

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E045 OF 2023

UNITED DEMOCRATIC ALLIANCE APPELLANT

VERSUS

THE REGISTRAR OF POLITICAL PARTIES RESPONDENT

AND

MAENDELEO DEMOCRATIC PARTY

ORANGE DEMOCRATIC MOVEMENT

PROGRESSIVE PARTY OF KENYA

CHAMA CHA UZALENDO

JUBILEE PARTY

DEVOLUTION EMPOWERMENT PARTYINTERESTED PARTIES

(Being an Appeal from the Judgment of the Political Parties Disputes Tribunal dated and delivered on 13th January, 2023 in Nairobi PPDT Appeal No. E009 of 2022)

JUDGMENT

Background

1. The present appeal arises out of the judgment delivered by the Political Parties Dispute Tribunal ("the Tribunal") on 13th January, 2023.

2. The subject matter of that judgment related to a challenge by the Appellant to Kenya Gazette Notice published on 4th November, 2022 in respect of the

allocation of the Political Parties Fund ("the Fund") established under the Political Parties Act, 2011.

3. On 13th January, 2023, the Tribunal delivered its judgment dismissing the appeal.
4. Aggrieved by the decision of the Tribunal, the Appellant filed its Memorandum of Appeal dated 23rd January, 2023 and Record of Appeal challenging the Tribunal's judgment based on the grounds set out in the following terms:-

- a. That the Honourable Tribunal erred in law and in fact by failing to find that the Respondent did not disclose the formula employed in calculating or arriving at the specific amounts allocated to the 48 qualifying parties.*
- b. That the Honourable Tribunal erred in law and in fact by failing to find that the Respondent failed to properly put to equilibrium the funds allocated to the Appellant vis a vis the votes secured in the general election held on 9th August 2022.*
- c. That the Honourable Tribunal erred in law and in fact by failing to find and hold that the Appellant was duly entitled to all the votes as per the published voters register in relation to Kericho County Woman Representative and Member of the County Assembly Ravine Ward Baringo County, having won the two elective positions unopposed.*

- d. *That the Honourable Tribunal erred in law and in fact by failing to find that the Respondent miscalculated the total number of votes garnered by the qualifying parties in the preceding general elections in the election of the President, Member of Parliament, County Governors and Member of County Assemblies as per the facts and figures published by the Independent Electoral and Boundaries Commission in Kenya Gazette Notices Numbers 9773, 9949, 9950, 9951, 9955, 9956 of 2022.*
- e. *That the Honourable Tribunal erred in law and in fact by disregarding the blatant admission by the Respondent that votes from a coalition that did not secure any elective seat as strictly mandated by section 25 (2) (c) of the Political Parties Act, 2011 were considered in computing the allocations from the The Fund.*
- f. *That the Honourable Tribunal erred in law and in fact by failing to find that the Respondent acted unlawfully by arbitrarily allocating the Funds, without deferring to provisions of section 25 (2) (c) of the Political Parties Act, thereby conferring irregular advantage to some political parties at the expense of others.*
- g. *That the Honourable Tribunal erred in law and in fact in finding that the Appellant was only eligible to receive Kenya Shillings, 577,162,898.00/- for the financial year 2022/2023 a figure unsupported by the final declaration published by the Independent and Boundaries Commission (sic).*
- h. *That the Honourable Tribunal erred in law and in fact by failing to find that the Respondent should exclude votes from any party and/or*

coalition that did not secure any elective seat as required by section 25 (2) (c) of the Political Parties Fund, 2011, in determining allocations from the Political Parties Fund for the financial year 2022/2023.

- i. That the Honourable Tribunal misdirected itself in finding that the distribution of the Political Parties Fund was lawful when there were glaring computational maladies.*
- j. That the Honourable Tribunal erred in both law and in fact by failing to find that the Respondent's refusal and/or failure to supply the Appellant with the breakdown of the allocations based on the votes attributable to each of the qualifying political parties violates the prescriptions of Article 10 of the Constitution.*
- k. That the Honourable Tribunal misdirected itself in finding that the issues raised by the Appellant relating to the distribution of The Political Parties Funds to qualifying political parties had already been addressed by the Respondent.*
- l. That the Honourable Tribunal erred in law and fact in finding that the Appellant's participation in meetings convened by the Respondent was an indication that the Appellant was content with the Respondent's allocation of Political Parties Fund to qualifying political parties.*
- m. That the Honourable Tribunal erred in law and in fact and gravely misdirected itself by regarding the Appellant's written submissions as evidence.*

n. That the Honourable court erred in law and in fact and abdicated its responsibility by failing to determine all the issues raised by the Appellant regarding the irregular disbursement of the Political Parties Fund by the Respondent.

