



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & OUKO, JJ.A)

CIVIL APPEAL NO. 203 OF 2017

BETWEEN

JOSEPH IBRAHIM MUSYOKI ..... APPELLANT

AND

1. WIPER DEMOCRATIC MOVEMENT-KENYA .....1<sup>ST</sup> RESPONDENT

2. KILONZI MAUNDU ..... 2<sup>ND</sup> RESPONDENT

*(An appeal from a part of the Judgment and Decree of the High Court of Kenya at Nairobi (J. Wakiaga, J) dated 16<sup>th</sup> June, 2017*

*in*

*Election Petition Appeal No. 102 of 2017*

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JUDGMENT OF THE COURT

1. As correctly observed by the High Court, this case has had a chequered history within a span of 45 days and it is necessary to briefly restate the facts.

2. The appellant (**Musyoki**) and the 2nd respondent (**Maundu**) are members of the 1<sup>st</sup> respondent (**the Party**). They took part in the party nomination exercise for Member of the County Assembly for Nuu Ward of Mwingi Constituency in Kitui County held on 30<sup>th</sup> April, 2017. According to the returns made to the party, Musyoki garnered 1903 votes against Maundu's 1860. Maundu was not satisfied with those returns and filed a complaint with the National Appeals Tribunal (**NAT**) of the party on 2<sup>nd</sup> May, 2017 but the complaint was dismissed. Musyoki then expected the party to issue him with the nomination certificate but that was not to be. Instead, the National Elections Board (**NEB**) of the party disqualified him on account of some alleged breaches of the party's code of conduct.

3. Musyoki denied those allegations and rushed to the Political Parties Disputes Tribunal (PPDT) on 10<sup>th</sup> May, 2017 but found he was time- barred. He filed a Constitutional Petition before the High Court (211/2017) and **Mativo, J.** made an order for the PPDT to hear him. He was heard on 19<sup>th</sup> May, 2017 in the absence of Maundu and the PPDT allowed his plea thus nullifying Maundu's nomination and

declaring Musyoki the winner. Both of them filed reviews of the orders made by the PPDT which were dismissed, but Maundu went to the High Court (Election Appeal No. 85/2017) and succeeded in obtaining an order from **Wakiaga, J.** on 31<sup>st</sup> May, 2017 setting aside the decision of the PPDT and ordering it to hear the matter *de novo* on merits.

4. The PPDT did so on 2<sup>nd</sup> June, 2017 and decided to send the matter back to the party's NEB to hear and determine the dispute on merits within 48 hours and forward the name of the nominee found to have been validly nominated to the Independent Electoral and Boundaries Commission (IEBC) within 72 hours. NEB complied and heard both parties and decided to award the certificate of nomination to Maundu on 2<sup>nd</sup> June, 2017.

5. Two days later, on 4<sup>th</sup> June, Musyoki went back to the PPDT and appealed the decision (Complaint No. 317/2017). The PPDT heard the matter and on 12<sup>th</sup> June, 2017 allowed the appeal and reversed the NEB. It declared Musyoki the winner. The party was aggrieved by that decision and filed High Court Appeal No. 102/2017 on 13<sup>th</sup> June, 2017. According to the party, the PPDT had no jurisdiction to deal with the matter after the party had already made the nomination of its candidate, in the person of Maundu, and submitted his name to the IEBC; and that the jurisdiction to deal with any disputes thereafter was within the jurisdiction of the IEBC.

6. Wakiaga, J. heard the appeal and made a decision on 16<sup>th</sup> June, 2017 holding that the PPDT had jurisdiction to hear the matter as it had arisen out of political party primaries and there was no evidence before the PPDT or the High Court that the nomination of Maundu had been forwarded to the IEBC.

7. The court made the following final order:

***“As an appellant court on both law and fact I have reviewed and reassessed the material placed before the Tribunal and find no fault with its determination herein on merit based on material placed before it and therefore find no merit on the appeal herein which is hereby dismissed with no order as to cost. So as to put this matter to a rest and as stated herein should it turn out that the names of the 2<sup>nd</sup> Respondent had been forwarded to IEBC which I am unable to determine based on the material placed before me, then the decision of the Tribunal herein affirmed shall be deemed to be of no effect.”***

8. On the one hand, it seems, the court dismissed the appeal but on the other, allowed it on a contingency. The second order aggrieved Musyoki who filed the appeal now before us on 29<sup>th</sup> June, 2017 seeking to affirm the dismissal of the appeal and to expunge the second order; while the first order aggrieved the party, which filed a cross appeal on 10<sup>th</sup> July, 2017 contending that there was evidence on record which was not properly evaluated but which confirmed that the party had submitted the nomination of Maundu to IEBC by the time the complaint before the PPDT was filed, thus removing the jurisdiction of the PPDT from the matter. It sought an order confirming that fact and consequently dismissing the main appeal and allowing the cross appeal. The issue of law that falls before us for hearing and determination is, whether, on the basis of the facts on record, the PPDT had any jurisdiction to hear the complaint placed before it as at the 12<sup>th</sup> June, 2017 when it made the decision upheld by the High Court. The corollary is whether the jurisdiction lay with the IEBC at the time.

9. Musyoki was represented before us by learned counsel Mr. Nyamu appearing with Mr. Wandati, both instructed by M/s Wandati & Company Advocates. They filed written submissions which they orally highlighted. They also filed a list of authorities in support of the submissions. The party was represented before us by learned counsel Ms. Sore assisted by Ms. Githii, both instructed by M/s GSLaw LLP. They also filed written submissions which they highlighted and cited various authorities. Lastly, Maundu was represented by learned counsel Mr. Wetaba instructed by M/s C. M. Ongoto & Company Advocates, who similarly filed written submissions which were orally highlighted.

10. We have carefully considered the entire record of appeal, the submissions of counsel and the

authorities cited before us and have formed the view that the main appeal is for dismissal and the cross appeal is for allowing. The consequence is that the orders of the High Court made on 16<sup>th</sup> June, 2017 are set aside and substituted with an order setting aside the decision of the Political Parties Disputes Tribunal made on 12<sup>th</sup> June, 2017. For the avoidance of doubt, the orders made by the National Elections Board of the Wiper Democratic Movement-Kenya on 4<sup>th</sup> June, 2017 and the nomination certificate issued to **Jacob Kilonzi Maundu** shall remain valid. Each party shall bear its own costs of the litigation.

11. The full reasoning on the findings and orders made in this appeal shall be delivered on 29<sup>th</sup> September, 2017.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of July, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**