



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, GATEMBU & MURGOR, JJA

CIVIL APPEAL NO. 186 OF 2017

BETWEEN

KITHINJI KIRAGU APPELLANT

AND

DENNIS MUGENDI 1ST RESPONDENT

JEREMIAH MUGAMBI NJAGI 2ND RESPONDENT

PATRICK MUCIRA WILSON 3RD RESPONDENT

SIMON NJUE GITEHUA 4TH RESPONDENT

PETER KIBERIA 5TH RESPONDENT

THE PARTY OF NATIONAL UNITY 6TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 7TH
RESPONDENT**

(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi delivered on the 7th June, 2017 (Mwongo, J) in Election Petition Appeal No. 1 Of 2017

JUDGMENT OF THE COURT

1. In a complaint before the Political Parties Disputes Tribunal (the PPDT) the 1st to 4th respondents sought to nullify the nomination exercise conducted on 22nd April 2017 by the Party of National Unity (PNU), the 6th respondent, for the gubernatorial, parliamentary and Members of the County Assembly for Embu County on grounds that the exercise was marred with serious irregularities.

2. In its judgment delivered on 2nd May 2017, the PPDT declared “the PNU nomination exercise of 22 April 2017 in Embu County is null and void having contravened the party constitution, nomination rules and electoral laws of Kenya.” PPDT also ordered, “PNU shall, within 48 hours hereof, conduct a repeat nomination exercise within Embu County to be carried out strictly in accordance with the party

constitution, nomination rules and electoral laws.”

3. Dissatisfied, PNU appealed to the High Court. In its judgment delivered on 5th May 2017, the High Court (Mwongo, J) upheld the judgment of the PPDT and directed that the repeat nomination exercise be undertaken within 48 hours “*from the delivery of this judgment.*” The court stayed execution of its judgment until Monday 8th May 2017.

4. In a Notice of Motion dated 31st May 2017 presented to the High Court on 2nd June 2017, the 1st to 4th respondents complained that PNU “*held nominations during the pendency of the...orders of stay*” in which the appellant was nominated as the PNU gubernatorial candidate for Embu County and sought orders to hold PNU and its Chief Executive-cum Treasurer, the 5th respondent in contempt of the court order. The 1st to 4th respondents also sought an order to declare the “*nominations purportedly held in Embu County for the seat of Governor and MCA’s on the 7th May 2017...in breach of the stay orders issued on the 5th May 2017...null and void.*”

5. In his ruling delivered on 7th June 2017 that is the subject of the present appeal, Mwongo, J found that “*for PNU to conduct the elections on 7th May 2017 when the stay was in operation, was an act of chicanery and in direct breach of the court’s decision to stay its orders until 8th May 2017.*” The learned Judge proceeded to declare the nominations held on 7th May 2017 illegal and also declared the same to be null and void.

6. Aggrieved, the appellant lodged the present appeal complaining that the High Court erred in nullifying his nomination as the PNU nominee for the position of the Governor of Embu County; that his rights under Articles 47, 48 and 50(1) of the Constitution were violated in that he was not afforded an opportunity to be heard before the orders given on 7th June 2017 were made notwithstanding that he is directly affected by those orders.

7. The 5th and 6th respondents have cross appealed contending, among other things, that the learned Judge of the High Court erred in nullifying PNU’s gubernatorial repeat nominations for Embu County; that the Judge failed to appreciate that the repeat nomination exercise conducted on 7th May 2017 were conducted in compliance with the orders of the court; and that 1st to 4th respondents did not discharge the burden of proving that the 5th and 6th respondents were in contempt of court.

8. At the hearing of the appeal before us, the parties were represented by learned counsel. Professor Ojienda, SC appeared with Ms. Awour for the appellant. Mr. A. Muinde appeared for the 1st and 4th respondents. Mr. Walukwe appeared for the 5th and 6th respondents.

9. Having considered the appeal and the cross appeal and the submissions by learned counsel including the authorities cited, and for the reasons to be given by the Court on 28th July 2017, we make the following orders:

1. The appellant’s appeal be and is hereby dismissed.
2. The cross-appeal by the 5th and 6th respondents be and is hereby dismissed.
3. There be no orders as to costs.

Dated and delivered at Nairobi this 30th day of June, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR