REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELECTION PETITION APPEAL NO. 100 OF 2017

(APPEAL FROM PPDT NO. 81 OF 2017)

KIPOKI OREU TASUR.....APPELLANT

VERSUS

GIDEON SITELU KONCHELLA.....1ST RESPONDENT

JUBILEE PARTY OF KENYA.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

1. On 25th April 2017 the Jubilee Party of Kenya (2nd respondent) conducted nomination for Kilgoris Central Constituency in Narok County to get its candidate to vie for the seat of member of National Assembly in the national elections to be held on 8th August 2017. Gideon Sitelu Konchella (the 1st respondent) was declared the winner. The appellant Kipoki Oreu Tasur was not satisfied. He complained to the Party's National Elections Appeals Tribunal ("N.E.A.T."). On 2nd May 2017 the N.E.A.T. dismissed the complaint and upheld the declaration by the returning officer. The appellant was aggrieved and appealed to the Political Parties Disputes Tribunal ("the Tribunal"). The Tribunal heard the appeal and on 10th May 2017 dismissed the same and upheld the decision of the N.E.A.T. This is when on 12th June 2017 the appellant filed this appeal.

2. In the Memorandum of Appeal, the appellant complained that:-

(a) the Tribunal disregarded the unrebutted evidence of election malpractice in two polling stations (Nyamansungura and Mashangwa);

(b) the Tribunal failed to allow the examination of the presiding officers Kiprotich Wesley Korir and Robert Kiplangat Kirui who were present and who would have confirmed that there was no nomination carried out in the two stations;

(c) the Tribunal made a finding that votes had not been manipulated when there was evidence to show otherwise; and

(d) the finding that the 1st respondent had been validly nominated was against the available evidence.

3. The application was prosecuted by Mr. Mutai and was opposed by M/s Savini for the 1st respondent and M/s Oloo for the 2nd respondent. The Independent Electoral and Boundaries Commission (3rd respondent) was served but did not oppose the appeal.

4. In **Peters –v- Sunday Post Limited [1958] EA 424** it was held that an appellate court has jurisdiction to review the evidence of the trial court to determine whether the conclusions reached should stand. If it is shown that the trial court failed to appreciate the weight or bearing of circumstances admitted or proved, or was plainly wrong, the appellate court will intervene.

5. In the instant case, the court is being asked to interfere with the concurrent findings of fact of the N.E.A.T. and the Tribunal. In **Onyango & Another –v- Luwayi [1986]EA 513** it was held that a court of appeal would not interfere with the concurrent findings of fact of the two lower courts unless it was clear that the courts had so misapprehended the evidence that their conclusions were based on incorrect bases.

6. In dealing with this appeal, I know that the legal principles above have to be applied while bearing in mind that this is an election matter that is governed by a legal regime contained in the Constitution of Kenya 2010, the **Elections Act No. 24 of 2011**, the **Political Parties Act No. 11 of 2011**, the **Independent Electoral and Boundaries Commission Act, 2011** and the 2nd respondent's Constitution and Elections and Nomination Rules. The political rights that the appellant seeks to enforce have to be realised within a political process that has a structured dispute resolution mechanism which takes into account the interests of the people of Kilgoris Central Constituency, the larger interests of the society and the need for a free, fair and credible election (**Francis Gitau Parsimei & 2 Others –v- National Alliance Party & 2 Others [2012]eKLR**).

7. Under **section 40** of the **Political Parties Act** where, during the process of nomination, there is a dispute between a candidate and his party, the dispute has to be first heard and determined by the party's internal dispute resolution mechanism. If any of the parties is aggrieved, he will complain to the Tribunal under the **Act**. These are both political and quasi-judicial processes, and the High Court will supervise them to basically make sure that the parties were fairly heard, and the process leading to the result in question was credible, and that the result did, in a substantial way, reflect the will of the electorate. It is in this spirit that, for instance, **section 83** of the **Elections Act** provides that:-

"83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."

This is why in **Morgan –v- Simpson [1974]3ALL ER 722** it was emphasised that it has to be clearly proved that an election was so badly conducted and substantially not in accordance with the law as to election, for the election to be vitiated. Not every non-compliance, malpractice or irregularity will vitiate an election.

8. Before the N.E.A.T. the appellant's complaint was that his agents had been ejected from four stronghold stations of the 1st respondent; the returning officer had been bribed, and arrested by police but had been released at the intervention of the 1st respondent's personal assistant; the results of the two candidates in six polling stations had been changed to favour the 1st respondent by 1131 votes; there were two polling stations where nomination did not take place; a government employee had interfered with the process; a GSU lorry had taken away ballot boxes to an unknown place; and that the appellant's tally was 20,006 votes and the 1st respondent 17,994 votes and yet the later was declared the winner. The 1st respondent and the Party's returning officer (who conducted the nomination) denied these allegations. The N.E.A.T. heard the complaint by calling oral evidence. At the conclusion of the hearing it dismissed the complaint. It found that the allegation of bribery was not proved. There was the question of Mashangwa and Nyamansungura polling stations where the nomination had allegedly not taken place, and the claim that the presiding officers Kiprotich Wesley Korir and Robert Kiplangat Kirui had been changed without reference. The two had stated that no nomination had been conducted in the two centres. The N.E.A.T. found that there was nomination in the two centres, and accepted the explanation of the returning officer that he had changed the two presiding officers because they did not hail from the Kuria community; that the nomination had proceeded peacefully after he got two officers from Kuria Community to manage the centres. The N.E.A.T. indicated that it had considered the appeal, the affidavit evidence and the oral testimonies to reach its conclusions. It is notable that both the Tribunal and this Court did not have the advantage of hearing and seeing the witnesses who testified before the N.E.A.T. The N.E.A.T. had that advantage.

9. Before the Tribunal, the appellant complained that although he had provided proof of the violence, bribery, malpractices and the non-nomination of the two stations, the N.E.A.T. had dismissed his appeal without affording him any reasons. He then alleged that

he had since learned that one of the members of the N.E.A.T. (one Mayani Sangale) had represented the 1st respondent in various other matters, and gave two of such matters as evidence. The 1st and 2nd respondents opposed the complaint at the Tribunal by filing responses. The Tribunal heard the complaint, and in its determination summarized the case of each side. It noted that the only issue for determination was whether the decision of the N.E.A.T. ought to be upheld. It went on to find that the issues raised before it had been raised before the N.E.A.T. which had interrogated and dismissed them. The Tribunal observed that based on the record presented no basis had been laid to disturb that finding.

10. It is notable that the issue of Mayani Sangale having been the 1st respondent's advocate and at the same time sitting as member of the N.E.A.T. was not a ground of this appeal and was not taken up by the appellant at the Tribunal. I consider that the appellant abandoned it.

11. In ground two of the Memorandum of Appeal, the appellant complained that the Tribunal had not allowed the examination of the presiding officers Kiprotich Wesley Korir and Robert Kiplangat Kirui who were present and who would have confirmed that there was no nomination carried out in the two stations. There was no evidence that there was a request by the appellant or his counsel to have the two officers examined at the Tribunal. The record shows that the hearing at the Tribunal was based on affidavit evidence, submissions by counsel and the record from the N.E.A.T. There was no oral hearing of the witnesses. The appellant cannot, therefore, raise this issue on appeal.

12. The appellant's complaint before this court was that the Tribunal had dismissed his appeal without giving reasons, and when he had presented evidence of malpractices during the nomination. He had problems with the finding by the Tribunal that he had not substantially demonstrated how and why he should be the *bonafide* holder of the 1st respondent's nomination certificate, or why the decision of the N.E.A.T. should not be upheld. Counsel for the appellant went on to claim that the identified ground for determination and the finding thereon were evidence of a pre-set mind on the part of the Tribunal. In my view, the Tribunal appreciated quite clearly the issues at hand. It appreciated that the appellant had the responsibility to prove that the N.E.A.T. had been wrong in its finding that his complaint had no material basis; that the burden was on him to show that the nomination of the 1st respondent was invalid, and he had not discharged that burden. The Tribunal gave reasons for its findings.

13. I have considered the grounds of appeal, the record of the proceedings and decision of the Tribunal and the submissions by counsel. I do not find that there was any error of law or fact on the part of the Tribunal. I find that the appeal lacks merits and is therefore dismissed. I make no order regarding costs.

DATED and DELIVERED at NAIROBI this 14th day of June 2017

A.O. MUCHELULE

JUDGE