**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ELECTION PETITION APPEAL NO. 93 OF 2017**

**BETWEEN**

**ERIC KYALO MUTUA.....APPELLANT**

**VERSUS**

**WIPER DEMOCRATIC MOVEMENT KENYA.....1ST RESPONDENT**

**GIDEON MUTEMI MULYUNGI.....2ND RESPONDENT**

(Being an appeal from the Judgment dated 2nd June 2017 in the Political Parties Disputes Tribunal Cause/Complaint No. 306 of 2017 Nairobi).

**JUDGMENT**

1. The appellant Eric Kyalo Mutua, the 2nd respondent Gideon Mutemi Mulyungi and one Musikali Mutemi were candidates in the nomination conducted on 24th April 2017 by the 1st respondent Wiper Democratic Movement Kenya ("the Party") to pick the Party's candidate to vie for the position of member of the National Assembly for Mwingi Central Constituency in the general elections to be held on 8th August 2017. After the exercise, the 2nd respondent was declared the winner. The appellant was not satisfied with the process. He alleged that the exercise was riddled with irregularities. He went to the Party's dispute resolution mechanism. He did not get the relief he wanted. On 1st May 2017 he appealed to the Political Parties Disputes Tribunal ("the Tribunal"). The Tribunal found that there were irregularities. It nullified the certificate that had been issued to the 2nd respondent, and ordered a repeat nomination in 19 of the 48 polling stations. The appellant was aggrieved by that decision and appealed to the High Court in **Appeal No. 4 of 2017** which was heard by my brother Justice J.L. Onguto. The Judge delivered his judgement on 15th May 2017. He allowed the appeal, set aside the Tribunal's order that the nomination exercise be repeated in only 19 polling stations, and, instead, ordered that the nomination process be repeated in all the 48 polling stations within 72 hours. The 2nd respondent had cross-appealed, contesting the jurisdiction of the Tribunal on the basis that the appellant had since ceased to be a member for the Party and that under **section 40** of the **Political Parties Act (No. 11 of 2011)** he could not complain or appeal against the Party regarding the nomination exercise.

2. In allowing the appeal, the Court found, in effect, that the nomination exercise was fundamentally flawed and not in substantial compliance with the election laws, the Party's constitution and nomination Rules.

3. On 11th May 2017 the 1st respondent conducted a repeat nomination involving only the appellant and the 2nd respondent. The 2nd respondent was declared the winner. The appellant appealed to the Party's Appeals Tribunal. He complained of violence, there being no Party Membership List, no enough ballot papers, the use of photocopy ballot papers and exercise books, double voting, illegal marking of ballot papers, stuffing of ballots, and that the 2nd respondent had more than one agent per polling station when it had been agreed that each station would have one agent for each candidate. He was unsuccessful before the Party's appeal process and appealed to the Tribunal in **Cause No. 306 of 2017**. On 2nd June 2017 the Tribunal dismissed the appeal. This is what led the appellant to appeal to this court.

4. In the Memorandum of Appeal dated 7th June 2017 and filed on the same day, the appellant complained that the Tribunal had erred in fact and law by finding that he had not led sufficient evidence to support his complaint against the respondents. In particular, he complained that the 1st respondent was incapable of conducting any credible nomination exercise because it did not have the Party Membership Register and ballot papers that conformed to the Party's Election and Nomination Rules; that the number of persons who had voted in the nomination exercise had exceeded those in the Party's Membership Register; that the Election Return Forms and Certificate of Return had not been filled by the officials of the 1st respondent; the ballot papers had not been serialised and were insufficient to the extent that photocopies of the ballot papers that had been used in the earlier nomination were used; and that these ballot papers had three candidates instead of the two candidates who had taken part in this second nomination. It was the appellant's contention that, despite all these, the Tribunal had found that he had not proved his complaint.

5. When the appeal was heard today, the appellant was represented by Mr. Musyoki, the 1st respondent by Mr. Sore and the 2nd respondent by Mr. Masese. On the part of the 1st respondent, Agatha Solitei (the Chairperson of the Party's National Elections Board) swore a replying affidavit to state that the appeal had been overtaken by events since the prayers in the complaint dated 25th May 2017 to the Tribunal had all been spent; that the nomination certificate had already been issued to the 2nd respondent who had presented it to the Independent Electoral and Boundaries Commission ("IEBC") which had cleared him to contest in the forthcoming general elections and had issued him with a certificate to that effect. On the merits of the appeal, it was sworn that the appellant had not proved any of the alleged malpractices and irregularities during the repeat nomination exercise, and had not shown that the 2nd respondent was responsible for any of them. It was denied that the party had no Membership List, or that the persons who had taken part in the nomination had exceeded those in the List. The alleged use of photocopy ballot papers was denied, and so was the shortage of the same. The 2nd respondent swore a replying affidavit to deny that there was any violence; stated that there was a Membership List on the basis of which the nomination was conducted; there were enough ballot papers; and denied that there was double voting. It was contended that the repeat exercise was free and fair. The 2nd respondent then raised two issues of jurisdiction:-

(a) that the appellant was no longer a member of the Party and therefore the Court had no jurisdiction to hear and determine the appeal; and

(b) the appeal had been filed out of time, outside 48 hours, and was therefore incompetent.

