IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, GATEMBU & MURGOR, JJ.A

CIVIL APPEAL NO. 157 OF 2017

BETWEEN

HON. SAMUEL KALII KIMINZA…….…….....……APPELLANT

AND

JUBILEE PARTY…..…….... 1ST RESPONDENT

HON RACHAEL NYAMAI …….…….…... 2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (the Hon Mr. Justice Aggrey Muchelule) dated 22nd May 2017

in

Election Petition Appeal No. 58 of 2017)

REASONS FOR JUDGMENT OF THE COURT

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

1. On the 16th June 2017, we delivered the judgment in this matter allowing 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 background of this appeal is that, on the 25th April 2017 the Jubilee Party (1st Respondent) was scheduled to conduct countrywide party primaries for the positions of Governor, Senator, Woman Representative to the National Assembly, Member of National Assembly and Member of County Assembly.

3. Hon. Samuel Kalii Kiminza (the Appellant) and Hon Rachael Nyamai (the 2nd Respondent) being members of the 1st Respondent had been cleared by the 1st Respondent to contest for the position of Member of the National Assembly for the Kitui South Constituency. However, for one reason or the other the party primaries did not take off as scheduled. According to the Appellant, he was later informed by the Secretary General of the 1st Respondent that the nomination exercise for the position of Member of the National Assembly for the Kitui South Constituency would take place on the 30th April, 2017. Nevertheless the nomination exercise still did not take place on the said date.

4. On the 4th May 2017, the Appellant, through his advocates, M/S Keli & Associates, wrote a letter addressed to the Chairman of the 1st Respondent's National Election Board (NAB) seeking an explanation as to why the party primaries for the position of Member of the National Assembly for the Kitui South Constituency had not been conducted. The 1st Respondent's NAB failed to respond leading to the Appellant lodging a complaint with the Political Parties Disputes Tribunal (PPDT). The PPDT dismissed the complaint for lack of jurisdiction because the Appellant had failed to invoke the 1st Respondent's internal disputes resolution mechanisms (IDRM).

5. On the 17th May 2017, the Appellant lodged another complaint being Complaint No. 121 of 2017 with the PPDT. This time around alleging that despite preferring an appeal in the 1st Respondent's Appeals Tribunal, there was no response to his appeal. He claimed that he only learnt of the 1st Respondent's decision to issue a direct nomination to the 2nd Respondent, when the 1st Respondent filed a replying affidavit in response to his initial complaint to the PPDT which was dismissed.

6. The PPDT upon hearing the complaint made a finding that the 1st Respondent had failed to conduct free and fair nominations for the position of Member of the National Assembly for the Kitui South Constituency. It went ahead to nullify the nomination certificate issued to the 2nd Respondent by the 1st Respondent and directed the 1st Respondent to conduct a fresh nomination exercise for the position of Member of the National Assembly for the Kitui South Constituency.

7. Aggrieved by the decision of the PPDT, the 2nd Respondent appealed against it in the High Court. The Memorandum of Appeal in the High Court listed 5 grounds of appeal which can be condensed into two main grounds as follows; first, that the PPDT lacked jurisdiction to hear and determine the matter since the Appellant had failed to exhaust the 1st Respondent's IDRM. Secondly, that the 1st Respondent acted within the law in issuing a direct nomination to the 2nd Respondent.

8. The High Court (Muchelule, J.) after hearing the appeal held that the Appellant did not appeal to the 1st Respondent's Appeals Tribunal in the prescribed format and had not paid the requisite fees. As a result the Appellant had not exhausted the 1st Respondent's IDRM hence the PPDT lacked jurisdiction to hear the complaint.

9. The Appellant was dissatisfied with the judgment of the High Court and on the 5th June 2017, he lodged the appeal before us now. The Memorandum of Appeal contained the following grounds of appeal:-

> a) The Honourable Judge erred in law in finding that the PPDT lacked jurisdiction to hear and determine Complaint No. 121 of 2017.
>
> b) The Honourable Judge erred in law in ignoring Section 19 of the Political Parties (Amendment) (No. 2) Act, 2016 which amended Section 40 (1) of the Political Parties Act, 2011 giving the PPDT original and direct jurisdiction over disputes arising out of party primaries.
>
> c) The Honourable Judge erred in law in failing to uphold the decision of the PPDT even after finding that the direct nomination of the 2nd Respondent by the 1st Respondent was irregular.

10. The 2nd Respondent filed a cross-appeal on the ground that the learned Judge had erred in failing to make a determination on the legality or otherwise of her direct nomination.

11. During the hearing of the appeal before us, Mr. Ombati appeared for the appellant, Mr. Njomo appeared for the 1st Respondent while Mr. Kibe Mungai together with Mrs. Mwadumbo appeared for the 2nd Respondent.

