REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO 90 OF 2017

SAMWEL MATHENGE NDIRITU.....APPELLANT

VERSUS

MARTHA WANGARE WANJIRA.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES COMMISSION...3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the Political Parties Dispute Tribunal of Kenya at Nairobi delivered on 12th May 2017 by Hon. Kyalo Mbobu, James Atemo and Hassan Abdi in complaint no 180 of 2017)

BETWEEN

SAMUEL MATHENGE NDIRITU.....APPLICANT

VERSUS

MARTHA WANGARE WANJIRA.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of PPDT dated 12th May 2017 in complaint No 180 of 2012. In that Judgment and Decree, the PPDT upheld the decision of the Jubilee Party's IDRM which had held the respondent to be the winner of nomination for the party's Gilgil Constituency member of the National Assembly.

2. In the Memorandum of Appeal dated 2nd June 2017, the appellant raised Twelve Grounds of Appeal that; t**he PPDT erred in law and fact in its judgment delivered on 12th May 2017 by ignoring the evidence presented before it to wit; the tallying sheets; that the tribunal erred in law and fact in failing to take into account that form 3(d)(J.P3) were consistent with the entries made in the final tally sheet presented to the party constituency returning officer; that the tribunal erred in law and fact in imputing electoral malpractices in the constituency when there was none, that the tribunal erred in law in upholding nullification of results from 8 polling stations on the basis of mere**

allegations, and that the tribunal erred in law in relying on JP3 forms supplied by the 1st respondent and failed to rely on the forms availed by the party.

3. Further grounds were that the tribunal erred by relying on imaginary tallying sheets and JP3 forms that were not availed to them and totally disregarded tallying sheets and form 3(d)(JP3) that had been availed by the party; that the tribunal ignored precedent set by superior courts; that it ignored evidence of delay in delivery of voting materials which saw some polling stations begin voting late, and subsequently holding that results from those stations were deliberately delayed; and that the tribunal erred by failing to examine vote turn out percentages in the 8 Polling Stations. The appellant also faulted the tribunal for relying on evidence from a person who was not a party official in Gilgil constituency.

4. The appellant, therefore, sought an order allowing the appeal and setting aside the judgment and decree of the PPDT. Of significance, the appellant sought an order compelling the Party, the 2nd respondent, to issue him with the final nomination certificate and the party be compelled to submit the appellant's name to IEBC as the duly nominated person to stand for election for member of National Assembly for Gilgil Constituency, Nakuru County.

5. The appellant filed written submissions dated and filed in court on 5th June 2017. The 1st respondent filed their submissions dated 6th June 2017 and filed in court on the same day. Counsel for the 1st respondent also filed an application by way of Notice of Motion dated 5th June 2017 and filed in court on the same day seeking to strike out or dismiss the appeal on the grounds that the appeal is an abuse of the court process since a similar appeal had been dismissed on 18th May 2017 and the appellant should have proceeded to the court of appeal.

6. At the hearing of the appeal, Prof. Ojienda appeared for the appellant, Mr. Kithi for 1st respondent and Mr Omuganda for 2nd respondent. Prof. Ojienda submitted in support of the appeal and urged the court to allow the appeal and grant the prayers sought in the memorandum of appeal. Learned Counsel faulted the PPDT for upholding the decision of IDRM of the party to nullify 8 Polling Stations in Gilgil constituency and have the 1st respondent declared as the winner of the nomination exercise for the Jubilee Party in that constituency. Learned Counsel contended that by excluding 8 Polling Stations, party members in these stations were disenfranchised.

7. According to counsel, tallying sheets from the constituency showed that the appellant had won the nomination with 14,842 Votes against the 1st respondent's 14,031 Votes. Learned counsel argued that the declaration of results was properly done by the constituency returning officer, and who also swore an affidavit to that effect. The affidavit was sworn on 9th May 2017 (by **Perminus Gichini Muigai**) and according to the returning officer the appellant had won. Counsel faulted PPDT for upholding the decision of IDRM to exclude 8 polling stations on account of suspicion of malpractices which violated the citizens' rights under Article 138 of the constitution.

8. In response to the respondent's submission that another appeal had been dismissed, counsel contended that Appeal number 28 of 2017 was in fact struck out and not dismissed. Counsel urged the court to allow the appeal as prayed in the memorandum of appeal.

9. Mr Kithi, learned counsel for the 1st respondent submitted that an appeal is originated by a memorandum of appeal and not a notice of appeal. Counsel went on to argue that the appeal having been instituted through a notice of appeal rather than a memorandum of appeal, the bundle filed herein did not constitute an appeal. Learned counsel submitted that an appeal is an extension of the suit that was before the lower court including the prayers. He contended, therefore, that the present appeal invites prayers against IEBC, which have no connection with what was before PPDT. Counsel took issue

with the introduction of IEBC to the matter saying it was an adulteration of the appeal.

10. Mr Kithi further contended that the appellant had introduced new evidence that was neither before the IDRM or PPDT, which include the affidavit by the returning officer, and other documents such as a report by the returning officer and tallying sheets. Counsel submitted that this appeal is a re-litigation of one that had been dismissed and is therefore an abuse of the court process. According to Counsel, the appellant filed appeal no 28 of 2017 which was heard and dismissed on 18th May 2017, and the only recourse available was to file an appeal to the court of appeal. Counsel contended that this fact was reiterated in the ruling of 1st June 2017 where again the judge stated that the appellant's option lay elsewhere. In counsel's view, therefore, this court cannot sit on a decision of a court of concurrent jurisdiction. Finally Counsel contended that an appeal should flow from the decree and an appeal cannot be expanded beyond what was before the PPDT. Counsel urged that the appeal be dismissed with costs.

11. Mr Omuganda, Learned Counsel for the 2nd respondent, opposed the appeal and associated himself with the 1st respondent's submissions. Counsel submitted that nullification of the 8 polling stations was based on evidence as opposed to the appellant's claim that the nullification was based on mere suspicion, since there were alterations noted in the tallying sheets.

12. In a short rejoinder, Prof Ojienda submitted that the earlier appeal was not dismissed but struck out hence the present appeal is properly before court, and should be determined on merit.

13. I have considered this appeal, objections thereto and submissions by counsel. I have also considered the authorities cited. What is before court is an appeal from the PPDT which upheld the decision of IDRM of Jubilee Party which declared the respondent herein the winner of the Party's nomination for member of National Assembly for Gilgil Constituency, Nakuru County.

14. The appellant has argued that he was properly declared the winner of the nomination by 14842 votes against the 1st respondent's 14031 voters, and that the PPDT was wrong in upholding the decision of IDRM cancelling nomination results from 8 Polling Stations.

15. In this appeal, three issues arise for determination namely; whether the appeal was properly instituted; whether a similar appeal was dismissed hence the present appeal is improperly before court; and whether the PPDT erred in upholding the decision of IDRM.

Whether the Appeal herein was properly initiated.

16. Mr. Kithi submitted that the appeal was initiated by way of Notice of appeal instead of memorandum of appeal. The law is clear on how to initiate an appeal. Order 42 Rule 1 of the Civil Procedure Rules (2010) provides that ***every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.***

17. It is true as submitted by Mr. Kithi that the record of appeal contains a Notice of Appeal. The same record contains a memorandum of appeal dated 2nd June 2017, while the Notice of Appeal is dated 13th May 2017. However, it is not clear when it was filed in court, if at all.

18. As provided for in Order 42 Rule 1, there is on a record a Memorandum of appeal, which makes the appeal properly initiated. Had there not been a memorandum of appeal the court would have agreed with learned counsel for the 1st respondent that the appeal would have been in competent. For that reason, I am satisfied that the appeal is properly in court.

Whether an appeal had been dismissed hence this appeal is an abuse of the court process.

19. It has been argued by the respondents and conceded by the appellant's Counsel, that there was Appeal No 28 of 2017 which was heard before this court (Mutuku J) but the two Counsels defer on the result of that appeal. Whereas the respondents' counsel contend that the appeal was dismissed, the appellant's, Counsel holds the position that the appeal was struck out.

20. The record shows that there was an appeal before Lady Justice Mutuku which was heard and a judgment delivered on 18th May 2017. It is also true that the judgment delivered on 18th May 2017 dismissed the appeal for being incompetent for failure to include the record of the trial court.

21. It is also clear that the appellant filed an application for review which was heard by the same judge and was again dismissed on 1st June 2017. Prof. Ojienda has argued that the appeal was struck out and for that reason has held the position that the present appeal is competent.

22. I have perused the ruling dated 1st June 2017 and although there is a sentence in which the judge referred to the appeal and said that it was in competent and therefore was for striking out, the learned judge never the less did not expressly state that she had reviewed her order dismissing the appeal and substituted it with an order striking out that appeal

23. In fact the learned judge still dismissed the application and emphasized that the avenue available was through an appeal. And after addressing the issues before court and the purpose for review, and quoting the decision of **National Bank of Kenya Ltd v Njau (1995-98) 2E A 249** the learned judge stated in the ruling:-

"In my view, the remedy may lie in the applicant taking appropriate measures to seek redress elsewhere. For the reasons I have advanced in this ruling, I hereby decline the orders sought and dismiss the applicant's application dated 23rd August 2017 and filed on 24th May 20117."

24. Prof. Ojienda has argued that the earlier appeal was struck out and has therefore maintained that the present appeal is properly before court. He has relied on the statement made by the Judge in the course of the ruling at page14 of the ruling where it was stated:

"This court dismissed it and as stated in the Ngoni-Matengo case, above, it is the substance of the matter that must be looked at rather than the words used, that is whether the matter was dismissed or struck out. The view of this court has been that the appeal before it was in fact incompetent. In the words of Ngoni – Matengo case, the appeal was not capable of being dismissed or in other words the appeal was not capable of being treated as something properly before the court and therefore it must be treated as if it had been struck out.

The import of this finding is that this court lacked jurisdiction to entertain the appeal that was filed by Musyoka Mogaka & Co. Advocates."

25. Both Counsels have not agreed on the outcome of the appeal before the court. Mr Kithi has argued that the appeal was dismissed while Prof Ojienda says that the appeal was struck out. The statement that the appeal be treated to have been struck out is in the body of the ruling. However the ruling is clear that the application for review dated 23rd May 2014 and filed on 24th May 2917 was dismissed-with no qualification on the fate of the appeal whether it had been dismissed or stuck out.

26. According to the ruling, the application had sought an order of review, setting aside of the judgment

dated 18th May 2017, and reinstatement of the appeal, and an order that that the record of appeal annexed to the application be deemed to have been properly filed. There is no doubt that the application was dismissed in entirely, which would mean the application for review was rejected, and the order flowing from the ruling is one of dismissal.

27. It would have been proper for the parties to seek the court's interpretation of that order now that the application for review was dismissed, and whether order dismissing the appeal was reviewed and if it formed part of the order of the court in that ruling. For that reason, I am unable to hold that the appeal was struck out in view of the final order of the court in that application.

Whether the PPDT was in order in upholding the decision of IDRM.

28. The appellant's Counsel has faulted PPDT for upholding the IDRM decision yet the evidence showed that the appellant had won; and further that the PPDT did not consider that IDRM had erred in upholding the decision to exclude 8 polling stations. For the respondents it has been argued that the appellant has introduced new evidence that was not before either IDRM or PPDT, and therefore, the appeal has introduced new matters of evidence in violation of the law. The respondents have pointed out an affidavit sworn by **Perminus Gichini Mungai,** (returning officer), a report purportedly done by the same person and some tallying forms that were not before PPDT.

29. It is true that the affidavit was sworn on 9th May 2017 while the report indicates to have been signed on 29th April 2017. The appellant has not denied contention by the respondents' counsel that those documents were not before both IDRM and PPDT.

