



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: NAMBUYE, KOOME & MUSINGA, JJA)
CIVIL APPEAL NO.257 OF 2017

BETWEEN

FRIDAH MUENDIAPPELLANT

AND

MOFFAT MAITHA MUIA.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC).....3RD RESPONDENT

(Appeals from the Judgment and Orders of the High Court of Kenya at Nairobi (J.N. Onyiego, J.) dated 17th July, 2017 in Election Petition Appeal No. 128 of 2017)

REASONS OF THE JUDGMENT OF THE COURT

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

This appeal was filed before this Court on the 27th July, 2017 and was exhaustively argued before us on the 3rd day of August 2017. **Mr. Dome**, learned counsel held brief for the firm of **Sang and Lagat** for the appellant, learned counsel **Mr. Laichena Mugambi**, instructed by the firm of **Laichena Mugambi advocates** appeared for the 1st respondent, **Moffat Maitha Muia**, and also held brief for **Mwangale Mboce**, instructed by the firm of **Mwangale Mboce advocates** for the 2nd respondent, **Jubilee Party**; and learned counsel **Mr. Obondi Victor** represented the 3rd respondent, the **Independent Electoral and Boundaries Commission (IEBC)**. Having considered the record of appeal; the oral and written submissions by counsel and buttressed by case law as cited by the respective counsel, we dismissed the appeal and ordered each party to bear their own costs, both on appeal and the proceedings in the High Court. We reserved reasons for the said judgment which we now proceed to give.

The background to the appeal is that, the appellant, **Fridah Muendi (Fridah)**, and the 1st Respondent, **Moffat Maitha Muia (Moffat)**, among others, participated in the nomination exercise for the position of the Jubilee party nominee candidate for Member of the County Assembly (MCA), Matungulu West

Ward, Matungulu Constituency, Machakos County, during the 2nd Respondent's primary nominations exercise held on the 27th day of April, 2017 for the general election then scheduled to be held on the 8th day of August, 2017. At the end of the exercise, **Moffat** was declared the winner; and was issued with the necessary nomination certificates.

Fridah successfully challenged **Moffat's** victory before the Jubilee Party Appeals Tribunal, mainly on the ground that **Moffat** was not a bonafide member of the Jubilee party as at the time he participated in the Jubilee Party primary nomination exercise on the 27th day of April, 2017. **Fridah's** victory was short lived as it was overturned in favour of **Moffat**, by the Jubilee National Elections Board. **Fridah** then moved to the Political parties Dispute Tribunal (PPDT) challenging the reversal of her victory. In a judgment delivered by the PPDT on the 2nd day of June, 2017, the PPDT ruled in her favour and revoked the nomination certificate issued to **Moffat** by the Jubilee Party and directed IEBC to give effect to that judgment.

Moffat was aggrieved. He moved to the High Court and filed Nairobi Election Petition Number 95/2017 which was resisted by **Fridah**, resulting in the judgment of **J.K. Sergon, J.** dated the 15th day of June, 2017, vide which the learned Judge set aside the orders granted by the PPDT on the 2nd day of June, 2017 in favour of **Fridah**, restored the proceedings before the PPDT and directed that the dispute be heard a fresh inter-partes. In a judgment dated the 29th day of June, 2017, the PPDT once again ruled in favour of **Fridah**. Undeterred, **Moffat**, moved to the High Court and filed High Court Election Petition No. 128/2017 which was resisted by **Fridah**, resulting in the impugned judgment by **J.N. Onyiego, J** dated the 17th day of July, 2017.

The findings of the learned Judge that **Fridah** invited us to overturn were that according to the record before him, **Moffat** resigned from the NARC party on the 13th March, 2017 and duly filed that resignation notice with the Registrar of Political Parties, who date stamped it on the same date; that the same Registrar of Political Parties had confirmed vide her letter dated the 19th June, 2017 that **Moffat** was a member of the Jubilee party, but without stating when he became such a member of the jubilee party; that there was also confirmation from the NARC party vide their letter dated June, 2017 that **Moffat** had resigned from their party effective the 13th March, 2017.

Relying on the case of **Wavinya Ndeti exparte Republic versus IEBC and 4 Others, JR Misc. App. No. 301/2017**, the learned Judge concluded that the effective date of resignation of a member from a party is the date of receipt of the resignation notice by that party or some other authorized body on its behalf and not when the Registrar of the Political Parties acknowledges receipt and updates the register. In the learned Judge's view, all the evidence outlined above had not been controverted. He also found that **Fridah's** successes before the earlier forums were as a result of exparte proceedings in the course of which **Moffat's** side of the story and supportive documents were not scrutinized, occasioned by lack of service upon him by **Fridah** of complaints filed against him in those other forums; that the Jubilee National Elections Board overruled the Jubilee National Elections Appeals Tribunal (NEAT's) decision in favour of **Moffat** after being satisfied that there was sufficient evidence to demonstrate that **Moffat** had indeed resigned from the NARC party and joined the Jubilee Party; that the Jubilee party's support for **Moffat's** appeal was sufficient demonstration that **Moffat** was indeed their member as at the time the Jubilee party primary nomination exercise was conducted on the 27th day of April, 2017. On account of the above reasoning, the learned Judge overturned the decision of the PPDT and declared **Moffat** the bonafide winner of the Jubilee party joint nomination primaries exercise for the position of MCA, Matungulu West Ward, Matungulu Constituency, Machakos County, and directed IEBC to make the necessary amendments in their records to accord with his judgment.

Fridah was unrelenting. She moved to this Court and filed the appeal under review, citing nine grounds of appeal. In summary, **Fridah's** complaints were that the learned Judge erred when: he failed to appreciate that resignation from a political party is not synonymous with registering as a member of another political party; he failed to consider the submissions of both parties and thereby occasioned a miscarriage of justice; he rendered a retrogressive, narrow, simplistic, opportunistic and oppressive

judgment. Further, that the learned Judge's judgment violates the principle, spirit and philosophy in **Article 20 (3)** of the Constitution; misapprehended and/or misinterpreted the applicable law on resignation from one political party to another and registration to the other political party; that the judgment sets a dangerous precedent for political party hoppers who will now be able to resign from one political party and be allowed to run for one elective position in another political party even before the registration of their names in the latter party's register; and, lastly that the judgment in all respects is erroneous and not justiciable.

In his oral submissions before us, learned counsel **Mr. Dome** submitted that **Article 82 (1) (b)** of the Constitution of Kenya, 2010 mandates parliament to legislate on the law governing the nomination of candidates for elective positions in any elections; that it was in the exercise of the said mandate that parliament enacted the Political Parties Act, Chapter 7B Laws of Kenya; that this is the Act that makes provision for membership to political parties and resignation from membership of one political party to another; that the same Act donates power to political parties to make regulations and Rules for internal self governance, among them those governing the Jubilee party primary nomination exercise.

Mr. Dome continued to urge that it is not in dispute that both **Fridah** and **Moffat** participated in the Jubilee Party Primary nomination exercise conducted on the 27th day of April; that although **Moffat** was declared the winner of the said nomination exercise, his victory was legitimately challenged by **Fridah** as **Moffat** was not a member of the Jubilee party as at that point in time; that in reversing **Fridah's** victory handed her by PPDt, the learned Judge did not only misconstrue the applicable law and the Rules made thereunder, but also misapprehended the facts presented to him as to when **Moffat's** resignation from his former NARC Party to Jubilee party took effect. In **Mr. Dome's** view, **Moffat** tendered documents to show that he resigned from his former party effective 13th March, 2017, but there was no evidence as to when he applied and joined the Jubilee party, and when he was accepted and registered as a Jubilee party member by the Registrar of political parties.

Learned counsel **Mr. Laichena Mugambi** for **Moffat** and holding brief for **Mwangale Mboce** for the Jubilee party, opposed the appeal on the grounds that it was not disputed that both **Fridah** and **Moffat** participated in the Jubilee party primary nomination exercise held on the 27th day of April, 2017; that it is **Moffat** who emerged the winner with 1,130 votes as against 241 votes garnered by **Fridah**; that the only reason as to why **Fridah** raised objections against **Moffat's** overwhelming victory was because he was allegedly not a member of the Jubilee party as at the time the nomination exercise was carried out; that the learned Judge cannot be faulted both in his reasoning and conclusions arrived at as he acted on the basis of the uncontroverted content of the record before him, which demonstrated clearly that **Moffat** was a member of the Jubilee party as at the time the nomination exercise was carried out on the 27th day of April, 2017.

On behalf of **Mwangale Mboce** for the Jubilee Party, **Mr. Laichena** reiterated his above submissions that both **Fridah** and **Moffat** were Jubilee party members, and that is why both were cleared by the Jubilee party to vie for the position of MCA Matungulu West Ward, Matungulu Constituency, Machakos County as Jubilee party members. This is also the reason as to why the Jubilee party has been consistent in supporting **Moffat's** victory.

To buttress those submissions, **Mr. Laichena** cited two persuasive authorities, namely, **Caroli Omondi versus Registrar of Political Parties**

- **Another [2017] eKLR** and **Hon. William Omondi Victor versus IEBC and Others [2014] eKLR**, both on the construction of **section 14(3)** of the Political Parties Act (supra).

Learned counsel **Mr. Obondi Victor** for IEBC, submitted that IEBC had no stake in the dispute between **Fridah** and **Moffat**; that IEBC was in court in response to the service of the record of appeal on them, and also to inform the court that IEBC had fully complied with the judgment of the High Court.

