IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MUSINGA, GATEMBU JJA

CIVIL APPEAL NO. 135 OF 2017

BETWEEN

DR. LILIAN GOGO.....APPELLANT

AND

JOSEPH MBOYA NYAMUTHE.....1ST RESPONDENT

THE ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

HON. GEORGE ONER.....3RD RESPONDENT

WILLIAM OBURO ODAJE.....4TH RESPONDENT

JOHN WASHINGTON AGUTU.....5TH RESPONDENT

(Being an Appeal from the Judgment and Order of the High Court of Kenya

at Nairobi delivered on 10th May, 2017 (Onyiego, J)

in

ELECTION PETITION NO. 5 OF 2017)

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JUDGMENT OF THE COURT

1. This appeal raises the question whether the Political Parties Disputes Tribunal (the PPDT) established under Section 39 of the Political Parties Act, (the Act) can hear and determine a dispute arising out of party primaries before such a dispute is heard and determined by the internal political party dispute resolution mechanism.

Background

2. Aspiring to vie for the position of Member of the National Assembly for Rangwe Constituency in the general elections scheduled for 8th August 2017, Joseph Mboya Nyamuthe, the 1st respondent, amongst other aspirants, sought nomination for that position by The Orange Democratic Movement, the 2nd respondent, during that party's primaries held on 24th April 2017 in which Dr. Lillian Gogo, the appellant was declared the winner.

3. Aggrieved, the 1st respondent lodged a claim with PPDT. In his statement of claim submitted to the PPDT dated 5th May 2017, the 1st respondent sought orders, among others, that the nomination certificate issued by the 2nd respondent to the appellant as the nominee for the position of Member of the National Assembly for Rangwe Constituency be nullified; that the results of various polling stations be tallied; that in the alternative there be a repeat of the nomination exercise with respect to the position of Member of the National Assembly for Rangwe Constituency. The 1st respondent asserted that, contrary to the Party Constitution and rules governing election and nomination of candidates, no results for the nomination for Member of Parliament for Rangwe were announced at the tallying center and "*the purported results announced over the radio were not accurate and were not announced efficiently and promptly*."

4. Whilst asserting that she emerged the winner of the nomination process, the appellant raised a preliminary objection to the 1st respondent's claim contending that under Section 40 of the Political Parties Act, the PPDT lacks jurisdiction to hear and determine the claim as "*the mandatory step of instituting the claim at the* [2nd] *respondent was skipped*."

5. After hearing the parties, the PPDT, in a ruling dated 6th May 2017 upheld the preliminary objection. It found that the claim before it was premature, as the internal dispute resolution mechanism had not been exhausted. In doing so, the PPDT had this to say:

"The Tribunal agrees that internal party processes are essential before the dispute can be considered by the Tribunal as envisaged in section 40(2) of the Political Parties Act…

***…The Tribunal has continued to take a flexible approach that the Claimant needs to demonstrate sufficient efforts towards party internal dispute resolution mechanism before it can entertain any claim, notwithstanding the response by the political party or the actual determination or resolution of the dispute. The Tribunal has further taken a position that this internal dispute resolution mechanism applies to party primary disputes*."**

6. The 1st respondent was dissatisfied. He lodged an appeal to the High Court on 7th May 2017. He sought an order to set aside the ruling of the PPDT and for an order directing the PPDT to hear and determine his claim on merits. In his memorandum of appeal before the High Court, he complained that the PPDT erred in upholding the preliminary objection; that the PPDT thereby denied him his constitutional right under Article 50(1) of the Constitution to have the dispute resolved in a fair manner; that the PPDT paid undue regard to procedural technicalities; and that the internal dispute mechanism of the tribunal of the 2nd respondent, the National Appeals Tribunal, had gone rogue by assuming jurisdiction it did not have and by failing to release results of appeals filed before it by the interested parties. The appellant opposed the appeal.

7. The High Court (Onyiego, J) delivered its judgment on 10th May 2017. It allowed the appeal, set aside the orders given by the PPDT on dated 6th May 2017 and ordered the file to be remitted back to the PPDT ***"to immediately reconstitute a fresh panel to hear and determine the appellant's/claimant's claim filed before the tribunal on 4th May, 2017."***

8. The appellant was dissatisfied and lodged the present appeal on 22nd May 2017.

The appeal and submissions by counsel

9. Expounding on the grounds of appeal in the appellant's memorandum of appeal and on the appellant's written submissions, Ms. Awour, learned counsel for the appellant, urged that the High Court erred by holding that disputes under Section 40(1)(fa) of the Act are not required to be submitted, in the first instance, to the internal dispute resolution mechanisms of the political party in accordance with Section 40(2) of the Act; that contrary to the holding by the lower court, the PPDT does not have original jurisdiction to hear and determine disputes arising out of election party primaries disputes.