5. The parties agreed that this appeal be disposed of by way of written submissions. The Appellant filed its submissions dated 10th February, 2023; the Respondent filed its submissions dated 8th March, 2023; and the Interested Parties filed their submissions dated 27th February, 2023.

Appellant's Submissions:

6. The Appellant proposed the following issues for determination:

- a. What is the import of section 25 of the Political Parties Act on allocation of funds to political parties?*
- b. Whether the Respondent erred in the formula adopted in allocating funds to the Appellant?*
- c. Whether the Appellant was entitled to the votes published in relation to Kericho County Women Representative and Member of County Assembly Ravine Road (sic), in the computation of funds?*
- d. Whether the Appellant acquiesced to the formula adopted by the Respondent?*
- e. Who bears the cost of the appeal?*

7. As regards the first issue, the thrust of the Appellant's argument was that the Respondent included votes from parties and or coalitions that did not secure any elective seat in computing the amounts to be allocated to political parties from the Fund contrary to Section 25 of the Act.
8. In particular, the Appellant outlined that of the Kshs. 1,475,000,000/- which had been allocated to the Fund for the year 2022/23, certain sums had been wrongly allocated to the Interested Parties at the expense of the Appellant.
9. Further to the above, despite multiple requests from the Appellant, the Respondent had failed to disclose the specifics of the formula employed in arriving at the amounts allocated to the various parties.
10. The Appellant submitted that the Respondent was in breach of Articles 201 and 10 of the Constitution by virtue of its failure as stated above.
11. As regards the second issue, the Appellant submitted that the Respondent had miscalculated the total number of votes secured by the Appellant in the preceding general elections. The correct figure was 31,106,673 votes against a possible total of 68,555,184 votes. Applying the numbers to the formula in Section 25, the Appellant ought to have been allocated the sum of Kshs. 468, 493, 234.00/-

12. Further to the above, that the Tribunal disregarded the figures provided by the Appellant as part of its submissions, which had tabulated the correct number of votes and proportion of funds owed to the qualifying parties on the erroneous basis that the same were evidence rather than submissions.
13. Based on the figure above, the applicant submitted that the Respondent had allocated the Appellant less than it should have and accordingly deprived the Appellant of Kshs. 43,083,404/- in the process.
14. As regards the third issue, the thrust of the Appellant's argument was that because the Kericho County Woman Representative and Member of County Assembly Ravine Ward had been elected unopposed, the votes of all registered voters (in relation to those electoral areas) ought to have been included in the calculation and applied to the formula for allocation of funds pursuant to Section 25 of the Act.
15. The above argument was premised on the Appellant's logic that "having secured the seats unopposed, it follows logically that the Appellant secured all the possible votes as per the published register".
16. In relation to the fourth issue, the Appellant submitted that while it admitted that it attended the various meetings scheduled by the Respondent to discuss the allocation of funds, it has not received the particulars of computation to

show how the figures allocated were arrived at. To date the Appellant is not content with the funds allocated to it.

Respondent's Submissions:

17. The Respondent submitted that the appeal raises the following pertinent issues for determination:

- a. Whether the Respondent ought to have considered the Appellant's votes in the elections for Kericho County Women Representative to the National Assembly and Member of County Assembly Ravine ward, Baringo County?*
- b. Whether the Appellant was aware of the formula and data relied upon by the Respondent; and*
- c. Whether the Respondent adhered to the law in allocating funds to political parties?*

18. As regards the first issue, the crux of the Respondent's argument was that on 9th August, 2022, there was no voting with regard to the elections for the above positions. As such, there are no votes attached to those two elections, and it is therefore impossible for the Respondent to determine the number of votes that the two leaders would have garnered had an election, in the style of voting, been held.

19. Further to the above, that a reading of section 25(1)(8) does not reveal any other meaning of “votes secured”, accordingly votes secured means actual votes, not imaginary, or inferred.
20. Finally, that based on Regulation 53 of the Election General Regulations, 2012, where at the close of nomination for any elective post only one candidate is validly nominated in respect of that elective post, the commission declares the candidate duly elected and publishes a notice in the gazette to that effect there was a declaration of ‘no contest’. Hence there are no votes to be relied upon in distribution of the fund.
21. As regards the second issue, the Respondent submitted that the Appellant has admitted that various consultative meetings took place between the parties on diverse dates in November 2022. As such, specifics of such meetings need not be repeated as the same are not being contested.
22. The Respondent submitted that in the event the Appellant was taking issue with the form in which the Respondent chose to address its inquiries, it ought to pursue the said matter under Section 23 of the Access to Information Act, 2016, rather than the present forum.
23. As regards the final issue, the Respondent submitted that it adhered to the law in allocating funds to the political parties. It outlined that Section 2 of the

Political Parties Act (“the Act”) includes, in its definition, a Coalition Political Party. A holistic reading of the Act provides a basis upon which the Azimio presidential candidate’s votes accrued to constituent political parties within the parameters of Section 25 of the Act.

Interested Parties Submissions:

24. The Interested Parties submitted that the issues are as follows:

- a. Whether the non -qualifying political parties benefited from the political parties’ fund allocation and whether the Appellant adduced evidence of the same;*
- b. What was the total number of votes secured by all qualifying political parties;*
- c. Whether the Appellant’s views were taken into consideration in the allocation of the political parties’ fund;*
- d. Whether the tribunal or this court can read into the political parties act the substantive requirements that the votes of a person elected unopposed should be included in the computation of votes cast for the purpose of allocation of the political parties’ fund.*

25. In relation to the above grounds, the Interested Parties submitted that the Appellant had failed to produce any evidence in relation to its submissions. In particular, they argued that if the Appellant sought to rely on its tabulations, it ought to have filed the same in the first instance together with its appeal.

By ignoring and dismissing the said submissions, the THE TRIBUNAL upheld the principle of fair hearing, that bodies must be heard before any adverse decisions are taken against them; and that each party must have a fair opportunity to present its case.

26. Further, that to date, the Appellant has never filed an application seeking leave to introduce its evidence on appeal, and as such, the tabulation referred to in its submissions remained improperly on record.
27. The Interested Parties submitted that there was no concrete evidence supplied by the Appellant to challenge the figures supplied by the IEBC, and that the Appellant's views were taken into consideration in regard to the formula for allocation of funds at several meetings, notably, the meetings on: 16th September, 2022, and 21st September, 2022, and the Appellant was duly represented during those meetings.
28. As regards the issue relating to the meaning of “vote secured”, the Interested Parties submitted that the interpretation proposed by the Appellant would lead to arbitrariness in the allocation of votes cast as the registrar would have to whimsically determine how many votes ‘may’ have been cast rather than how many were actually cast.

29. Finally, the Interested Parties submitted that this court ought not to enlarge the scope of legislation or intention of legislation; and further, that it has no powers to interpret the law in a manner that amounts to rewriting the same.

Analysis and Determination:

30. I have considered the submissions of the parties. I note that the parties did not agree on the various issues. Having considered all the issues raised, in my opinion, the issues are as follows:

- a. Did the Respondent fail to allocate and distribute the funds from the Fund to the various political parties in accordance with the law?
 - b. Was the Appellant entitled to receive allocation of funds from the Fund based on the outcome of the elections of Kericho County Women Representative to the National Assembly and Member of County Assembly Ravine ward, Baringo County?
 - c. What are the appropriate orders as to cost?
- a) **Did the Respondent fail to allocate and distribute the funds from the Fund to the various political parties in accordance with the law?**

31. As this is a first appeal, I have a duty to re-evaluate the evidence before me.

This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

32. The above authority is consistent with the provisions of Section 41(2) of the Act, which states as follows:-

“41(2)

An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to the Court of Appeal and the decision of the Court of Appeal shall be final.”