30. I have perused the record and it is clear that the decision of IDRM was made on 3rd May 2017. That means the affidavit by the "returning officer" could not therefore have been before IDRM and was not considered before it made its verdict. The appellant has not said that the disputed affidavit, report and tallying sheets were place before the PPDT and that they were considered. In the absence of any denial, it is taken that the appellant is introducing such evidence for the first time on appeal and without leave of court.

31. By virtue of Section 40 of the Political Parties Act, this court, sitting as a first appellate court, has jurisdiction to consider an appeal on both law and facts. Evidence is a fact and such evidence should have been on record before the PPDT. If it was not, and a party wishes to introduce or call additional evidence, one has to apply for leave of court to do so. However, in this appeal, and it is not denied, the appellant has simply introduced new evidence that was not before the PPDT and did not form part of the Tribunal's record and without leave. The respondents did not have a chance to interrogate that evidence or counter it.

32. Section 78(1)(d) of the Civil Procedure Act allows an appellate court to take additional evidence or to require additional evidence to be taken. Order 42 Rule 27 of the Civil Procedure Rules which deals with procedure on calling for additional evidence on appeal, provides where relevant;

27(1)" the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary, in the court to which the appeal is preferred; but if-

a)……

b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

33. In the case of **Sadrudin Sharrif v Tarlochan Singh s/o Jwala Singh [1961]EA 7 2**, it was held that it is completely within the discretion of- the court to admit fresh evidence **on application**. This means the appellate court has to be moved by application and thereby consider whether or not to grant leave for production of additional evidence. The case of **Wange v Sakwa [1984]KLR 275** also considered the principles upon which an appellate court can exercise its discretion or not to receive further evidence and under what circumstances that should happen. One of the principles is that at the time of the hearing of the matter before the lower court, the appellant did not know that the issues he/she needs to adduce evidence on would have arisen during the trial.

34. And for new evidence to be admitted an applicant must show that the evidence could not have been obtained with reasonable diligence for use at the trial, and that the applicant (appellant) is not simply trying to make up for his failure to adduce that evidence earlier in the trial (see **James Mwangi Nganga v Kenyatta University & 4 Others [2009]eKLR.**

35. The power to take additional evidence is discretionary and like all discretions, it must be exercised, sparingly, judiciously and in the spirit of Section 78 and Order 42. The new evidence should be additional and not contradictory which would otherwise amount to a rehearing of the case afresh. It should not also be away of aiding a litigant who has not been diligent, fill up gaps in his case.

36. In this appeal, the documents that have been introduced, have been included without leave of the court and without any application, the court was not even alerted by the appellant's counsel that these documents were not before either the IDRM or PPDT and that he would want them formally included in the record for consideration. It would appear they were intended to aid the appellant otherwise there should have been an application for leave. It has not been explained why this new evidence was not before the IDRM and PPDT. and as was stated in **K. Tar Mohammed v Lakhani [1958]EA 567** :-

"Except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial or that reasonable diligence could not have made it available" (see Governors Balloon Safaris Limited v Zakaria W. Baraza t/a Sirima Auctioneers[2016]eKLR").

37. I have considered this appeal and the way the appellant has tried to sneak in evidence that was not before both the PPDT and IDRM, and without leave of the court. I have also noted that even before the cancellation of the results in the 8 polling stations, where the appellant is said to have influenced the results in his favour, the difference was insignificant. The appellant was blamed for the malpractice leading to cancellation of results in those polling stations.

38. A party who approaches the court on appeal should present to court material that formed the basis of the case before the lower court to enable the appellate court re-examine he evidence and appraise it itself in order to draw its own conclusion on it. Introducing new evidence without leave and knowledge of the court makes it impossible for the court to know what constituted the lower court or tribunal's record for purposes of an objective and fair assessment of the evidence and a just determination of the dispute.

39. Given what I have stated above, I do not find merit in the appeal. Consequently it is dismissed. Each party will bear their own costs.

Dated, Signed and Delivered at Nairobi this 9th Day of June, 2017

E C MWITA

JUDGE