12. Learned counsel, Mr. Ombati submitted that the learned Judge did not refer to the amendment in

Section 40 (1) of the Political Parties Act. He argued that this amendment was deliberate to address the challenge of concurrent jurisdiction of two bodies handling electoral disputes. In his view, it is not necessary for one to first go through a party's IDRM such as in this case but that one can elect which jurisdiction to invoke. He pointed out that the High Court's opinion in that regard was unsettled.

13. Mr. Njomo asserted, that there was no appeal before the 1st Respondent Appeals Tribunal because the appellant had not paid the requisite fees. Counsel further submitted that the dispute was between a member of a political party and a political party. Counsel contended that the Appellant could not go outside Section 40 (1) (a) and that he must exhaust the internal mechanism.

14. Mr. Kibe Mungai contended that, the Appellant having failed to use the prescribed format and pay the requisite fees for the appeal before the 1st Respondent's Appeals Tribunal, the question of jurisdiction before the PPDT automatically arose. Counsel further submitted that the amendment to Section 40 was to give the PPDT the legal basis to determine political parties' disputes because the jurisdiction rested with the Independent Electoral and Boundaries Commission.

15. Mrs. Mwadumbo while arguing the cross appeal stated that the High Court failed to make a determination on the complaint of direct nomination. Counsel opined that ***Section 13 of the Elections Act*** donates the power to political parties to nominate its candidates for an election. She urged the Court to find that the nomination of the 2nd Respondent was legal.

16. In response to the cross-appeal, it was submitted on behalf of the Appellant that the 1st Respondent should not have relied on Chapter XV of the Nomination Rules to award the 2nd Respondent the nomination certificate. The Appellant relied on Article 11 of the 1st Respondent's constitution in urging that the 1st Respondent ought to have conducted a competitive process.

17. We have considered the record, the respective submissions by learned counsel and the authorities cited. This is a second appeal from the decision of the PPDT. Under ***Section 41 (2)*** of the Political Parties Act, this Court's jurisdiction is restricted to points of law only.

18. We are of the view that only two issues arise for our determination. Firstly whether the PPDT had jurisdiction to hear and determine this matter and secondly, whether the direct nomination of the 2nd Respondent was valid.

19. The learned Judge in his decision made a finding that the PPDT lacked jurisdiction to hear and determine the matter because the Appellant did not exhaust the IDRM. The Respondents argued that because the Appellant did not appeal in the prescribed format and failed to pay the requisite fees there was no appeal to the 1st respondent's Appeals Tribunal. The appellant on the other hand argued that pursuant to ***Section 40 (1) (fa)*** he was not required to go through the internal mechanisms.

20. ***Section 40*** of the Political Parties Act deals with the jurisdiction of the PPDT. ***Section 40(1)*** provides that:-

> **(1) The Tribunal shall determine—**
>
> **(a) disputes between the members of a political party;**
>
> **(b) disputes between a member of a political party and a political party;**
>
> **(c) disputes between political parties;**
>
> **(d)disputes between an independent candidate and a political party;**
>
> **(e) disputes between coalition partners; and**

(f) appeals from decisions of the Registrar under this Act; (fa) disputes arising out of party primaries.

Section 40(2) of the Act provides that:-

> ***"Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms."***

Section 19 of the **Political Parties (Amendment) Act No. 12 of 2016** which introduced Section 40 (1) (fa). It states:-

> ***"Section 40 of the Principal Act is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (f) –***
>
> > ***"(fa) disputes arising out of party primaries."***

21. The appellant therefore argued that because his dispute arose out of party nominations, by virtue of the fact that the introduced Section 1(fa) was not captured under Section 40 (2), he could go directly to the PPDT without having to go through IDRM. In a very recent decision this Court faced with similar circumstances in the case of ***Lilian Gogo v Joseph Mboya Nyamuthe*** *& 4 others [2017] eKLR* rendered itself thus:-

"*In* ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others Petition 2B of 2014 [2014] eKLR*** *the Supreme Court of Kenya adopted the words of Lord Griffiths in* ***Pepper vs. Hart [1992] 3 WLR 1032*** *thus:*

> ***"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.*** *(Emphasis added)."*
>
> *The Supreme Court also referred to the House of Lords decision in* ***Maunsell v. Olins [1975] AC 373*** *where Lord Simon of Glaisdale stated that:*
>
> ***"The first task of a court of construction is to put itself in the shoes of the draftsman – to consider what knowledge he had and, importantly, what statutory objective he had …being thus placed…the court proceeds to ascertain the meaning of the statutory language.***
>
> *The object of introducing Section 40(1)(fa) of the Act was set out in the memorandum of objects and reasons of the Political Parties (Amendment) Bill as follows:*
>
> **Clause 19 seeks to amend section 40 of the principal Act by adding disputes arising out of party primaries in order to address the challenge of concurrent jurisdiction with other bodies handling electoral disputes.** *[Emphasis]*
>
> ***In our view, that amendment did not introduce an entirely new category of disputes as was urged by counsel for the 1st respondent. Disputes arising out of party primaries between members of a political party or between a member of a political party and a political party, or between political parties or between coalition partners were already catered for under paragraphs a, b, c, and e of Section 40(1) of the Act. Such disputes are subject to Section 40(2) of the Act and must first be subjected to the internal party dispute resolution mechanism before the PPDT takes cognizance***

of them."

