Case Number:	Election Petition Appeal 5 of 2017
Date Delivered:	10 May 2017
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	John Nyabuto Onyiego
Citation:	Joseph Mboya Nyamuthe v Orange Democratic Movement & 4 others [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	M.O. Lwanga-Presiding Member Desma Nungo, Paul Ngotho Dr. Adeline Mbithi)
County:	Nairobi
Docket Number:	-
History Docket Number:	Tribunal Cause Number 69 of 2017
Case Outcome:	Appeal succeeded
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION APPEAL NO. 5 OF 2017

JOSEPH MBOYA NYAMUTHE.....APPELLANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

DR. LILIAN GOGO.....2ND RESPONDENT

AND

HON. GEORGE ONER OGALO.....1ST INTERESTED PARTY

WILLIAM OMBURO ODAJE.....2ND INTERESTED PARTY

JOHN WASHINGTON AGUTU.....3RD INTERESTED PARTY

(Being an appeal from the ruling and order of the Political Parties Disputes

Tribunal (M.O. Lwanga-Presiding Member, Desma Nungo, Paul Ngotho

and Dr. Adeline Mbithi) dated 6th May, 2017 in Tribunal Cause Number 69 of 2017)

JUDGMENT

1. This is an appeal arising out of a ruling made by the political parties disputes tribunal and delivered on the 6th day of May, 2017 in which the said tribunal dismissed the claim by the appellant on the ground that it had no jurisdiction to entertain the same before the appellant exhausted internal party dispute resolution mechanism.

2. Joseph Mboya Nyamuthe, hereinafter referred to as the appellant, is a life member of a political party known as Orange Democratic Movement the first respondent in respect of this appeal.

3. On 24th April, 2017, the appellant together with the second respondent Dr. Lilian Gogo, Hon. George Oner Ogalo (1st Interested Party), William Omburo Odaje (2nd Interested Party) and John Washington Agutu (3rd Interested Party) both members of the 1st Respondent, participated in joint primary nomination exercise for the position of Member of Parliament Rangwe Constituency.

4. Upon completion of the exercise albeit alleged cases of electoral malpractices, the second respondent was nonetheless declared the winner by the first respondent and consequently was issued with a nomination certificate as the first respondent's nominee for the position of Member of Parliament for Rangwe Constituency.

5. According to the appellant, the nomination exercise was tainted and manipulated by top party officials upon

whose directions the returning officer was working and every effort to raise the said electoral malpractices in particular to the returning officer and top party officials was ignored.

6. Aggrieved by the decision of the 1st respondent in declaring the 2nd respondent the winner, the 1st, 2nd and 3rd interested parties lodged their appeals to the party's national dispute resolution organ on 24th April, 2017 seeking for annulment and or a repeat of the whole exercise

7. However, the appellant herein opted to straight away file his claim to the political party's disputes tribunal on 4th May, 2017 challenging the manner in which the nomination exercise was conducted and results announced in Rangwe Constituency. In his claim, he cited the 1st and 2nd respondents together with the 1st, 2nd and 3rd interested parties.

8. Among the orders sought before the political parties tribunal by the appellant (claimant) and by "extension the interested parties "was:

1. **That the nomination of the 2nd respondent Dr. Lilian Gogo as the 1st respondent's nominee for the position of the member of Rangwe Constituency be nullified.**

2. **That the honourable tribunal be ordered to tally the results of the nomination of the Member of Parliament for Rangwe Constituency from Kochia, Kagan, East and West Gem Wards and the results thereof be declared.**

3. **That in the alternative, the honourable tribunal be pleased to order the 1st respondent to repeat the nomination exercise for its nominee for the position of the Member of the National Assembly for Rangwe Constituency.**

4. **That the Honourable court be pleased to issue such further orders as it shall deem fit and just in the circumstances.**

9. Before the hearing of the claim, Professor Ojienda, counsel for the 2nd respondent raised a preliminary objection on a point of law. The said preliminary objection centered on the lack of jurisdiction by the tribunal in entertaining the claim under Section 40 of the Political Parties Act before the appellant/claimant exhausted the internal party dispute resolution mechanism which was mandatory. In contrast, Mr. Onyango learned counsel for the appellant opposed the preliminary objection thereby submitting that political parties disputes tribunal has jurisdiction under section 40(1)(fa) to entertain directly a dispute arising out of party primaries.

10. After considering the preliminary objection, the honourable members of the tribunal upheld the same thereby dismissing the claim on the 6th May, 2017 conceding that they had no jurisdiction to entertain the claim as the claimant (appellant) had not lodged his appeal to the 1st respondent's internal dispute resolution mechanism before proceeding to the tribunal contrary to Section 40 (2) of the political parties Act and that appeals by the interested parties were not representative of the appellant's appeal before the 1st respondent.

11. Dissatisfied with this ruling, the appellant swiftly moved to the High Court and filed this petition appealing against the decision of the

Tribunal. Simultaneously filed with the appeal is a notice of motion dated 7th May, 2017 and filed in court same day seeking a temporary injunction restraining the 1st respondent either by itself, its servants or anybody else acting on its behalf from forwarding and or gazetting the name of the 2nd respondent herein to the Independent Electoral and Boundaries Commission as its nominee for the position of Member of Parliament for Rangwe Constituency.

12. When both parties appeared before me on 8th May, 2017 for directions, by consent, they agreed to dispense with hearing of the aforesaid notice of motion and instead proceed with the main appeal to save on time. Parties agreed for the respondents to file their responses and proceed with the hearing the following day save for the 3rd interested party who withdrew from participating further after delivery of the tribunal's verdict.

13. In his memorandum of appeal, the appellant listed nine grounds particularized as hereunder:

1. **That the tribunal erred in law and fact in upholding the 2nd respondent's preliminary objection dated 6th May, 2017, by holding that it lacked the jurisdiction to hear and determine the appellant's claim before it on the ground that the appellant had skipped mandatory step of first instituting the claim with the 1st respondent's national appeals tribunal pursuant to Section 40 of the Political Parties Act.**

2. **That the tribunal erred in law and fact in failing to find and hold that In fact Section 40 (2) of the Political Parties Act as read together with Section 40 (1) of the said Act allowed the appellant to file his claim Before the tribunal without the need to first file an appeal with the 1st respondent's appeal's tribunal.**

3. **That the tribunal erred in law in ignoring the fact that the mischief behind the enactment of Section 40 (1) (f a) as read together with Section 40 (2) of the Political Parties Act by the legislature was to protect political parties members especially nomination aspirants in disputes where political parties internal dispute resolution bodies were themselves being accused of misconduct and therefore could not be Judges in their own disputes under the rules of natural justice.**

4. **That the tribunal erred in law and fact in failing to find that the 1st respondent's tribunal had itself gone rogue by assuming a jurisdiction which it did not have and failing to release the results of the appeals which had been filed before it by 1st, 2nd and 3rd interested parties within 48 hours as provided in Article 12.2 of the 1st respondent's election and nomination rules.**

5. **That the tribunal erred in law and fact in holding that there was no appeal which had been filed before the respondent's national appeal's tribunal on the dispute before it while in fact there were three pending appeals and on which the said tribunal had refused and or ignored to give a decision.**

6. **That in upholding the 2nd respondent's objection, the tribunal denied the appellant his constitutional right to have the dispute between him and the respondents resolved in open and public hearing before the tribunal contrary to Article 50 (1) of the Constitution of Kenya.**

7. **That the tribunal erred in law and fact in placing undue regard to procedural technicalities while ignoring the express and plain provisions of the political parties Act and the Constitution of Kenya 2010 contrary to Article 159 (2) (a) and (b) of the said Constitution.**

8. **That the tribunal, by considering irrelevant matters, misdirected itself on the application of the principles of law and in all circumstances of the claim before it, failed to exercise its discretion judiciously.**

9. **That the tribunal erred and misdirected itself in law by selectively Interpreting the law thereby aiding the cause of the 1st and 2nd respondents as against the appellant.**

14. The appellant therefore urged the honourable court for orders that, the ruling and or order of the tribunal made on the 6th May, 2017 be set aside and instead be substituted therefore with an order dismissing the 2nd respondent's notice of preliminary objection dated 6th May, 2017 and that; the tribunal be directed to proceed and hear the appellant's claim dated 5th May, 2017 and determine the same on its merits.

15. During the hearing, Mr. Kenyatta for the appellant urged the court to consider all the nine grounds although in essence he did not argue them individually. Both counsels basically approached their submissions generally while oscillating on the main ground i.e. whether the political parties disputes tribunal has jurisdiction to entertain a dispute out of party primaries directly without the affected party (complainant/ claimant) first having exhausted their internal dispute resolution mechanism.

16. Mr. Kenyatta contended that the political parties disputes tribunal has jurisdiction under Section 40 sub-section 1 and 2. Counsel urged the court to consider the plain reading and wording of Section 40 of the political parties which provides jurisdiction of the tribunal as follows:

"Sub-section (1) – the tribunal shall determine:

(a) **Disputes between 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 registrar under this Act**.

(fa) Disputes arising out of party primaries.

Section 40 (2) goes further to say:

"***Notwithstanding sub-section (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".***

17. According to Kenyatta, Section 40 (2) only makes it mandatory for disputes falling under Section 40 (1) paragraphs a, b, c and e to first go through internal party disputes resolution mechanism before approaching the political parties disputes tribunal. Counsel opined that issues arising out of Section 40 (1) paragraphs d, f and (fa) need not go through any party internal dispute resolution mechanism hence any aggrieved party can directly approach the tribunal.

18. Learned counsel contended that his client's dispute squarely falls under Para (fa) and therefore it is not one of such cases covered under Section 40 (2) aforementioned which mandatorily requires a party to exhaust internal dispute resolution mechanism.

19. Based on that argument alone, counsel submitted that the political parties disputes tribunal had jurisdiction to entertain the claim by his client and that the preliminary objection was misplaced hence the tribunal should be overruled and therefore directed to hear the main claim and make substantive orders thereof.

20. In support of his submission, Mr. Kenyatta submitted that, in introducing paragraph (fa) to Section 40 (1) of the Political Parties Act, parliament was alive to the fact that in party primaries, aspirants quite often suffer in the hands of internal dispute resolution mechanism officials in which case members are frustrated and their claims end up not being litigated on time hence the need by parliament to curb that mischief by allowing aggrieved parties

to ventilate their disputes before an impartial and independent organ in this case the political parties disputes tribunal.

21. Counsel urged the court not to interpret Section 40(1) narrowly and that the provision should be given its literal interpretation. He referred the court to the case of **Joseph Kaberia Kahinga & 11 others vs Attorney General (2016) eKLR** in which the court held that:

"**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 ambigous, 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 courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposeful approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted".**

22. Learned counsel averred that Article 38 of the constitution provides that every citizen has a right to participate in political parties activities and that his client is entitled to a fair hearing before an impartial tribunal in accordance with Article 50 of the 2010 Constitution.

23. In response, Professor Ojienda for the respondents opposed the appeal and urged the court to dismiss the same and uphold the political parties' disputes tribunals ruling which held that they had no jurisdiction.

24. Counsel submitted that, the applicant being a member of Orange Democratic Party (1st respondent) is bound by the internal party dispute resolution mechanism in accordance with Section 40(1) paragraph b and Section 40 (2) of the political parties Act and Rule 19. 2.3 of the Orange Democratic Movement Party (1st respondent).

25. Learned counsel contended that, the intention of Parliament was to have a process of solving complaints at the party level to avoid flooding the political party's disputes tribunal with unnecessary cases. He urged the court not to adapt a literal approach in interpretation paragraph (fa).

The respondents counsel cited several authorities in support of his arguments which the court appreciated and made reference to.

26. Mr. Nyangweso for the 1st interested party merely associated himself with the submissions of the appellant.

27. I have considered the grounds of appeal herein and submissions by both counsels. Although the appellant listed nine grounds of appeal, they basically concentrated on the main ground i.e. jurisdiction of the political parties disputes tribunal.

28. Issues for determination are:

a. **Whether the political party's disputes tribunal has jurisdiction to entertain disputes arising out of party primaries before the aggrieved party exhausts internal party dispute resolution mechanism.**

b. **Whether the tribunal's holding that they did not have jurisdiction denied the appellant a right to a fair hearing.**

c. **Whether a member of a party who is aggrieved by results out of party primaries is automatically bound by his party's internal dispute resolution mechanism.**

29. According to the applicant, Sections 40 (1) and 40 (2) have no effect on Section 40 (1) (fa). Professor Ojienda relied on the case of **Adan Ali Wako vs Nura Diba Billa and 2 others (2017) eKLR** where J. Gikonyo held that "***where there is provision of internal dispute resolution mechanism a party should exhaust that process first in accordance with Section 40 (1) of the Political Parties Act".***

Similar preposition was held in the case of; **Stanley Mugathi Daudi and 4 others -versus - Cyprian Kubai Kiingo member of parliament Igembe Central Constituency and 3 others (2013) eKLR and Ephrahim Mwangi Maina –versus- Attorney General & 2 Others (2013) eKLR.**

It is apparent from the authorities quoted herein above, that the honourable Judges were dealing with issues touching on parties disputes in respect of Section 40 (1) and (2) before the introduction of Section 40 (1) (fa). With paragraph (fa) now in place, the legal landscape obviously is on a trajectory of its own.