33. The further relevant sections of the Act include: Section 23 of the Act, which establishes the Fund and states that the same shall be administered by the Registrar. Section 24 of the Act further identifies the sources of the Fund in the following terms:

“24. Sources of moneys in the Fund

(1) The sources of the Fund are—

(a) such funds not being less than zero point three per cent of all the national government’s share of revenue as divided by the annual Division of Revenue Act enacted pursuant to Article 218 of the Constitution as may be determined by the National Assembly; and

(b) contributions and donations to the Fund from any other lawful source.”

34. Most relevant to the dispute, Section 25 of the Act spells out the formula for distribution of the Fund in clear and certain terms. It reads as follows:

25. Distribution of the Fund

The Fund shall be distributed as follows—

(a) seventy per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election;

(b) fifteen per cent of the Fund proportionately to political parties based on the number of candidates of the political party from special interest groups elected in the preceding general election;

(c) ten per cent of the Fund proportionately to political parties based on the total number of representatives from the political party elected in the preceding general election; and

(d) five per cent for the administration expenses of the Fund.”

35. Based on my reading of Section 25 as stated above, I am of the view that distribution of funds from the Fund is based solely on the statutory formula as set out above. Further to the above, and because the Appellant has admitted that consultation between the parties took place on the various dates stipulated by the Respondent and Interested Parties, I have chosen not to consider the question of whether or not the Appellant was ‘aware’ or ‘acquiesced’ to the formula as an issue. Therefore, the relevant question is simply, was the money allocated in accordance with the statutory formula.

36. Looking at the formula, it is evident that the allocation is arrived at by applying the numbers of votes received by each of the parties to the relevant part of the formula. The outcome is essentially based on mathematics.

37. The question here, is whether the correct numbers were applied to Section 25 (a) only of the formula. The Appellant admitted that it had no issue with the outcome in respect of the allocations made pursuant to Section 25 (b), (c) and (d).

38. The bone of contention in relation to Section 25 of the formula is based on the Appellant's assertion that its votes had been miscalculated or improperly allocated to other parties. By its own calculations, the Appellant was of the view that it obtained **31,106,673 votes against a possible total of 68,555,184 votes**, and ought to have been allocated the said number.

39. Conversely, the Respondent submitted to the Tribunal that the total number of votes secured by all qualifying political parties was **75,498,114 votes**, which number was based on the statistics provided to it by the IEBC. The Respondent's position was accordingly that it had no option but to rely on the official numbers published.

40. Looking at the record, I see that the Tribunal considered this issue and reached a conclusion relating to the same. The Tribunal stated as follows:-

“in order to address our minds to the subject allegations, it is inescapable to ascertain the particulars of political parties and or coalition that were wrongly included...the Appellant did not plead

specifics...the Appellant mentioned certain political parties for the first time in its submissions....”

41. And further, more specifically, in relation to the question of number of votes used for computation, the Tribunal noted the contest and stated as follows:-

“the Appellant did not swear any Further Affidavit in contestation of this allegation. Taking into consideration the Respondent’s response and evidence in respect of the Appellant’s contestation, the burden shifted to the Appellant to prove its claim....”

42. Having considered the reasoning above, I am inclined to agree with the Tribunal. The Tribunal’s position is in line with Section 107 of the Evidence Act, that he who alleges must prove. I do not think this was done. Based on the record, I see that the Appellant had several opportunities during the trial process in the lower court to substantiate its version of the number of votes it had garnered, but did not do so. It failed to file any affidavits, further or supplementary, or to take advantage of its right of reply to the evidence of the Respondent at the appropriate time during that process. Instead, it contested the Respondent’s numbers by way of submissions at the tail end of the process.

43. The question is, were those submissions binding on the Tribunal? I do not think so. Submissions are not a recognized mode of receiving evidence under the Civil Procedure Rules. Therefore, the Tribunal was justified in disregarding the Appellant's table if it so wished, because a court of law is not bound by the submissions of a party. The Tribunal had the right to reach its own conclusion based on its own assessment of the applicable law and evidence on record.

44. I wish to clarify, I am not saying that submissions have no role at all to play in the trial process. Submissions do in fact play an important and useful role, which is to help crystalize the arguments made by the parties in relation to the evidence on record and applicable law, and to persuade the court towards a particular direction. See generally *Daniel Torotich Arap Moi vs Mwangi Stephen Murithi & Another [2014]*; and *Avenue Car Hire & Another vs Slipa Wanjiru Muthegu Civil Appeal No. 302 of 1997*.