10. According to counsel, Section 40(2) of the Act lays out a procedure that must be followed by first exhausting the internal dispute resolution mechanism within the political party and that that procedure must be followed. In that regard counsel referred to the decision in **Speaker of the National Assembly vs. Karume [2008] 1 KLR 426** and **Isiolo County Assembly Service Board & another vs. Principal Secretary (Devolution) Ministry of Devolution and Planning and another [2016] eKLR**.

11. Counsel went on to say that the learned Judge ought to have applied a purposive, rather than a restrictive approach in the interpretation of the provisions of Section 40(1)(fa) of the Political Parties Act. In that regard, counsel referred to Uganda Court of Appeal decision in **Kigula and others vs. Attorney General [2005] 1 EA132**; and **Kenya Medical Research Institute vs. Attorney General & 3 others [2014] eKLR** among other decisions.

12. Ms. Awour argued that contrary to the principle of sub judice, the effect of the decision by the High Court is that the PPDT is forced to handle disputes concurrently with the respective national elections boards of the respective political parties with the attendant risk of different conclusions being reached by the national elections boards and the PPDT; that in interpreting the provisions of the Act, the Judge failed to apply Articles 10, 159 and 259 of the Constitution; that applying Section 40(1)(fa) of the Act in the manner that the court did will result in an absurdity; that the spirit of the law should be applied so that Section 40(1)(fa) should be included under Section 40(2) of the Act; and that the Judge failed to appreciate that the National Elections Board of the 2nd respondent and the PPDT play a critical and pivotal role in support of Section 40(1) in determining disputes expeditiously in consonance with Article 159 of the Constitution.

13. Opposing the appeal, Mr. Kenyatta, learned counsel for the 1st respondent, submitted that Section 40(1)(fa) of the Act was introduced by Parliament in exercise of its legislative authority under Article 94 of the Constitution through an amendment to the Act in 2016; that the intention of Parliament in amending Section 40 of the Act was to confer jurisdiction on the PPDT in relation to a new category of disputes arising from party primaries that need not go through the internal dispute resolution mechanisms of political parties.

14. Citing the decision of this Court in **Italframe Ltd vs. Mediterranean Shipping Company [1986] KLR54**, Mr. Kenyatta submitted that the Court cannot proceed on an assumption that Parliament made a mistake in introducing Section 40(1)(fa) of the Act and by not amending Section 40(2) to subject the new category of disputes to internal dispute resolution mechanisms of the political parties; that the intention of Parliament in amending the provision is clear and there is no need to "*read in*" Section 40(1)(fa) into Section 40(2); that the 1st respondent correctly invoked Section 40(1)(fa) of the Act and presented his complaint to the PPDT; that under Article 50 of the Constitution, every person has a right to have any dispute resolved in an independent and impartial tribunal and the court cannot withdraw or limit that right; and that that right cannot by dint of Article 24 of the Constitution be limited or taken away by the court.

15. Learned counsel for the 3rd respondent, Mr. Nyangweso, associated himself with the submissions by Mr. Kenyatta, urging that under Section 40 of the Act, disputes that can be taken directly to the PPDT are clearly indicated; that the appellant is in effect urging the Court to amend Section 40(2) of the Act to encompass disputes arising from party primaries, and the Court cannot do so.

Determination

16. We have considered the appeal and submissions by learned counsel. Under Section 41(2) of the Act, appeals to this Court are restricted to points of law. As already stated, the issue in this appeal is whether the PPDT can hear and determine a dispute arising out of party primaries under Section 40(1)(fa) of the Act before such a dispute is heard and determined by the internal political party dispute resolution mechanism.

17. Section 40 of the Act deals with the jurisdiction of the PPDT. Section 40(1) provides that:

"(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 decisions of the Registrar under this Act;

(fa) disputes arising out of party primaries."

18. Section 40(2) of the Act provides that the PPDT shall not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless the dispute is, as a first port of call, heard and determined by the internal political party dispute resolution mechanisms. It reads as follows:

"(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."

