



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 203 OF 2017

BETWEEN

JOSEPH IBRAHIM MUSYOKI ..... APPELLANT

AND

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

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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**REASONS FOR THE JUDGMENT OF THE COURT**

**(RULE 32(5), COURT OF APPEAL RULES)**

1. On 21<sup>st</sup> July 2017, we dismissed the appellant's appeal and allowed the respondents cross appeal with the consequence that the orders of the High Court made on 16<sup>th</sup> June 2017 were set aside and substituted with an order setting aside the decision of the Political Parties Disputes Tribunal (**PPDT**). We clarified that the decision of the Internal Dispute Resolution Mechanism (**IDRM**) of Wiper Democratic Movement-Kenya made on 4<sup>th</sup> June 2017 and the nomination certificate issued to the 2<sup>nd</sup> respondent, Jacob Kilonzi Maundu, (**Maundu**) shall remain valid. Each party was to bear its own costs of the litigation. We then reserved the reasons for that decision which we now give.

2. We may briefly rehash the facts:

The appellant (**Musyoki**) and **Maundu** are members of the 1<sup>st</sup> respondent (**Wiper**). 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 Wiper 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 Wiper disqualified him on account of alleged breaches of the Party's code of conduct.

3. Musyoki rushed to the PPDT on 10<sup>th</sup> May, 2017 but found he was time- barred. He filed a Constitutional Petition before the High Court (**No. 211/2017**) and **Mativo, J.** made an order that the PPDT should hear him. He filed **Complaint No. 261/2017** on 16<sup>th</sup> May 2017 and was heard on 19<sup>th</sup> May, 2017 in the absence of Maundu. The PPDT allowed his plea, thus nullifying Maundu's nomination and declaring Musyoki the winner. Both of them sought 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 Wiper'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 4<sup>th</sup> June, 2017. The parties were notified accordingly on 5<sup>th</sup> June 2017.

5. Two days later, on 7<sup>th</sup> June 2017, Musyoki went back to the PPDT and filed another **Complaint No. 317/2017** seeking reversal of the NEB decision. Wiper and Maundu objected to the jurisdiction of the PPDT but it heard the matter and on 12<sup>th</sup> June, 2017 allowed the appeal and reversed the NEB. It declared Musyoki the winner and ordered Wiper to submit his name to IEBC as its nominee. Wiper was aggrieved by that decision and filed **High Court Appeal No. 102/2017** on 13<sup>th</sup> June, 2017. According to Wiper, 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. 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 appellate 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.”*** [Emphasis added].

8. That order was obviously ambivalent and it is no wonder that the parties on both sides sought to challenge it. 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 main appeal now before us on 29<sup>th</sup> June, 2017. The memorandum of appeal raises five grounds but they basically seek to affirm the order dismissing the appeal and to expunge the order dismissing it on the erroneous basis that the name of Maundu had been forwarded to the IEBC.

9. On the other hand, Wiper filed a cross appeal on 10<sup>th</sup> July, 2017 raising two grounds 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, heard and determined, thus ousting 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.

10. 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 were orally highlighted by counsel. They also filed a list of authorities in support of the submissions. In both written

submissions and oral highlights, Mr. Nyamu faulted the learned Judge for implicitly delegating to IEBC its role of verifying whether there was confirmation from the record before him that Maundu's name had been forwarded to IEBC. In so doing, submitted counsel, the court failed to discharge its judicial function of determining with finality the matter before it and thus becoming *functus officio*. The concept of partial judgment or interim judgment after hearing the parties is unknown to the Kenyan law, he asserted. The case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR** was relied on and cited *in extenso* to illustrate the scope of delegation of judicial authority.

11. Counsel further submitted that the PPDT had the jurisdiction under **Section 40(1)(fa)** of the Political Parties Act (**PPA**) to hear and determine "*disputes arising from party primaries*", while the IEBC under **section 74(1)** of the **Elections Act** settles electoral disputes including "*disputes relating to or arising from nominations*". According to counsel, the two provisions remove any concurrent jurisdiction between the two institutions and it was clear therefore that the dispute herein which arose from the decision of Wiper's NEB was about party primaries and therefore the body seized of jurisdiction was the PPDT. There was no evidence at all, he asserted, that Maundu's name had been forwarded to IEBC by the time the matter went to the PPDT and even if it was, it could not oust the jurisdiction of the PPDT to hear and determine the matter. Several cases decided by the High Court were relied on to underscore the jurisdiction of the PPDT including: **Thomas Ludindi Mwadeghu v John Mruttu & another [2017] eKLR**; **Eric Kyalo Mutua v Wiper Democratic Movement, Kenya & another [2017] eKLR**; and **Wiper Democratic Movement of Kenya v Bernard Muia Tom Kiala & another [2017] eKLR**, among others.