45. I will now turn back to the broader question, namely, whether or not the Respondent failed in its duty to allocate the funds in accordance with Section 25 1(a)? I remind myself that the test is whether the Appellant, on balance, proved to the requisite standard and degree of probability, that the Respondent misapplied the formula set out in Section 25. Further, if the same is

affirmative, did the Appellant prove that its numbers were the correct figures to be applied to the formula?

46. Looking at the test above, the starting point is that based on the long-standing common law approach (in respect of alleged irregularities in the acts of public bodies) **that all acts are presumed to have been done rightly and regularly unless proven otherwise.** This is the essence of the common law maxim *Omnia praesumuntur rite etsolemniteresseacta*. In this regard, the Supreme Court of Kenya in *Raila Odinga & 5 others v IEBC & others, Supreme Court Petition No. 3 of 2013 (UR)* stated as follows:-

“196....Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite etsolemniteresseacta: all acts are presumed to have been done rightly and regularly. So the petitioner must set out by raising firm

and credible evidence of the public authority's departures from the prescription of the law.” (emphasis mine).

47. I therefore begin my evaluation with the presumption that the numbers provided by the IEBC and applied by the Respondent to the formula (set out in Section 25 of the Act) were, in fact, correct. I then go on to ask the question, did the Appellant discharge its burden of proving otherwise?

48. Applying my mind to the test above, and based on the evidence on the record, I do not think the test has been met. I say this because beyond ‘submitting’ that the Appellant did not agree with the numbers provided by the IEBC, it did not provide any evidence of what the correct numbers ought to be, nor did it provide any evidence as to why, or how, the IEBC numbers were wrong.

49. Based on the reasons above, I am satisfied that the Tribunal reached a reasonable decision in relation to this issue.

b). Was the Appellant entitled to receive an allocation of funds from the Fund in relation to the elections of Kericho County Women Representative to the National Assembly and Member of County Assembly Ravine ward, Baringo county?

50. I have considered the submission of the parties on this issue. To my mind, the answer to this question depends on the interpretation of the words “votes secured” found in section 25 of the Act.

51. While analyzing how to determine the intention of a statute, the Court of Appeal in County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu [2015] eKLR held that:

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.” (emphasis mine)

52. Bearing in mind the need for predictability and certainty, and considering the unique nature of the electoral process, I am not persuaded by the logic of the Appellant. To apply such a proposition, where the total number of registered voters is equated with votes cast for a particular candidate (elected unopposed) leaves out far too many variables which are innate to the electoral process. For instance, I cannot help but wonder, what about the registered voters who may simply not show up on the day of the election; what about votes that are 'spoilt'; and there may be many other reasons why this logic may not be fairly applied.

53. Further to the above, I note that such an interpretation proposed by the Appellant would also run contrary to the provisions of Regulation 53 of the Elections (General) Regulations, the effect of which is a declaration of '**no contest**' where a candidate is elected unopposed. The words 'no contest' and the fact that no votes are actually cast, lead me to understand that the words "votes secured" taken in its ordinary meaning, and understood in its ordinary way, cannot mean each and every registered vote. In the event parliament intended this to be the case, nothing would have been easier than to say so. At present, I am not inclined to take such a big leap, and I decline to read in the words to such effect.

54. I would however encourage parliament to clarify the meaning of “votes secured” as found in Section 25 of the Act for the purpose of the distribution of the Fund in these types of elections, and call upon them to take appropriate action.

c). What are the appropriate orders as to costs?

55. The general principle is that costs follow the event unless there are good reasons to depart from the general principle. The Supreme Court affirmed this in its decision of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR. In this regard, the court quoted with approval the following:-

“Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise: Chamilabs v. Lalji Bhimji and Shamji Jinabhai Patel, High Court of Kenya, Civil Case No. 1062 of 1973.”

56. And further, in the same decision, it stated as follows:-

So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit.

57. In the present matter, no good reasons to depart from the general principle have been put forward by the parties, and accordingly, I see no reason to depart from the same.

58. Based on the reasons set out above, I find that the Appeal is without merit and the same is dismissed with costs.

Dated and delivered virtually via Microsoft Teams this 11th day of May 2023

A. Visram
ALEEM VISRAM
JUDGE

In the presence of;

..... For the Appellant

..... For the Respondent