30. Counsel for the respondent further invited the court to make reference to Justice Ngugi Mumbi's approach in the case of **Stephen Asura Ochieng and 2 others vs Orange Democratic Movement Party and 2 others (2011)eKLR** in which the honourable Judge held

"**To my mind, the intention behind the establishment of the political parties Tribunal was to create a specialized body for the resolution of inter party and intra party disputes. The creation of the tribunal was in line with Provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunal's established under the Constitution and for the use of alternative dispute resolution mechanism. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between Members of political parties among themselves or with their parties wind up on the constitutional division of the High court would clearly be prejudicial to the expeditious disposal of cases.**

31. What mischief was the introduction of Section 40 (1) (fa) vide Political parties amendment Act No.21/2016 intended to cure. According to Professor Ojienda, paragraph (fa) was intended to take care of a situation where parties do not have internal disputes resolution mechanism. Mr. Kenyatta on the other hand argued that, the provision was intended to protect nomination aspirants who may not get justice before the party dispute resolution tribunal.

32. From the plain reading and wording of Section 40(1) (fa), one is able to distinguish disputes between members of a Political Party under paragraph (a) and disputes between a member of a political party and a political party under paragraph (b) from disputes arising out of party primaries as provided for under paragraph (fa).

33. When Parliament in their wisdom decided to introduce paragraph **"fa**" in Section 40(1) in the year 2016 while fully aware that Section 40 (a) and (b) already in existence could properly take care of disputes arising out of party primaries, they must have had a reason in specifically isolating disputes arising out of party primaries from those under paragraph a,b,c & e.

34. Although the Court did not have a Parliamentary Hansard to extract the actual objective and intention in introducing paragraph (fa), it is not lost in my mind that, where the words and language used in a statute are clear and or explicit on the face of it and therefore no element of ambiguity, a court should not endeavor in farfetched fishing expedition trying to import and attach some unnecessary and unwarranted construction and or interpretation of statute which would otherwise distort the very purpose for which such statute or provision was established and or meant to achieve.

35. In construction of statutes, MN Rao Amita Dhanda 10th Edition on interpretation of statutes page 432 gives a clear analysis to the effect that, in Construction of statutes in the first instance, the grammatical

sense of the word is to be adhered to. The words of a statute must prima facie be given the ordinary meaning (see Nokes -vs- Don caster amalgamated collieries (1940) AC 1014 Page 1022 and Oriental Insurance Company limited -vs- Sardar Saddhu Singh AIR (1994 Raj.44). Where there is no ambiguity in the words, there is no room for construction

(See Yates -vs- United states 1 L Ed 2nd 1356 Page 1387 per Harlan Judge In which the learned Judge held " **where the intention is clear, there is no room for construction nor exercise for interpretation or addition**."

In the same vein, when the language of a statute is un ambiguous in interpreting the provisions thereof, it is not necessary to look in the legislative intent or the object of the act (See Aru Nadar -vs- Authorized officer land reforms (1998) 7 SCC 159 (Supreme Court of India), In the case of Browdor -vs- United states 85 L Ed 862, Judge Reed held " **No single argument has more weight in a statutory interpretation than the plain meaning of the words"**. In the instant case I do hold that the words are clear and un ambiguous therefore requiring no further interpretation.

36. I am alive to the contribution made by Article 159 of the Constitution in so far as alternative dispute resolution mechanism is concerned thereby curbing and reducing unnecessary litigation in our courts and consequently saving on costs and time. Equally, I am aware that Section 40(2) requiring parties to exhaust internal party dispute resolution mechanism within their parties before approaching the tribunal was meant to control, manage and reduce the amount of cases flowing to the tribunal thereby flooding the justice system at that level and thereafter the courts hence making it almost impossible to effectively discharge justice in a manner that is just, expeditions and affordable in compliance with the overriding objective under Section 1A and 1B of the Civil Procedure Act.

37. Key questions therefore arise: wasn't parliament aware that by introducing paragraph (fa) to Section 40 (1) of the Political Parties Act and by excluding it from Section 40(2), would open a pandora box and increased litigation thereby allowing members aggrieved by decisions arising out of Party primaries to directly access the Tribunal" Wasn't parliament aware that, the parties have their internal dispute resolution mechanism to deal with disputes arising out of party primaries hence the same should not directly proceed to the Tribunal before exhausting their internal dispute resolution mechanism as it is the case with disputes under Section 40 (1) a, b, c and e " wasn't Parliament aware that paragraph (fa) will render political parties internal dispute resolution futile.