22. The appeal before us is on all fours with ***Lilian Gogo v Joseph Mboya Nyamuthe (supra)*** on the issue of whether disputes arising out of political parties nominations under Section 40 (1) (fa) are also subject to IDRM. We wholly agree with that finding of the Court and adopt it. Suffice to add that it could not have been the intention of the legislature to make disputes between members of a political party; disputes between a member of a political party and a political party subject to IDRM and exclude disputes arising out of political parties nominations whereas, disputes arising out of political parties nominations are essentially disputes between political parties and its members. Our view is further buttressed by Section 13 (2A) of the Elections Act which provides that:-

"A political party shall hear and determine all intra party disputes arising from political party nominations within thirty days."

23. We therefore find that the disputes arising out political parties nominations are also subject to IDRM pursuant ***Section 40 (2)*** of the Political Parties Act.

24. However, even with the above finding we are still left with the question of whether the PPDT was vested with jurisdiction to hear the dispute. As stated above the Appellant lodged the initial complaint in the PPDT which was dismissed and thereafter he was referred back to the party's IDRM. This was after the Appellant, through his advocates, had written to the 1st Respondent to find out why the nomination exercise was not carried out on the 30th April 2017 as earlier on indicated. The Appellant still through his advocates wrote another letter on the 10th May, 2017 where he complained about the direct nomination of the 2nd respondent. These letters did not elicit any response which prompted him to go back to the PPDT.

25. The 1st Respondent's Nomination Rules required that appeals to the Appeals Tribunal be in a prescribed format and that a prescribed fee had to be paid. There would appear to be some contention that the Appellant's appeal was neither in the prescribed format nor was the prescribed fee paid. This notwithstanding, the letter dated the 10th May, 2017 expressly referred to a complaint that the Appellant had lodged with the 1st Respondent's Appeals Tribunal. The complaint, titled "Appeal", was dated the 9th May, 2017 and signed by the Appellant, and was attached to the letter. We have had a look at the Appeal, and are of the view that though it may not have been in the prescribed format, it nevertheless contained all the ingredients of an appeal. The document gave particulars of the position in relation to which the appeal was lodged; it also had the statement of facts; the specific complaint of the Appellant; as well as the prayers that he was seeking. Article 159 (2) (d) of the Constitution enjoins courts in their exercise of judicial authority, to administer justice without undue regard to procedural technicalities. We are therefore of the view that if there was any failure by the Appellant to lodge the appeal in the prescribed format, such failure is easily cured by Article 159 (2) (d) of the Constitution, considering that the substance of the Appellant's appeal included all the ingredients necessary for one to decipher what his complaint was and the remedies he was seeking. We therefore make a finding that the Appellant filed an appeal with the 1st Respondent's Appeals Tribunal.

26. Further, we cannot help but note that the Appellant wrote to the 1st Respondent not once but twice and none of these letters elicited any response from the 1st Respondent. The Appellant is a member of the 1st Respondent having paid the requisite fees. The Appellant had also paid Kshs. 250,000/= in order to be eligible to take part in the nomination exercise for the position of Member of the National Assembly for the Kitui South Constituency. We are therefore of the view that the least that the 1st Respondent could have done, taking into account that the appellant was its member, is to respond to the Appellant's letters and advise him on the right way to go about the appeal. Having failed to do so we hold that the Appellant was entitled to approach the PPDT and that the PPDT therefore had jurisdiction to hear and determine the matter.

27. On the cross appeal, we are of the view that having determined that the PPDT had jurisdiction to hear the dispute and the PPDT having already allowed the appeal and directed that fresh nominations be

carried out, a determination on the direct nomination is not necessary. Suffice it is to say, the 1st Respondent, having accepted the Appellant's payment for nomination fees and having cleared him to vie for the position of Member of the National Assembly for the Kitui South Constituency, should have at the very least given the appellant audience before directly nominating the 2nd Respondent.

28. These are our reasons for the judgment delivered on 16th June, 2017.

Dated and delivered at Nairobi this 28th day of July, 2017.

P. KIHARA KARIUKI, PCA

…….....

JUDGE OF APPEAL

S. GATEMBU, FCIArb

……...

JUDGE OF APPEAL

A. K. MURGOR

…….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.