



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA, AT NAIROBI
ELECTION PETITION APPEAL NO. 49 OF 2017
GEOFFREY KING'ANG'I MUTIRI.....APPELLANT
VERSUS
PETER KAMAU NYUTU 1ST RESPONDENT
JUBILEE PARTY.....2ND RESPONDENT

(Being an appeal against the Judgment of the Political Parties Dispute Tribunal, (Kyalo Mbobu, James Atema & Hassan Abdi, Tribunal Members) dated 18th May, 2017 in Complaint No. 236 of 2017)

JUDGMENT

1. **GEOFFREY KING'ANGI MUTURI** “the Appellant” and **PETER KAMAU NYUTU** “the 1st Respondent” were members of the **JUBILEE PARTY** (2nd Respondent).
2. The Appellant and the 1st Respondent were both contestants on the 2nd Respondent’s ticket for nomination for member of the National Assembly for Mbeere South Constituency. The nominations were conducted on 25th April, 2017.
3. Each of them claims to have been declared the winner of the said nominations and was issued with a Provisional Nomination Certificate.
4. The 1st Respondent moved the 2nd Respondent National Appeals Tribunal (NAT) seeking the nullification of the results announced on 28th April, 2017 by the County Returning Officer which favoured the Appellant.
He further sought the reinstatement of the results announced by the Constituency Returning Officer which favoured him.\
5. The appeal before the NAT was heard in the absence of the Appellant who had been duly served. The NAT found in favour of the Appellant. The 1st Respondent being dissatisfied with the decision moved to the PPDT vide complaint No. 236 of 2017, which was heard and a determination rendered in favour of the 1st Respondent. The said Judgment forms the basis of this Appeal.
6. The Appellant raised the following grounds of appeal;

1. That the Honourable Tribunal erred both in law and in fact by arriving at its judgment by relying on an affidavit dated 5th May, 2017 which sought to introduce new, inadmissible, contradictory, unsubstantiated, incredible and strange facts that had been obtained either through forgery, corruption, conspiracy and intimidation.

2. That the Honourable Tribunal erred both in law and in fact by entertaining a new dispute that had neither formed part of the proceedings nor had it been arbitrated or made a point of determination by the Jubilee Party National Elections Appeals Tribunal in contravention to section 40 of the Political Parties Act.

3. That the Honourable Tribunal erred both in law and fact by ignoring and or failing to consider and uphold the Notice of Preliminary Objection, evidence and submissions of the Appellant in respect of the inadmissible and hearsay evidence being introduced at the Appeal level.

4. The Honourable Court erred both in law and in fact by failing to find that the evidence sneaked in through the back door purporting to be from the Returning Officer was not credible as it was contradictory and totally different from the evidence produced by the same person at the Jubilee Party National Elections Appeals Tribunal.

5. That the Honourable Tribunal erred in law and in fact by directing that the Certificate of Nomination issued to the Appellant be cancelled and the same be issued to the 1st Respondent when there was no shred of evidence to indicate that the 1st Respondent won the nomination.

6. That the Honourable Tribunal erred both in law and in fact by directing the nomination certificate be issued to the 1st Respondent against the evidence on record of the final tallied results indicating that the Appellant won fairly and squarely.

7. That the Honourable Tribunal erred in law and in fact by failing to find that the 1st Respondent had not proved his case on the required standard.

8. That the Honourable Court erred in law and in fact by delivering a judgement against the weight of evidence.

9. That the Honourable Tribunal erred both in law and in fact by overturning the will of the people of Mbeere South Constituency.

7. When the appeal came for hearing, Mr. Mutuma argued the 9 grounds of appeal in three (3) limbs as follows;

1st limb – ground 3

8. He submitted that there had been a deliberate attempt by the Political Parties Disputes Tribunal (PPDT) to disregard the Appellant's evidence on record. He pointed out that the PPDT in its Judgment both accepts and denies seeing the Appellant's replying affidavit. This he said was deliberate because the replying affidavit had annexures like the certificate of interim nomination of the Appellant by the Returning Officer; a photograph of the Appellant receiving the certificate and the statement by the Returning Officer, which were all ignored.

2nd limb – grounds 1, 2 and 4

9. His submission was that the PPDT's jurisdiction in this matter was appellate. Therefore, no new evidence would be sneaked in without leave. He pointed out that the 1st Respondent in its Notice of Motion at page 32 – 41 sneaked in an affidavit in form of new evidence without leave. This affidavit formed the basis of the decision by the PPDT, yet it had not been filed at the NAT. Counsel submitted

heavily on this affidavit which was sworn on 5th May, 2017.

On dispute resolution, he submitted that the PPDT at paragraph 9 of its Judgment contradicted what had been at NAT. On this, he referred the Court to the case of **Zakaria O. Obado –vs- Edward Okong’o Oyugi & Others. Petition No. 4 of 2014 (Supreme Court) 2014 eKLR**

3rd Limb – grounds 7 and 8

10. On this limb, he submitted that the Judgment was delivered against the weight of the evidence. That there was no single document produced to show that the 1st Respondent won beside the purged affidavit. He told the Court that the PPDT did not have the Jurisdiction to cancel and resissue certificate of nomination.

It was his submission that the 1st Respondent having resigned from the 2nd Respondent on 2nd May, 2017, had no *locus standi* to maintain the appeal filed at the PPDT on 11th May, 2017. He stressed that the 1st Respondent had been cleared to run as an independent candidate.

11. Mr. Ndegwa for the 1st Respondent addressed the Court on grounds 1, 2, 3 and 4 of the appeal. He submitted that the application and the affidavits of the 1st Respondent were before the PPDT but the Appellant did not react to them and the averments remained uncontroverted.

He said if **Joyce Mwangi** had committed any offence, the same should have been reported but was not. On ground 2, he argued that the matter before the PPDT had been dealt with in the Tribunal’s original jurisdiction. He referred to the case of **Sammy Kilukei & 22 Others, Appeal No. 10 of 2017** saying the PPDT was not bound by the proceedings at the NAT.

12. On ground 3, he submitted that all parties were heard by the PPDT and the Appellant had been given time to file his papers. The Preliminary Objection (P.O) was not served or heard and no directions were taken on the P. O.

On ground 4, he submitted that neither the Appellant or 2nd Respondent had brought any affidavit to contradict what was on record.

13. Mr. Mburu for the 1st Respondent addressed the Court on ground 5 – 9.

Referring to Article 1 (3) (c) and 159 (1) and Section 39 and 41 of the Political Parties Act (PPA), he submitted that the PPDT has jurisdiction to deal with party nominations. He submitted further that the NAT of the 2nd Respondent is a junior Tribunal and so the PPDT can issue orders declaring a winner.

On ground 8 – 9 he referred to the 1st Respondent’s affidavit whose evidence at paragraph 7 was never controverted. He stated that the Ruling by the NAT confirmed who the winner was. It was his submission that the Appellant’s replying affidavit of 12th May, 2017 did not have the complaint before the Tribunal.

14. Mr. Kago also for the 1st Respondent submitted that annexure PKN – 2 was not in the Record of Appeal which is so disorderly and confusing, as the Appellant believes that this appeal is a 2nd appeal. He referred to the affidavit of Joyce Mwangi and the 1st Respondent’s affidavit at the NAT. When the 1st Respondent filed his application at the PPDT, the affidavit was annexed and the Tribunal noted that the contents of the affidavits were not controverted.

15. He pointed out that the Appellant’s affidavit served on them on the date of hearing of the appeal was undated and whoever certified annexure GKM – 1b did not sign it. That the averments at paragraph 2 are hearsay and cannot be verified. That MK – 1a and b was unattested information from the IEBC website which was not in compliance with Section 106B (1) Evidence Act.

He referred to MK - 1 by Mary Karen Kigen and asked the Court to look at Section 14 (1) (a) PPA.

16. While referring to Section 17 (1) (a) PPA, he wondered where the record of the Registrar Political Parties including its list of members of the parties was. He submitted that the 2nd Respondent had not filed any evidence to confirm that the 1st Respondent had resigned from the 2nd Respondent. All in all, he submitted that the documents in Court were all secondary evidence. The 1st Respondent, he said has disowned the document MK – 1b as the signature on it is not his.

17. Mr. Macharia for the 2nd Respondent submitted that the whole purpose of a nomination exercise is to establish the will of the people. This will, he said, is discovered through the nomination or the adjudication process in accordance with the law. He submitted that the PPDT terribly failed in complying with the tenets of the Constitution. He pointed out that the PPDT in paragraph 8 of its Judgment and page 1 of the Supplementary Affidavit showed that the 3rd and 4th Respondents therein were struck out. In their Judgment, the 3rd Respondent was back with no readmission.

The 3rd Respondent was the 2nd Respondent's Returning Officer for the Constituency. The document GKM 3 was issued by the 3rd Respondent. She does not mention the issuance of this certificate (GKM 3) in her affidavit and she does not deny issuing it either. She does not deny the photo at page 22 of the Record of Appeal.

18. He dismissed Joyce Mwangi's affidavit as being untruthful and of a rogue Returning Officer. Referring to the ruling by NAT at page 49 – 52 he said, the 3rd Respondent was the only one who stated different things. That the PPDT had no basis of interfering with the finding by the NAT. On further controversies, he invited the Court to look at paragraph 16 and 20 of the Judgment. If they found the nomination to have been incredible how were they able to determine who to issue the certificate to?

He referred to the case of ***Faith Wairimu Gitau –vs- Hon. Wanjiku Muhia & Another, EPA No. 25 of 2017*** stressing on page 19 and 23 of the Judgment. He compared the conduct of the PPDT in the ***Faith case*** to that of the PPDT herein.

19. On the status of the 1st Respondent, he submitted that they had filed two (2) affidavits and the case of ***Sammy Kilukei & 299 Others and Ndiritu Mwirithi –vs- Jubilee Party & 2 Others EPA No. 10 of 2017***. He relied on the Judgment of ***Muchelule J.*** in the said case.

20. It was his submission that under Section 7 (2) (f) (i) PPA, the 2nd Respondent is required to submit to the Registrar a list and addresses of all its members. The Registrar maintains a register of all members of Political Parties (Section 14 of the Act) and one cannot be a member of more than one political party. On the issue of their documents being secondary and not certified, he submitted that Section 106B (1) Evidence Act should be looked at alongside Section 38 and 83 of the same Act.

He referred to the original letter from the Registrar of Political Parties confirming that the 1st Respondent is no longer a member of the 2nd Respondent and so it cannot issue him with a certificate even if it wanted to.

21. In a rejoinder, Mr. Mutuma submitted that the Appellant's replying affidavit of 15th May, 2017 controverts the issues raised but the said affidavit was ignored. He also added that a P.O had been raised to challenge the admissibility of the affidavit of 5th May, 2017 but it was also ignored.

22. Before me, is the Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal, Affidavits, annexures and oral submissions by all the counsels appearing. I have duly evaluated and considered them. The issues I find falling for determination are as follows;

- i. The jurisdiction of the PPDT;

ii. The admissibility of the affidavit of Joyce Mwangi sworn on 5th May, 2017; and

iii. The status of the 1st Respondent;

Issue No. (i): The Jurisdiction of The PPDT

23. The jurisdiction of the PPDT is clearly set out in Section 40 of the PPA which provides;

(1) The Tribunal shall determine—

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and a political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners; and

(f) appeals from decisions of the Registrar under this Act;

(fa) disputes arising out of party primaries.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

24. It is agreed that the PPDT has both original and appellate Jurisdiction.

It is also agreed that prior to filing this complaint before the PPDT, the 1st Respondent had filed a complaint at the 2nd Respondent's NAT. This complaint was fully heard and a determination made on 7th day of May, 2017 (page 49 – 52).

25. It is not disputed that under Section 40 (2) of the PPA the disputes arising out of party primaries as the present one, are not among those disputes that **must** originate from the party's NAT. What this means is that a dispute on party primaries may either be filed direct as a fresh claim at the PPDT **or** it originates at the NAT.

26. It has been submitted by the appellant that what the 1st respondent filed at the PPDT was an appeal. On the other hand, the 1st respondent argues that what he filed at the PPDT was a fresh claim.

27. Internal dispute resolution mechanism is a recognized method of Alternative Dispute Resolution (ADR) and is anchored in the Kenya Constitution 2010. Article 159 provides;

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

Rule 14.3 of the Jubilee Party Nomination Rules 2016 provides;

“Alternative Dispute Resolution (ADR) – Encourages Disputing Party's aspirants to seek and exhaust alternative dispute resolution mechanisms and reconciliation, in relation to nominations

at the County level.”

The PPA also embraces ADR. Section 40 (2) of the said Act provides;

“Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”

Parties have always been urged to exhaust any internal resolution mechanism available before coming to Court.

28. A party who has opted to go to the NAT for his dispute in party primaries and the matter resolved cannot claim before the PPDT that he is filing a new complaint. It does not matter how he approaches the PPDT – it could be by way of complaint, petition or appeal. The fact of the matter is that his claim has been heard and determined elsewhere by a duly recognized machinery.

29. In this case, the 1st Respondent had been before the 2nd Respondent’s NAT, heard and a determination made. He was therefore not appearing before the PPDT in its original jurisdiction. What he presented before the PPDT was a ***Memorandum of Appeal No. 236 of 2017***. He is bound by that.

Issue (ii) The Admissibility of the Affidavit of Joyce Mwangi Sworn on 5th May, 2017

Section 41 (4) of the Political Parties Act provides;

“(4) The Tribunal shall apply the rules of evidence and procedure under the Evidence Act (Cap. 80) and the Civil Procedure Act (Cap. 75), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.”

30. The complaint at the NAT was filed on 1st May, 2017. The affidavit of Joyce Mwangi is dated 5th May, 2017.

The hearing at NAT was on 4th May, 2017. There is therefore no way the affidavit of Joyce Mwangi could have found its way to the NAT after the 1st Respondent had closed its case, unless with the leave of the NAT. There is no leave that is shown to have been granted by the NAT. In its Ruling, the NAT states that it interrogated the County Returning Officer, Constituency Returning Officer and the Regional County Co-ordinator. It mentions nothing about the affidavit of Joyce Mwangi, the Constituency Returning Officer herein.

31. The Memorandum of Appeal dated 11th May, 2017 that was filed before the PPDT had an accompanying Notice of Motion dated 11th May, 2017 under certificate of urgency. It was supported by 16 grounds and a supporting affidavit by Peter Kamau Nyutu the 1st Respondent herein. The documents that were referred to as annexures were as follows;

- Copy of the Memorandum of Appeal dated 27th April, 2017 (PKN – 1)
- Copy of Memorandum of Appeal dated 28th April, 2017 (PKN – 2) (this is illegible)
- A compact disc containing a video and certificate (PKN – 3)
- Copy of publication from the Standard Newspaper (PKN – 4)

32. It is therefore evident that the affidavit of Joyce Mwangi was never annexed to this application. Among the orders issued on 12th May, 2017 I see no order allowing the 1st Respondent to file the said affidavit. This affidavit was received at the PPDT on 13th May, 2017 and strangely, it is marked as PKN – 4 when there is already another document marked as PKN – 4.

33. I have gone through the proceedings and at no point do I see any order allowing for the inclusion of

this affidavit in the record. Strangely on 12th May, 2017 the PPDT – granted leave for amendment of the pleadings to exclude the 3rd and 4th Respondents. The Notice of Motion of the same date only had two Respondents while the Memorandum of Appeal had four Respondents.

34. As per that Memorandum of Appeal, the 3rd Respondent – was **Joyce W. Mwangi** while the 4th Respondent was the **County Returning Officer**. By virtue of that order of 12th May, 2017, the two Respondents i.e. 3rd and 4th Respondents were removed from the pleadings.

35. The Judgment being challenged has four clear Respondents including the 3rd and 4th Respondents. The Judgment at paragraph 8 and 9 sets out the 3rd Respondent’s case based on the affidavit sworn on 5th May, 2017 and which was not an annexure therein. Paragraphs 11, 12, 16, 17 and 18 of the Judgment are all based on the affidavit of **Joyce W. Mwangi**. Was this really an oversight? It was not. The proceedings are very clear.

36. At paragraph 13 of the Judgment, the PPDT confirms that the appellant raised a P.O on the introduction of new evidence which is the questioned affidavit by Joyce Mwangi, the Returning Officer. The Tribunal did not address this P.O at all. This confirms clearly why even after the appellant raised the red flag on this affidavit, the PPDT ignored it and went ahead to use the contents of the said affidavit of Joyce Mwangi to determine the matter.

Order 42 Civil Procedure Rules 2010 provides;

Rule 27 (1)

“The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if –

b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.”

37. The above provision explains the procedure of introducing new evidence in an appeal. By virtue of Section 41 (4) PPA, the PPDT had to comply with the above Rules.

I have found that no leave was sought or granted for the inclusion of the affidavit mentioned above in the proceedings. I find that the affidavit of Joyce Mwangi was not part of the annexures to the supporting affidavit of Peter Kamau Nyutu (1st Respondent). It was unlawfully sneaked into the proceedings and should never have been relied on by the PPDT in determining the matter in issue.

38. I further find that the 3rd and 4th Respondents’ names having been removed as parties to the dispute by the leave granted on 12th May, 2017, should not have been referred to in the Judgment.

39. The PPDT relying on Joyce Mwangi’s affidavit, found that the nominations were incredible. Based on this finding, the best they could have done was to quash the nominations and order for fresh ones. They went beyond their mandate to declare a winner after making such a finding.

I am persuaded by the finding of my sister **Mutuku J.** in the case of Faith **Wairimu Gitau –vs- Hon. Wanjiku Muhia & Another** (*supra*). I therefore find the declaration of the PPDT to be null and void.

I order the affidavit of Joyce Mwangi dated 5th May, 2017 expunged from the proceedings and Record of Appeal.

Issue No. (iii): The Status of the First Respondent

40. There are two affidavits filed by the Appellant and the 2nd Respondent in respect of the allegation that the 1st Respondent is no longer a member of Jubilee Party and has been cleared by IEBC to vie as an independent candidate. They have annexed documents namely;

- A list of independent candidates with their symbols from the IEBC website at www.iebc.org.ke (GKM – 1a)
- Copy of his ID card No. 235343413 in the names of Peter Kamau Nyutu (GKM – 1b)
- Letter from the Registrar of Political Parties (MK -1a)
- The 1st Respondents's request for clearance to vie as an independent candidate dated 2nd May, 2017 and received by the Office of the Registrar, Political Parties on 3rd May, 2017.

The 2nd deponent Mary Karen Kigen is the Deputy Executive Director, Legal Compliance of the 2nd Respondent. She is also an advocate of the High Court of Kenya. She is the one who swore an affidavit and annexed documents from the Political Parties Registrar.

41. The 1st Respondent filed a replying affidavit denying the averments in the two affidavits. He deponed that the information in the said affidavits is hearsay which has not been verified. He denies having resigned from the Party (2nd Respondent). He annexed copy of his ID card (PKN – 1) and his party membership card (PKN – 2).

42. Mr. Kago for the 1st Respondent submitted that the 2nd Respondent had not placed before the Court any evidence to show that the 1st Respondent had resigned from the party (2nd Respondent). Further, that no list or register of parties had been produced by the Registrar of Political Parties. He submitted that Section 14 (1) (a), Section 17 (1) (a) and Section 34 of the PPA had not been complied with, by the Respondents and that all the documents produced were secondary evidence.

43. Mr. Macharia for the 2nd Respondent submitted that the Registrar of Political Parties has the list and addresses of all its members and members of political parties. Under Section 14 (4) PPA, one cannot be a member of more than one political party. He referred the Court to Sections 38, 83 and 106B (1) of the Evidence Act on admission of electronic evidence.

Section 14 (4) PPA provides;

“A person shall not be a member of more than one political party at the same time.”

It follows that if one is a member of a political party, he/she cannot purport to vie as an independent candidate at the same time.

44. Before this Court is a document which has been downloaded from the IEBC website. IEBC is a public institution and its website can be accessed by all Kenyans. This document GKM – 1a lists the 1st Respondent's name as one of the independent candidates in the forthcoming general elections. His symbol is also shown

The Registrar of Political Parties – who is a public officer has again presented a letter by her hand to this Court showing that the 1st Respondent is not a member of a fully registered political party. Attached to it is a letter received by her office on 3rd May, 2017 (MK – 1b). In it, the 1st Respondent was seeking clearance to vie as an independent candidate.

The letter MK – 1a & b from the Registrar of Political Parties is an official document and can safely be admitted under Section 83 of the Evidence Act.

The list downloaded from the IEBC website is also a public document and is admissible under Section 89

and Section 106B (1) of the Evidence Act.

45. To counter this, is the 1st Respondent's replying affidavit. The possession of the party's membership card per se is not proof that he is still a member. Material evidence from two public institutions has been filed against him. These are institutions he has direct access to, yet he has not filed anything from the said institutions to counter what is contained in the documents before the Court. It was his duty to get that evidence and place it before this Court.

46. With or without a resignation notice to the political party, once it is established that one is vying as an independent candidate, then it follows that he/she is not a member of any political party. This is because under Section 33 of the PPA (No. 24 of 2011) a person can only qualify to be nominated as an independent candidate for a county election if he does not belong to any political party. The 1st Respondent is not a member of any fully registered political party.

47. In the case of **Sammy Kilukei & 299 Others and Another –vs- Jubilee Party and Another, EPA NO. 10 of 2017**, where a similar issue arose, **Muchelule J.** stated thus;

“8. Further, the basis upon which one can complain about a decision of a political party and its dispute resolution mechanism is if he is a member of the party. It is on the basis of that membership that he can participate in the nominations called by the party, and, if aggrieved, he can appeal to the Political Parties Disputes Tribunal for a remedy. Once he ceases to be a member of the party, he cannot seek to be nominated, or to be declared a nominee, on the party ticket. Once he ceases to be a member of the party, he cannot have the locus to complain about the nominations of the party, and cannot appeal either to the Political Parties Disputes Tribunal or to this court seeking a determination on the nominations.

9. In short, the 2nd appellant did not have the capacity and locus to file this appeal. His appeal is consequently incompetent and this court has no jurisdiction to hear or determine it.”

I do find that the 1st Respondent has ceased being a member of the 2nd respondent and cannot by any chance participate in any nominations by the Jubilee Party (2nd Respondent).

48. Having arrived at the above findings on issues no. (i), (ii) and (iii), I finally find that the appeal has merit and it succeeds. I hereby grant the following prayers;

- i. The appeal is allowed;
- ii. The Judgment of the Political Parties Dispute Tribunal delivered on 18th May, 2017 vide Appeal No. 236 of 2017 is set aside;
- iii. The Jubilee Party Nomination Certificate issued to the Appellant **GEOFFREY KING'ANG'I MUTURI** for the Mbeere South Constituency Member of National Assembly is hereby upheld;
- iv. Any Nomination Certificate that may have been issued to the 1st Respondent pursuant to the Judgment of the Tribunal be cancelled forthwith.
- v. Each party to bear his own costs.

49. Orders accordingly.

Delivered, signed and dated this 25th day of May 2017 at NAIROBI

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HEDWIG I. ONG'UDI

HIGH COURT JUDGE