



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION APPEAL NO. 34 OF 2017**

**EMILY MKALUMA MBASAU.....APPELLANT**

**VERSUS**

**GODFREY FUNDI MWAMBI ..... 1<sup>ST</sup> RESPONDENT**

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

*(Being an Appeal from the judgment and Decree of the Political Parties Dispute Resolution Tribunal in PPDRT Case No. 107 of 2017 delivered by Hon. Kyalo Mbobu, Mr. James Atema and Mr. Hassan Abdi on 9<sup>th</sup> day of May, 2017 at Nairobi,*

**J U D G M E N T**

1. This appeal emanates from a judgment of the Political Parties Dispute Resolution Tribunal (hereinafter the PPDT) delivered on 9<sup>th</sup> May, 2017. The Appellant prays for orders that the decision by the PPDT in Complaint No. 107 of 2017 be set aside. The grounds in the Memorandum of appeal are that the PPDT erred in law and fact by:

(i) holding that a party can file proceedings in the PPDT before a dispute filed in the political party's Internal Dispute Resolution Mechanism (IDRM) had been heard and determined;

(ii) holding that Appellant's right to lodge a dispute before it pursuant to Section 40(2) of the Political Parties Act, 2011 accrued on 21<sup>st</sup> April 2017 being 48 hours after filing the appeal in the 2<sup>nd</sup> Respondent's Special County Appeals Tribunal.

(iii) finding that the 2<sup>nd</sup> Respondent's Special County Appeals Board acted without jurisdiction in giving its judgment, in an appeal filed before it by the Appellant, fifteen (15) days after it was filed, and therefore its decision was null and void.

2. Mr. Ogutu learned Counsel for the Appellant submitted that the finding by the PPDT that the Appellant did not have to wait for the determination of the IDRM before going to the PPDT, was an error in law, because once a process is started it must be finished. He referred the court to **Rule 19.1.8** of the **ODM Nomination Rules** which provides that:

**“The County Appeals Tribunal shall consider and determine the appeal in accordance with the Constitution of Kenya, applicable Law, Party Constitution and Election and Nomination Rules within 48 hours of receipt of the appeal.”**

3. Secondly, Counsel argued that the PPDT erred in law in finding that the Special County Appeals

Tribunal (hereinafter SCAT) acted without jurisdiction in giving its judgment 15 days after the appeal was filed. He stated that although Rule 19.1.8 states that appeals shall be determined within 48 hours of receipt of the appeal, judgments given after 48 hours are not rendered illegal or null and void. Counsel contended that the appeal having been filed within 48 hours and therefore within time, when judgment was given cannot affect its validity. The body exercises quasi-judicial functions and therefore has powers to extend time for hearing and for delivering its judgments.

4. Thirdly, Counsel argued that the Returning Officer at one of the Polling stations was the 1<sup>st</sup> Respondent's campaign manager, hence there was a conflict of interest, a fact which was admitted and is a clear malpractice. Further that in the three polling stations where repeat exercise was ordered there was no party register and Voters were allowed to vote without proof that they were party members contrary to **Rule 23(1) of the Nomination rules**, which gives only party members the right to vote. That the voters only recorded their names after they had voted.

5. Counsel complained that the 1<sup>st</sup> Respondent went into the polling stations and held meetings with the voters. He was also seen transporting voters to venues and he intimidated everybody including officials who started putting spoilt votes in the ballot box and they were counted for him. Counsel also argued that the Returning Officer did not announce the results as required under Rule 3.3.1. (d). That the 1<sup>st</sup> Respondent has not filed anything to show that results were announced and submitted to NEB because it was not done.

6. Counsel stated that the Returning Officer failed to tabulate results once announced contrary to Rule 18.8 (i), or to issue a certificate signed by the candidates contrary to Rule 18.8. (ii). The only tabulation available is that by the Appellant. That the 2<sup>nd</sup> Respondent decided to repeat the nomination in three Polling Stations, Tausa, Kirindini and Mkwachunyi and the 1<sup>st</sup> Respondent did not bring this to the attention of the PPDT. He urged the court to order the implementation of the judgment of the IDRM by the 2<sup>nd</sup> Respondent.

7. Mr. Okoth learned Counsel for the 1<sup>st</sup> Respondent opposed the appeal. On the question of the validity of the judgment of the IDRM delivered beyond 48 hours of filing appeal he argued that **rule 19** requires all appeals lodged at the SCAT to be determined within 48 hours of lodging the appeal.

8. Counsel stated that the appeal herein was filed on 19<sup>th</sup> April 2017 and ought to have been determined on 21<sup>st</sup> April 2017 and the PPDT was therefore right to find that the SCAT was in error to determine it on 4<sup>th</sup> May 2017 when it did. He referred to the decision in **Patrick Ngeta v Mutua Muhuvi and 2 others NRB CA 191 of 2013**, in which the Supreme Court held that time in an electoral dispute goes to the jurisdiction of the court and the court cannot determine the case outside the stipulated time.

9. Counsel stated that the order of the SCAT for the nominations to be repeated was therefore null and void as it was pursuant to a judgment that was null and void.

10. On whether a party aggrieved by party primaries should first exhaust the IDRM before going to the PPDT, Counsel argued that under **Section 40(2) Political Parties Act Section 41 (fa)** is not one of the situations where a party must first exhaust the IDRM before going to the PPDT in a dispute from party primaries. He referred to the case of **Omega Enterprises K Ltd v Kenya Tourist Dev. Corp Civil Appeal No. 991 of 1993**.

11. On whether there was sufficient proof of electoral malpractices to warrant an order of repeat of the process in three stations, Counsel argued that the burden of proof lies with the party alleging to prove non conformity with the law and on the substantial effect on the outcome. He contended that the Appellant has made mere allegations and the relevant affidavit does not mention voter intimidation or bribery or ballot staffing. That the Returning Officers' certificate declaring results is on record and the Appellant herself filed a tabulation of the results.

12. In a brief rejoinder Mr. Ogutu submitted that the 1<sup>st</sup> Respondent having submitted himself to the jurisdiction of the IDRМ cannot raise the question of jurisdiction herein. That elections must be conducted in a free, fair and transparent manner.

13. I have considered the rival arguments placed before me and re-evaluated the material which was placed before the SCAT and that which was placed before the PPDT. First, this court has held elsewhere that the law is clear with regard to circumstances such as are now before me, and courts have expressed themselves quite succinctly on this point; where there are specialised procedures provided by law or the Constitution for the resolution of disputes they should be followed. See in this regard the case of *Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Other (2008)3 KLR (EP)*; *Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP) 425*; and *Alphonse Mwangemi Munga & 10 Others vs African Safari Club Ltd Petition No. 564 of 2004*.

14. Mumbi Ngugi J in the case of **Francis Mutuku vs Wiper Democratic Movement - Kenya & Others [2015] eKLR** also stated as follows:

**The circumstances of this case dictate that this Court, despite its wide jurisdiction under the Constitution, does not assume such jurisdiction. The dispute is clearly a dispute that falls within the mandate of the institutions in which the Political Parties Act vests jurisdiction. It involves a member of a political party and his political party. That party has an internal dispute resolution mechanism. The law requires that the said mechanism be exhausted; that a party dissatisfied with the outcome of the internal party dispute resolution process takes his grievance to the Political Parties Tribunal, and if unhappy with the outcome, has a right to appeal to the High Court. It would be to undermine and defeat the mechanism and institutions provided by law, which are underpinned by the Constitution, to hold otherwise.”**

It is therefore my considered opinion that the IDRМ should be the first line of approach where a dispute arises in the circumstances set out in **Section 40 Political Parties Act**. I do not think that the amendment that brought in **Section 40(fa)** intended there to be parallel proceedings at the same time so that a party can file a complaint in the IDRМ and 48 hours later they file another at the PPDT without waiting for the decision of the IDRМ.

15. For that reason it is my view that a party who submits themselves to the jurisdiction of the IDRМ should at least await their decision. In the same vein the complainant having filed their complaint within time, the decision of the SCAT which came 15 days later instead of two days later cannot be held to be null and void. It is the rule itself that is unreasonable in view of the sheer numbers of the claims filed before that body. The PPDT should have been guided by **Section 40 (2) Political Parties Act** in these circumstances.

16. I note that in the complaint of the 1<sup>st</sup> Respondent before the PPDT the Claimant complained that the SCAT had purported to nullify the certificate of nomination issued to him and to order a repeat of the nomination only in polling stations where the current Appellant lost to him.

17. The Appellant complaint before the SCAT as can be seen in the judgment of that body was that there was Conflict of interest with malpractices such as voter bribery and the voter manager of the Respondent participating; voter transportation; staffing of spoilt votes into the ballot box; intimidation by the Respondent; use of exercise books instead of the official registers and the result being not announced.

18. The Respondent’s answer therein was that the Applicant’s campaign team was also involved in Poll duty; the 1<sup>st</sup> Respondent did not involve himself in the alleged voter bribery; the Returning Officer was his Campaign manager but the 1<sup>st</sup> Respondent was not involved in the appointment process of the Officers; the Registers used were the 2013 IEBC register and the ODM Party Register only.

19. The SCAT found first, that there were massive irregularities in Mkwachuni, Kirindini and Tausa Polling stations and secondly that the elections were not fair and free. It is my considered view that having so far found it would have been prudent to order a repeat of the exercise in the entire Ward

because it may be well said that the 1<sup>st</sup> Respondent was right to complain that the repeat was only held in his strongholds.

20. For the foregoing reasons and also noting that the results do not appear to have been either tabulated or announced by the Retuning Officer, the elections in Mbololo Ward cannot be said to have been free and fair and transparent.

The appeal therefore succeeds and the decision of the PPDT is set aside. It is hereby ordered that there be a repeat of the nomination process for the entire Mbololo Ward, Voi Constituency Taita/Taveta County, within the next 48 hours.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> DAY OF May 2017.**

**L. ACHODE**

**JUDGE**

In the presence of .....for the Appellant

In the presence of .....for the 1<sup>st</sup> Respondent

In the presence of .....for the 2<sup>nd</sup> Respondent