38. Parliament definitely wanted to remove disputes arising out of party primaries from the jurisdiction of the parties' dispute resolution mechanism to a more independent body (tribunal) given the seriousness of such disputes in which the outcome may automatically in some regions translate to one becoming a member of parliament even before the actual elections.

39. The answer to me is simple, they were aware and the introduction of paragraph (fa) was deliberate thus giving a member aggrieved by decisions arising out of party primaries the option of either starting with Internal party dispute resolution mechanism, under Section 40 (1) paragraph (a & b) or straight away go to the Tribunal which is the position in the appellant's case, it therefore means, that a party aggrieved by the outcome of party primaries 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.

40. I do not see any wrong committed by the appellant in directly approaching the tribunal under Section 40 (1) (fa) of the Political Parties Act. That is why that particular dispute is not included under Section 40 (2) which distinctly states that, disputes under paragraph a, b, c, and e should first be sorted out at the level of Internal party disputes resolution mechanism.

41. I do not see any ambiguity as between Section 40 (1) paragraph a and b and paragraph (fa). Paragraphs a, b, c and e deals with other party disputes except party primaries. Those disputes that can go directly to the tribunal are those covered by paragraph (d) (f) and (fa) hence their exclusion from Section 40 (2).

42. Although the appellant is a life member of the 1st respondent, any dispute between him and the party or co-member other than a dispute arising out of primary disputes must first go through the party internal disputes resolution mechanism. It is therefore not true that the appellant erred by approaching the Tribunal first as submitted by Professor Ojienda in respect of the dispute herein.

43. As stated in the case of Speaker of National Assembly and Stephen Asura Ochieng cited by Professor Ojienda, where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be followed. In this particular case, the procedure is clearly provided for and stipulated in Section 40 (1) (fa) of the Political Parties Act which is a statute hence the tribunal was properly seized of the matter. I believe lady Justice Mumbi Ngugi would have been persuaded to arrive at a different approach in the case of Stephen Asura Ochieng if Paragraph (fa) of Section 40 (1) were in existence.

44. I have painfully agonized as to why parliament thought of introducing paragraph (fa) at this particular point in time thereby watering down the gains made by Article 159 of the Constitution and Section 40 (2) of the Political Parties Act in so far as alternative dispute resolution mechanism is concerned. Was the amendment mischievously made as it has happened before" Or was it an omission on the part of the printers in not including paragraph (fa) in Section 40(2). Be that as it may, a party's fundamental right to a fair hearing under Article 50 and the right to participate in political activities cannot be sacrificed at the altar of convenience, pressure of time in litigation before the tribunal/ courts or lack of sufficient resources and personnel.

46. In my opinion, parliament made a painful decision which we must adjust to live with until the same parliament takes a bold step to amend Section 40(1) by either removing Paragraph (fa) completely or specifically by adding it to Section 40 (2) for the sake of Article 159 (1) (c) of the constitution thereby promoting alternative dispute resolution mechanism.

46. A court can therefore not be a partaker of parliament's mistakes in otherwise giving a different interpretation other than pronouncing the clear wording and language of their legislation.

47. For those reasons, I am satisfied that the appellant has sufficiently persuaded the court and the appeal is hereby allowed with a declaration that the political parties disputes tribunal has jurisdiction to hear a dispute arising out of party primaries under Section 40 (1) (fa) which the honourable members of the tribunal did not address themselves to, hence misapprehended and misinterpreted Section 40 of the political parties Act.

48. Accordingly, the appeal herein succeeds and the political parties disputes tribunal's decision/ruling upholding the 2nd respondent's preliminary objection dated 6th May, 2007 be and is hereby set aside and the file be remitted back to the tribunal to immediately reconstitute a fresh panel to hear and determine the appellant's/claimant's claim filed before the tribunal on 4th May, 2017. Considering the confusion caused by the introduction of Section 40 (1) (fa), I will order that each party bears its own costs.

DATED AND DELIVERED IN COURT AT NAIROBI THIS 10TH DAY OF MAY, 2017

J. N. ONYIEGO

JUDGE

In the presence of;

…….....……Advocate for the Appellant

……Advocate for the Respondent