May, 2022, and the ruling dated 28th May 2022. These could not give a conclusive picture of the proceedings before the Tribunal or at the Party IDRM, therefore, if the superior court was to make any substantive determination on the appeal, it should have confined itself to the material before it taking into consideration the role that is to be played by the first appellate court.

30. The appellant submitted that Order 42 rule 13(4) of the High Court lists the mandatory documents that are required to be on the court record before admitting a matter for appeal; in which respect the learned Judge did not have the opportunity of perusing the record of appeal as the same was not available before him. Ultimately, instead of confining himself to the evidence before him, the learned Judge proceeded to make substantive pronouncements based on the documents before him, yet the 1st respondent should have placed before him other documents such as the copies of pleadings before the PPDT which were mentioned by the 1st respondent in his supporting affidavit to the application

for stay of execution. The appellant argued that the record of appeal is a fundamental component of an appeal as it provides the documentation and procedural history of the dispute without which an appellate court is unable to make a determination. In support of this argument the appellant cited the case of *Josphine Wambui Mwangi v Michael Mukundi Ngungi* [2021] eKLR, and the Supreme Court decision in *Law Society of Kenya vs Centre for Human Rights and Democracy & Others*, which holding was affirmed by the Supreme Court in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* [2014] eKLR concerning the list of documents mandatorily required in a record of appeal. In the premise, the appellant submitted that there was no appeal before High Court for determination as there was no notice of appeal or even a record of appeal and that the learned Judge ought not to have entertained such a defective matter before him.

31. On the second issue, the appellant submitted that it is trite law that he who alleges must prove as provided under Section 107 of the *Evidence Act*; in which regard the appellant contended that the finding of the court on the issue of service was erroneous since it was not upon the appellant to find such evidence. It was incumbent upon the 1st respondent to provide such information in the form of a record of appeal which was missing before the court and as such, it failed to appreciate the advantage that the trial Tribunal had in reaching the decisions made on 15th and 28th May, 2020. He relied on the case of *Bracegirde vs. Oxley* with regard to the distinction between primary facts and conclusions and submitted that the court did not have the primary facts to analyze, as it was only presented with conclusions which it faulted without the benefit of primary facts.

32. On the third issue, the appellant submitted that it is trite law that costs follow the event and owing to the litigation history of the dispute herein and the financial and intellectual resources employed, it is only fair that this Court awards costs to the appellant.

33. In rebuttal, the 2nd respondent submitted that the instant appeal is misconceived and frivolous and lacks merit for the reason that, the appellant should have raised the issue of lack of the record of appeal at the High Court vide a preliminary objection. It relied on the case of *Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd* [1969] EA 696. The 2nd respondent argued that had the appellant exercised due diligence and raised the issue challenging the competency of the appeal, the court would have dealt with the issue conclusively and so he is now estopped from raising the same since he abandoned that right. It relied on the case of *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR C.A No. 314 of 2009. The 2nd respondent also relied on the case of *Political Parties Forum Coalition & 3 Others v Registrar of Political Parties & 8 Others* [2016] eKLR and Jones vs. National Coal Board [1957] 2 QB55 for the preposition that the court is bound by the pleadings filed by the parties.

34. The 2nd respondent submitted that Order 42 rule 13(4) of the *Civil Procedure Rules* provides that before allowing an appeal, a Judge needs to be satisfied that the court has the items of the record of appeal listed thereunder. In this respect, it contended that the Section does not specify that a record of appeal must be in the custody of a judge for the court to make any determination provided that all the other documents have been filed at the court. It contended that the 1st respondent herein filed the memorandum of appeal with other accompanying documents which were properly before the court for determination. Under clause II, the Judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f), and the learned Judge decided the matter with all the relevant documents supplied before him as specified in clause (ii) of Rule 13(4) of the *Civil Procedure Rules*. It and prayed that this Court desists from interfering with the same and rather, sustain it.

35. On the second issue, the 2nd respondent submitted that the appellant has not demonstrated how the burden of proof was shifted since the 1st respondent, after lodging his appeal at the High Court, was able to prove his case on a balance of probabilities and convinced the learned Judge that the IDRM at the Tribunal was completely ignored, hence lack of jurisdiction of the PPDT. The superior court exercised its discretion on the evidence adduced by counsel for the 1st respondent owing to the strict timelines that were set by IEBC and had to come up with a decision based on the evidence on record.

36. On the third issue, the 2nd respondent submitted that pursuant to Section 27(1) of the *Civil Procedure Act*, the general rule relating to the award of cost is that costs follow events and having fully demonstrated that the instant appeal is fatally defective, a non-starter and lacks merit, it urged this Court to dismiss the same and award costs to the 2nd respondent.

37 Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, only one issue falls for determination which is;

a) Whether there was a competent appeal before the superior court.

38 We are alive to the provisions of Order 42 Rule 13(4), as to what constitutes a complete record of appeal and note that what was before the superior court did not contain the PPDT proceedings and annextures therein, in particular, the appellant's letter dated 27th April, 2022, wherein the appellant wrote to the 2nd respondent in protest regarding the nomination of the 1st respondent. The said letter forms the bone of contention in this instant appeal as it raises the fundamental question whether it was a letter to invite the possibility of an internal dispute resolution mechanism, or simply a protest letter declining the decision made by the 2nd respondent which was to the detriment of the appellant's legitimate expectations, as it were.

39 The learned Judge did not expressly exclude the said letter nor does the record show that the learned Judge was satisfied with the record before him and excluded certain documents on grounds that he did not consider them relevant, and if that was so, the reason for that exclusion was not recorded. Certainly, the omission could have been cured if both parties had agreed to proceed, and not raised any objection, but there is no indication of a definite consensus on that. We find that the learned Judge in upsetting the Tribunal's decision, made a fundamental error as he did not have the said letter which was critical to the appeal and the determination thereafter. Indeed, given its centrality to the question of the PPDT's jurisdiction, it was a document of signal relevance that could not be admitted.

40 Section 40 of the *Political Parties Act* (now amended) requires an aggrieved party to approach the Party's Internal Dispute Resolution Mechanism (IDRM) as the first port of call before approaching the Tribunal. All that is required is for one to demonstrate that he/she triggered the process and the same either failed, did not bear any fruit or was denied and/or ignored. There is no format set as to the nature of the letter, it is enough for a party to say: "I am not disatissfied", and in this regard, we hold that the letter dated 27th April, 2022, though directed to the 2nd respondent, protested the nomination of the 1st respondent to fly the 2nd respondent's ticket for the Member of National Assembly, North Mugirango Constituency. The said letter is not just a protest letter but a trigger to the IDRM process, and he should have been heard. It met the threshold of having attempted IDRM, which conferred upon the PPDT the requisite jurisdiction.

41 On the issue of service, we are in agreement with the findings of the PPDT that the same was properly effected in consonance with the email address of the Party as displayed in their website.

42 It was for those reasons that, we held that the appeal had merit and allowed it in terms of our judgment.

DATED AT KISUMU THIS 8TH DAY OF JULY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR