



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA, AT NAIROBI

ELECTION PETITION APPEAL NO. 86 OF 2017

JUBILEE PARTY OF KENYAAPPELLANT

VERSUS

DAVID KIMELI LETINGRESPONDENT

AND

HILLARY KIPKEMOI RONOINTERESTED PARTY

(Being an Appeal against the Judgment of the Political Parties Dispute Tribunal, (Kyalo Mbobu, James Atema & Hassan Abdi, Tribunal Members) dated 26th May, 2017

in Complaint No. 291 of 2017)

JUDGMENT

1. The **Jubilee Party of Kenya** (the Appellant) has Appealed against the Judgment and decree of the Political Parties Disputes Tribunal (PPDT) delivered on the 26th May, 2017. The Appellant raised two grounds;

1. The Honorable Tribunal erred in law and in fact by revoking the nomination certificate issued by the Appellant to one Mr. Hillary Rono as the nominated candidate for the Appellant, for Member of County Assembly, Kipkenyo Ward Kapseret Constituency, Uasin Gishu County.

2. The Honorable Tribunal erred in law and in fact in failing to appreciate the provisions of the Political Parties Act, Number 11 of 2011 by ordering the Appellant to issue Nomination Certificate to the Respondent.

2. David Kimeli Leting (the Respondent) filed grounds of opposition dated 31st May, 2017. They are as follows;

1. Given the timelines issued by the Independent Electoral and Boundaries Commission, IEBC, the Appellant has unreasonably delayed in bringing this Appeal. It, nevertheless, had already fully executed the Judgment and Degree of the Honorable Tribunal rendering this Appeal inconsequential.

2. The grounds upon which this Appeal is predicated is superfluous, frivolous and defeating the course of justice.

3. The Respondent contends that the Honorable Tribunal is vested with the requisite jurisdiction to hear and determine disputes between political parties and members of such political parties including the complaint from which this Appeal arises.

4. The Respondent was duly nominated as Member of County Assembly, Kapseret Constituency, Uasin Gishu County on 24th April, 2017 during an exercise conducted by the Appellant.

5. The nominations results, in favour of the Respondent, have been contested at any point since conclusion of the exercise on 24th April, 2017 by either the Appellant or the Interested Party.

6. The Chairman and Members of the Tribunal correctly applied the law and facts in allowing the Memorandum of Claim, declaring the Respondent the winner and revoking the Nomination Certificate issued to the Interested Party, Mr. Hillary Kipkemoi Rono.

7. The alleged affidavit of the Appellant's Legal Counsel filed in the Tribunal on whose strength the Appellant relies has not been placed before this court.

8. The Honorable Tribunal exercised its jurisdiction in entertaining the Complaint by the Respondent without necessarily requiring him to show any attempt in seeking relief from the Appellant through its internal dispute resolution mechanisms, IDRM.

9. That in the interest of expeditious disposition of the matter, bearing in mind the strict timelines set by IEBC and the lethargic attitude towards the Respondent in resolving his issue, he opted to move to the tribunal instead of pursuing the Appellant's IDRM.

10. That the Appellant's Memorandum of Appeal does not meritoriously address any legal or factual issues pertaining to the decision of the Honorable Tribunal and should be dismissed with costs and the decision of the Political Parties Disputes Tribunal be upheld

Hillary Kipkemoi Rono was on application enjoined as an Interested Party (I.P). He too filed a Memorandum of Appeal on the following grounds;

1. The Honorable Tribunal erred in law and in fact in failing to sufficiently appreciate that the complainant's evidence was purely on circumstantial evidence when the same was merely suspicion, theory and hypothesis with no basis at all.

2. The Honorable Tribunal erred in law and fact by making conclusions that are not supported by evidence on record.

3. The Honorable Tribunal erred in law and fact by making a conclusion and revoking the Nomination of the Interested Party (Hillary Kipkemoi Rono) when he was not a party to the proceedings in the Tribunal.

3. A brief background to this matter will suffice. The Respondent and the I.P are both members of the Appellant and they contested for the position of Member of the County Assembly (MCA) of Kipkenyo Ward, Kapseret Constituency within Uasin Gishu County. The Respondent's claim before the PPDT was that despite emerging the winner with 1,353 votes, issued with a declaration form and form 3(e), he

was not issued with a Nomination Certificate by the Appellant. He moved to the PPDT on 19th May 2017 seeking various prayers and a declaration that he is the duly nominated MCA for Kipkenyo Ward on the Jubilee Party ticket. Further, that the Appellant herein issues him with a Nomination Certificate.

4. The only party whom he sued before the PPDT was the Jubilee Party (Appellant). After hearing both the Appellant and Respondent, the PPDT rendered a Judgment on 26th May, 2017 in favour of the Respondent and issued the following orders;

i. The Respondent declared the duly nominated Jubilee Party Candidate for MCA Kipkenyo Ward.

ii. The Appellant to issue a Nomination Certificate to the Respondent as the duly nominated member of County Assembly, Kipkenyo Ward, Kapseret Constituency, Uasin Gishu County.

iii. The Nomination Certificate issued to Hillary Rono by the Respondent as the duly nominated Jubilee Party candidate for MCA Kapseret Constituency, Uasin Gishu County is hereby revoked.

This is what has prompted this Appeal by both the Appellant and interested party.

5. When the Appeal came for hearing, ***M/s Mboche*** for the Appellant submitted that the PPDT erred in entertaining the complaint before it because the Respondent had not exhausted the Party's internal dispute resolution mechanism. She referred to the Appellant's Constitution and Article 159 of the Constitution of Kenya. Her second issue was that the PPDT proceeded to hear the matter in the absence of the affected party who is the I.P herein.

6. Mr. Rutto for the I.P submitted that the I.P herein was not a party to the matter before the PPDT which was a big error. Secondly, his rights to a fair trial as enshrined in Articles 27, 47, 50 and 159 of the Constitution were violated. He asked the Court to reinstate the I.P's Certificate of Nomination which had been revoked.

7. In reply, ***M/s Kerubo*** went through all their grounds of opposition, submitting that the Independent Electoral Boundaries Commission (IEBC) was operating under strict timelines and this Appeal should have been filed earlier. The Appeal she said, had been rendered inconsequential because the Appellant had actualized the Judgment and decree of the PPDT. She referred to the case of ***Selestica Ltd. -vs- Gold Rock Development Ltd. [2015] eKLR.***

It was her further submission that the PPDT is vested with the requisite jurisdiction to issue the Orders it did. That it used the results declaring the Respondent as a winner to make its Orders. She cited the case of ***Joseph Mboya Nyamuthe -vs- Orange Democratic Movement & 7 Others [2017] eKLR*** to support the Respondent's position on the issue of jurisdiction.

8. **M/s Kerubo** proceeded to submit that the internal dispute resolution mechanism was never availed to the Respondent in spite of his attempts hence his resort to the PPDT. She stated that Article 50 of the Constitution also applied to the Respondent and since time was running out, the Respondent had to act. In response to the issue of the I.P not being heard, she submitted that at the time of filing the complaint at the PPDT, the Respondent was not aware that the I.P was the one who had the Nomination Certificate. That there is no explanation on how the party resolved to issue the I.P with the Nomination Certificate and further the results were not contested by the Appellant at the Tribunal.

DETERMINATION

9. After hearing the parties herein and considering the grounds raised, one main issue emerges which could determine this Appeal;

Whether the PPDT acted in vain when it made a determination without having the IP as a party to the case.

10. This issue relates to the rules of natural justice where public officers, State officers, State organs and independent bodies or tribunals make decisions which are characterized as Judicial, quasi-judicial or administrative and are required to make such decision in a fair and just manner.

The landmark case of ***Ridge –vs- Baldwin (1964) AC 40*** identified three pillars of natural justice;

- i. The right to be heard by an unbiased tribunal;
- ii. The right to have notice of charges of misconduct; and
- iii. The right to be heard in answer to those charges.

