



**THE REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO.76 OF 2017**

**VINCENT AMENYA MARUBE.....APPELLANT**

**VERSUS**

**JUBILEE PARTY OF KENYA .....1<sup>ST</sup>RESPONDENT**

**ZABLON RASHID MINYONGA.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The Appellant has approached this court with a Notice of Motion application dated 25<sup>th</sup> May, 2017. The Appellant has also filed a Memorandum of Appeal of even date.
2. The Notice of Motion seeks, inter alia, to stay the 1<sup>st</sup> Respondent herein from issuing a Nomination Certificate to the 2<sup>nd</sup> Respondent herein for the South Mugirango Parliamentary Seat. It also seeks a stay of execution of the Political Parties Disputes Tribunal (PPDT) judgment delivered on the 25<sup>th</sup> May, 2017.
3. The Memorandum of Appeal premises the appeal on 15 grounds among them that the PPDT erred in law by failing to apply the rules of Evidence and Civil Procedure Rules, finding the 2<sup>nd</sup> Respondent was a member of Jubilee Party (JP) while he had participated in Orange Democratic Movement (ODM) Party Primaries; failing to give the Appellant a fair hearing; failing to give regard to rules against party hopping; regarding new evidence at submission stage; and, failing to weigh all the evidence placed before it thus relying on insufficient evidence.
4. The Appellant filed a supplementary affidavit which is sworn by Ibrahim Nyangesa the Secretary of the Kisii County Election Board for JP. In that affidavit he deposes that the JP has not issued any Nomination Certificate to the 2<sup>nd</sup> Respondent for the South Mugirango Constituency. He also deposes that the JP has not cancelled and/or recalled the Nomination Certificate issued to the Appellant; further that the Certificate annexed by the 2<sup>nd</sup> Respondent was cancelled by the JP.
5. The appeal is opposed. The 2<sup>nd</sup> Respondent has filed a replying affidavit dated 29<sup>th</sup> May, 2017 in which he denies having participated in the ODM Party Primaries; that the PPDT found that he was a member of the JP and ordered that he be issued with the Nomination Certificate for the 1<sup>st</sup> Respondent for South Mugirango Parliamentary Seat which was done; and, that he has the certificate duly issued to him,

which he annexed, and his name has already been sent to IEBC. He has also annexed letter signed on behalf of the JP Secretary General Hon. Raphael Tuju stating that the 2<sup>nd</sup> Respondent was the JP's nominee for the Constituency in question.

6. The 2<sup>nd</sup> Respondent has also filed a sworn response by way of an affidavit of even date in which he has averred that the PPDT decided the matter correctly; applied the law correctly; accorded the Appellant a hearing and weighed all the evidence before it. I have perused the this affidavit and find that it should have been filed as Grounds of Opposition as it raises issues of law. Those issues ought not to have been presented by way of affidavit, especially given the fact the deponent does not state the source of his information or the basis upon which he has sworn to the legal issues.

7. The court noted that the proceedings of the PPDT were not supplied together with the appeal and it was informed that the PPDT declined to supply them on the ground that they were not typed.

8. The appeal was argued by Ms. Samali for the Appellant and Dr. Khaminwa for the 2<sup>nd</sup> Respondent through M/S Matweve & Co advocates for the 2<sup>nd</sup> Respondent.

9. The Appellant in this appeal first filed an application dated 9/5/17 before the PPDT by way of a Notice of Motion (NT). In that application he sought to have the 1<sup>st</sup> Respondent herein restrained from issuing a nomination certificate for South Mugirango Constituency to the 2<sup>nd</sup> Respondent herein. The PPDT declined and directed the Appellant to exhaust the 1<sup>st</sup> Respondent's IDRMs marking the NT Stood Over Generally (SOG). An attempt to have the application Appellant's application before the PPDT withdrawn bore no results as no ruling was made on that request.

10. On 12<sup>th</sup> May 2017 the 2<sup>nd</sup> Respondent riding on the same file by the Appellant herein approached PPDT with a Notice of Motion seeking to restrain the 1<sup>st</sup> Respondent from issuing the nomination certificate for South Mugirango Constituency to the Appellant and further sought that the 1<sup>st</sup> Respondent be declared the winner of the nomination exercise. The 2<sup>nd</sup> Respondent also sought to be declared a Member of the 1<sup>st</sup> Respondent Party. The application was heard ex-parte.

11. There is a copy of a hand written unsigned ruling dated 19<sup>th</sup> May, 2017 in which the 2<sup>nd</sup> Respondent was confirmed to be a Member of the 1<sup>st</sup> Respondent and which also declared that the 2<sup>nd</sup> Respondent won the nomination; but that since there was no evidence to support the fact he won, the PPDT declined to restrain the 1<sup>st</sup> Respondent from issuing a nomination certificate to the Appellant; and, further declined to order the 1<sup>st</sup> Respondent to issue a nomination certificate to the 2<sup>nd</sup> Respondent.

12. The 2<sup>nd</sup> Respondent was aggrieved by the ruling of the PPDT dated 19<sup>th</sup> May, 2017 and approached the Tribunal again for a review of its ruling. The PPDT this time round directed the 2<sup>nd</sup> Respondent to serve both the 1<sup>st</sup> Respondent and the Appellant with the application for review. It further directed that the parties to file their responses together with their submissions by 24<sup>th</sup> May 2017.

13. The parties filed submissions as directed. The 2<sup>nd</sup> Respondent also filed a supporting affidavit in which he attached Tallying sheets and his Membership Certificate to the 1<sup>st</sup> Respondent party. He also annexed a letter signed for the Director of Membership of ODM Party saying that the Appellant was a Member of ODM; and another letter from Political Parties office of Registrar saying that the Appellant was a member of ODM. The 2<sup>nd</sup> Respondent's affidavit also annexed an affidavit without a title by one Trevelian Ongige Shem claiming to be the Returning Officer for purposes of the nomination exercise for South Mugirango Constituency, which he avers was won by the 2<sup>nd</sup> Respondent.

14. The 1<sup>st</sup> Respondent filed an affidavit opposing the review dated 24<sup>th</sup> May, 2017 terming the application an abuse of the court process. The 1<sup>st</sup> Respondent also urged that the 2<sup>nd</sup> Respondent had introduced new evidence at the review stage yet the 1<sup>st</sup> Respondent and the Appellant were not accorded

a chance to respond to it. The 1<sup>st</sup> Respondent contended that the affidavit dated 12<sup>th</sup> May, 2017 annexed to the 2<sup>nd</sup> Respondent's supporting affidavit for review was dated same day as the initial Notice of Motion application and therefore was not new evidence within the meaning of **Order 45** of the **Civil Procedure Rules (CPR)**.

15. The 1<sup>st</sup> Respondent also filed a replying affidavit dated 24<sup>th</sup> May 2017 in which it averred that it was the custodian of the Tallying Sheets and the Results of the South Mugirango Constituency Party nominations. It averred that the evidence annexed by the 2<sup>nd</sup> Respondent which is the affidavit sworn by Trevelian Ongige Shem; the Tallying Sheet and the declaration form showing that the 2<sup>nd</sup> Respondent won the nomination should not be recognized by the PPDT.

16. The Appellant opposed the application for review and urged that the same was incompetent, an abuse of process and brought in bad faith. The Appellant urged that the prayers and declarations sought could not issue without hearing a claim and calling of witnesses and further that the same was contrary to the provisions of **Order 45** of the **Civil Procedure Rules**. The Appellant contended further that the evidence brought by the 2<sup>nd</sup> Respondent was inadmissible and did not comply with the provisions of the **Evidence Act**.

17. After receiving the affidavits and submissions from all the parties the PPDT in its ruling dated 25<sup>th</sup> May, 2017 ruled that the application was meritorious, that the new evidence adduced was sufficient to support the application. The PPDT was satisfied from the evidence, meaning the affidavit of Trevelian Ongige Shem that the 2<sup>nd</sup> Respondent won the nomination. The PPDT however was doubtful whether that affidavit met the requirements of **Order 45** of the **Civil Procedure Rules** and made no finding on whether it should have been available at the first instance when the 2<sup>nd</sup> Respondent filed its Notice of Motion before court.

18. The PPDT ruled that there was sufficient evidence to review its ruling of 19<sup>th</sup> May 2017 and proceeded to: allow the application; declared the 2<sup>nd</sup> Respondent a member of Jubilee Party; declared 2<sup>nd</sup> Respondent was the duly nominated candidate of South Mugirango Constituency for 1<sup>st</sup> Respondent and directed the 1<sup>st</sup> Respondent to issue the 2<sup>nd</sup> Respondent with the nomination certificate and forward his name to the IEBC. It further issued a mandatory injunction to the 1<sup>st</sup> Respondent not to issue the nomination certificate to the Appellant and ordered that if already issued the same is recalled, revoked and declared null and void.

19. It is against the two rulings by the PPDT on the two applications filed by the 2<sup>nd</sup> Respondent on 12<sup>th</sup> May 2017, and the order of SOG on the Appellant's Notice of Motion application dated 9<sup>th</sup> May 2017 that the Appellant has appealed to this court. I have set out the Memo of Appeal and prayers sought together with the submissions by the Appellant and the 2<sup>nd</sup> Respondent herein above.

20. The issues for determination are clear.

**i. Whether the PPDT gave the Appellant a fair hearing.**

**ii. The other issue is whether the PPDT erred in law in admitting new evidence in the application for review.**

**iii. Whether the documents annexed to the 2nd Respondent's application contravened the rules of evidence.**

**Whether the PPDT gave the Appellant a fair hearing.**

21. The PPDT marked the Appellant's application dated 9<sup>th</sup> May 2017 S.O.G. and directed him to go back to the 1<sup>st</sup> Respondent and exhaust the IDRM. Soon thereafter on the 12<sup>th</sup> May the 2<sup>nd</sup> Respondent

filed a Notice of Motion which was entertained. Having declined the Appellant's application, the PPDT should equally have declined to hear the 2<sup>nd</sup> Respondent as it was very clear that the IDRMs had not been exhausted. **Section 40(2)** of the **Political Parties Act (PPA)** is couched in Mandatory terms. Contrary to its findings in **Benjamin Andola Andayi vs. Racheal Ameso Omollo & Others** Complaint No. 37 as consolidated with No. 61 of 2017, where the Tribunal found that an attempt to exhaust the IDRMs is sufficient to vest the Tribunal with jurisdiction.

22. In this case there was no attempt by both the Appellant and 2<sup>nd</sup> Respondent to approach the 1<sup>st</sup> Respondent. Even though the Tribunal has original jurisdiction to entertain complaints from the Party Primaries, the Tribunal ought to have given the parties a level playing ground and treated both equally. To that extent the PPDT appears to have given the 2<sup>nd</sup> Respondent preferential treatment when it varied and decided to entertain his application yet it was in the same position as that of the Appellant which was marked SOG.

23. There is a second limb to this issue, which is whether looking at the entire process before the PPDT the Appellant was given a fair hearing. It is clear that his matter was S.O.G. The PPDT then proceeded to hear the 2<sup>nd</sup> Respondent's application ex parte without requiring service or proof of service. It is at the application for review stage that the PPDT required the 2<sup>nd</sup> Respondent to serve the Appellant and 1<sup>st</sup> Respondent. On that ground alone I find that the Appellant was not given a fair hearing.

**The other issue is whether the PPDT erred in law in admitting new evidence in the application for review.**

24. Order 45 of the Civil Procedure Rules provide for the grounds upon which review can be granted. These are where the applicant can show that there has been discovery of new and important matter which was not within his knowledge after exercise of due diligence; or on account of mistake or error; or any other sufficient reason.

25. The Tribunal was very much aware of this requirement but still found that there was sufficient evidence to justify a review. That finding was in error because the affidavit annexed to the supporting affidavit of the 2<sup>nd</sup> Respondent which was sworn allegedly by the Returning Officer who averred that the 2<sup>nd</sup> Respondent had been declared the winner was dated 12<sup>th</sup> May, 2017 the same day the initial application was filed. Furthermore the 2<sup>nd</sup> Respondent knew who the Returning Officer was, and was aware of who had been declared the winner of the nominations. The 2<sup>nd</sup> Respondent cannot therefore be heard to say that any of that information which he claimed was new and important was not within his knowledge at the time he filed that application.

**Whether the documents annexed to the 2<sup>nd</sup> Respondent's application contravened the rules of evidence.**

26. Regarding the documents annexed to the 2<sup>nd</sup> Respondent's application, these were inadmissible in evidence under the Evidence Act. They were not signed, neither were they certified as true copies of original. They include letter signed for Director Membership of the ODM, and those from the Registrar Political Parties.

27. The 1<sup>st</sup> Respondent disowned the documents annexed to the affidavit of Trevelyne, a nomination certificate to the 2<sup>nd</sup> respondent as its nominee for the South Mugirango Constituency seat and the Tallying sheets. The Tribunal ought to have taken that into account given that the 1<sup>st</sup> Respondent was the custodian of the Tallying sheets; that it appointed the Presiding and Returning Officers and the Tallying clerks involved in the exercise.

**CONCLUSION.**

28. I find that the Tribunal erred in law and fact by admitting evidence in contravention of the **Evidence**

**Act and the Civil Procedure Rules Order 45** thereof, thereby falling into error. The Tribunal failed to accord all the parties in this dispute a fair hearing, did not insist on service until of the processes until when the 2<sup>nd</sup> Respondent applied for a review of the Tribunal's ruling.

## **ORDERS**

29. The appeal herein is allowed. It is ordered:

- a) The appeal is allowed and the judgment of the Tribunal and all consequential orders set aside.**
- b) That the matter of representation of the 1<sup>st</sup> Respondent in the South Mugirango Constituency be and hereby reverts to the 1<sup>st</sup> Respondent.**
- c) The 1<sup>st</sup> Respondent to hear the complaints by the Appellant and 2<sup>nd</sup> Respondent and resolve the issues within 48 hours of today and proceed to announce their nominee for the said South Mugirango Constituency seat.**
- d) Each party to bear their own costs.**

**DATED AT NAIROBI THIS 31<sup>st</sup> DAY OF MAY, 2017.**

**LESIT, J.**

**JUDGE**