19. Section 40(1)(fa) of the Act relating to **"*disputes arising out of party primaries*"** was introduced through an amendment to the Act vide Section 19 of the Political Parties (Amendment) Bill which provided that:

"Section 40 of the principal Act is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (f) —

"(fa) disputes arising out of party primaries"

20. It was pointed out that it is significant that, when making that amendment, Parliament did not amend Section 40(2) to include

"*disputes arising out of party primaries*" in the category of disputes that must first be heard and determined by the internal party dispute resolution mechanism. Counsel addressed us at length on the import of and the manner in which Section 40 of the Act should therefore be interpreted.

21. In **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others Petition 2B of 2014 [2014] eKLR** the Supreme Court of Kenya adopted the words of Lord Griffiths in **Pepper vs. Hart [1992] 3 WLR 1032** thus:

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted. (Emphasis added).

22. The Supreme Court also referred to the House of Lords decision in **Maunsell v. Olins [1975] AC 373** where Lord Simon of Glaisdale stated that:

"The first task of a court of construction is to put itself in the shoes of the draftsman – to consider what knowledge he had and, importantly, what statutory objective he had …being thus placed…the court proceeds to ascertain the meaning of the statutory language."

23.The object of introducing Section 40(1)(fa) of the Act was set out in the memorandum of objects and reasons of the Political Parties (Amendment) Bill as follows:

"*Clause 19 seeks to amend section 40 of the principal Act by adding disputes arising out of party primaries in order to address the challenge of concurrent jurisdiction with other bodies handling electoral disputes*." [Emphasis]

24. In our view, that amendment did not introduce an entirely new category of disputes as was urged by counsel for the 1st respondent. Disputes arising out of party primaries between members of a political party or between a member of a political party and a political party, or between political parties or between coalition partners were already catered for under paragraphs a, b, c, and e of Section 40(1) of the Act. Such disputes are subject to Section 40(2) of the Act and must first be subjected to the internal party dispute resolution mechanism before the PPDT takes cognizance of them.

25. A common denominator of the categories of disputes that must in the first instance be submitted to the internal political party dispute resolution mechanism is that the disputants would all be subject to the political party and therefore subject to such party's internal party dispute resolution mechanism. It is also instructive that under Section 9 of the Act as read with paragraph 23 of the 2nd Schedule to the Act, it is a mandatory statutory requirement that every political party must have provision in its constitution and rules for "*internal party dispute resolution mechanism in accordance with Article 47 and 50 of the Constitution.*" Also noteworthy is Section 13(2A) of the Elections Act, Act No. 24 of 2011 that requires a political party to hear and determine "*all intra party disputes arising from political party nominations*" within thirty days.

26. There could well be disputes that arise out of party primaries that do not fall within the categories of disputes set out under paragraphs a, b, c, and e of Section 40(1) of the Act in which case such disputes can be taken directly to PPDT.

27. In the present case, there is no doubt that the dispute arose out of party primaries of the 2nd respondent. That dispute is between members of the same political party. Although it is a dispute arising from the party primaries, it is nonetheless a dispute that falls under paragraphs a, b, c, and e of Section 40(1) of the Act that is required to be heard by the party's internal dispute resolution mechanism before the PPDT can take cognizance of it. That is the procedure dictated by Section 40 of the Act. In **Kimani Wanyoike vs. Electoral Commission & another [1995] eKLR**, this Court upheld the proposition advanced in **Speaker of the National Assembly vs. Hon. James Njenga Karume, Civil Application No. 92 of 1992 (2008) 1KLR 425** that "*where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that*

procedure should be strictly followed."

28. We are therefore satisfied that the learned Judge of the High Court fell into error in holding, without qualification, that the PPDT has jurisdiction to hear disputes arising out of party primaries and that in all cases involving disputes arising out of party primaries, an aggrieved party "*is not necessarily bound by the party nomination rules and regulations which require that such aggrieved party do appeal to the party national appeals tribunal*."

29. We accordingly allow the appeal and set aside the judgment and orders of the High Court given on 10th May 2017 with the result that the decision of PPDT given on 6th May 2017 declaring that the 1st respondent's claim was premature is upheld.

30. We make no orders as to costs.

Dated and delivered at Nairobi this 30th day of June, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I *certify that this is a true copy of the original.*

DEPUTY REGISTRAR