12. Finally on the merits, Mr. Nyamu submitted that the matter was correctly decided by both the PPDT and the High Court which found no malpractices having been committed by Musyoki who had obtained the majority votes at the nomination. The dismissal order made by the High Court should therefore be allowed to stand as the only substantive order of the Court.

13. Responding to those submissions and urging the cross appeal for Wiper, learned counsel **Ms. Githii**, and **Mr. Sore**, both instructed by M/s GS Law LLP, adopted their written submissions and made oral highlights. Ms Githii was in no doubt, since it was admitted in the pleadings and there was uncontroverted affidavit evidence on record, that the name of Maundu had been submitted to the IEBC by the time the PPDT was seized of the matter. As such, the dispute had moved from party primaries to nomination stage which only the IEBC had the exclusive jurisdiction to handle. According to her, that legal position was appreciated by both the PPDT and the High Court. Citing **Section 13** of the Act which provides for the time limit of 45 days to submit the names of nominees and bars any revocation of a submitted name, counsel submitted that it was crucial to abide by the statutory timelines otherwise the political party would have been locked out of the elections. She cited **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR** to underscore the rigidity of electoral timelines. Finally counsel observed that Musyoki had applied for temporary orders before the PPDT to revoke the clearance by IEBC and restrain it from printing ballots containing Maundu's name, which are all post nomination processes. The complaint had been overtaken by events, and Musyoki knew it, she concluded.

14. Those submissions were supported by learned counsel for Maundu, **Mr. Wetaba**, instructed by M/s C. M. Ongoto & Company Advocates, who similarly filed written submissions. Counsel observed that the deadline for submission of the nominee of Wiper was set by the PPDT when it remitted the dispute back to Wiper's IDRM for hearing and submission of the nominee to IEBC within 72 hours- that is, by the 5th of June 2017. By the time **complaint No. 317/2017** was filed on 7th June 2017, the order had been complied with and confirmation made to the PPDT. Counsel emphasized that since the appellant was fully aware of these facts and pleaded them, he cannot be allowed to resile from those pleadings. He cited several cases to support the proposition that parties are bound by their pleadings, among them this Court's decision in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**.

10. Finally Mr. Wetaba submitted that disputes emanating from political party nominations are dealt with by IEBC by dint of **Regulation 99(2)** of the **Elections (General) Regulations 2012**, and the PPDT had no jurisdiction. In his view, the High Court fell in error but not in finding that the question of whether Maundu's name had been forwarded to IEBC was a non- issue having been conceded by Musyoki.

15. In a short rejoinder, Mr. Nyamu submitted that the deadlines set in the Elections Act bind the IEBC and not the courts which can reverse entries at any time to protect the constitutional rights of any party.

16. We have carefully considered the record of appeal and the rival submissions of counsel. As this is a second appeal, the mandate of the Court is to decide on matters of law only as set out in **Section 41(2)** of the **PPA** which provides:

***“(2) An appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.”***

17. As we see it, the issue of law that falls for our determination is jurisdictional. It is to decide 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.

18. There is no discernible dispute about the different roles the two institutions - PPDT and IEBC - play in the resolution of electoral disputes. The jurisdiction of the PPDT is spelt out in **Section 40** of the PPA which provides:

***“40. Jurisdiction of Tribunal***

***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 decision of the Registrar under this Act; (fa) disputes arising out of party primaries.***

***2. 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.”***

***“Party primary”*** referred to in **(fa)** is defined in the **Elections (General) Regulations, 2012** as ***“the process through which a political party elects or selects a candidate for an election but does not include a party list.”***

19. On the other hand, the jurisdiction of IEBC in settlement of electoral disputes is spelt out under **Section 74(1)** of the Elections Act and is derived from Article 88(4)(e) of the Constitution. It ***“includes disputes relating to or arising from nominations.”*** Under the Act, **“Nomination”** means ***“the submission to the Commission of the name of a candidate in accordance with the Constitution and this Act.”***

20. It is significant to note that **Section 40 (fa)** was an amendment made by Act No. 21 of 2016 on 21st July 2016 with the object of addressing the challenge of concurrent jurisdiction with other bodies handling electoral disputes. The two institutions therefore have their roles clearly and distinctively cut out. Indeed, this was acknowledged by the PPDT and the High Court. The submission had been made before the PPDT by Wiper that the matter had been overtaken by events due to submission of the name of Maundu to the IEBC as its nominee. But the PPDT rejected that submission on the basis that there was no evidence to support the assertion that the process of nomination had come to an end. We may quote the

PPDT:-

***“on the second issue of jurisdiction, the respondents have failed to adduce any evidence to demonstrate that the name of the 2<sup>nd</sup> respondent has been submitted to IEBC or that the 2<sup>nd</sup> respondent has been cleared or gazetted by IEBC as the 1<sup>st</sup> respondent’s nominee for the position in issue. There is therefore no evidence before the Tribunal to conclusively determine that the process of nomination in respect of the Ward in issue has come to an end.”***

21. The PPDT understood "nomination" to mean not only submission of the name to IEBC but also clearance or gazettment by IEBC, which was a clear misdirection arising from the definition of "nomination" (supra). Be that as it may, the logic is that if there was evidence of those actions, the PPDT would not have had the jurisdiction to deal with the matter.