11. In the case of ***Judicial Service Commission –vs- Mbalu Mutava & Another [2015] eKLR E.M. Githinji, JA*** gave an explanation as to what consists of natural justice when he said;

“As I have endeavored to show above, natural justice comprises the doctrine of or is synonymous with “acting fairly”.”

The observance of the rules is paramount to the outcome of any case as any breach of the said rules would render such a decision null and void. This position was affirmed in the case of ***Pashito Holdings Ltd. & Another –vs- Paul Nderitu Ndungu & Others [1997] 1 KLR (E&L)*** where the Court held thus;

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared to be no decision.....” (emphasis mine)

12. A similar outcome was derived in ***Mbaki & Others –vs- Macharia & Another [2005]2 EA 206*** where the Court was of the opinion that the right to be heard is a value right and that it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

Where a party has not been accorded the right to be heard, challenge or defend any position before a decision making body, then, any decision arrived at, would be *void abinito* as the decision maker cannot be said to have arrived at a concrete decision without having both perspectives of the parties on the table.

13. I wish to reiterate the words of the Court in ***General Medical Council –vs- Spackman (1943) 2 ALL ER 337*** where the Court stated as follows;

“If indeed the principles of natural justice are violated in respect of any decision, it is indeed

immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.”

14. It is not disputed that the I.P was never a party to the proceedings at the PPDT. It is the Respondent who moved the said tribunal for issuance of the Orders being challenged. The Respondent has submitted that when he filed the complaint, he was not aware that the I.P had been issued with the Nomination Certificate. This cannot be true because the nominations were conducted on 19th April, 2017. He cannot be heard to say that on 19th May, 2017 when he filed the complaint at the PPDT, he had not known that the I.P had been issued with the Nomination Certificate.

15. Secondly, the PPDT in its Judgment and Decree revoked the Nomination Certificate issued to the I.P (Order No. 3 of the Decree). How did the PPDT know that it is the I.P who had been issued with the Nomination Certificate if this evidence had not been placed before the Tribunal" Such evidence could only have been placed there by none other than the Respondent and/or the Appellant.

Be it as it may, the revocation of the I.P's Nomination Certificate is an Order that adversely affected him. The Tribunal ought to have known better and enjoined the I.P even on its own motion before hearing the complaint.

16. The PPDT relied on official documents produced by the Respondent and not a Returning Officer in making its decision. What about, if the I.P also had in his possession documents that stated otherwise" It was therefore a serious error of law for the PPDT to have denied the I.P an opportunity to state his case. This contravened Articles 50 and 159 of the Constitution.

17. It is therefore glaringly clear that the decision of the PPDT having been arrived at in the manner that has been stated above cannot be left to stand. This determines this Appeal.

Both the Respondent and I.P are members of the Jubilee Party (Appellant) and both were candidates for nomination for the post of MCA, Kipkenyo Ward on the Jubilee Party ticket. Both these candidates have Nomination Certificates. Both certificates cannot be valid as each party is to nominate one candidate for one post. It is not for this court to get into the exercise of nominating candidates for the parties. The appellant must sort out this by itself.

18. I therefore find the Appeal to be meritorious and successful. I proceed to make the following orders;

i. The Appeal is allowed.

ii. The Judgment of the PPDT is hereby set aside.

iii. The Nomination Certificates issued by Jubilee Party of Kenya to (i) **David Leting Kimeli** (Respondent) and (ii) **Hillary Kipkemboi Rono** (I.P) are hereby revoked.

iv. The Jubilee Party of Kenya in compliance with the Party Constitution and Election Rules and the Political Parties Act to nominate a candidate for the post of MCA, Kipkenyo Ward, Kapseret Constituency, Uasin Gishu County on the Jubilee Party ticket within the next 24 hours.

v. Each party to bear his own costs.

Orders accordingly.

Delivered, signed and dated this **5th day** of **June** 2017 at **NAIROBI**

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE



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