



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 186 OF 2017

(CORAM: NAMBUYE, GATEMBU & MURGOR, J.J.A)

BETWEEN

KITHINJI KIRAGU.....APPELLANT

AND

DENNIS MUGENDI..... 1ST RESPONDENT

JEREMIAH MUGAMBI NJAGI2ND RESPONDENT

PATRICK MUCIRA WILSON3RD RESPONDENT

SIMON NJUE GITEHUA4TH RESPONDENT

PETER KABERIA5TH RESPONDENT

THE PARTY OF NATIONAL UNITY6TH RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION7TH 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)

Reasons for the Judgment of the Court

(Rule 32(5) of the Court of Appeal Rules)

1. In a judgment delivered on 30th June 2017, this Court dismissed the appellant's appeal as well as the 5th and 6th respondents cross appeal from the ruling of the High Court (Mwongo, J) dated 7th June 2017

and reserved reasons for doing so. We now give our reasons for doing so.

2. The appeal and cross appeal arose from a ruling of the High Court delivered on 7th June 2017 in which the learned Judge ordered summons to issue against the 5th respondent and “*the lawful officers*” of the 6th respondent “*to attend court to answer personally to the allegations of contempt of court and whether they should be so cited*”. In the same ruling, the court ordered that:

“The nominations conducted 7th may, 2017 by the PNU Party for Embu Gubernatorial seat were in breach of this court's order of 5th May, 2017 and the stay issued on the same date all forming this court's decision. Accordingly, the nominations were not legal and the outcome is hereby declared to be null and void.”

Background

3. The 6th respondent conducted its nomination elections for the position of county governor, Embu County on 22nd April 2017 after which the appellant was declared the winner. Following a complaint by the 1st to 4th respondents, the Political Parties Disputes Tribunal (the PPDT) nullified the nomination exercise for contravening the party constitution, rules and electoral laws and ordered a repeat nomination exercise within Embu County in a judgment delivered on 2nd May 2017.

4. Dissatisfied, the 6th respondent appealed to the High Court. In a judgment delivered on 5th May 2017, the High Court upheld the judgment of the PPDT and ordered that the repeat nomination exercise within Embu County be undertaken within 48 hours of delivery of the High Court judgment.

5. Intending to appeal the judgment of the High Court delivered on 5th May 2017, the 6th respondent immediately upon delivery of that judgment prayed for a stay of execution of the judgment. The court granted the order for stay of execution and directed that “*the stay granted hereby shall lapse at 12.00 noon on Monday 8th May 2017.*”

6. Notwithstanding the order for stay of execution, the 6th respondent went ahead to conduct a repeat nomination exercise on 7th May 2017 as a result of which the appellant was declared the 6th respondent's nominee to run for the position county governor Embu County.

7. On 2nd June 2017, the 1st to 4th respondents presented a motion before the High Court dated 31st May 2017 seeking orders that the purported nomination of the appellant as the 6th respondent's gubernatorial candidate for Embu County be stayed and that the 7th respondent, the Independent Electoral and Boundaries Commission (IEBC) be directed not to accept his nomination certificate and that the 6th respondent and its Executive Director, the 5th respondent, be found and declared to be in contempt of the court order issued on 5th May 2017.

8. After hearing that motion, the learned judge was not in any doubt that the nominations exercise undertaken by the 6th respondent was in violation of the orders of the court given on 5th May 2017. In his ruling delivered on 7th June 2017 the Judge ruled thus:

“...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.”

9. On that basis, the learned Judge proceeded to declare the nominations held on 7th May 2017 illegal and declared the same to be null and void.

10. Aggrieved, the appellant lodged the present appeal

The appeal and submissions

11. During the hearing of the appeal, the parties were represented by learned counsel. Prof. T. Ojienda, SC appeared with Ms. Awour for the appellant. Mr. A Muinde appeared for the 1st to 4th respondents. Mr. Walukwe appeared for the 5th and 6th respondents. Counsel relied on written submissions, which they highlighted.

12. Amplifying the appellant's complaints in the memorandum of appeal, Prof. Ojienda submitted that the High Court did not accord the appellant an opportunity to be heard before making the adverse orders that nullified his nomination by the 6th respondent as its gubernatorial candidate for the position of county governor, Embu County.

13. Counsel urged that the appellant's „non-derogable? right to a fair hearing under Article 50(1) of the Constitution was violated and invited us to consider the decisions of this Court in **Judicial Service Commission vs. Gladys Boss Shollei & another [2014] eKLR**; **Judicial Service Commission vs. Mbalu Mutava & another [2015] eKLR**.

14. Counsel submitted that the appellant was not served with the application on the basis of which the impugned orders were made; that the appellant has been punished for an alleged contempt by nullification of his nomination as the 6th respondent's candidate for the position of county governor Embu County even though he was not cited as a contemnor in the contempt proceedings; that the appellant is an innocent third party and was not privy to the proceedings leading to judgment given on 5th May 2017 and neither was the appellant aware of the court order given on 5th May 2017 staying execution.

15. Referring to the decision of the Court in **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR**, counsel submitted that the court erred in punishing the appellant when it was not established that the appellant had knowledge or notice of the existence of the order given on 5th May 2017.

