Case Number:	Election Petition Appeal 44 of 2017
Date Delivered:	22 May 2017
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Joseph Kiplagat Sergon
Citation:	Chama Cha Mashinani Elections Board & 2 others v Beatrice Chebomui [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 44 OF 2017

CHAMA CHA MASHINANI ELECTIONS BOARD.....1ST APPELLANT

CHAM CHA MASHINANI.....2ND APPELLANT

HELLEN TAPLELEI.....3RD APPELLANT

-V E R S U S –

BEATRICE CHEBOMUI.....RESPONDENT

(Being an Appeal from the judgement and decree of the Political Parties Dispute Tribunal of Kenya at Nairobi delivered on 15th May, 2017 by Hon. Kyalo Mbobu, James Atema and Hassan Abdi vide Complaint No. 130 of 2017))

JUDGEMENT

1. On 20th April 2017, Chama Cha Mashinani, the 2nd Appellant herein, conducted party nominations for the Bomet Women representative seat. At the end of the exercise the following results were declared:

Beatrice Chebomui (Respondent)..... 50,763

Hellen Taplelei (3rd Appellant)..... 47,277

Rachael Ngeno 20,279

2. Hellen Taplelei, the 3rd Appellant herein wrote a letter dated 21st April 2017 to the chairman of the National Elections Board of Chama Cha Mashinani, the 1st Appellant herein, disputing the results announced for Chepalungu sub-county. She complained that the actual results announced in respect of Chepalungu Constituency were different from what was presented. It would appear the 1st Appellant convened a meeting on 22nd April 2017 to address the 3rd Appellant's complaint and resolved to order for a recount of the votes for Chepalungu Constituency to be held on 28.4.2017 at Bomet Blue House instead of Chepalungu sub-county Tallying Centre for security reasons. Prior to the recount, Hellen Taplelei, the 3rd Appellant and Beatrice Chebomui, the Respondent, were declared to have garnered 18,077 and 11,499 votes respectively in Chepalungu constituency.

3. When the votes were recounted on 28th April 2017, the 3rd Appellant was declared to have garnered 23,077 votes while the Respondent remained constant with 11,499 votes in Chepalungu Constituency. Being aggrieved by the aforesaid decision, the Respondent lodged a complaint before the Political Parties Disputes Tribunal (P.P.D.T). The dispute was heard and determined in favour of the Respondent. In short the Political Parties Disputes Tribunal set aside the decision to order for recount of votes from Chepalungu Constituency and proceeded to nullify the outcome of the recount. PPDT ordered Chama Cha Mashinai, the 2nd Appellant to issue the Respondent with a nomination certificate for the position of women representative, Bomet County within 48 hours. Being aggrieved by the decision of PPDT, the Appellants preferred this appeal.

4. On appeal, the Appellants put forward the following grounds in their memorandum:

a. The honourable Tribunal erred in law and fact in failing to issue directions for service of the complainant on the 3rd Appellant thereby grossly violating her right to a fair hearing under Article 50 of the Constitution.

b. The honourable Tribunal erred in law and fact in failing to enforce the provisions of Article 48 of the constitution by allowing the complainant to prosecute her complaint without serving the 3rd Appellant who was at the time of filing the suit in possession of the contested nomination certificate.

c. The honourable Tribunal erred in law and fact in failing to uphold our preliminary objection dated 11th May, 2017.

d. The honourable Tribunal erred in law and fact in failing to inquire into the authenticity of the witness statement sworn by David Kipsang Koske.

e. The honourable Tribunal erred in law and fact in annulling the recount of votes in Chepalungu votes in the absence of evidence to demonstrate the process was irregular.

f. The honourable Tribunal erred in law and fact in finding that the Respondent ought to have been given reasons for the decision to carry out the recount.

g. The honourable Tribunal misdirected itself in its interpretation and application of Article 47(2) of the Constitution and Section 4(3) of the Fair Administration Act.

h. The honourable Tribunal erred in law and fact in failing to uphold the political rights of the 3rd Appellant under Article 38(3) (c) of the constitution.

5. When the appeal came up for hearing, learned counsels appearing in the matter were invited to make oral submissions. I have re-evaluated the case that was before the Political Parties Disputes Tribunal. I have also considered the rival oral submissions. Mr. Wanyama, learned advocate for the Appellants beseeched this court to allow the appeal and set aside the decision of the PPDT delivered on 15.5.2017 on various grounds put forward in the memorandum of appeal.

6. Let me begin by considering together grounds (c) and (d) which are closely related. It is the submission of the Appellants that the Political Parties Disputes Tribunal failed to inquire into the authenticity of the witness statement sworn by one David Kipsang Koske, hence failing to uphold the Appellants' preliminary objection dated 11th May 2017. Mr. Kiptoo, learned advocate for the Respondent was of the submission that PPDT considered the Appellants preliminary objection and the affidavit of David Kipsang Koske plus the further affidavit sworn by the Respondent to controvert the averments in the affidavit alleging forgery. It is argued that PPDT rightly concluded that the preliminary objection did not raise pure points of law but was instead based on facts. I have examined the proceedings of PPDT and its clear that when the parties appeared they recorded a consent order to allow the Political Parties Disputes Tribunal to determine the dispute on the basis of affidavit evidence, submissions and pleadings presented. Learned counsels further agreed before PPDT that the preliminary objection dated 11th May 2017 be considered and dealt with in the final judgment. I have looked at the affidavit of David Kipsang Koske sworn on 11th May 2017, in para. 6 of the aforesaid affidavit, David Kipsang Koske denies drawing the witness statement annexed to the affidavit of Beatrice Chebomui, sworn and filed in support of the motion dated 8th May 2017. The deponent avers that the statement was a forgery. In paragraph

11 of the affidavit of Beatrice Chebomui, it is stated that the Chebalungu County returning officer issued a statement that the party primaries for Chepalungu sub-county was free and fair with no irregularity reported hence there was no need for the recount. She attached to the aforesaid affidavit a witness statement allegedly signed by the returning officer i.e David Kipsang Koske. It is also on record that the Respondent filed supplementary affidavit sworn on 12.5.2017 to answer the affidavit of David Kipsang Koske. In this later affidavit the deponent pointed out that Mr. David Kipsang Koske did not deny that she (Respondent) was declared as the winner of the nomination and that she was not notified of the letter of complaint which prompted the decision to order for the recount of the Chepalungu sub-county votes. She further averred that she was not called for the hearing of the complaint. It was also pointed out that the preliminary objection was based on an allegation of forgery which is a factual matter hence the same not be regarded as a proper preliminary objection. It is important to also look at how the PPDT determined the issue when faced with the aforesaid rival arguments and pleadings. The judgment of the PPDT clearly shows that one of the issued framed for determination was the preliminary objection. At page 3 of the judgment the PPDT expressed itself in part as follows:

"The 2nd and 3rd Respondents (1st and 2nd Appellants herein) raised a preliminary objection, seeking that the suit be struck out, on grounds that the affidavit filed by the claimant was a forgery. A preliminary objection is raised on a pure point of law as per Mukisa Biscuit Manufacturing Co. =vs= West End Distributors (1969) E.A 696. In this case, whether or not the affidavit is a forgery, is a question of fact requiring examination of witnesses. The preliminary objection is disallowed."

7. It is clear in my mind that the PPDT adequately addressed itself over the preliminary objection and disallowed the same. In other words the Tribunal was of the view that the issue relating to the allegation of forgery could not have been determined as a preliminary point without calling for evidence. It was therefore not based on pure points of law. In my humble estimation, the Tribunal cannot be faulted in the manner it dealt with the issue. I have taken time to critically examine the pleadings and it is apparent that the Respondent herein filed a supplementary affidavit which controverted the averments contained in the affidavit of David Kipsang Koske. Even assuming that the preliminary objection was sustained, I think the whole complaint would not have been struck out but instead what would have been struck out was paragraph 11 of the affidavit of Beatrice Chebomui with the disputed annexture marked "B.C.3" i.e the purported witness statement of David Kipsang Koske. The complaint could therefore have been determined using the remaining averments of the supporting affidavit. It has been argued that the PPDT should have inquired into the authenticity of the alleged witness statement. It is trite law that whoever alleges the existence of a fact, she/he is enjoined by law to prove that fact. The 3rd Appellant was bound to present evidence to establish that the alleged witness statement was a forgery either by subjecting the signature for examination by a document examiner or by summoning the witness to be subjected to cross-examination. The 3rd Appellant's allegation of forgery prima facie would not have seen the light of the day even if the PPDT had made inquiries into the allegation.

8. Having disposed of grounds (c) and (d), let me now shift my attention to grounds (a) and (b). It is the argument of the Appellants that the PPDT breached the provisions of Articles 47, 48 and 50 of the Constitution when it failed to issue directions for service of the complaint on the 3rd Appellant thus violating her right to a fair hearing. It is also argued that the Respondent was allowed to prosecute her complaint without serving the 3rd Appellant. The Appellants further argued that the PPDT misdirected itself in its interpretation and application of Article 47(2) of the Constitution and Section 4(3) of the Fair Administration Act. Mr. Wanyama, learned advocate for the Appellants argued that the 3rd Appellant did not participate in the PPDT proceedings and despite raising the issue before the PPDT it was never addressed. The learned advocate pointed out that there was no affidavit of service filed to prove service. The Appellants' advocate faulted the use of substituted service unknown to law. The learned

advocate proposed that the 1st and 2nd Appellants are willing to conduct another round of nominations in Chepalungu Constituency. This later proposal was flatly rejected by Mr. Kiptoo, the Respondent's advocate arguing that there is no good reason to justify the ordering of a rerun yet there were no irregularities in the primaries in any of the voting centres. Mr. Kiptoo also argued that if this court is of the view that a re-run be conducted then it should be in the entire county. Mr. Wanyama was not impressed by Mr. Kiptoo's proposal. He argued that the dispute was over Chepalungu Constituency and not in any other constituency. The Respondent's advocate pointed out that the Respondent obtained leave to serve the 3rd Appellant by substituted service and service was effected by whatsapp. The learned advocate submitted that the 3rd Appellant who is a member of the County Assembly of Bomet County just like the Respondent had failed to attend the assembly to avoid being personally served thus prompting the Respondent to seek for leave to serve by substituted service. The question which this court has been left to grapple with is whether or not he 3rd appellant was served. I have carefully considered the arguments of Mr. Wanyama and what comes of the learned advocate's submissions is that 3rd Appellant is basically saying that she was served using a mode of service not recognised by law. Mr. Kiptoo has submitted an affidavit of service showing that the 3rd Appellant was served by WhatsApp.

9. With respect, I agree with the submissions of Mr. Wanyama that the aforesaid mode of service is not recognised under Order 5 of the Civil Procedure Rules, 2010. That mode of service by electronic transmission. The question is can service by electronic transmission be regarded as unlawful on the basis that they are not recognised by procedural law: I am of the humble view that applying the overriding objective under Section 1A of the Civil Procedure Act, that such mode of service should be adopted but with caution. There must be sufficient evidence to show that the mobile number used belong to the person intended to be served. The court is directed under Section 1(B) (c) of the Civil Procedure Act for purposes of furthering the overriding objective to handle all matters presented before it for the purpose of attaining *inter alia* the use of suitable technology. In this appeal, the Respondent successfully obtained leave to serve by substituted service from the Political Parties Disputes Tribunal. I have already stated that there is no dispute that the 3rd Appellant was served by Whats App. There is no dispute that the email address and or the mobile number used belong to the 3rd Appellant. The dispute before this court emanate from nomination processes by political parties where time is of extreme essence therefore the court in the circumstances is ready to accept various modes of service but with caution as alluded hereinabove. For the above reasons I am satisfied that the 3rd Appellant was properly served but she chose not to avail herself before the Political Parties Disputes Tribunal to argue her case.

10. Though the PPDT did not address itself over the issue, this court is not oblivious of the fact that the 3rd Appellant was aware of the existence of those proceedings, so that had the PPDT addressed itself to the issue it would still have gone ahead to hear and determine the complaint in the absence of the 3rd Appellant because she had been informed. I therefore do not find that the PPDT having breached Articles 47, 48 and 50 of the Constitution of Kenya, 2010.

In grounds (e) (f) and (g) it is the Appellant's submission that the PPDT annulled the recount of votes in Chepalungu Constituency in the absence of evidence to demonstrate the process was irregular. The Respondent opposed this ground arguing that the Tribunal gave reasons for its decision. I have on my part examined the judgment of the PPDT. One of the issues framed for determination is whether the decision to order for a recount was reasonable, lawful or procedurally fair" The Tribunal analysed the evidence presented before it and came to the conclusion that the Respondent was not informed of the reasons for the decision of 22nd April 2017 to recount the votes for Chepalungu sub-county. The PPDT further opined that the failure to inform the Respondent the reasons was in breach of the Article 47(2) of the constitution of Kenya, 2010. In the end the Tribunal concluded that the decision to order for recount was made without providing the Respondent written reasons.

11. It is clear from the judgment of the Tribunal that the decision of the 1st Appellant was faulted on the ground that it ordered for a recount without hearing and giving written reasons to the Respondent. Therefore nothing turns out on this ground.

12. In the final ground (h), it is the Appellants submission that the Tribunal erred by failing to uphold the political rights of the 3rd Appellant under Article 38(3) (c) of the constitution. In the aforesaid constitutional provision, it is expressly stated that every adult citizen has the right, without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office.

13. I have carefully re-evaluated the material placed before the PPDT- vis-a-vis the consequent decision. In my humble appreciation of the dispute, it cannot be said that the Tribunal breached any provision of the constitution nor the relevant statute. The Tribunal simply exercised its statutory duty to hear and determine the dispute brought before it and in so doing it cannot be said it denied the 3rd Appellant her political rights.

14. In the end and on the basis of the above reasons, I find the appeal to be without merit. The same is dismissed in its entirety. Consequently the decision of the political Parties Dispute Tribunal delivered on 15th May, 2017 is upheld. Chama Cha Mashinani and its Elections Board (1st and 2nd Appellants) should forthwith issue Beatrice Chebomui, the Respondent with the nomination certificate for the position of Women Representative Bomet County.

15. In the circumstances of this appeal I order that each party meets its own costs.

Dated, Signed and Delivered in open court this 22nd day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent