



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI, PCA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 154 OF 2017**

**BETWEEN**

**HON. JOHN NDIRANGU KARIUKI.....APPELLANT**

**AND**

**BENJAMIN GATHIRU MWANGI.....1<sup>ST</sup> RESPONDENT**

**JUBILEE PARTY..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Wakiaga, J) dated the 29<sup>th</sup> May, 2017*

*in*

*Election Petition Appeal No. 60 of 2017)*

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**REASONS FOR JUDGMENT OF THE COURT**

*(Pursuant to Rule 32 (5) of the Court's Rules)*

(1) On the 16<sup>th</sup> June 2017, we delivered the judgment in this matter dismissing the appeal, but pursuant to **Rule 32 (5)** of this Court's Rules we reserved our reasons for the decision. We now proceed to render our reasons for the decision.

(2) The facts leading to this appeal are that the Hon. John Ndirangu Kariuki (the Appellant) and Benjamin Gathiru Mwangi (the 1<sup>st</sup> Respondent) being members of the Jubilee Party (the 2<sup>nd</sup> Respondent) took part in the Party's primaries conducted on the 26<sup>th</sup> April, 2017 for the position of Member of the National Assembly for the Embakasi Central Constituency.

(3) The 1<sup>st</sup> Respondent was declared the winner and was issued with the Party's nomination certificate. The Appellant being aggrieved by that declaration filed an appeal with the 2<sup>nd</sup> Respondent's Appeals Tribunal. The Appellant complained of massive irregularities during the nomination exercise and he prayed for a declaration that he was the winner. In the alternative, he sought nullification of the results and a repeat of the nomination exercise.

On the 9<sup>th</sup> May, 2017 the Appellant moved the Political Parties Disputes Tribunal (the PPDT) through a Notice of Motion application filed under a certificate of urgency. He alleged that despite lodging a complaint in the 2<sup>nd</sup> Respondent's Appeals Tribunal raising weighty issues with regard to the nomination of the 1<sup>st</sup> Respondent, the Appeals Tribunal had refused to render a verdict on the same. According to him, the delay in rendering the verdict was a ploy to lock him out from contesting the Embakasi Central Parliamentary seat in the August, 2017 general elections. The Appellant also contended that the nomination of the 1<sup>st</sup> Respondent was marred by massive irregularities. He sought similar orders as in the appeal before the 2<sup>nd</sup> Respondent's Appeals Tribunal.

(4) The PPDT upon hearing the Appellant *ex parte* made the following orders:-

***a) That the matter be and is hereby certified urgent.***

***b) That an interim injunction order be and is hereby issued against the 1<sup>st</sup> and 2<sup>nd</sup> respondents restraining them from presenting the 2<sup>nd</sup> respondent as the duly nominated candidate for the member of parliament seat in Embakasi Central constituency on Jubilee Party pending the hearing and determination of this application.***

***c) That the claimant to serve the 2<sup>nd</sup> and 3<sup>rd</sup> respondents forthwith.***

***d) That the respondents to file and serve their replies by noon 10<sup>th</sup> May, 2017.***

***e) That the parties to file written submissions.***

***f) That the main complaint to be heard on the 10<sup>th</sup> May, 2017 at 4.30pm.***

(5) It would appear that the matter did not proceed as scheduled on the 10<sup>th</sup> May, 2017. The application was subsequently heard on the 12<sup>th</sup> May, 2017 in the absence of the Respondents. The PPDT delivered its judgment on the 15<sup>th</sup> May, 2017. It nullified the nomination certificate issued to the 1<sup>st</sup> Respondent and directed the 2<sup>nd</sup> Respondent to determine the Party's nominee for Embakasi Central parliamentary seat in a manner compatible with its Constitution, Election and Nomination Rules.

(6) The 1<sup>st</sup> Respondent preferred an appeal against that decision in the High Court. The 1<sup>st</sup> Respondent's Memorandum of Appeal contained a total of 14 grounds. The gist of the appeal was that the 1<sup>st</sup> Respondent was not served with pleadings before the PPDT. However, even before filing the appeal before the High Court, the 1<sup>st</sup> respondent had on the 18<sup>th</sup> May, 2017 filed an application before the PPDT seeking a review and the setting aside of the judgment of the PPDT.

(7) The High Court (Wakiaga, J.) after hearing the appeal framed the following issues for determination:-

***a) Was there any proper valid service of proceedings in PPDT upon the 1<sup>st</sup> respondent.***

***b) Was there material concealment of fact by the appellant before the PPDT.***

***c) What is the effect of the withdrawn application for Review upon the proceedings.***

***d) Was the judgment and decree of the PPDT properly issued.***

(8) On the issue of service, the learned Judge found that there was no service at all upon the 1<sup>st</sup> Respondent. On that basis the learned Judge allowed the appeal and set aside the *ex parte* judgment of the PPDT. The learned Judge directed that the original PPDT file be remitted back to the PPDT for a fresh hearing of the other issues on merit. The learned Judge also directed that the certificate of nomination issued to the 1<sup>st</sup> Respondent which had been nullified by the PPDT be reinstated pending determination

of the 1<sup>st</sup> Respondent's complaint before the PPDT.

(9) The Appellant was dissatisfied with that decision and now brings this appeal before us. The Appeal is based on the following four grounds, namely:-

***a) The learned appellate Judge erred in law by holding and finding that the Respondents were not served with the hearing notice for the case when in fact the said Respondents had ignored appearing at the date and time appointed by the Tribunal's orders.***

***b) The learned appellate Judge erred in law by holding that there was no service of the hearing notice whereas there was no holding of the non-service of the initial pleadings which by themselves had indications and directions as to hearing on account of the affidavit of service on record.***

***c) The learned appellate Judge erred in law by allowing the appeal to proceed for determination when the court lacked jurisdiction to hear it on account of the parallel nature of the proceedings and the non disclosure thereof by the 1<sup>st</sup> Respondent.***

***d) The learned appellate Judge erred in law by disturbing the judgment in the Appellant's favour which was legally obtained through prosecution of the claim at the PPDT***

10. The parties filed their written submissions which they highlighted before us. In his written submissions the Appellant condensed his grounds of appeal into two main grounds. The first ground was on the issue of the application for review filed by the 1<sup>st</sup> Respondent at the PPDT and the second was on the issue of service.

(11) On the first issue the Appellant submitted that prior to the 1<sup>st</sup> Respondent lodging his appeal before the High Court, he had filed a review application on the 18<sup>th</sup> May, 2017 before the PPDT seeking to set aside the *ex parte* judgment delivered on the 15<sup>th</sup> May, 2017. It was argued that since the said application was scheduled for hearing on the 25<sup>th</sup> May, 2017, the appeal before the High Court was *sub-judice* and amounted to forum shopping. The Appellant urged that the learned Judge erred by declining to determine this issue. He added that the learned Judge ought to have dismissed the entire appeal and referred the parties back to the PPDT for hearing of the application for review which to him took precedence over the appeal.

(12) On the second issue, the Appellant claimed that the learned Judge erred by finding that the Appellant was under a duty to serve the Respondents with the hearing notice dated the 12<sup>th</sup> May, 2017. Besides, the learned Judge did not fault service of the initial pleadings on the Respondents. In any event, the Respondents were aware of the proceedings before the PPDT and the orders issued on the 9<sup>th</sup> May, 2017. As such, the Respondents had an obligation to appear before the PPDT on the 10<sup>th</sup> May, 2017 but failed to do so. Based on the foregoing, the Appellant was adamant that he was not under any obligation to serve the Respondents with the hearing notice dated the 12<sup>th</sup> May, 2017.

(13) On his part the 1<sup>st</sup> Respondent, submitted that the Appellant was trying to mislead this Court. This was because the evidence before the High Court was clear that the 1<sup>st</sup> Respondent had withdrawn the application for review before filing the appeal before the High Court. Therefore, there was nothing barring the hearing of the appeal. On the issue of service, the 1<sup>st</sup> Respondent maintained that there was an obligation on the part of the Appellant to serve the hearing notice. Furthermore, the learned Judge noted in his judgment that the Appellant's advocate had conceded that there was no service. In addition, the 1<sup>st</sup> Respondent argued that the Appellant's complaint was heard on merit before the PPDT on the 8<sup>th</sup> June, 2017 in compliance with the order of the High Court. On the 12<sup>th</sup> June, 2017 the PPDT delivered its judgment dismissing the Appellant's complaint on merit. As a result this appeal had been overtaken by events and, the same is an academic exercise.

(14) It was submitted on behalf of the 2<sup>nd</sup> Respondent that the Appellant in compliance with the orders of the learned Judge fixed the complaint before the PPDT for hearing on the 8<sup>th</sup> June, 2017, when all parties attended and took directions for hearing. The 2<sup>nd</sup> Respondent further submitted that the complaint proceeded for hearing on 9<sup>th</sup> June 2017 and was pending judgment. On the issue of service the 2<sup>nd</sup> respondent contended that the Respondents were not served with the pleadings before the PPDT and on the issue of the review application the 2<sup>nd</sup> Respondent was of the view that the same was withdrawn before the appeal was filed.

(15) After considering the record, the respective submissions by learned counsel and the authorities cited, we now proceed to make a determination. Under **Section 41(2)** of the **Political Parties Act**, appeals to this Court are restricted to points of law only. In our view, there are only two issues that arise for our determination in this appeal; the issue of service and the fate of the application for review filed at the PPDT by the 1<sup>st</sup> Respondent.

(16) On the issue of service the Appellant contended that having served the Respondents with the initial pleadings it was under no obligation to serve the notice of hearing scheduled for the 12<sup>th</sup> May 2017. It is not in doubt that the Appellant served the 2<sup>nd</sup> Respondent with the order issued on the 9<sup>th</sup> May, 2017 together with the pleadings. However, the alleged service upon the 1<sup>st</sup> Respondent is suspect. There are two affidavits of service sworn by one Erick Agumba on the 10<sup>th</sup> May, 2017. One was filed on the same day and the other one on the 11<sup>th</sup> May, 2017. We have looked at the two affidavits of service and the two are not clear on how service was effected upon the 1<sup>st</sup> Respondent. Paragraph 4 of the affidavit of service filed on the 11<sup>th</sup> May, 2017 talks of service upon an “African male” but it does not state who this person was and whether it was the 1<sup>st</sup> Respondent. The High Court in its judgment stated that the PPDT found fault with the initial service and rather than attempt fresh service, the Appellant just filed another affidavit of service. The Appellant’s advocate conceded that no hearing notice was served when the matter was fixed for hearing on the 12<sup>th</sup> May, 2017. Consequently, we find that the Appellant did not serve the 1<sup>st</sup> Respondent at all thus, the 1<sup>st</sup> Respondent was not aware of the matter before the PPDT. We agree with the High Court that there was a deliberate effort by the Appellant not to serve the 1<sup>st</sup> Respondent.

(17) On the issue of the review application before the PPDT, the Appellant submitted that the 1<sup>st</sup> Respondent should have withdrawn the application prior to filing the appeal before the High Court. The 1<sup>st</sup> Respondent maintained that the application was withdrawn before the appeal was filed in High Court and that the High Court made a similar finding. We find that nothing much turns on this ground of appeal. Our reason is twofold. Firstly, it is trite that he who alleges must prove. The Appellant upon alleging that the review application had not been withdrawn, it behooved him to give evidence of that. Secondly, this Court does not wish to disturb the finding by the learned Judge to the effect that the application was withdrawn by the 1<sup>st</sup> Respondent. The High Court had the benefit of looking at the entire PPDT file which we have not had the benefit of looking at. We concur with the finding of the High Court that the application for review was withdrawn prior to filing the appeal.

(18) Based on our findings above, we dismissed this appeal on the 16<sup>th</sup> June, 2017. Before we pen off there is another issue that we wish address. It’s not lost to us that the Appellant has since complied with the orders of the High Court requiring that the matter be fixed for hearing on merit before the PPDT. The PPDT rendered its decision on the 12<sup>th</sup> June, 2017 and dismissed the Appellant’s claim. When the Appellant’s advocate appeared before us he casually stated that the judgment of the PPDT should not affect this Court’s decision. With respect to learned counsel, we are at a loss as to how the judgment of the PPDT, which was rendered in compliance with the High Court order, would not affect this appeal which is challenging that very same decision of the High Court. It is an abuse of this Court’s process for the Appellant to lodge this appeal before us and at the same time go ahead and comply with the High Court order which it is challenging before us. This smacks of bad faith on the part of the Appellant.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of July, 2017.**

**P. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**S. GATEMBU FCIArb**

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**JUDGE OF APPEAL**

**A. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR.**