16. Furthermore, counsel argued, the learned Judge should have addressed his mind to the fact that the only other contestant for nomination for the gubernatorial position had resigned from the 6th respondent and was seeking election to the position as an independent candidate, and there was therefore no cause of action; that the application for contempt was filed in bad faith in order to ensure the appellant is locked out from the general election to be held on 8th August 2017.

17. Learned counsel for the 5th and 6th respondents Mr. Walukwe supported the appellant's appeal in addition to urging the Court to allow the cross appeal in which the 5th and 6th respondents, in addition to reiterating the complaints by the appellant, asserted that the court erred in finding that the nominations conducted on 7th May 2017 were in breach of a court order and by nullifying the same when the nominations were conducted in compliance with a court order.

18. Counsel referred to the decision of the Supreme Court of Kenya in **Moses Mwigigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** and submitted that the High Court did not have jurisdiction over the matter; and that the 1st to 4th respondent were not candidates during nomination exercise and had no basis for raising complaints over the nomination process.

19. Counsel submitted that the appellant having been issued with a nomination certificate by the 7th respondent, a fresh dispute should have been declared; that the nomination exercise undertaken on 7th May 2017 was carried out in compliance with, and not in violation, of the court order; that the object of the order of stay given on 5th May 2017 was intended to give the 6th respondent more time to comply and

did not prevent compliance with the order requiring fresh nomination exercise to be carried out.

20. Opposing the appeal Mr. Muinde for the 1st to 4th respondents submitted that the appellant was undoubtedly aware of the proceedings before the High Court and was present in court when the orders of stay of execution were made on 5th May 2017; that the appellant is a beneficiary of an illegal process and is not an innocent party as he would like this Court to believe; that he was served with the contempt proceedings before the High Court and counsel on record for the 5th and 6th respondents Mr. Walukwe indicated at some point that he was acting for the appellant but later changed his position.

Analysis

21. Having considered the appeal, the cross-appeal and the rival submissions, the only issue for determination is this: whether the learned Judge erred in nullifying the nomination exercise undertaken by the 6th respondent on 7th May 2017 in which the appellant was nominated as the 6th respondent's candidate for the position of county governor Embu County notwithstanding the contention by the appellant that he was not heard.

22. The appellant contends that he was not heard before the order nullifying his nomination was made. He asserts that his constitutional right to a fair hearing under Article 50(1) of the Constitution was violated; that as an innocent party he should not be punished or deprived of the nomination as a result of the nominations having been undertaken, without his knowledge, in violation of a court order to which he was not privy.

23. Although the appellant was named as a respondent as well as the "1st proposed interested party" in the motion by the 1st to 4th respondents dated 31st May 2017 on the basis of which the court granted the impugned orders, and although it was indicated in that motion that the appellant was one of the persons on whom the motion was to be served, it is not manifest that the motion was indeed served with the motion.

24. However, in a replying affidavit sworn on 7th June 2017 in opposition to that application by one Martin Kuria who described himself as a life member and head of programmes of the 6th respondent it was deposed that subsequent to the orders of the court given on 5th May 2017, a meeting was convened by the National Elections Board of the 6th respondent "for purposes of analyzing the order" at which it was resolved to carry out a repeat nomination exercise after which a meeting was held with the returning officers with "all the candidates except one Cyrus Njiru" at which it was agreed to have the nominations exercise repeated on Sunday the 7th May 2017.

25. There cannot be any doubt therefore that the 6th respondent resolved to go ahead with the repeat nominations exercise on 7th May 2017 with the full knowledge that the order of the court that had ordered repeat nominations had been stayed. The learned Judge cannot therefore be faulted for taking the view that the 6th respondent was "***in direct breach of the court's decision to stay its orders until 8th May 2017***" when it conducted elections on 7th May 2017 when the stay was in operation.

26. Assuming for a moment that the appellant had no knowledge of the orders of stay, can he nonetheless benefit from the nomination exercise undertaken in breach of the court order? That question points to a tension, in this case, between the right to a fair hearing and the need to safeguard and maintain the dignity and authority of the courts. A similar situation arose in the case of **Commercial Bank of Africa Limited vs. Isaac Kamau Ndirangu [1992] eKLR** where Kwach, JA, as he then was, articulated the problem in this way:

"Granted that the rules of natural justice have been breached, this Court should not lose sight of the fact that a valid order of the Court had been flouted in a most contemptuous and callous manner. Since there is a conflict, I have to decide whether to uphold the rules of natural justice or the authority and dignity of the Court."

27. In the same case, Cockar, JA stated that:

“Rules of natural justice are the foundation of a judicial system. Their observance is universal. But, at the same time, a flagrant disobedience of a court order, if allowed to go unchecked will result in the onset of an erosion of judicial authority.”

28. Muli, JA had no doubt that such a conflict must be resolved in favour of upholding the dignity of the court. He put it this way:

“It is imperative that orders of the Court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the Courts. The blatant disobedience of the court's consent order in this case renders any transactions in breach of the order to be void...” [Emphasis]

29. Consequently, even though the appellant asserts that he was not aware that the nomination exercise carried out on 7th May 2017 was in violation of a court order, (and we make no finding that he was not aware) he cannot benefit from it.

30. It is for those reasons that this Court dismissed the appellant's appeal as well as the cross appeal by the 5th and 6th respondents in our judgment delivered herein on 30th June 2017.

Dated and delivered at Nairobi this 28th day of July, 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