



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 8 OF 2017

THOMAS LUDINDI MWADEGHU.....COMPLAINANT

VERSUS

JOHN MRUTTU.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT (ODM) PARTY.....2ND RESPONDENT

JUDGMENT

BACKGROUND

1. By a Memorandum of Appeal dated 8 May 2017, the appellant approached this court seeking to have the decree of the Political Parties Disputes Tribunal in PPDT Complaint No.48 of 2017 set aside.
2. The Appellant crystallised 4 headings into which the present appeal was to be considered:
 - a. **Whether the Tribunal was correct in law and fact to hold that it had jurisdiction over the dispute**
 - b. **Whether the Tribunal properly conceived the facts and the law as to the polling stations which voted in the elections**
 - c. **Whether the Tribunal was correct in law and fact in disregarding the direct nomination given to the 1st Respondent**
 - d. **Whether in the light of the circumstances now obtaining, the orders that were issued by the Tribunal can be sustained.**
3. Before the appeal was heard, a party identifying itself as an Interested Party applied to be enjoined to this appeal. It was argued that the Intended Interested Party had not participated in the Nomination exercise and that their interest could not be adequately represented by either of the parties in this appeal.
4. The application was rejected. The Intended Interested Party is a busy body. No evidence was placed before the court to establish its membership to the 2nd Respondent. Besides the said party made it clear that they never participated in the nomination exercise. They therefore have no interest to protect in this appeal. For that reason the court found no merit in the application.

ISSUES FOR DETERMINATION

Whether the Tribunal erred in law in holding that it had jurisdiction to hear the Complaint.

5. It is the Appellant's contention that the said judgment is bad in law for upholding the invalid judgment of the 2nd Respondent's National Appeals Tribunal (NAT) in NAT Appeal No. 24 of 2017 delivered on 29 April 2017; such appeal having been filed out of time contrary to Rules 19.2.5 and 18.7 of the 2nd Respondent's Election and Nomination Rules. As such, it was their contention that the NAT lacked jurisdiction to hear the appeal, having been filed more than 48 hours after announcement of nomination results.
6. The 1st Respondent's nominations were carried out on 18 April 2017. Rule 19.2.5 of the 2nd Respondent's Nomination and Election Rules requires that any appeals arising out of the nomination exercise be filed within 48 hours of the announcement of results. It was therefore contended before the Tribunal by Mr Kajwang for the Appellant that the Tribunal lacked the requisite jurisdiction, the Complaint having been filed outside the mandatory timelines stipulated in the party's nomination and election rules. It is the Appellant's contention that rule 19.2.5 is not procedural in light of the mandatory language. It was their contention that an appeal filed out of time was invalid.

7. **Order 42 Rule 32** of the **Civil Procedure Rules** sets out the powers of an appellate court. It states as follows:

32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may or may not have filed a cross-appeal.

8. Jurisdiction is a fundamental question that goes directly to the root of the competence of a body to adjudicate over a dispute and can be raised at any point. While the question of jurisdiction was not raised at the NAT, it was raised before the Tribunal. The question became what weight should be placed on the non-compliance with the party rules. The Tribunal agreed that the question of jurisdiction was a matter that could be raised at any stage of the proceedings. It proceeded to find that the non-compliance with the timelines established under the 2nd Respondent's constitution was not the same as non-compliance with statutory timelines. It stated at para 17:

We would be hoisting procedural technicalities above the need to do substantive justice if we held that failure to comply with the party's procedural rules automatically ousts this Tribunal's jurisdiction. Party primaries and other elections in a multi-ethnic nation such as Kenya are highly contested and it would be remiss of us to resolve a dispute arising from a party primary on a procedural point.

9. The Appellant contended that it was a misdirection of law for the Tribunal to hold that the 2nd Respondent's Elections and Nomination Rules were less significant than statute and that non-compliance with the nomination rules was a procedural technicality rather than a substantive question of law. This Court was urged to find, as the Court of Appeal did in ***Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Nairobi CA No 59 of 1993 [1998] eKLR*** that nothing turns on nothing. It was their contention, as was stated in that case that where proceedings are based on a null and void order, they are a nullity.

10. While **section 40 (2)** of the **Political Parties Act** appears to be couched in mandatory terms, the Tribunal has taken a less restrictive approach to the fulfilment of this requirement and its impact of complaints filed before the Tribunal. In several decisions, including ***Benjamin Andola Andayi v Rachel Ameso Omollo and Others Complaint 37*** as consolidated with **61 of 2017** and ***Jeconia O Ogutu & Others v ODM & Others Complaint 200 of 2017***, the Tribunal has found that an attempt to exhaust the internal party dispute resolution mechanism is sufficient to vest the Tribunal with jurisdiction.

11. Onguto J takes a different approach in ***Eric Kyalu Mutua v Wiper Democratic Movement & Anor High Court Election Appeal 4 of 2017***. Reflecting on the jurisdiction of the Tribunal in respect of party primaries under **section 40 (1) (fa)**, the court stated at para 48:

Evidently, in so much as the relatively less adversarial intra party dispute resolution is encouraged, the statute also expressly grants powers to the PPDT to directly handle disputes having their origins in party nominations. There is concurrent jurisdiction and a party may either land before the PPDT or the party's internal dispute resolution mechanism...

12. I agree with the finding of Onguto J. The Tribunal's jurisdiction is neither appellate nor is it an extension of the jurisdiction of the political party's internal party dispute resolution mechanism (IDRM). The Tribunal takes into account the IDRM proceedings and processes but makes its own evaluation; it is not bound by the findings of the IDRM. It is therefore immaterial to the Tribunal that the appeal was filed outside the timelines stipulated in the 2nd Respondent's Election and Nomination Rules. The jurisdiction that is attacked was the NAT jurisdiction. Since the jurisdiction of the Tribunal is original and concurrent, the argument on jurisdiction cannot arise. I find that the Tribunal was properly seized, and that ground of appeal fails.

13. The 2nd Respondent also contended that the Tribunal erred in failing to consider that the 1st Respondent had tendered his resignation from the 2nd Respondent and expressed his intention to vie as an independent candidate. It was their contention that the orders of the Tribunal could not stand in light of the fact that the Tribunal failed to consider the resignation of the 1st Respondent. However, a perusal of the letter of resignation adduced indicates that the 1st Respondent tendered his resignation on 8 May 2017, the day after the decision of the Tribunal. It was therefore not a fact that was material in making the determination by the Tribunal. However, it is material to the determination of this appeal, since being a first appeal, this court is entitled to re-evaluate both the facts and the law afresh and make its own finding. It will be revisited in the determination of the appropriate orders.

14. Nevertheless, even if the resignation had occurred during the determination of the dispute, **section 40 (1) (d)** of the **Political Parties Act** gives the Tribunal jurisdiction over disputes between political parties and independent candidates. The resignation of the 1st Respondent would therefore not have altered the jurisdiction of the Tribunal. **Whether the Tribunal erred in law in ordering a repeat of nominations in polling stations where no irregularities had been alleged**

15. The directive of the NAT was for a fresh nomination exercise to be carried out in Challa Ward, Mahoo Ward and Jipe Polling Station. This finding was upheld by the Tribunal at para 39 (c) of its decision. However, being a first appeal, I am entitled to review the matter afresh to determine whether repeat nominations ought to have been ordered in all the polling stations alleged.

16. The polling stations where it was contended that no polling took place were Njukini Primary, St Joseph's Kivukoni, Challa Primary, Mahandakini Primary School and Jipe Primary School. It was contended that the polling stations where voting did not take place would not have affected the entire electoral result since the number of votes at stake, based on registered voters listed in the 2013 register were 2053. However, according to the Secretary to the County Election Committee, Noelina Chao, the only areas where polling did not take place were Challa Primary, Mahandakini Primary and Jipe Primary School. It was her averment that voting was not to take place at St Joseph's Kivukoni Primary as it was part of the clustered Chokaa Primary School. While St Joseph's Kivukoni and Njukini were listed as those in respect of which no polling took place, this was controverted by the Appellant and Ms Chao for the 2nd Respondent. According to Ms Chao, those registered to vote at St Joseph's Kivukoni were to vote at Chokaa Primary. Lack of polling at St Joseph's Kivukoni was therefore not in

issue as it was not a designated polling station. However, Challa and Mahandakini were clustered polling stations and therefore those registered in Ziwani were entitled to vote either at Challa or at Mahandakini.

17. The figure of 2053 registered voters from Challa Primary, Ziwani Primary, Mahandakini Primary and Jipe Primary is based on the 2013 IEBC register. In respect of Mahoo Ward, other than the IDRMM finding dated 29 April 2017 where it is contended by the Appellant that the results in Mahoo Primary and Malkiloriti Primary Schools were flawed, it is not clear why the IDRMM ordered a repeat poll for the entire ward. The polling stations in Mahoo Ward were not among the ones in issue before the Tribunal. According to Ms Chao, Malkiloriti Primary was an illegally created polling station and was never recognised by the party. It is therefore not clear why repeat polls were ordered in respect of the entire Mahoo Ward.

Whether the Tribunal erred in law by subverting the mandate of the 2nd Respondent to issue a direct nomination to the Appellant

18. The decision of the NAT directed that the 2nd Respondent carry out fresh elections for the position of Governor, Taita/Taveta County in Challa Ward, Mahoo Ward and Jipe Polling Stations in accordance with the party constitution and nomination rules. This finding was upheld by the Tribunal at para 39 (c) of its decision. The 2nd Respondent contended that it could not have carried out a fresh nomination exercise in light of the strict timelines given by the IEBC. It was therefore their contention that to comply with their obligation to field a candidate for the gubernatorial seat in Taita/Taveta, a direct nomination was called for.

19. As to whether the 2nd Respondent acted in accordance with its constitution when it awarded a direct nomination to the 1st Respondent, it is not in doubt that the party constitution allows the National Executive Council (NEC) to direct the National Elections Board (NEB) to issue an automatic or direct nomination to a candidate. Rule 3.3 of the Party Election and Nomination Rules provides that **'the National Elections Board may, with the written approval of the National Executive Committee (NEC) grant a candidate an automatic nomination'**. What arises for determination is whether the decision to award the direct nomination was in accordance with the law as set out in the party constitution and electoral laws.

20. A perusal of the rules indicates that certain requirements must be complied. Rule 18.1 of the 2nd Respondent's Election and Nomination Rules provides:

Party primaries for the nomination of member of the County Assembly, Governor, Member of the Senate, Member of the National Assembly and County Woman Representative shall be by way of universal suffrage of all registered Party members or by Sub Branch Electoral College

Rule 18.1A provides that:

The party primaries set out above may be held at least six months before the date of the election in respect of Zone A and at least three months before the date of the election in respect of Zone B; and The National Elections Board may with the approval of NEC directly nominate candidates using any other criteria in regard to Zone C, as set out in the second schedule.

21. From the foregoing, it is clear that whereas the party may directly nominate a candidate, such a candidate must be vying in a county designated as a Zone C county. For all other counties, nomination must be by way of universal suffrage. Taita Taveta is designated as a Zone B county. It is therefore not open to the party to nominate candidates vying in counties outside of Zone C.

22. The 2nd Respondent has contended that the decision of the Central Committee to directly nominate the Appellant was guided by the short timelines within which the party was operating, guided by the IEBC timelines. However, a perusal of the Rule 7.5A2 (ii) indicates that there is no reference to direct nomination. It provides for the power of the Central Committee to supervise the conduct of the organisation's activities. It does not give the power to directly nominate to the Central Committee. The decision to directly nominate the appellant was therefore not made in accordance with the party constitution and election laws.

23. Moreover, the 1st Respondent was not afforded a hearing before the decision was made. The First Schedule to the **Political Parties Act** sets out the Code of Conduct for political parties. **Section 6 (c)** requires political parties to:

respect, uphold and defend their respective political party constitutions, political party election rules, political party nomination rules and any other political party rules and regulations developed and agreed upon in accordance with this code of conduct;

Further, **section 6 (g)** requires them to:

respect, uphold and promote democratic values and principles, performing inclusive participation of party members and accountable representation in governance for the development of the country;(emphasis mine).

24. I therefore find that the decision to directly nominate the Appellant does not accord with the constitution and election laws of the 2nd Respondent.

Whether in the light of the circumstances now obtaining, the orders that were issued by the Tribunal can be sustained.

25. There is no dispute that the 1st Respondent was aggrieved by the outcome of the nominations and accordingly filed a complaint. The 1st Respondent has since moved on, losing interest in the outcome of this appeal by virtue of having taken a step to resign from membership of the 2nd Respondent. The results of the voting at the nominations are clear that the only other party who could have won if the nominations

are repeated is the party who has left the Political party.

26. I have not lost sight of the fact that this was party elections, not national elections. I am also not lost to the fact that there is a serious constraint on time. The other fact is that the members of the party have expressed their desire going by the way they voted at the nominations. It is the duty of the party to decide one, the process to use to come up with a nominee, and two, who would represent them.

ORDERS

27. **In the result I allow the appeal and order as follows:**

- a) **That the orders of the PPDT be and are hereby set aside, including the order on costs;**
- b) **The matter of the nomination of the gubernatorial representation for the Taita Taveta County now reverts back to the 2nd Respondent to determine**
 - i) **the process it will use to come up with a nominee; and,**
 - ii) **who would represent them.**
- c) **The process and the nomination must comply with the party constitution and election laws.**
- d) **The 2nd Respondent should complete the nomination process within 3 days of today.**
- e) **Each party will bear its own costs.**

DATED AT NAIROBI THIS 23RD DAY OF MAY 2017.

LESITT, J.

JUDGE