



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO 60 OF 2017

BETWEEN

BENJAMIN GATHIRU MWANGI.....APPELLANT

VERSUS

HON. JOHN NDIRANGU KARIUKI 1ST RESPONDENT

JUBILEE PARTY 2ND RESPONDENT

(Being an appeal against the Judgment and Decree of the Political Parties Disputes Tribunal dated 15th May, 2017 in complaint NO. 196 of 2017)

BETWEEN

HON. JOHN NDIRANGU KARIUKI COMPLAINANT

VERSUS

JUBILEE PARTY NATIONAL APPEAL TRIBUNAL..... 1ST RESPONDENT

BENJAMIN GATHIRU MWANGI..... 2ND RESPONDENT

JUBILEE PARTY 3RD RESPONDENT

JUDGMENT

1. The Appellant **Benjamin Gathiru Mwangi** and the 1st Respondent **Hon. John Ndirangu Kariuki** are both members of the 2nd Respondent **Jubilee** party who took part in the party primaries on 26/4/2017 wherein the appellant was allegedly declared the winner with 6325 votes against the 1st Respondent 5405 votes and was issued with party nomination certificate.

2. The second Respondent being dissatisfied with the said nominations filed an Appeal with the Jubilee Appeal Tribunal No. 118 of 2017 dated 27/4/2017 in which he sought the following prayers:

a) He should be declared the winner and issued with certificate.

b) A recount should be done to ascertain his compliant.

c) Nullification of the results and if possible a whole repeat.

3. The Appellant filed a reply to the said complaint in which he stated that the compliant lacked merit. There is a dispute as to whether the said compliant was determined by the Jubilee Appeal Tribunal. On one hand the Respondent state that it was not hence his filing of the dispute before the Tribunal while the Appellant stated that the same was issued and un dated copy thereof attached to the pleadings.

4. On 9/5/2017 the 1st Respondent filed a complaint No 196/2017 at the political Parties Dispute Tribunal together with a notice of motion under section 40(I) and (2) of Political Parties Act in which he stated that the exercise was a real sham and that the 2nd Respondent did not act upon his complaint and neither was there any communication regarding the same.

5. In his statement of claim, he stated that whereas the 2nd Respondent was at Law supposed to deliver its verdict within stipulated time, she had refused, ignored and or declined to give any directions on the same. He therefore sought the following orders:

a) Nullifying the nomination certificate issued to the Appellant to via for Embakasi Central Seat on Jubilee Party ticket.

b) A repeat of the nomination exercise for the entire Embakasi.

c) Alternative, a declaration that the Appellant was duly nominated candidate for Jubilee ticket.

d) Cost

6. The tribunal certified the application urgent and set it down for hearing on 15/05/2017 at 4.30 pm where records show that Mr. Nyaberi appeared for the 1st Respondent. The matter as per the records from the Tribunal file was heard on 12/5/2017 exparte where Mr. Nyaberi stated that he had complied with the order issued on 9/5/2017 and adopted his pleadings thereon and in its judgment found that the 2nd Respondent was served on 10th May 2017 and that non appearance of the 2nd Respondent was an Act in contravention of the Kenya Constitution and its own constitutes and values and found that the irregularities alleged by the 1st Respondent were substantial enough to enable the tribunal upset the nomination and issue the following orders:

i. Statement of claim dated 9/5/2017 is allowed.

ii. The nomination certificate issued to the Appellant by the 2nd Respondent is nullified.

iii. The 2nd Respondent is directed to determine the party nominee in a manner compatible with the party constitution, Election and Nomination Rules

7. Being aggrieved by the said decision the Appellant herein filed an application for review of the said judgment and decree on 18/5/2017 on the basis that the same was not served with the hearing notice and only came to know the said decision on 17/5/2017. This Application has since been withdrawn by the Appellant.

APPEAL

8. On 21/5/2017 the Appellant filed this appeal and raised the following 14 grounds of Appeal:

1. The Judgment and Decree dated 15th May 2017, are null and void *ab initio* for having been obtained by the first Respondent through fraud and willful misrepresentation in that:-

i) The first Respondent falsely represented to the Tribunal in his pleadings dated and filed on 9th May, 2017 that his complaint NO. 118 of 2017 had not been heard and determined when in fact the same was heard on 30th April, 2017.

ii) The 1st Respondent complaint proceeded as an undefended appeal on account of two fraudulent affidavits of service filed on 10th and 11th May, 2017 and falsely deposing that the Appellant had been served with the Appeal complaint filed in the Tribunal.

iii) Given that the first Respondent was aware of the Appellant was represented before the Jubilee party's National Appeal Tribunal by Ms. Okatch & Partners Advocates who he could have served the complaint, it is clear that he failed to do so in order to prosecute his appeal as an undefended complaint.

2. The Judgment and Decree dated 16th May 2017 were obtained through deliberate concealment and non- disclosure of material facts that:

i) In the pleading of his appeal complaint, the 1st Respondent refused and/or failed to annex the Replying Affidavit sworn by the Appellant on 30th April, 2017 in opposition to the complaint filed before Jubilee Party's National Appeal Tribunal.

ii) The First Respondent did not annex in the pleadings of his Appeal complaint the electoral results (constituency Tallying Sheet Form 4 (ii)) showing that the appellant garnered 6325 voted whilst he got 5405 votes during the Jubilee Party's Primaries held on 26th April 2017.

iii) The First Respondent did not annex in his pleadings the decision of the Jubilee Party's National Appeals Tribunal which had been declared on 2nd May, 2017.

3. Whereas in his statement of Claim dated and filed in the Tribunal on 9th May, 2017 the main relief sought by the First Respondent was an order for a repeat of the nomination exercise of Jubilee Party for the entire Embakasi Central Constituency on a date to be appointed by the Tribunal, in his submissions dated and filed on 10th May, 2017 the First Respondent Falsely contended that it was impractical to repeat the nominations exercise and fraudulently sought to be in the primaries held on 26th April, 2017.

4. The Tribunal erred in neglected or failing to notice that the First Respondent's filling of the submissions on 10th May, 2017 whilst the Affidavit of service was filed on 11th May, 2017 was Prima facie irregular and indicative of non-service of the Appeal complaint upon the Respondents in the matter before it.

5. The Tribunal had no jurisdiction to hear and determine the First Respondent's Appeal Complaint for want of the decision of the Jubilee Party's National Appeal Tribunal in Appeal No. 118 of 2017 which the 1st Respondent admitted having filed on 28th April, 2017.

6. Given that the First Respondent's Complaint that Jubilee Party's National Appeals Tribunal had failed to hear and determine his appeal in Appeal No 118 of 2017, the Tribunal erred in hearing and determining the First Respondent's case in the first instance of the first compelling the National Appeal's Tribunal of Jubilee Party to hear and determine the appeal aforementioned with a specific period.

7. The Tribunal erred in granting reliefs that had been sought by the First Respondent in his Appeal complaint.

8. In the light of evidence before the Tribunal that the Appellant was issued with a nomination certificate pursuant to party primaries, the reliefs it granted were wholly inappropriate and unfair to the Appellant and party membership in Embakasi Central Constituency.

9. There was no legal or factual basis for the Tribunal to accept the First Respondent's submission that a repeat of the nominations exercise was impractical notwithstanding that was the major relief sought in the Appeal Complaint.

10. The timelines prescribed by the Tribunal in its orders made on 9th May 2017 for the hearing of the Appeal complaint were unrealistic and unfair and could well have induced the First Respondent to file false Affidavits of Service claiming he had served the Appellant and the 2nd Respondent herein.

11. The Tribunal erred in its failure to notice that the First Respondent prosecuted his Appeal Complaint as an undefended complaint on the basis of two affidavits of service sworn on the same date before two different commissions of oath and filed separate on 10th May, 2017 and 11th May, 2017.

12. On the evidence and submissions before it, the Tribunal erred in applying a lower threshold in nullifying the results of the Jubilee Party primaries for the Embakasi Central Constituency held on 26th April, 2017.

13. The Decree dated 15th May, 2017 is contradictory and untenable on the following grounds.

i) By allowing the statement of Claimant dated 9th May, 2017 the Decree means, inter-alia, that Jubilee Party was being compelled to conduct a repeat nomination exercise for parliamentary seat of Embakasi Central.

ii) The nullification of the Appellants' Certificate of Nomination was neither pleaded nor sought by the First Respondent yet the PPDT made the said order.

iii) The directive to party in order 3 of the Decree to determine the Jubilee Party nominee of Embakasi Central Parliamentary Seat in a manner Contradict order 1 of the Decree.

14. The 2nd Respondent's National Elections Board is undertaking unlawful implementation of the Decree dated 15th May, 2017 despite the Appellant pointing out its contradictions and *prima facie* fraud and illegality.

9. The Appellant therefore sought the following orders:-

a) The Appeal be allowed.

b) The Judgment and Decree of the Tribunal dated 15/5/2017 be and is hereby set aside together with all consequential decisions and actions of the 2nd Respondents National Elections Board.

c) The proceedings and decision of the 2nd Respondent National Elections Board undertaken or made pursuant to the judgment and Decree of the Tribunal dated 15/5/2017 be quashed and set aside.

d) The certificate of Nomination issued to the 1st Respondent pursuant to the judgment and Decree of the Tribunal dated 15/5/2017 be nullified.

e) A declaration be issued to declare that the appellant was lawfully nominated as the candidate of Jubilee party.

f) Any other order

10. Directions were made in this matter by the Hon. Chief Justice on 21/5/2017 that the file be placed before me for hearing on 22/5/2017 9.00 am at which I issued the following Directions:-

1. The Respondent to file the response to the Appeal and to serve before 3.30 pm.

2. The Appeal is admitted for hearing on 23/5/2017.

3. The notice of motion to await the outcome of the Appeal.

4. Parties to file and serve their submission ready for hearing on 23/5/2017.

5. The Tribunal files to be placed before the court.

6. The 1st and 2nd Respondent to be served forthwith.

SUBMISSIONS

11. Parties complied with the said order and the Appeal proceeded for hearing by way of Submissions. On behalf of the Appellant Mr. Kibe submitted that he won the Jubilee nomination with 6325 votes against the 1st Respondent 5405 and being aggrieved the 1st Respondent filed a claim at the party Appeal Tribunal whose Ruling was delivered on 2/5/2017 upholding the Appellants win and the same issued with certificate of nomination dated 9th May 2017. It was therefore submitted that the 1st Respondent filed the Appeal compliant No. 196/2017 before PPDT on 9/5/2017 in a false claim that he had not received the verdict of the Tribunal.

12. It was submitted and conceded to by Mr. Nyabari that the 1st Respondent did not serve the Appellant with the hearing notice for 12/5/2017 and therefore the compliant proceeded as undefended. It was submitted that the Tribunal itself was not satisfied with the service and thereby ordered the 1st Respondent to serve again. It was further submitted that the appellant was represented by MS. Okatch & partner at the Jubilee Appeal Tribunal and should have been served and therefore the 1st Respondent deliberately Set out to defraud the PPDT because service of pleading upon the Appellant would have been fatal to its case.

13. It was submitted that parties are bound by their pleadings and so courts are enjoined to grant only the reliefs sought in the pleadings and that the order granted by the Tribunal in (III) of its judgment

directing the 2nd Respondent to determine the party nominee for Embakasi Central parliamentary seat on its ticket in a manner compatible with the party constitution, Election and nomination rules was not sought by the 1st Respondent and was granted pursuant to his submission that it was not practical for Jubilee party to hold repeat nomination if the said order was granted. The case of **Global Vehicles Kenya Ltd Vs Lenana Road Motors (2015) eKLR** was submitted in support.

14. It was therefore submitted that the PPDT refused to be bound by pleadings of the parties and pronounced itself on matters not made by the parties thereby plunging itself into the realm of speculation to the obvious prejudice of the Appellant and resultant violation of the applicable Law. That having allowed the statement of claim PPDT could not proceed to grant order 3 for which the case of **Faith Wainaina Gitau Vs Hon. Wanjiku Muhia & Another Nairobi High Court EPA No.25 OF 2017** was submitted in support.

15. It was further submitted that since the dispute between the Appellant and the 1st Respondent had been presented before the party Tribunal heard and determined on 2/5/2017 the 1st respondent could only invoke the Appellate jurisdiction of the PPDT under section 40(l)(a) and (b) of the political parties Act as opposed to the original jurisdiction under section 40(l)(fa). It was submitted that even if the claim was undefended the burden of proof was upon the 1st Respondent and having declined to order for repeat of nomination the only option for the PPDT was to consider whether it could declare the 1st Respondent the winner of which the PPDT was reluctant or unwilling to do so.

16. It was stated that the 1st Respondent set out on a deliberate and calculated scheme to overturn the verdict of the Jubilee party members in Embakasi central constituency and the party Tribunal and have himself declared the winner which scheme could not succeed had the appellant been served. It was submitted that a judgment procured through fraudulent conduct, material misrepresentation and concealment of material facts would not stand and ought to be set aside see **Republic Vs Principal Registrar Government Lands and 3 Others Exparte John Ngugi Gathumbi (2014) eKLR**

17. On behalf of the 2nd Respondent Mr. Njumo supported the Appeal and stated that the party only acted on the strengths of a Decree served upon it on 17/5/2017 and on the basis that the proceedings were proper and that is why they implemented order No.3 before NEB. It was submitted that the second Respondent Tribunal had considered the 1st Respondent claim and dismissed the same. It was submitted that the 2nd Respondent was an innocent party to the misrepresentation and actions taken.

18. Mr. Nyaberi submitted on behalf of the 1st Respondent that there was proper service on the Appellant and 2nd Respondent and that the Tribunal was satisfied with the said service. It was submitted that the 2nd Respondent had therefore come to court with unclear hands and that the Appellant had not disclosed to the court that it had filed an application for review of the challenged Judgment. It was submitted that the judgment of Jubilee Tribunal had not been rendered until this appeal was filed and that this was a case of parallel proceedings which offends order 25(l) (2)(1) of CPR. It was submitted that there was no fraud on the part of the appellant since the Judgment of PPDT is lawful and a certificate had been issued to the 1st Respondent. It was finally submitted that since the Appellant did not disclose the existence of application for review the court's jurisdiction on this matter is ousted.

ANALYSIS AND DETERMINATION

19. From the pleading herein, the proceeding before the PPDT the original file of which the court called for and the submissions by counsels, I am of the considered view that the following issues are for determination herein

- a) Was there any proper valid service of proceedings in PPDT upon the Appellant.
- b) Was there material concealment of fact by the 1st Respondent before the PPDT.
- c) What is the effect of the withdrawn application for Review upon the proceedings herein.
- d) Was the Judgment and Decree of PPDT properly issued

SERVICE

20. It is not in dispute as confirmed from the proceedings before PPDT that the matter was certified urgent and fixed for hearing on 10/5/2017 at 4.30 pm. There are two affidavit of service to that effect sworn by one **Erick Agumba** filed on 10th and 11th May 2017 respectively. It is clear that the matter did not proceed for hearing on 10/5/2017 but on 12/5/2017. There is no evidence to show that the Appellant and the 2nd Respondent were served with the hearing notice for 12/5/2017 and that the Tribunal proceeded ex parte without confirming service on the Appellant and the 2nd Respondent. Mr. Nyaberi conceded that in deed that was the position.

21. In the case of **MBAKI & OTHERS VS MACHARIA & ANOTHER** [2005] EA 206 at 207 it was stated

“The right to be heard is a valid Right. It would offend all notion of justice if the right of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

It is trite Law that an ex parte Judgment would be set aside where there has been no proper service and where there is a Defence that raises triable issues with the overriding issues being that of doing justice to the parties see **Patel Vs E.A Cargo Handling Services Ltd [1994] EA 75** Whereas the Appellant has disputed the fact that he was served on 10/5/2017 as stated in the two Affidavits of serve, Mr. Nyaberi has conceded rightly so that there was no service of hearing notice for 12/5/2017.

22. Ex parte or default Judgments are usually set aside so that parties can approach the judgment seat with the merit of their respective case and as was stated in **Kiptanui Vs Delphis Bank Ltd And Another HCC No 1864 Of 1991** unreported as follows:

“Once it is established that a Judgment on record is irregular it must be set aside as of right. There are no two ways about it. The same is not susceptible to any variation. Its only fate is vacation form the record. Such a Judgment is not set aside as a matter of discretion but as a matter of judicial duty in order to uphold the integrity of the Judicial process itself”

23. Whereas Mr. Nyaberi for the 1st Respondent has tried to explain the circumstances under which the Tribunal was operating, from the record it is apparent that the Tribunal found fault with the initial service and instead of the 1st Respondent making a fresh attempt to service the Appellant, the same only filed a fresh affidavit of service on 11th May 2017 and as submitted by Mr. Kibe the Appellant was at the Jubilee party Tribunal represented by Mr. Okatch who continued to represent the same even before me together with Mr. Kibe , no justifiable reason has been given by the 1st Respondent as to why no attempt was made to service him and would therefore agree with the submission of Mr. Kibe that there was a deliberate attempt not to service the appellant and thereby defeat the cause of justice.

24. I have perused the records of the proceedings before the Tribunal and it is clear that the Appellant was never served with the hearing notice for 12/5/2017 and there being no service at all upon the appellant the only justifiable cause is for the court to allow the Appeal herein and set aside the ex parte

Judgment of the Tribunal issued on 15/5/2017 and all subsequent orders issued therefore which I hereby do.

25. Having come to the conclusion to set aside the Judgment of the PPDT and in view of the order I am making herein, I would therefore leave the determination of the other issues to the outcome of the hearing of the Appeal on merit before PPDT save as to state that the Tribunal in their Judgment made orders that were not pleaded for by the appellant and fall into error by granting all the prayers and therefore the order was imprecise and incapable of Lawful implementation.

26. Whereas the Appellant has raised the substantial issues as regards the proceedings before the Tribunal and as stated herein. I am of the considered view that since the appeal was never heard on merit and since the right of parties to have their day in court must be upheld at all time, the most logical thing to be done which I hereby do having set aside the Judgment of the Tribunal and the subsequent orders thereon is to refer back the Tribunal file for hearing on merit before other members of the Tribunal rather than Kyalo Mbobu, James Atiemi and Hassan Abdi so that the Appellant can have his day before the Tribunal.

27. In the final analysis I make the following orders:

a) The appeal by the Appellant herein is allowed and the Judgment of the PPDT dated 15/5/2017 and subsequent orders hereto are set aside and vacated.

b) For avoidance of doubt the certificate issued to the Appellant which was revoked by the Judgment of the Tribunal is hereby reinstated pending the determination of the 1st Respondents Appeal before the PPDT.

c) The original Tribunal file to be remitted back for fresh hearing on merit.

d) The 1st Respondent to pay the cost of this appeal.

DATED, SIGNED and DELIVERED at Nairobi this 29th day of **May, 2017.**

.....

J. WAKIAGA

JUDGE

In the presence of:-

Kibe and Miss Mwangi for the Appellant

Mr. Nyaberi for the 1st Respondent

No appearance for the 2nd Respondent

Paul/Tabitha court clerk



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