



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA, AT NAIROBI**  
**ELECTION PETITION APPEAL NO. 71 OF 2017**

**JOSEPHAT NDETEI NZUKI .....APPELLANT**

**VERSUS**

**ALBANUS MUTISYA MATHEKA .....1<sup>ST</sup> RESPONDENT**

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

*(Being an Appeal against the Judgment of the Political Parties Dispute Tribunal, (Milly L. Odongo, Desmas Nungo, Paul Ngotho & Dr. Adelaide Mbithi, Tribunal Members) dated 8<sup>th</sup> May, 2017*

*in*

*Complaint No. 125 of 2017)*

\*\*\*\*\*

**JUDGMENT**

1. **JOSEPHAT NDETEI NZUKI** “the Appellant” and **ALBANUS MUTISYA MATHEKA** “1<sup>st</sup> Respondent” are members of the Wiper Democratic Movement Party “2<sup>nd</sup> Respondent”. The Appellant and 1<sup>st</sup> Respondent were both candidates for the post of Member of County Assembly Mbitini Ward in Makueni Constituency, Makueni County.

2. The nominations were held on 25<sup>th</sup> April, 2017. On 4<sup>th</sup> May, 2017, the 1<sup>st</sup> Respondent received a letter notifying him of his nomination by the Party 2<sup>nd</sup> Respondent) to participate in the 8<sup>th</sup> August, 2017 general elections. Later on 6<sup>th</sup> May, 2017, he was again called by the Elections Board Chairperson, **Agatha Solitei**, who informed him that she had been instructed to declare the Appellant as the winner. This took him aback because the 2<sup>nd</sup> Respondent’s appeal board had declared him as the winner.

3. The 1<sup>st</sup> Respondent then moved the PPDT with his claim seeking to be declared the winner of the nominations. The pleadings were filed on 7<sup>th</sup> May, 2017 and the claim was heard on 8<sup>th</sup> May, 2017 and Judgment rendered on 9<sup>th</sup> May, 2017 at 11 am.

The 1<sup>st</sup> Respondent did not participate in the proceedings. He did not file any response to the claim and neither did he attend the hearing of 8<sup>th</sup> May, 2017.

4. The PPDT in its judgment allowed the 1<sup>st</sup> Respondent’s claim and upheld the election results and the

notification to the 1<sup>st</sup> Respondent dated 3<sup>rd</sup> May, 2017. It also ordered the 2<sup>nd</sup> Respondent to issue the 1<sup>st</sup> Respondent with a final certificate of nomination.

5. It is this judgment that triggered the filing of this appeal. Two main issues argued by **Mr. Wetaba** for the Appellant are;

- (i) Lack of service of the Motion at the PPDT; and
- (ii) Whether the PPDT considered all the evidence on record.

He referred the Court to the affidavit of service filed by one **Kelvin Balongo** a licensed Court process server. Of particular reference was paragraph 7 of the said affidavit.

6. It was his submission that the Appellant was not served and was denied a right to be heard contrary to Articles 25 and 50 of the Constitution. He faulted the PPDT for finding that the Appellant had been served.

7. On the second issue, he submitted that proceedings at the PPDT were never challenged and the 2<sup>nd</sup> Respondent did not counter the allegations by the 1<sup>st</sup> Respondent. He stated that the documents presented to Court originated from the 2<sup>nd</sup> Respondent who should have affirmed or countered them.

Mr. Wetaba finally submitted that even without the participation of the Appellant, the documents on record point to the fact that the nomination was disputed. He asked the Court to consider the contents of the affidavit of Agatha Solitei for the 2<sup>nd</sup> Respondent.

8. **Mr. Makhanu** for the 1<sup>st</sup> Respondent submitted that even though the Appellant was not served by the process server, he was sent photographs of the application via his WhatsApp on No. 0703\*\*\*\*\*. He further submitted that the PPDT considered all the evidence on record including the documents of the tallying done by all agents. He said the party (2<sup>nd</sup> Respondent) had failed to assist the Court arrive at a just conclusion. He referred the Court to paragraph 5 of the Judgment saying it was a confirmation that the Tribunal had considered all the evidence on record. He wondered why the Appellant never moved the Tribunal by way of review, to challenge the proceedings and judgment.

9. **Mr. Sore** for the 2<sup>nd</sup> Respondent associated himself with the submissions by Mr. Wetaba adding that the Appellant was condemned unheard. He submitted that the PPDT had relied on tallying sheets signed by agents to declare the 1<sup>st</sup> Respondent the winner without an input from the Returning Officer.

10. On the WhatsApp service, he submitted that the 1<sup>st</sup> Respondent was not a process server and this issue had not come up before the PPDT.

11. I will first address the issue of service of the claim that was filed at the PPDT as Cause No. 125 of 2017. This claim was filed on 7<sup>th</sup> May, 2017 and directions given for service for interpartes hearing on 8<sup>th</sup> May, 2017 12 noon.

The proceedings show this as the directions;

- (i) Prayer No. 2 of the Notice of Motion dated 7<sup>th</sup> May, 2017 hereby granted.
- (ii) Matter to proceed to inter parties hearing on 8<sup>th</sup> May, 2017 at 12 noon.
- (iii) Service to be effected and service shown.**

12. By indicating that service had to be shown, it shows that the PPDT was alive to the importance of

proof of service in a matter. The proceedings of 8<sup>th</sup> May, 2017 do not show any mention of proof of service. Despite the absence of the Appellant and/or a counsel for him the members of the Tribunal did not deem it fit to inquire as to whether the Appellant had been served.

13. The affidavit of service of Kelvin Balongo answers the issue of service.

At paragraphs 7 and 8 he states;

***“7. That later on the same day at around 9.30 am, I proceeded and called the 2<sup>nd</sup> Respondent (Josephat Ndetei Nzuki) after having been given his number with the claimant (Albanus Mutisya Matheka), the phone was off.***

***8. That I return hereby the duly serviced Notice of Motion application and a hearing notice duly served.”***

14. It is evident that the Appellant was not served with either the Notice of Motion or hearing notice. If indeed there was any service by WhatsApp, the 1<sup>st</sup> Respondent would have filed an affidavit of service to that effect for consideration. That was not done and it's a none issue here as it was not raised at the PPDT.

It was an error for the PPDT not to satisfy itself of the service on the Appellant before proceeding to hear the 1<sup>st</sup> Respondent. As if that was not bad enough, in its Judgment at paragraph 3 it says;

***“The 2<sup>nd</sup> Respondent did not however participate in the proceedings. As per the return of Service sworn by Kelvin Balongo on 8<sup>th</sup> May, 2017 and filed on the same day, the deponent avers that he could not effect service on the 2<sup>nd</sup> Respondent as his phone was off.”***

15. The PPDT erred in making this finding as there was no service on the 1<sup>st</sup> Respondent. The result of non-service on the Appellant denied him an opportunity to controvert the evidence adduced.

In reference to this, the Judgment at paragraph 5 states

***“The complainant has attached the tallied results which have been attested to by agents of all the candidates involved. The documents have not been disputed by the 1<sup>st</sup> Respondent who had an opportunity do so. As the complainant's facts have been uncontroverted, we can adduce that on a balance of probability, the complainant has established a case in his favour.”***

The 1<sup>st</sup> Respondent (Wiper Democratic Movement) was in Court at that time as a Respondent in its own right. It was not acting on behalf of the 2<sup>nd</sup> Respondent (Josephat Ndetei Nzuki) in those proceedings before the PPDT.

16. The right to be heard is a constitutional right. Article 50 (1) of the Constitution provides;

***“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”***

The right to be heard is one of the fundamental rights which shall not be limited. Article 25 of the Constitution provides;

***“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***

***(c) the right to a fair trial.”***

The PPDT only heard one side of the story without ensuring that the Appellant was notified of the matter before it.

17. In the case of ***Onyango –vs- The Attorney General (1986 – 1986) EA 456*** Nyarangi JA stated at page 459;

***“I would say that the principle of natural justice applied where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”***

At page 460 the learned Judge added;

***“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same would have been arrived at.”***

And in ***Mbaki & Others –vs- Macharia & Another (2005) 2 EA 206*** at 210 the Court of Appeal stated;

***“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”***

18. My finding therefore is that the lack of service on the Appellant denied him an opportunity to respond to the claim before the Tribunal. The PPDT in the circumstances relied on the evidence of one party to make the decision it made and overturned the decision of the NAT of the 2<sup>nd</sup> Respondent. That decision can therefore not be left to hold as it affected the rights of the Appellant yet he was never given a chance to be heard.

19. Secondly, the 2<sup>nd</sup> Respondent made two decisions in respect of the results of the subject nominations held on 25<sup>th</sup> April, 2017. That mess must be cleared by the 2<sup>nd</sup> Respondent itself.

The result is that I find the appeal to be meritorious and is hence successful. I issue the following prayers;

(i) Appeal is allowed.

(ii) The Judgment of the Political Parties Disputes Tribunal delivered on 9<sup>th</sup> May, 2017 is set aside.

(iii) The nomination of both the Appellant (***Josephat Ndetei Nzuki***) and 1<sup>st</sup> Respondent (***Albanus Mutisya Matheka***) to be nominees by the 2<sup>nd</sup> Respondent for the Member of County Assembly (MCA) Mbitini Ward Makueni County is declared null and void.

(iv) The 2<sup>nd</sup> Respondent to conduct fresh nominations for Member of County Assembly, Mbitini Ward, Makueni County within 48 hours of this Judgment.

(v) Each party to bear his/its own costs.

Orders accordingly.

**Delivered, signed and dated this 26<sup>th</sup> day of May 2017 at NAIROBI**

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**HEDWIG I. ONG’UDI**

**HIGH COURT JUDGE**