6 The question whether or not the appellant had resigned from the Party was considered by Justice Onguto in the earlier appeal. This followed the claim by the respondents that he had resigned and his denial of the same. His case was that the documents presented showing that he had resigned were a forgery. This is how the court handled the matter:-

**"63. I am however not prepared to determine the Appellant's status. He contests his alleged resignation and has apparently a genuine reason to do so when he states that his resignation has been stage managed.**

**64. Ideally, under section 14 of the Political Parties Act the resignation details that the Registrar is expected to act upon must originate from the Political Party to the Registrar. The instant one did not do so.**

**65. Secondly, the nub of both appeal and cross-appeal was not the Appellant's resignation. It was whether or not the nomination process was free and fair. The resignation issue has been visited for too late in the day.**

**66. Thirdly, to determine whether the Appellant had resigned would be to rob the PPDT of its jurisdiction. It would also rob the Appellant of its undoubted right to challenge any factual findings or appeal, as all appeals to the Court of Appeal must be on issues of law only.**

**67. I am ready to extend the benefit of doubt to the Appellant when he insists that he has never resigned from the 1st respondent party. I must hasten to add that this will not prohibit the 1st respondent from seeking any damages by way of indemnity from the Appellant if it ultimately turns out that the Appellant had indeed resigned voluntarily from the 1st respondent."**

7. The question was considered by the Tribunal. The Tribunal made reference to the observations by Justice Onguto (above), and proceeded as follows:-

**"We however note that despite this contention, the 1st respondent proceeded to conduct a repeat nomination exercise on 11th May 2017 in consultation with the Claimant and conducted the said nomination exercise with the Claimant's name on the ballot papers. In consideration of the Claimant's submissions and the 1st Respondent's behaviour towards the Claimant the Tribunal is not convinced that the Claimant resigned from the Party on his own volition and finds that the 1st Respondent's behaviour towards the Claimant is not reflective of this resignation. This Tribunal therefore holds that, it is properly seized of the matter and will proceed to interrogate the remaining two issues for determination."**

8. The respondents, or any of them, did not appeal against that finding. The 2nd respondent specifically raised the issue of the appellant's resignation from the party in paragraphs 11, 12, 13, 14, 15 and 16 of the replying affidavit in which he asked that the appeal should be struck out with costs for want of jurisdiction. It is my finding that a competent Tribunal heard and determined this issue by finding that the appellant had not resigned from the Party. The same issue should therefore not be raised by the 2nd respondent. The issue is *res-judicata* **(James Odera –v- John Patrick Wachira, Civil Appeal No. NAI 49 of 2001).**

9. The next issue was that the Tribunal did not have jurisdiction to hear and determine the complaint as the same had not been filed with the Party's National Appeals Tribunal within 48 hours as was required by Rule 6.2.5 of the Party's Election and Nomination Rules which provides that:-

**"The Appeals to the National Appeals Tribunal shall be in writing duly signed by the Appellant and shall be lodged within 48 hours of the announcement of the results appealed from."**

In the case, the nomination was conducted and concluded on 11th May 2017 and the letter of complaint by the appellant to the National Appeals Tribunal was on 15th May 2017. From the judgment of the

Tribunal, this issue was dealt with at pages 5 and 6. It was dismissed. The 2nd respondent did not file a cross-appeal on the issue, or at all. Once again, the issue is *res-judicata.*

10. The respondents raised the issue that the appeal has been overtaken by events since the 1st respondent already issued a nomination certificate to the 2nd respondent who had subsequently been cleared by the IEBC to contest for the seat on the Party ticket. Reference was made to **section 13** of the **Elections Act 2011** which states as follows:

**"13(1) A political party shall nominate its candidates for an election under this Act at least forty-five days before a general election under this Act in accordance with its constitution and nomination rules.**

**(2) A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission.**

**Provided that in the event of death, resignation or irregularity of the nominated candidate or the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable, substitute its candidate before the date of presentation of nomination papers to the Commission.**

**(3) Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall not be more than twenty one days after the date of publication of such notice."**

On this issue, Mr. Musyoki's submission was that the court has wide powers, and that it can revoke the nomination that was issued to the 2nd respondent and presented to the IEBC if it finds that the nomination was neither free nor fair. In my view, this is a problematic submission. The wide powers that the court has can only be exercised within the law. On this occasion the law is clear that once a candidate has presented his nomination papers to the IEBC, and the IEBC has cleared him, there can be no change to that candidature. The only way there can be change is if there is death, resignation or incapacity of the nominated candidate, or if the nominated candidate has violated the electoral code of conduct. None of these situations obtains here.

11. The other fundamental issue is that the IEBC which has taken over the election process from the Party was not made a party to this appeal. The Party cannot at this stage change its candidate (the 2nd respondent). IEBC, after receipt of the nomination of the 2nd respondent, is not allowed by **section 13** of the **Elections Act** to change or substitute him with another. When the appellant went to the Tribunal he sought the following orders, among others:-

(a) a permanent injunction restraining the 1st respondent from issuing a nomination certificate to the 2nd respondent or presenting the name of the 2nd respondent to the IEBC;

(b) a declaration that the nomination exercise held on 11th May 2017 was null and void;

(c) an order setting aside the 1st respondent's decision to issue a nomination certificate to the 2nd respondent; and

(d) an order that any action by the 1st respondent forwarding the name of the 2nd respondent to the IEBC

as nominee or candidate is illegal, irregular, null and void and that the 2nd respondent's name should be struck out from the 1st respondent's list of candidates for Mwingi Central Constituency and/or the 2nd respondent's name should not be gazetted by the IEBC for the aforementioned position.

I have indicated in the foregoing that the process of nomination in respect of Mwingi Central Constituency came to an end when the appellant successfully presented his papers to the IEBC. Adverse orders cannot issue against the IEBC, which is protected by **section 13** of the **Elections Act**, without reference to it, and without it being afforded a hearing.

12. Incase I am wrong, I will now deal with the merits of the appeal. The first appellate court has the duty to evaluate all the evidence before the lower court and determine whether the decision reached was supportable on the basis of the evidence and the law **(Jahendra Kumar Haria –v- Abdulrasil Husein, Civil Appeal No. 220 of 1996)**. It is also trite that an appellate court ought not to interfere with the discretion of the trial court. In **Richard Ncharpi Leiyagu –v- IEBC & 2 Others [2013]eKLR** it was stated as follows:-

**"..... a Court of Appeal will not interfere with the exercise of the judges discretion unless it is satisfied that the judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest that from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."**

13. I have carefully read the judgment of the Tribunal. Without following any order, I will deal with the contention that the number of people who participated in the nomination exercise was more than the number of the Party List. According to the appellant he was declared to have received 7025 votes and the 2nd respondent 15,913 votes. The total was 22,937 votes. However, according to IEBC the Party had 10795 members. The Party's case was that the membership was over 25000. The Tribunal was not provided with the party List, and found that it could not hold against the respondents without the List. In ground 6 of the Memorandum of Appeal it was alleged that the persons who voted exceeded the registered members of the 1st respondent. In ground 8 it was claimed that the nomination went on without the Party List. In ground 7 the appellant blamed the 1st respondent for not providing the Party List. It was the appellant who made the claim that the number of those who voted in the nomination was more than those that were registered by the Party. The burden was on him to prove the allegation. The standard of proof was higher than on a balance of probabilities but lower than proof beyond doubt **(John –v- Nyange & Another No. 4 [2008]3 KLR (ED))**. Did he discharge the burden" If he complained that the 1st respondent had not provided the List, how did he know how many members were on the List" Did he, before the Tribunal, seek the production of the List of registered members of the Party" It was clear that, before the nomination, the two candidates and the 1st respondent had agreed on the ground rules. The issue of the List was not one of those on the table. Why didn't the appellant, at that stage, seek to have the List and to make sure that only those on it voted" It is for these reasons that I find no basis to fault the finding of the Tribunal on the issue.

14. There was the question of alleged violence during the exercise. The appellant had submitted Occurance Book numbers to show three reports made regarding acts of violence. The Tribunal found, relying on the decision of **Moses Masika Wetang'ula –v- Musikari Nazi Kombo & 2 Others [2014]eKLR**, that even if there was violence it had not been shown the acts of violence had sufficiently affected the outcome of the nomination.

15. There were allegations that Election Return Forms and Certificate of Return had not been completed and that the appellant's agents had not seen them. The Tribunal considered the available

evidence and discounted the version by the appellant.

16. Lastly, there were the issues of double voting, vote stuffing, use of photocopy ballot papers and use of exercise books. These issues were denied by the respondents. The Tribunal considered the rival versions and found that none of these had been proved. One has to remember that the burden was always on the appellant to prove the claims, and that the standard was higher than in ordinary civil cases. Further, it has to be remembered that in any election or nomination there may be irregularities or malpractices. However, not every irregularity or malpractice committed in the conduct of an election or nomination will affect the validity of the exercise. The irregularities have to be so pervasive and/or so widespread that they put the integrity of the election or nomination to question. There was no proof that the alleged or proved irregularities or malpractices were widespread or pervasive.

17. I have looked at the circumstances that the appeal has presented. I find that the Tribunal was correct to reach the finding that the nomination was not impeachable. The appeal does not therefore have merits, and is hereby dismissed.

18. Mr. Masese invited the court to order costs against the appellant if the appeal is dismissed. In this kind of complaints, however, costs should not be ordered.

**DATED, DELIVERED and SIGNED at NAIROBI this 8TH day of JUNE 2017.**

**A.O. MUCHELULE**

**JUDGE**