



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 1 OF 2018**

**ELVIS KIRUI.....1<sup>ST</sup> APPELLANT**

**OLGA KARANI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SAITOTI SALAON.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT.....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from a decision of the Political Parties Disputes Tribunal (PPDT) in Claim No. 2 of 2018 made on 8<sup>th</sup> February 2018)***

**JUDGMENT**

1. This is an appeal from the decision of the Political Parties Disputes Tribunal (PPDT) Claim No. 2 of 2018. The grounds of appeal are set out in the memorandum of appeal herein dated 22<sup>nd</sup> February 2018, and filed herein on even date. It is pleaded in it that the PPDT had no jurisdiction to entertain a dispute over the validity of nomination of a candidate, it erred in holding that the question of jurisdiction presented before it was not a pure point of law, it misdirected itself in holding that it needed to interrogate the facts when the sole issue before it was its jurisdiction over the dispute, and it had misapplied the law in holding that it had jurisdiction to entertain a claim seeking nullification of a nomination to County Assembly. It is sought that the decision in question be set aside, a declaration that the PPDT has no jurisdiction to entertain the claim before it, and costs be borne by the respondent.

2. The material in the documents presented before me indicate that the 1<sup>st</sup> appellant was declared duly nominated as Member of the Narok County Assembly through a corrigendum published in the *Kenya Gazette* of 6<sup>th</sup> September 2017, being a corrigendum to Gazette Notice No. 8380 of 2017 in *Kenya Gazette* Vol. CXIX No. 24. He was subsequently sworn in as Member of the Narok County Assembly.

3. The 1<sup>st</sup> respondent moved the PPDT challenging the said nomination of the 1<sup>st</sup> appellant to the County Assembly. His complaint was that the nomination did not follow due process. He argued that the 1<sup>st</sup> appellant had withdrawn his candidature sometime before the date of declaration and therefore he was not eligible for nomination. When the matter was placed before the PPDT, the 1<sup>st</sup> appellant raised a preliminary objection on a point of law, founded on the argument that the PPDT lacked jurisdiction to hear and determine the matter. The objection was overruled on grounds that the same was founded on facts that the PPDT needed to investigate. It is the said dismissal that prompted the appeal herein.

4. The appellants moved this court on a Motion dated 22<sup>nd</sup> February 2018 for stay of proceedings before the PPDT. When the Motion came up for argument on 1<sup>st</sup> March 2018, the appellants abandoned the stay application and urged that they were ready to argue the appeal. I directed the parties to dispose of the single issue of jurisdiction by way of written submissions. There has been compliance with the directions on filing of written submissions. Both the appellants and the respondents, through counsel, have filed their respective submissions. I have read through them and noted the arguments advanced.

5. There is only one issue for me to determine, whether the PPDT has jurisdiction to entertain a dispute relating to determination of the validity of a nomination of a sitting Member of County Assembly.

6. The matter of nomination lists has its basis in the Constitution. The relevant provisions are Articles 90 and 177. The starting point should be Article 177 which provides for composition of the County Assembly, the Assembly includes elected and nominated ward representatives. Article 177 states as follows –

*‘(1) A county assembly consists of –*

(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;

(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;

(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and

(d) the Speaker, who is an ex office member.

(2) The members contemplated in clause (1)(b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.'

7. Then follows Article 90 which says that –

'(1) Elections ... for the members of the county assemblies under 177(1) (b) and (c), shall be on the basis of proportional representation by use of party lists.

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that –

a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

b) except in the case of the seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in priority in which they are listed; and

c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.'

8. Articles 90 and 177 of the Constitution are implemented through the Elections Act, No. 24 of 2011. The relevant provisions being sections 34 and 35, which state as follows –

'34(1) The election of members of the National Assembly, Senate and county assemblies for party list seats specified in Articles 97(1)(c) and 98(1)(b)(c) and Article 177 (1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2). ...

(3). ...

(4). A political party which nominates a candidate for election under Article 177(1)(a) shall submit to the Commission a party list in accordance with Article 177(1)(b) and (c) of the Constitution.'

35(1) A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97(1)(a) and (b), 98(1)(a) and 177 (a) of the Constitution.'

9. Disputes relating to party nominations of members of the County Assembly are dealt with by the PPDT, the Independent Electoral and Boundaries Commission (IEBC) and the courts depending on the stage at which the dispute erupts.

10. The PPDT is a creature of the Political Parties Act, No. 11 of 2011. Its primary jurisdiction is to determine disputes that arise between political parties and their members, other political parties, independent candidates and coalition partners. It also resolves disputes that arise out of party primaries. It has not been clearly articulated before me as to the nature of the dispute that is currently before the PPDT. It is presumed that it is a dispute between a political party, the 2<sup>nd</sup> respondent and its members, the appellants and the 1<sup>st</sup> respondent. However, my reading of it is that it is a dispute relating not so much to party affairs, but a dispute arising from party primaries. If it is a dispute arising from party primaries, it would follow that the PPDT would have jurisdiction over the dispute. However, it is important to underscore the point that the PPDT would have no jurisdiction over matters that are within the purview of the IEBC or the courts.

11. The mandate of the IEBC to resolve election nomination disputes is set out in the Constitution and in statute, to wit the Election Act. The relevant provisions are Article 88(4) of the Constitution and section 74 of the Election Act, which state as follows–

'88(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or established by this Constitution, and any other election prescribed by an Act of Parliament and, in particular, for –

a) ...

b) ...

c) ...

d) ...

e) *the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and subsequent to the declaration of election results;*

f) ...

g) ...'

*'74(1) Pursuant to Article 88(4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.*

(2) ...

*(3) ...where a dispute relates to a prospective nomination or election, the dispute shall be determined before the nomination or election, whichever is applicable.'*

12. The jurisdiction of the IEBC over electoral disputes is limited to matters that arise after the lists have been placed before it by the political parties after political party primaries or nominations. The jurisdiction ends after election results are declared for the contested seats or a valid nomination has been made for the nominated seats. Declaration of results or a nomination is through a gazette notice. Any disputes that arise from the declaration of results and a valid nomination would be outside the jurisdiction of the IEBC and would fall under the power of the court. That is the effect of section 74(1)(3) of the Elections Act. A declaration that some person has been validly elected or nominated as a Member of the County Assembly can only be challenged before a court of law.

13. A challenge as to the validity of an election or nomination of a Member of the County Assembly should be placed before a magistrate's court by virtue of section 75(1A) of the Elections Act, which says that –

*'A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.'*

14. The Supreme Court has had occasion, through *Moses Mwicigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others* (2016) eKLR, to define what 'election' for the purpose of section 75(1A) of the Elections Act means, when it ruled that –

*'It is clear to us that the Constitution provides for two modes of 'election.' The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of nomination, through party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition.'*

15. The exercise that gave rise to these proceedings was a nomination in compliance with the provisions cited above. The name of the 1<sup>st</sup> appellant was submitted by the 2<sup>nd</sup> respondent to the IEBC in obedience to section 35(1) of the Elections Act, it was evaluated by the IEBC, which then caused the nomination to be declared in a gazette notice, paving way for the swearing in of the 1<sup>st</sup> appellant as a Member of the Narok County Assembly. The gazettement exercise was no doubt under the full control of the IEBC. None of the processes undertaken by or are in the hands of the IEBC are liable to scrutiny by the PPDT. The 1<sup>st</sup> appellant was sworn in as Member of County Assembly after the said gazettement. As a Member of the County Assembly the 1<sup>st</sup> appellant cannot be unseated from that position by the PPDT, it is only the courts that have jurisdiction to make orders that would lead to his removal as such. Any party aggrieved by the processes that led up to his nomination had a right of recourse to the disputes mechanisms of the IEBC and the court. They lost the opportunity to move the IEBC appropriately. I agree with the submission that there is no jurisdiction in the PPDT to handle the dispute. I need to reiterate that the matter, whether looked at as a dispute between a political party and its members or as a dispute emanating from party primaries, had progressed far beyond the jurisdiction of the PPDT once the name of the 1<sup>st</sup> appellant was presented to the IEBC and the IEBC caused it to be duly gazetted, and once the 1<sup>st</sup> appellant was sworn in as member of the county assembly.

16. In view of what I have held in paragraph 15 here above, this appeal must succeed. The proceedings underway before the Political Parties Disputes Tribunal in Claim No. 2 of 2018 are being conducted without jurisdiction and are therefore null and void. The 1<sup>st</sup> appellant shall have the costs of the appeal.

**DATED, SIGNED and DELIVERED at NAIROBI this 8<sup>TH</sup> DAY OF MARCH, 2018.**

**W. MUSYOKA**

**JUDGE**