



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO. 40 OF 2017

*IN THE MATTER OF THE CONTRAVENTION OF ARTICLE 84, 91 AND 92 OF THE CONSTITUTION
OF KENYA, 2010*

AND

*IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOM
UNDER ARTICLE 19, 20, 22, 38 & 33 OF THE CONSTITUTION OF KENYA 2010*

BETWEEN

MAGERO GUMO APPELLANT

VERSUS

JAFFAR A. KASSAM 1ST RESPONDENT

THE ORANGE DEMOCRATIC MOVEMENT..... 2ND RESPONDENT

*(Being an appeal against the decision of the Political Parties Dispute tribunal delivered on 13th May,
2017 and the Order derived therefrom before Hon. Milly Odongo, Desma Nungo, Paul Ngotho and Dr.
Adelaide Mbithi)*

JUDGMENT

1. The appeal herein emanates from the decision of the political parties disputes tribunal (PPDT) delivered on the 13th May 2017 in which the said tribunal made the following orders

a) That Judgment of 11th May 2017 is hereby set aside.

b) That the applicant is hereby declared the first respondent's nominee for the seat of the County Assembly, Parklands/High Ridge Ward in Westland's Constituency.

c) That in view of the 2nd respondent's omission to name the applicant as a party from the beginning, the second respondent shall pay the costs incurred by the applicant in this application.

2. Aggrieved by that decision, the appellant (Michael Magero) filed a memorandum of appeal dated 15.5.2017 citing nine grounds listed as hereunder.

(i) THAT the learned Members of the Tribunal erred in law and fact in setting aside the Tribunal's Judgment of 11th May 2017 in Political Parties Disputes Tribunal Petition No.224 of 2017-Michael Magero Gumo – Versus- Orange Democratic Movement (ODM) without taking into consideration that the evidence as taken and been presented by the first respondent herein was insufficient to meet the threshold necessary for the grant of an order for review and/or setting aside as provided for under order 45 Rule 1 of the civil procedure rules 2010.

(ii) THAT the learned Members of the Tribunal erred in law and fact in wrongfully conferring themselves with the jurisdiction of the trial Tribunal and exceeding the purview of the Application therein that was solely premised on review of the decision dated 11th May 2017, and subsequently declaring the first respondent herein as the winner of the second respondent's Party.

(iii) THAT the learned Members of the Tribunal erred in law and fact in wrongfully conferring themselves with jurisdiction to review and/or set aside the Honourable Tribunals own decision having already been rendered *functus officio*.

iv) THAT the learned Members of the Tribunal erred in law and fact in finding that the authenticity and /or validity of the first respondent's final nomination certificate dated 3rd May 2017 had not been questioned by the appellant herein, even after the appellant, vide the Statement of Grounds of opposition dated 13th May 2017 at the inter-parties hearing of the application therein had vehemently questioned and opposed the validity and the probative value of all documentary evidence as had been adduced by the first respondent including the final nomination certificate that was issued to him.

v) THAT the learned Members of the Tribunal erred in law and fact in entertaining the application therein without considering that there was no evidence of compliance with Internal Disputes Resolution Mechanism (IDRM) as required under section 40(2) of the political parties Act No.11 of 2011 by the first respondent

vi) THAT the learned Members of the Tribunal erred in law and fact in failing to consider and/or recognize the appellant's provisional nomination certificate yet the same had been adduced as evidence by the Appellant at the *inter-parties* hearing of the application herein.

vii) THAT the learned Members of the Tribunal erred in law and fact in finding that the first respondent was not given an opportunity to be heard without considering all the evidence, in its entirety, including *inter alia* that the first respondent did not have the right of audience and/or *locus standi* to institute the application for review therein.

viii) THAT the learned Members of the Tribunal gravely erred in law and fact in failing to consider the evidence of IDRM vide the ruling of the Special County Appeals Tribunal of the Orange Democratic Movement (ODM) dated 6th May 2017, which ultimately directed that the final nomination certificate be awarded to the appellant herein.

ix) THAT the learned Members of the Tribunal erred in law and fact in directing that the appellant herein should bear the costs of application therein.

3. Consequently, the appellant prayed for the following orders:

i) That this appeal be allowed and that the decision of the Honourable tribunal in political parties disputes tribunal application No.224 of 2017-Jaffar Kassam-versus-The Orange Democratic Movement (ODM) & Michael Magero Gumo and the order derived therefrom be varied and /or set aside.

ii) That the orders as prayed in the appellant's petition dated 10th May 2017 and his subsequent notice of motion application dated 15th May 2017, both filed under Certificate of Urgency be granted.

iii) That costs of this appeal and the honorable tribunal be granted to the appellant.

iv) That this honorable court grants any other or further relief it deems fit or just.

4. Briefly, on the 30th April 2017, the appellant herein being a member of the Orange Democratic Movement Party (herein after referred to as ODM), took part in the Party's primary nomination exercise for the seat of Member of County Assembly Parklands High Ridge Ward being a contestant for the said seat alongside other contestants namely Jaffar Abdul Wahab Kassam, Robert W. Obonyo, Ramesh Rafik Sadik, Henry Muhumbwa Mudogo and Judith Mwavali Milimo.

5. That upon completion of the exercise, the appellant was declared the winner by the constituency's returning officer one Modesta Akoki who allegedly disappeared before signing the provisional certificate for the winner (appellant)

despite announcing the results to that effect.

6. Pursuant to the alleged disappearance of the returning officer, the deputy returning officer one Enock Wanyonyi stepped in and subsequently issued the appellant a provisional nomination certificate dated 30th April 2017 signed for and on behalf of Modesta Akoki the returning officer hence confirming him as the validly nominated ODM candidate for the seat of member of county Assembly Parklands High Ridge Ward.

7. When the appellant presented his provisional nomination certificate to the National Executive Committee on 8th May 2017, with a view of getting final nomination certificate, he was informed that the same had already been issued to the first respondent one Jaffar Kassam. Shocked and dismayed by the turn of events, the appellant lodged a complaint with the party officials who unfortunately turned him away and instead advised him to file his complaint with the Political Parties Disputes Tribunal (hereinafter referred to as PPDT) which he did on 10th May 2017 with ODM as the respondent.

8. After hearing his petition ex parte following non-appearance of the respondent (ODM), the PPDT delivered a Judgment dated 11th May 2017 with the following orders:

i) An order to issue nullifying nomination certificate that may have been issued to any person in respect of position of Member of the county assembly for Parklands /High Ridge ward, Nairobi county.

ii) That the respondent do forthwith issue the petitioner with the final nomination certificate for the position of Member of the county assembly for Parklands /High Ridge ward, Nairobi County.

iii) That a nomination to issue to the independent electoral and boundaries commission.

iv) Each party to bear its own costs.

9. Upon delivery of the said judgment, one Jaffar A. Kassam one of the candidates who had also been declared a winner by the returning officer one Modesta Akoki and issued with both the provisional and final nomination certificates dated 30th April, 2017 and 3rd May 2017 respectively, filed an application dated 12th May 2017 before PPDT seeking review of the tribunal's judgment delivered on the 11th May 2017 on grounds that as an interested party, he was neither informed nor made aware of the proceedings instituted by the appellant.

10. After serving the said application, PPDT heard the same and finally allowed the application for review on grounds that the appellant/petitioner had concealed material information by not disclosing that there was another candidate (Kassam) who had been issued with a final nomination certificate and that the party's internal disputes resolution mechanism (IDRM) had upheld the results declared by Modesta Akoki the party's officially recognized returning officer for Westland's constituency as authentic.
11. Having made the said finding, the tribunal (PPDT) effectively set aside its judgment dated 11th May 2017 and made the orders which are the subject of this appeal.
12. It is this orders that provoked the appellant to file this appeal arguing that the PPDT erred in declaring the first respondent an ODM nominee and that the tribunal (PPDT) had no powers to review its judgment dated 11th May 2017 as they had become functus official.
13. Simultaneously filed with the appeal herein is a notice of motion dated 16th May 2017 seeking to stay the tribunals orders and also an order to call for additional evidence by calling several witnesses among them Modesta Akoki the returning officer.
14. On 17th May 2017 when the appellant's counsel appeared before the court under certificate of urgency, the court did grant stay orders staying the tribunal's orders pending hearing and determination of the application interpartes on 18th May 2017. On 18th May 2017, parties agreed to canvass the application and main appeal together given the urgency of the matter and exigency of time.
15. In reply to the notice of motion and appeal herein, the first respondent filed his response together with submissions in which he claimed that he was the validly nominated candidate on ODM ticket, Parklands High Ridge Ward and that he was issued with a provisional and final nomination certificate on 30th April, 2017 and 3rd May 2017 by the officially authorized and recognized returning officer one Modesta Akoki and NEC respectively. He termed the provisional nomination certificate issued to the appellant and signed by Enoch Wanyonyi for the returning officer as fake and unofficial.
16. In his submissions, Mr. Mulani for the appellant urged the court to set aside its orders of PPDT dated 13th May 2017 on grounds that having rendered its decision on 11th May 2017 declaring the appellant the validly elected nominee, it had no powers to review its decision under order 45 of the civil procedure rules. Counsel invited the court to take into account the polling stations' results in which the appellant allegedly garnered 470 votes against 239 for Jaffar Abdul Kassam, Robert W. Obonyo 204, Ramesh Rafik Sadik 57, Henry Muhumbwa Mudogo 79 and Judith Mwavali Milimo 15.
17. Learned counsel submitted that the appellant was validly declared the winner by Enoch Wanyonyi the returning officer after Modesta abdicated her duties as returning officer. Counsel relied on the decision of the internal party dispute resolution mechanism (IDRM) in which they allegedly declared the appellant as the winner and issued him with the provisional nomination certificate.
18. Basically, counsel contended that the source of the nomination certificate issued to the first respondent (Kassam) is not known as no tallying sheets were produced neither by the candidate nor the returning officer.
19. Mr. Jamal holding brief for Prof Ojienda for the respondent opposed the appeal arguing that the tribunal properly reviewed its orders of 11th May 2017 under sec 80 of the civil procedure Act and order 45 of the civil procedure rules based on discovery of new evidence and material facts which were not within the tribunal's knowledge since the appellant had failed to disclose that the first respondent who was not made a party had a provisional nomination certificate signed by the official returning officer and a final one signed by NEC.
20. Learned counsel averred that the decision of the parties disputes resolution mechanism (IDRM)

had upheld the officially announced nominee implying the first respondent hence contending that it was Modesta Akoki's announced results and nomination certificate that was authentic and official.

21. Lastly, counsel argued that, under article 40 of the political parties Act, the first respondent had locus to be made a party in petition No. 224/17 in which the appellant deliberately omitted his name.

22. I have considered the petition of appeal and material placed before me plus submissions by both counsels. Issues for determinations are;

i) Did the tribunal(PPDT) properly exercise its powers and/or authority in reversing its orders of 11th May 2017

ii) Did the tribunal (PPDT) have jurisdiction to or properly entertain the first respondent as an interested party.

iii) Did the ODM party disputes resolution mechanism panel (IDRM) declare the appellant as the validly elected nominee on ODM ticket Parklands High Ridge ward.

iv) Did the tribunal (PPDT) properly exercise its mandate in declaring the first respondent as the winner and ODM nominee for the seat of member of county assembly Parklands High Ridge Ward.

23. In his application dated 10th May 2017 being petition No. 224/17, the appellant sued the second respondent (ODM) as the sole respondent seeking to be declared as the validly elected nominee. Despite service of petition upon the respondent (ODM), the respondent did not file any response hence on 11th May 2017 orders granting the application were made thereby declaring the appellant as the ODM Candidate.

24. By issuing the orders aforesaid, Kassam who was also a candidate for the same seat in the same ward and who had already secured a provisional certificate, had to move the court as an Interested party through a Notice of motion dated 12th May 2017. Based on that application, the tribunal (PPDT) allowed the same and after considering his submissions and final certificate in his possession, the tribunal declared him as the winner.

25. Did the 1st respondent properly move the court at that stage to be enjoined as an interested party? Under Article 50 (1) of the Kenyan Constitution, 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 court or, if appropriate, another independent and impartial tribunal or body.

26. It is a pertinent principle of natural justice that nobody should be condemned unheard. In this case, adverse orders were made on 11/5/2017 against Kassam without his knowledge. He was condemned unheard as his nomination certificate was taken away before he would be given an opportunity to give his side of the story.

27. The only remedy available was to move the court that made the orders to relook into its decision after considering the 1st respondent's story. The dispute having arisen from party primaries or a dispute between a member of a party and another member or between a party and a member, under Section 40 of the political parties Act, the tribunal was properly seized of the matter hence had jurisdiction. The 1st respondent had nowhere to go other than to follow the procedure provided for under Section 40 of Political Parties Act. It is settled law that where there are specialized procedures provided by law or constitution for resolution of internal disputes, the same must be followed strictly. **(See Francis Mutuku vs Wiper Democratic Movement Kenya and 2 others (2015)eKLR).**

28. Did the tribunal have powers to review its orders? Section 80 of the Civil Procedure Act provides that:

“Any person who considers himself aggrieved:

(a) By a decree or order from which an appeal is allowed by this Act:

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such orders therein as it thinks fit”.

29. Further, order 45 provides for review under similar circumstances where there is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the aggrieved party, or could not be produced by him at a time when the decree was pronounced or made or on account of mistake or error apparent on the face of the record or for any other sufficient cause. In granting orders of this nature an application must be brought without unreasonable delay.

30. Besides Section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules, the appellant would still have moved the court under Order 10 rule 11 which provides for setting aside of a judgment or any consequential decree or order upon such terms as are just. Equally political parties disputes tribunal (procedure) regulations of 21st April, 2017 provides room for review. Regulation 33 (1) provides as follows:

“The tribunal may, of its own motion or upon application by an aggrieved party, review its decisions or orders”.

Regulation 24 (1) also gives powers to the tribunal to review its orders if moved by an aggrieved party hence the argument by Mr. Mulani that the PPDT became functus official upon delivery of its judgment dated 11th May, 2017 is not tenable.

31. In the instant case, the 1st respondent filed the application without unreasonable delay challenging orders of the tribunal under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The 1st respondent is properly covered by Section 80 of the Civil Procedure Act and the court was properly moved on grounds that there was concealment of material facts or information. Even if we were to take Mr. Mulani’s approach that Order 45 of Civil Procedure Rules was not applicable, Section 80 of CPA did properly take care of the situation together with the political parties disputes tribunal’s regulations of 21st April, 2017.

32. For those reasons, the tribunal (PPDT) properly exercised its powers in allowing the 1st respondent as an interested party. In any event, there is no miscarriage of justice in allowing the 1st respondent to be part of the proceedings and any procedural technicalities in not quoting or following the proper law for review if any, the same is curable under Article 159 of the Constitution and Regulation 2 of the Political Parties Disputes Tribunal Regulations.

33. Was the 1st respondent properly declared as the validly elected nominee? While making its decision, the tribunal relied on the decision of the party’s county special tribunal (IDRM) which heard a petition filed by one Robert Obonyo one of the candidates challenging the nomination exercise. The tribunal in paragraph three delivered its judgment in the following words:

“Having considered this appeal, we hereby make the following directives:

1 – The petition fails

2 – The nomination officially announced is upheld and the provisional certificate issued is hereby retained”.

34. This is the decision that the tribunal (PPDT) upheld interpreting it to mean that the officially issued provisional certificate was the one issued by Modesta Akoki the official returning officer and not Enock Wanyonyi who issued a provisional certificate to the appellant but signed for returning officer.

35. According to Mulani, the special tribunal's finding referred to the appellant's provisional certificate as official whilst the 1st respondent claims the opposite. What was the officially announced nomination results?

36. There is no dispute that Modesta Akoki was the Constituency returning officer. It is also admitted by both parties that it was the same returning officer who announced and declared results but failed to sign provisional certificate for the appellant but instead did sign for the 1st respondent.

37. How did Erick Wanyonyi secure authority to sign a provisional

certificate? Between the provisional certificate signed by Modesta Akoki and Enock Wanyonyi which one is official? Obviously, there is nothing on record or tendered before the special tribunal (IDRM) to show what they meant as officially announced results. The party's tribunal did not expressly state for avoidance of doubt as to who was the officially elected nominee. The court is left to infer and by implication make determination.

38. There is no evidence from the National Executive Committee ODM or anybody showing that Enock Wanyonyi was authorized to issue a provisional certificate for any candidate. It is not true as submitted by Mr. Mulani that the special tribunal declared the appellant as the winner. Who was supposed to declare official results? In this case official results should be those declared by the constituency returning officer and that is why Enock Wanyonyi purported to sign for returning officer.

39. If that is the position, and in the absence of any proof that Enock Wanyonyi was authorized to issue and sign a provisional certificate, then the official results should be those announced by Modesta Akoki and the provisional certificate issued by her. Based on that holding, it was the 1st respondent who was officially declared as the winner.

40. What was the source of information that it was Kassam who won? According to the appellant, he won by 470 votes and Kassam (1st respondent, got 239 votes. Appellant attached some uncertified pieces of paper (See page 63 and 64 of the record of appeal) showing some printed figures in a plain sheet which has neither heading, name nor signature. In the circumstances, the source of those papers is unknown. A plain paper purporting to be a tallying sheet which is blurred and has no signature cannot be relied on as credible source of evidence. Although the same were relied on as evidence in support of the appellant's application dated 10/5/2017, the tribunal properly disregarded the same in so far as their source and authenticity is in question.

41. Contrary to the allegations made by the appellant, the 1st respondent (Jaffar Kassam) swore an affidavit deponed on 12th May, 2017 in support of his notice of motion filed on the same date in which he deponed in Paragraph 18 that, he scored 474 votes against Magero's 470 votes. Mr. Jaffar attached a tallying sheet marked 'JAK-2' showing final results from High Ridge and Muguga polling stations as hereunder.

Name of Candidate	High Ridge	Muguga	Total Votes
1. Jaffar A. Kassam	293	181	474
2. Ramesh Sadik	46	11	57
3. Robert W. Obonyo	193	11	204
4. Henry Muhumbwa	32	47	79
5. Michael Magero	417	53	470
6. Judith M. Milimo	8	7	15

42. The said tallying sheet is duly signed by all agents against their respective candidates with Apiyo Rosemary signing for M. Magero (appellant) and Hannington Kimathi for Jaffer Kassam. The same tallying sheet is signed by the presiding officer one Enock Wanyonyi who made very unfortunate remarks as follows:

“very tiresome with goons threatening my safety, I was under great danger at Nyayo stadium with threats from

one of the aspirants who forced me to write a preliminary certificate in the presence of county returning officer Mr. Owiti”.

43. It is clear from the submissions of both parties that Enock Wanyonyi signed a provisional nomination certificate which he admitted he did issue under duress. The tallying sheet presented by the 1st respondent shows that the 1st respondent won by 474 votes and the appellant got 470 votes which he has admitted in his affidavit in support to his application dated 10th May, 2017 although he later claimed that it was an arithmetic error.

44. The appellant has not supplied or placed any credible and or official

tallying sheet to challenge that of the 1st respondent. What he purported to be a tallying sheet is a plain sheet with some figures without the author’s name or signature. The 1st respondent tendered prima facie evidence before the tribunal and on a balance of probability emphasized that he indeed won the ODM party nominations Parklands High Ridge ward and therefore met the threshold on the degree and burden of proof as required under regulation 27 of the Political Parties Disputes tribunal regulations of 21st April, 2017.

45. The appellant having failed to prove that he was a returning officer with

authority to declare a candidate as the winner and issue a provisional certificate, his actions to issue a parallel provisional certificate to the appellant amounted to a coup within the party which the court should not perpetuate.

46. The court has no convincing reason why it should recognize and deliberate on a provisional certificate issued by an unauthorized returning officer.

48. It is trite law that, he who alleges has the burden of proof. In this case, the appellant has neither proved that he won the elections, was declared the winner by an authorized returning officer nor did the party’s special disputes tribunal (IDRM) declare him the winner.

49. The attempt by the appellant to introduce new evidence on appeal did not meet the threshold under Order 42 rule 27 of the Civil Procedure Rules.

50. For the above reasons stated, I do not see any good reason why this court should interfere with the tribunal’s decision dated 13th May, 2017. Accordingly, appeal is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MAY, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of:

.....Counsel for the appellant

..... Counsel for the respondent