22. On the other hand, the High Court clearly stated in its findings that there was no dispute that the PPDT would not have jurisdiction. We may quote the Court:

***“It was conceded that after the nomination has been presented to IEBC then the tribunal does not have jurisdiction but in this case, there was nothing presented before the Tribunal to confirm that the names had been presented.”***

The Court then reinforced the jurisdictional issue in its final order now the subject matter of this appeal.

23. Had the process in this matter transited from 'party primary' to 'nomination' before the PPDT dealt with it? That is the question. The Tribunal and the High Court found no evidence to support the contention but Wiper and Maundu say there was, and we have reason to believe them.

24. First, the pleadings. The basic rule, for the sake of certainty and finality is that:

***"..each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves..... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to." See Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3***

25. In his Complaint dated 6th June 2017 and filed with the PPDT the following day, Musyoki was not in doubt that Wiper had already issued the nomination certificate to Maundu. What he was not sure about was whether it had been submitted to the IEBC. He stated as follows:-

***“The complainant is extremely apprehensive that unless the Nominations Certificate already issued to the 2<sup>nd</sup> respondent and probably forwarded to IEBC is not immediately cancelled, then IEBC is likely to gazette the 2<sup>nd</sup> respondent as the 1<sup>st</sup> respondent’s candidate for the position of Member of County***

***Assembly, Nuu Ward, Mwingi Central Constituency, Kitui County and print ballot papers with his name and picture in it in readiness for the forthcoming general elections.”***

He repeated those averments in an affidavit sworn on the same day to support an application for interim relief which was apparently not given. In the main prayers of his complaint, he sought permanent injunctions to "revoke and recall" the nomination certificate; prohibit IEBC from 'clearing' Maundu or 'processing the ballot papers' in his name. The PPDT did not grant those prayers in the end but ordered Wiper to submit the name of Musyoki to IEBC as its nominee.

26. Secondly, the evidence. There was no oral evidence tendered either before the PPDT or the High Court. The matter was determined on affidavit and documentary evidence. Among the affidavits

submitted to the PPDT by Wiper was one sworn on 9th June 2017 by the Executive Director of Wiper, **Dr. Jared Maaka Siso** stating, *inter alia*, as follows:-

***“THAT I am advised by my advocates on record, which advice I believe to be true, that since the 1<sup>st</sup> respondent have already forwarded the name of the 2<sup>nd</sup> respondent to the IEBC, section 13(2) of the Elections Act, with regard to the nomination of candidates by a political party, applies to the effect that a party is barred from changing the candidate it has nominated after the nomination papers of that person has been received by the IEBC and any substitution of such a candidate should be before the date of presentation of nomination papers to the IEBC.”***

***(Annexed hereto and marked JMS-3 is an excerpt of section 13(2) of the Elections Act).***

Maundu also swore an affidavit on 8th June 2017 affirming that he had been *"finally awarded the nomination certificate after the decision of NEB made on 5<sup>th</sup> June 2017."*

27. Those affidavits were in place before the PPDT was seized of the matter. No other affidavit was filed to controvert those sworn assertions. Surprisingly, neither the PPDT nor the High Court made any reference to the affidavits before declaring that there was no evidence of submission of the nominee's name to IEBC at all. In our view, that was a misdirection which rendered the finding of fact an error of law since it was based on no evidence or a misapprehension of it. As earlier observed, the PPDT itself imported an erroneous definition or understanding of what amounts to "nomination".

28. At any rate, Wiper was Complaint **No. 261/2017** simply complying with the Order of the PPDT in made on 2nd June 2017 directing as follows:

***“The 1<sup>st</sup> respondent be and is hereby directed to hear both parties and review its decision dated 8<sup>th</sup> May, 2017 within the next 48 hours. Upon compliance with this order, the 1<sup>st</sup> respondent be and is hereby directed further to forthwith submit to the IEBC the name of its candidate for Nuu Ward, Mwingi Central Constituency within 72 hours of the pronouncement of this judgment.”***

The 72 hours were expiring on 5th June 2017 and it is therefore more probable than not, that the assertion made by the Executive Director of Wiper was true. As stated earlier, it was not controverted.

29. The sum total of the pleadings and affidavit evidence lead us to the inescapable conclusion that as at the 6th June 2017, and certainly before the PPDT determined the complaint laid before it by Musyoki , the name of Maundu had been submitted to IEBC as the nominee of Wiper. It follows that the process had transited from party primary to nomination as by law defined and that the jurisdiction to challenge the nomination lay with the IEBC. It is for those reasons that we dismissed the main appeal and allowed the cross appeal in our judgment dated 21<sup>st</sup> July 2017.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of September, 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**