In reply to submissions by both **Mr. Laichena** and **Mr. Obondi**, **Mr. Dome** reiterated that the impugned judgment was contradictory; that the learned judge misapprehended the law by confusing resignation

from a party to be synonymous with membership to a new party; that it was necessary for **Moffat** to demonstrate that he was a member of the jubilee party as at the time the party primary nomination exercise was carried out.

This is a first appeal. Our mandate is as was set out by the predecessor of the Court in the case of **Dinkerral Ram Krishan Pandya Versus Republic [1957] EA 336 pg. 337**, when it observed, *inter alia*, that where an appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case by reconsidering the material placed before the trial court, carefully weighing and considering the judgment resulting there from and without shirking away from overruling it if in full consideration of the record before it, the Court is minded to come to the conclusion that the judgment is plainly wrong.

We have revisited the record on our own and considered it in the light of the rival submissions set out above. In our view, only one issue fell for our determination, namely:-

1. Whether the learned judge fell into error when he ruled that Moffat was the bonafide Jubilee party nominee for the position of MCA Matungulu West Ward, Matungulu Constituency, Machakos County.

From the record, it is not contested that **Moffat** had been a member of the NARC party; that he resigned from the membership of the NARC party effective the 13th March, 2017 and joined the Jubilee party. It is also not in dispute that the said resignation was long before the primary nomination exercise was held on the 27th day of April, 2017. The Jubilee party Nomination Rules exhibited on the record lay out an elaborate criteria on the mechanism the party machinery employs when identifying who is and who is not a bonafide party member. The learned Judge observed that when **Moffat** learnt that his victory had been overturned by the Jubilee NEAT in favour of **Fridah**, he presented his papers to the Jubilee National Elections Board which reversed the decision of the Jubilee NEAT in his favour; that **Fridah** successfully challenged that decision in ex parte proceedings before the PPDT which did not have the benefit of hearing **Moffat's** story; that the party itself was a party to the appeal before him and was in support of **Moffat's** position; that he had no reason to disbelieve the Jubilee party when it asserted that **Moffat** was its member as at the 27th April, 2017.

The correct position in law is that when **Fridah** challenged **Moffat's** membership to the Jubilee party as at the 27th April, 2017, she assumed the burden of proof in terms of **section 107** of the Evidence Act to prove that fact. It provides:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

As correctly observed by the learned Judge, there was no evidence before him as to when **Moffat** exactly applied for and was accepted for membership to the Jubilee party. He relied on his construction of the provisions of **section 14(1) (2)&(3)** of the Political Parties Act (supra) and the decision in **Wavinya Ndeti - Republic versus IEBC (supra)**, that resignation takes effect the date the notice of resignation is served either on the party or some other authorized agent on behalf of the party and then served on the Registrar of Political Parties within three days. The learned Judge also rightly took into consideration the very fact that the Jubilee party itself had affirmed **Moffat's** contention that he was a member of the Jubilee party as at the time the nomination exercise was carried out was the correct position as he had been processed procedurally through the party primary nomination mechanism machinery and cleared to contest for the said position as a bonafide member of the party.

We have revisited **section 14(1) (2) & 3** of the Political Parties Act (supra) construed it on our own, and we agree with the impression made of it by the learned Judge as being correct, that resignation takes effect upon receipt of the notice by the party or some other authorized agent on its behalf as specified in

the Act, and receipt of the same notice by the Registrar of Political Parties. **Section 14 (3)** of the Act requires that such a notice be filed with the Registrar of Political Parties within 3 days, of which **Moffat** complied with, as he filled his on the same date of his resignation from his former party.

The above being the position, the learned Judge cannot be faulted in the conclusions reached by him that on the record as it stood before him, and as it now stands before us, **Fridah** had not discharged the burden of proof that lay on to her in terms of **section 108 & 109** of the Evidence Act. These provide:

“108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Reference was also made of alleged violation of Article 20 (3) of the Kenya Constitution, 2010. It provides:-

“ (3) In applying a provision of the Bill of Rights, a court shall-

(a) Develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

We have considered this provision in the light of the learned Judge’s construction of **section 14(1) (2) & (3)** of the Political Parties Act (supra). We reiterate our earlier stand that the learned Judge properly interpreted and applied that provision to the record before him and that there was no misapprehension of the law or the facts.

In light of the above assessment, we found nothing on the record before us to suggest that **Moffat** was not a bonafide member of the Jubilee party as at the 27th day of April, 2017, when he participated in the Jubilee party primary nomination exercise and won with a majority. We therefore found the learned Judge rightly upheld the victory of **Moffat**. We had no reason to interfere. These then are the reasons as to why we dismissed the appeal.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR