



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**E. P. A NO. 25 OF 2017**

**FAITH WAIRIMU GITAU.....APPELLANT**

**VERSUS**

**HON. WANJIKU MUHIA.....1<sup>ST</sup> RESPONDENT**

**JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Judgment of the Political Parties Disputes Tribunal Complaint No. 210 of 2017 Hon. Wanjiku Muhia v. Jubilee Party & Another by Kyalo Mbobu, James Atema and Hassan Abdi)**

**JUDGMENT**

**Background**

The Appellant and the 1<sup>st</sup> Respondent are members of the Jubilee Party which is the 2<sup>nd</sup> Respondent. They also participated as aspirants for nomination for the position of County Woman Member of the National Assembly (commonly referred to as Woman Representative) for Nyandarua County in the General Elections to be held on 8<sup>th</sup> August 2017. The nominations were conducted on 26<sup>th</sup> April 20. The Appellant was declared the winner and was issued with a provisional nomination certificate by the Returning Officer. This decision aggrieved the 1<sup>st</sup> Respondent who moved to the 2<sup>nd</sup> Respondent's National Appeals Tribunal (NAT). The NAT decided in favour of the Appellant and upheld the decision of the Returning Officer.

The 1<sup>st</sup> Respondent filed a complaint with the Political Parties Disputes Tribunal (PPDT) being Complaint No. 210 of 2017 on 9<sup>th</sup> May 2017. PPDT heard the matter and delivered its judgment on 12<sup>th</sup> May 2017 overturning the decision of the NAT and ordering that the 1<sup>st</sup> Respondent be issued with a certificate of nomination for the position of Woman Representative. It is against that order that the Appellant has appealed to this court.

Together with the memorandum of appeal, the Appellant filed a Notice of Motion seeking orders to stay the execution of the judgment and decree of the PPDT pending the hearing and determination of the Notice of Motion and the Appeal. These orders were granted.

**Memorandum of Appeal**

The Appellant, through the firm of M/s Mirugi Kariuki & Company Advocates, filed ten (10) grounds of appeal as listed below:

1. The learned tribunal erred in law and in fact by ordering that the 1<sup>st</sup> Respondent herein be issued with a nomination certificate despite the overwhelming evidence that the Appellant herein had won the Jubilee Party nominations for the position of Nyandarua County Woman representative with an overwhelming majority.
2. The learned tribunal erred in law and in fact by granting prayers that were not sought. The 1<sup>st</sup> Respondent did not pray to be declared a winner or to be given the nomination certificate but prayed for nullification of results and repeat nominations.
3. The learned tribunal having ruled that the nomination was not free and fair (which holding is disputed) erred in law by declaring the 1<sup>st</sup> Respondent a winner by ordering her to be given nomination certificate, arising from a process the tribunal had ruled was flawed.
4. The tribunal acted in excess of its jurisdiction by ordering that the Jubilee to give the 1<sup>st</sup> Respondent nomination certificate whereas those powers are vested in people (voters) or the party through mechanism set out in the party constitution.
5. The learned tribunal erred in fact by holding that the ballot papers had been destroyed/burnt before the appeal process was concluded despite the fact that the Respondent herein had not asked for recount and scrutiny.
6. The learned tribunal erred in law and in fact by holding that the judgment submitted by the Jubilee Party tribunal was in draft whereas there was, in tribunal record, a certified and signed copy of the judgment which was in total agreement with the draft submitted by the 1<sup>st</sup> Respondent.
7. The learned tribunal erred in fact and in law by striking out an affidavit of Jubilee on the ground that it was sworn by an advocate despite the fact that the said affidavit did not contain any contentious fact.
8. The learned tribunal erred in law and in fact by not considering the fact that the complaint before it was a total departure from what had been lodged before the Jubilee Party Appeals Tribunal, had the tribunal addressed itself to that fact it would have discovered that the complaint was a mere afterthought.
9. The tribunal erred in law and in fact by disregarding the wishes of the people of Nyandarua and therefore violating the constitutional democratic rights of the people of Nyandarua County.
10. The tribunal erred in law and in fact by delivering a judgment which was founded neither on facts presented nor in law.

The Appellant is seeking that this Appeal be allowed; that the decision of the tribunal in the Political Parties Tribunal Case No. 210 of 2017 be set aside; that the decision of both by the County Returning Officer and by the Jubilee Party tribunal declaring the Appellant as the nominee of Jubilee Party Nyandarua County Woman Representative be upheld and that pending hearing and determination of this appeal the decision of the tribunal in Political Parties Disputes Tribunal Case No. 210 of 2017 be stayed.

At the hearing of the Appeal, the Appellant was represented by Mr. Ndegwa Wahome as the lead counsel. With him were Mr. Lawrence Karanja, Mr. S. Kihiko, Mr. Anthony Kago, Mr. Ndegwa Njiru, Mr. Kariuki Njiri and Mr. David Mabea. Mr. Omari Danstan appeared for the 1<sup>st</sup> Respondent with Mr. Mogaka and Mr. Mureithi Kimathhi while Mr. Tom Macharia appeared for the 2<sup>nd</sup> Respondent.

### **Appellant's Submissions**

Mr. Kihiko submitted on facts of this appeal. He took the court through the circumstances giving rise to this Appeal and told the court that the 2<sup>nd</sup> Respondent conducted nominations in Nyandarua County on

26<sup>th</sup> April 2017 to select candidates to vie for elective seats during the General Elections slated for 8<sup>th</sup> August 2017; that results of the nominations in all the other positions remain unchallenged save for results in respect of the position of the Woman Representative that had been overturned by the (PPDT); that the action by the PPDT is discriminatory and contrary to Article 27 of the Constitution because all results flowed from the same exercise and that there is no good reason for PPDT to annul the nomination for Woman Representative seat. Mr. Kihiko further submitted that after tallying the results the Appellant was declared the winner by Nyandarua Returning Officer at the Ol-Kalou Catholic Church Hall after garnering 106,004 votes against the 1<sup>st</sup> Respondent's 75,296 votes, a margin of 30,708 votes; that 1<sup>st</sup> Respondent challenged the results before the NAT but lost the claim; that she filed a Complaint before the PPDT which overturned the decision of NAT; that the issues complained of before the NAT and PPDT were similar save for the ground that 2<sup>nd</sup> Respondent had burnt ballot material in respect to the nominations; that PPDT failed to interrogate all the issues raised and dealt only on the burning of the election material which is contrary to the rules of evidence; that it failed to appreciate that it was dealing with nominations and not an election and that PPDT made a decision that was not supported by evidence.

Mr. Lawrence Karanja adopted Appellant's written submissions on points of law. In his submissions several issues were raised: firstly on jurisdiction, it was submitted that PPDT did not have jurisdiction to select a candidate for the 2<sup>nd</sup> Respondent and that PPDT sought to exercise the mandate of the 2<sup>nd</sup> Respondent; that its jurisdiction was limited to determining whether the nomination process was reasonable, lawful, legal and/or suspect; that by deciding as it did, PPDT acted contrary to Section 31 of the Elections Act that provides that a person qualifies to be nominated by a political party for Presidential, Parliamentary and County elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person (a) is selected in the manner provided for in the Constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections. On that point counsel cited **Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR** the summary of which is captured in the last two sentences of the citation that:

***“Courts decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself.”***

Secondly, it was submitted that the prayers for recount and scrutiny were not pleaded before the NAT and PPDT; that the 1<sup>st</sup> Respondent's allegations that ballots were burnt during the pendency of 1<sup>st</sup> Respondent's case before the NAT had no basis since she had not sought recount and scrutiny and therefore PPDT could not make an order for recount or scrutiny.

Thirdly, it was submitted that PPDT did not consider evidence; that the Appellant in her Replying Affidavit, answered each allegations leveled against her; that on paragraph 18 of her Replying Affidavit she provides alibi that she was away when the alleged burning of ballot papers took place; that burning of the ballots was nationwide and was not peculiar to Nyandarua County; that the Constitution of the 2<sup>nd</sup> Respondent did not provide for preservation of ballot materials; that the contents of paragraph 18 of the Appellant's Replying Affidavit rebuts the allegations of burning of ballots contrary to the ruling by PPDT that there was no evidence in rebuttal.

Fourthly, on the issue of collusion, it was submitted that there was no evidence of collusion; that collusion was not pleaded as required under Order 2 Rule 10 of the Civil Procedure Rules.

Fifthly, it was submitted that PPDT was estopped from striking out the affidavit by counsel for the 2<sup>nd</sup> Respondent because it had been admitted in evidence by consent of the parties. It was argued on the same point that the affidavit by Mr. Ombasa was in reply in respect of matters within his knowledge as an employee of the 2<sup>nd</sup> Respondent.

Sixthly, it was submitted that the burden of proof remained with the 1<sup>st</sup> Respondent to proof her case which she failed to discharge; that PPDT shifted the burden of proof from the 1<sup>st</sup> Respondent that there

were irregularities during nominations to the Appellant and the 2<sup>nd</sup> Respondent; that the law provides that he who alleges must prove. Counsel cited the case of **Joho v Nyange & Another (2008) 3 KLR (EP) 500** which discusses the issue of burden and standard of proof. It is further submitted that the 1<sup>st</sup> Respondent's prayers before the PPDT were contradictory and incapable of being granted.

This court was urged to scrutinize the evidence and come up with its own independent findings and find that the Complaint before the PPDT had no merit and allow this appeal.

### **1<sup>st</sup> Respondent's Submissions**

Mr. Omari for the 1<sup>st</sup> Respondent submitted that the nominations were marred by irregularities; that voting continued on the next day, 27<sup>th</sup> April 2017; that there was no declaration of a winner and that the 1<sup>st</sup> Respondent raised an appeal on 28<sup>th</sup> April 2017 citing malpractices and seeking nullification; that two days later, on 30<sup>th</sup> April 2017 the 2<sup>nd</sup> Respondent burnt the ballot papers because of pre-marked ballots; that this was because the 1<sup>st</sup> Respondent had raised the issue with NAT; that the burning was meant to conceal the malpractices; that some papers were found with counter-foils, a clear indication that they had been pre-marked; that on 3<sup>rd</sup> May the 1<sup>st</sup> Respondent appeared before the 2<sup>nd</sup> Respondent and the case was heard and an oral decision given that the application had been dismissed; that the 1<sup>st</sup> Respondent filed a Complaint at the PPDT who agreed with her that there was collusion. Counsel claimed that the Ruling of the NAT dated 7<sup>th</sup> May 2017 is foreign because it is signed and was not presented before the PPDT while what was presented before PPDT was not signed; that the argument that PPDT had not power to declare results of the nomination is to give the 2<sup>nd</sup> Respondent power to deal with the matter arbitrarily and that PPDT plays an oversight role and can declare a winner. On the issue that the 1<sup>st</sup> Respondent did not plead for scrutiny and recount, it was submitted that the court can order scrutiny and recount *suo moto*. On the issue of collusion it was submitted that burning of the ballot papers was meant to conceal some facts and that 2<sup>nd</sup> Respondent cannot preside over scrutiny and recount.

Mr. Mogaka submitted on points of law. He cited **Timamy Issa Abdala v. Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 36 of 2014** to support submissions that where votes cast had counter-foils or had no official stamp the question of integrity of the ballots arises putting the entire exercise into question. On the issue of jurisdiction of the PPDT, Mr. Mogaka cited **The National Gender and Equality Commission and The Independent Electoral and Boundaries Commission & Another and Association of Physically Disabled of Kenya & 4 others [2013] eKLR** on the point that in case of disputes in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members to the PPDT or to High Court.

### **2<sup>nd</sup> Respondent's Submissions**

Mr. Macharia for the 2<sup>nd</sup> Respondent took issue with the decision of the PPDT specifically in reference to the following: (i) unsigned draft of the ruling of the NAT; (ii) statement by PPDT that no one should be allowed to benefit from an illegality; (iii) finding by PPDT that there is apparent collusion between the Respondents (now Appellant and 2<sup>nd</sup> Respondent); (iv) finding by PPDT that there was suppression of truth; (v) statement by PPDT that the people of Nyandarua should not be subjected to another election; and (vi) and statement that another election would place the 2<sup>nd</sup> Respondent and the Appellant in the same corner.

On the issue of illegality, Mr. Macharia submitted that the authorities cited in this case will not be of much use to the parties because issues in this case arise from nomination and not election; that the constitutional underpinning of nominations is Article 82 (b) of the Constitution and that the statute envisaged is Sections 13 (1) and 31 (1) of the Elections Act; that for PPDT to make a decision that there was an illegality it must state what statutes have been breached. It was further submitted that there was no reference made by counsel for the 1<sup>st</sup> Respondent to any law that has been violated.

On collusion, it was submitted that the basis for this allegation is that ballot papers were burnt; that this was done countrywide and that there is no evidence to support the conclusion by PPDT that this was as result of collusion; that there is no evidence to demonstrate that this was done with the aim of benefitting the Nyandarua County; that “collusion” is a strong word that connotes fraudulent action which cannot be proved by affidavit evidence; that oral evidence is required to prove allegations of collusion and that evidentiary standard of proof for fraud is higher than a balance of probabilities; that PPDT did not subject itself to this standard of proof.

On suppression of truth, it was submitted that the parties to the nomination exercise had agents in every polling station who signed all the forms and that if the court were to order a recount the results would be same if allegations of ballot stuffing were true. It was submitted that PPDT had no jurisdiction to make a finding that the people of Nyandarua should not be subjected to another nomination; that it is for the people to make that decisions.

On the issue that the NAT ruling presented before the PPDT was a draft that was not signed, it was submitted that if this were the case, then PPDT had no jurisdiction to decide the Complaint by the 1<sup>st</sup> Respondent for the reason that it cannot exercise that jurisdiction before the internal party dispute mechanism has been exhausted. It was submitted that PPDT should not have struck out the affidavit of Mr. Ambasa because he was an in-house lawyer for the 2<sup>nd</sup> Respondent and he had personal knowledge of the facts he was deposing. Mr. Macharia cited **Zola & another v Ralli Brothers Limited & another, Civil Appeal No. 4 of 1969** where the court held thus:

*“.....There is scarcely an affidavit, or indeed any document, which cannot be criticized. It may be that the affidavit could have been more explicit in certain respects, but there is set out therein the means of knowledge and the grounds of belief and the source of information in respect of each of the matters stated on knowledge, belief or information. I am satisfied that the affidavit complied with the provisions of O. 35 and O. 38 and substantially with the requirements relating to affidavits as set out in decisions of this Court in Assanand & Sons v East African Records, [1959] E. A 360 and Standard Goods Corporation v Nathu & Company (1959), 17 E.A.C.A 99....”*

Finally, Mr. Ndegwa Njiri submitted in support of the submissions for the Appellant and 2<sup>nd</sup> Respondent. He submitted that irregularities must be substantive as to affect the outcome and submitted that this court has not been told how the burning of ballots affected the results. He also submitted that the allegation of collusion was a creation of the PPDT.

### **Determination**

This court is sitting on this appeal as the first appellate court. The court is therefore required, as a matter law and principle, to consider all the evidence presented in the lower court/tribunal and evaluate it afresh in order to arrive at an independent finding irrespective of the findings of the court/tribunal whose decision is appealed from. The jurisdiction of this court sitting on appeal in this matter is derived from Section 41 (2) of the Political Parties Act that provides that “**appeals shall lie from the decision of the Tribunal to the High Court on points of law and facts.**”

I have read all the submissions by counsels for the three parties before this court. I have considered the authorities cited. It is not possible to repeat everything that has been stated in the respective submissions or to cite every authority relied on by the parties. Suffice it to state that in determining this matter, I have taken into account all the submissions and authorities, especially on points of law submitted before me.

I have summarized the issues presented to this court and I have identified eight (8) broad issues which I feel will cover all the issues raised. These are enumerated below as follows:

- i. Whether the Political Parties Disputes Tribunal had jurisdiction to make the orders it made.
- ii. Whether allegations that ballot papers were burnt to suppress or conceal malpractices and

irregularities, and whether allegations of collusion between the Appellant and 2<sup>nd</sup> Respondent are supported by evidence.

- iii. Whether the Political Parties Disputes Tribunal failed to consider the Appellant's evidence.
- iv. Whether the 1<sup>st</sup> Respondent discharged the burden of proof before the Political Parties Disputes Tribunal.
- v. Whether the Political Parties Disputes Tribunal was justified in striking out the affidavit of Mr. Ambasa.
- vi. Whether the prayers sought by the 1<sup>st</sup> Respondent in the Political Parties Disputes Tribunal are capable of being granted.
- vii. Whether there was declaration of a winner after the nominations for Woman Representative for Nyandarua Constituency.
- viii. Whether the Appellant herein has introduced new evidence in this appeal.

**Whether prayers sought by 1<sup>st</sup> Respondent at the Political Parties Disputes Tribunal are capable of being granted**

The 1<sup>st</sup> Respondent sought the following orders from the PPDT:

- (a) An order quashing the declaration, representation and or endorsement of Mrs. Faith Wairimu Gitau as the legitimately nominated party representation for the seat of Nyandarua County.*
- (b) An order compelling the Respondent to repeat the nominations of the disputed women representative race, Nyandarua County.*
- (c) A declaration of the claimant as the winner and lawfully nominated contestant for Women Representative for the Nyandarua County for the Jubilee Party.*
- (d) An order compelling the Respondent to issue the claimant with the nomination certificate as the winner and lawfully nominated Women Representative race, Nyandarua County.*
- (e) A declaration that the decision endorsing and/or representing Mrs. Faith Wairimu Gitau as the legitimately nominated party representative for the seat of Women Representative race, Nyandarua County is unreasonable, unlawful, illegal and/or suspect.*

It was submitted that these orders are contradictory and incapable of being granted. Prayers (iii) and (iv) respectively seek orders to declare the 1<sup>st</sup> Respondent as the winner and lawfully nominated contestant for Woman Representative seat for the Nyandarua County and to compel the 2<sup>nd</sup> Respondent to issue the 1<sup>st</sup> Respondent with the nomination certificate as the winner of that seat. These prayers were not sought in alternative to the orders sought in prayers (i), (ii) and (v). I have considered this issue and I agree with the submission that the 1<sup>st</sup> Respondent cannot pray for repeat nominations and at the same time seek to be declared the winner. By seeking repeat of nominations, the 1<sup>st</sup> Respondent is questioning the process that led to the decision that declared the Appellant the winner. Therefore the logical thing to do is to seek repeat of nominations in order that a winner can be determined without much controversy. I have read the judgment of the PPDT and find nowhere in that judgment did the Tribunal consider the issue of contradictory prayers sought by the 1<sup>st</sup> Respondent. The Tribunal went ahead and allowed the Complaint dated 9<sup>th</sup> May 2017 in respect to order (i). This, to my mind, means that by allowing the Complaint, all the prayers sought were allowed, yet it is obvious that as sought those prayers cannot all issue at the same

time unless pleaded in the alternative. Had they been pleaded in the alternative, then the Tribunal would perhaps have made a decision as to which alternative prayers to grant the 1<sup>st</sup> Respondent. I agree that the prayers as sought before the PPDT were contradictory and incapable of being granted as prayed.

**Whether allegations that ballot papers were burnt to suppress or conceal malpractices and irregularities, and whether allegations of collusion between the Appellant and 2<sup>nd</sup> Respondent are supported by evidence**

I have read the Claim by the 1<sup>st</sup> Respondent in respect to the Appeal before the 2<sup>nd</sup> Respondent's National Appeals Tribunal. In summary it alleges several irregularities and malpractices. These were identified as photocopying of ballot papers; inconsistency between the total tally of votes cast for the other elective positions like the Governor, Senator, Member of National Assembly and Member of County Assembly and the position of the Woman Representative; votes cast in some polling stations exceeding 100% turn-out; some polling stations voting past midnight into 27<sup>th</sup> April 2017; few ballot papers in some polling stations and 1<sup>st</sup> Respondents agents being turned away in some polling stations.

I have also read the Complaint filed before the PPDT. It alleges irregularities and malpractices in the nomination exercise. These were identified as pre-marking of ballot papers to favour the Appellant; extension of voting until 27<sup>th</sup> April 2017; pre-planned rigging of nominations by the Appellant; total tally of votes for Woman Representative position not consistent with votes for the other positions; failure by NAT to consider strong evidence in favour of the 1<sup>st</sup> Respondent; collusion between Appellant and 2<sup>nd</sup> Respondent; failure by NAT to write a ruling in respect to the Appeal lodged before it by the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent, in support of her claim before the PPDT, presented evidence that **“she had learnt from myriad sources that she might have emerged second”** in the nominations. She also said it was difficult to ascertain votes cast in her favour because the 2<sup>nd</sup> Respondent did not make an official declaration. PPDT in determining the Complaint before it stated as follows in the judgment delivered on 12<sup>th</sup> May 2017:

***“To support her case, the Complainant has produced witness statements on oath by Ann Wanjiku Kamau, John Kiarie Muthoni and Dennis Njau Wambui, who state on oath that the voting continued past scheduled time and other malpractices.”***

I have also read the proceedings before the PPDT on pages 88 to 91 of the Record of Appeal. I have not seen mention of the evidence of the witnesses mentioned in the above quoted part of the judgment. It is not clear to me what nature of **“statements on oath”** these witnesses produced. Was it affidavits, was it recorded statements and if the latter, how were the statements made on oath? I have not seen any statements from Ann Wanjiku Kamau, John Kiarie Muthoni and Dennis Njau Wambui attached to the 1<sup>st</sup> Respondent's documents filed in respect of this appeal.

The burden of proof before the PPDT rested on the 1<sup>st</sup> Respondent. It was upon her to discharge that burden by providing evidence to prove the irregularities and malpractices alleged. It was stated in **Joho v. Nyange & another (2008) 3 KLR (EP) 500** that:

***“The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree is required.”***

This court has been told that authorities on elections may not be relevant in this case because it is in respect to nominations. Even if this were so, Section 41 (4) of the Political Parties Act provides that:

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

In ordinary proceedings the law is clear on where the burden of proof lies. This is well captured under the Evidence Act, Sections 107, 108 and 109 which provide as shown below:

***107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

***108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

I have analyzed and considered the response by the Appellant contained in her affidavits in her defense before the NAT and PPDT. She has provided explanations to each of the allegations raised by the 1<sup>st</sup> Respondent. She stated that the results were announced publicly at Al-Kalou Catholic Hall; that the 1<sup>st</sup> Respondent was absent during the announcing; that she was not aware of pre-marked ballot papers and that this was not pleaded before the NAT. She further stated that out of the 352 polling stations only 5 voted on 27<sup>th</sup> April 2017 with concurrence of all stakeholders; that the 1<sup>st</sup> Respondent participated in all the five polling stations where her agents were present and that extension of voting was necessitated by lack of voting materials. She has stated that she was not privy to the burning of the ballot papers; that she was away from Nyandarua at the time and learned through her supporters that this had happened; that there is no evidence that the people burning the ballot papers were aware of the appeal before NAT by the 1<sup>st</sup> Respondent and that the 1<sup>st</sup> Respondent's Appeal was not the only appeal pending before the NAT at the time.

I have considered this issue and submissions of all the parties on the matter. It was submitted by the 1<sup>st</sup> Respondent's counsel that the Appellant did not adduce evidence in rebuttal. As shown in my analysis above, I find that there is evidence by the Appellant in rebuttal. It is my view that for the 1<sup>st</sup> Respondent to file an appeal with NAT, she must have had the results of the total tally of votes cast. She went to complaint that she had lost because of the irregularities and malpractices which in her view allowed the Appellant to garner 106,004 votes against her 75,296 votes. For her to ask NAT to nullify the nominations there must have been an identified winner and that winner was not her. This, in my considered view, must have been done by declaring who the winner was.

In respect to the written ruling of the NAT, the Appellant explained that NAT had communicated to all parties including the 1<sup>st</sup> Respondent and her counsel that NAT would orally communicate its decision and later provide reasons and that this was due to overwhelming number of appeals NAT was handling.

### **Whether there was declaration of a winner for Woman Representative in Nyandarua County**

The 1<sup>st</sup> Respondent submits that there was no declaration of a winner. The Appellant submits that there was a declaration of a winner of the nomination exercise at Ol-Kalou Catholic Hall where the results announced showed the Appellant had 106,004 votes against the 1<sup>st</sup> Respondent with 75,296 votes. I have analyzed this issue in the preceding paragraphs. My view in the matter, and I so find, is that there was declaration of results and that after this was done, the 1<sup>st</sup> Respondent was dissatisfied and lodged an appeal with the 2<sup>nd</sup> Respondent's National Appeals Board.

## **Whether the 1<sup>st</sup> Respondent had discharged the burden of proof before the Political Parties Disputes Tribunal**

I have discussed the burden of proof elsewhere in this judgment. Sections 107, 108 and 109 of the Evidence Act are relevant to show that the 1<sup>st</sup> Respondent, being the party that alleges irregularities, malpractices and collusion, has a duty under the law to adduce evidence in support of those allegations. I have stated elsewhere in this judgment that I did not find the statements of the three witnesses mentioned in the judgment of the PPDT as having presented statements on oath to support 1<sup>st</sup> Respondent's claim. I have also stated that the 1<sup>st</sup> Respondent relied on information from myriad sources which sources have not been disclosed. My finding on this matter is that the 1<sup>st</sup> Respondent did not discharge the burden of proof.

## **Whether the Political Parties Disputes Tribunal failed to consider Appellant's evidence**

This issue follows closely to the issue discussed above in respect of evidence in support of allegations of irregularities and malpractices. From my reading of the proceedings in the Record of Appeal, it is clear to me that parties presented their case before the PPDT by way of documents. There is no evidence of *viva voce* evidence being adduced. I have read the judgment of the PPDT. It summarizes submissions by the 1<sup>st</sup> Respondent (Complainant at the time) and the 2<sup>nd</sup> Respondent in this Appeal (1<sup>st</sup> Respondent before PPDT). In respect of the Appellant, who was the 2<sup>nd</sup> Respondent before PPDT, this is what the Tribunal said:

***“The 2<sup>nd</sup> Respondent filed a defense on the 11<sup>th</sup> May 2017. She submits that results were declared at Ol-Kalou Catholic Hall as follows: Faith Wairimu Gitau, 106,004; Wanjiku Muhia 75,296; Esther Wanjiku Muhoho 8,019 and Jane Gathoni Kiambati 2, 538. She submits that the nomination primaries were free, fair and accountable and that she won by a margin of 31,000 votes. Hence prays that the Complaint be dismissed.”***

The Tribunal went on to determine the issues. In that determination much time was spent castigating the 1<sup>st</sup> Respondent (Jubilee Party) and Mr. Ombasa for mistakes viewed as having been committed by them. The Tribunal arrived at a conclusion captured in part of the judgment as follows:

***“Be that as it may, upon evaluating the evidence, we hold that burning of the votes cast, as an allegation has not been rebutted by the Respondent. There is evidence on record about the burning. The Respondents have engaged in mere denials and not sufficiently countered the allegations. The 1<sup>st</sup> Respondent bears the onus of promoting democracy in the Party, both under the Constitution, the Political Parties Act, and its own constitution and rules.***

***Burning of votes case amounts to nothing but suppression of evidence, especially when the 1<sup>st</sup> Respondent knew that its own Appeals Tribunal was seized of the appeal by the Complainant. As a Tribunal we read nothing short of malice and collusion between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the burning of votes cast. It was an act of suppressing the evidence of the truth. The idea being to hide the truth in case the Complainant was to get an order for recount or verification of votes cast.”***

To resolve that issue, it is my finding that PPDT did not consider the evidence of the Appellant. I have stated above that the Appellant, in her various affidavits and her defense to the Complaint before PPDT and the NAT, provided rebuttal of the evidence by the 1<sup>st</sup> Respondent alleging malpractices and irregularities.

## **Whether Political Parties Disputes Tribunal had jurisdiction to make the orders it made.**

As stated in cited authorities, jurisdiction flows from the Constitution or legislation and a court/tribunal cannot exercise what it does not have nor can it arrogate to itself jurisdiction exceeding that which is

conferred upon it by the law (see **Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others [2012]**). As submitted, the PPDT derives its jurisdiction from Section 40 of the Political Parties Act. Under Section 31 (a) of the Elections Act a person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of the elective positions of President (Art. 137), Governor (Art. 180), Senator (Art. 98), Member of National Assembly (Art. 97) and Member of County Assembly (Art. 177) if that person is selected in the manner provided for in the constitution or rules of the Political Party concerned relating to members of that party who wish to contest those positions. To my understanding, and as submitted, the jurisdiction of PPDT is limited to determining whether the nomination process was conducted according to the Constitution, the law and the party constitution and rules and where the law is found to have been breached, the Tribunal's jurisdiction would have been limited to granting orders in respect of prayers (a) an order quashing the declaration of Appellant as nominated, (b) an order to compel 2<sup>nd</sup> Respondent to repeat nominations and (e) an order declaring that the decision of NAT was unlawful and unreasonable. It had no power, in my view, to grant prayers (c) an order declaring the 1<sup>st</sup> Respondent the lawfully nominated and the winner and (d) an order compelling the 2<sup>nd</sup> Respondent to issue the 1<sup>st</sup> Respondent with the nomination certificate. This is because the Tribunal can only issue an order to compel the 2<sup>nd</sup> Respondent to comply with the law by repeating the nominations in accordance with the law. It is my considered opinion that in the instant case the Tribunal arrogated to itself jurisdiction it did not have. To echo the decision of **Sir Ali Salim v Shariff Mohammed Sharray 1938 KLR** cited by counsel for the Appellant:

***“If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver or their part cannot make up for the lack of jurisdiction. “***

### **Whether the Political Parties Disputes Tribunal was justified in striking out the affidavit of an advocate**

PPDT struck out the affidavit sworn by Mr. Stephen Ombasa on 11<sup>th</sup> May 2017. The affidavit is found on pages 81 to 82 of the Record of Appeal. The basis for striking it out was that the facts in the affidavit were made in Mr. Ombasa's capacity as an advocate. In striking out that affidavit PPDT relied on **Kisya Investments Ltd & another v. Kenya Finance Corporation Ltd Civil Case No. 3504 of 1993** where it was stated that advocates should not swear affidavits in relation to contentious matters. It was submitted for the Appellant that the provisions of Rule 9 of the Advocates (Practice) Rules provides that:

***“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or declaration or affidavit, he shall not continue to appeal.***

***Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in which he acts or appears.”***

Rule 9 cited above gives the exception to the rule. The issue is whether the affidavit sworn by Mr. Stephen Ombasa contained any contentious matter.

Without repeating every paragraph of that affidavit, it is noted that paragraphs 1, 2, and 3 contain information that repeats what transpired in the NAT. It is true the 1<sup>st</sup> Respondent filed a complaint before NAT. I have read that complaint and I found no contentious matters relating to the nomination results. What were contested were allegations of malpractices and irregularities. There is information that the 1<sup>st</sup> Respondent filed her Complaint before PPDT before the written ruling by NAT was issued. It is true that

NAT made a ruling on the issues before it in writing and in that ruling it upheld the results of nomination. In paragraph 6 of the affidavit the deponent is stating the justification of the decision by NAT by that Tribunal. He then prays for dismissal of the Complaint with costs.

I have considered the protestations by the 1<sup>st</sup> Respondent in respect to the affidavit. This court was not told what was contentious about that affidavit. In my view, the affidavit falls under the exception to the general rule found in the proviso to Rule 9 of the Advocates (Practice) Rules. To my mind it does not raise contentious matter. PPDT was therefore wrong in striking it out.

### **Whether the Appellant has introduced new evidence**

The 1<sup>st</sup> Respondent submitted that the Appellant is attempting to introduce new evidence. The new evidence referred to here is the signed judgment of the PPDT. It is submitted that the judgment that was before the PPDT was a draft that was not signed. This court was referred to **Palmer v. Queens (1980) 1 SCRR 759** to the effect that **“evidence should be generally not be admitted if, by due diligence, it could have been adduced at trial.”**

My reading of the evidence before PPDT and its judgment and the submissions by all the parties before this court shows that there is mention of a draft ruling of the NAT that did not bear signatures of the members of NAT. This is not disputed. I have not seen the impugned ruling because neither party has attached it to their documents nor brought it to my attention. The ruling that is available is the signed one. That notwithstanding, I am alive to the fact that the 1<sup>st</sup> Respondent has not adduced evidence to show that the contents of the impugned unsigned draft of the ruling of NAT differs from the contents in the signed copy now before this court. I have not been told that the claim by the 1<sup>st</sup> Respondent as captured in that ruling is not the same as the claim she presented nor am I informed that the orders granted dismissing the Claim are not the same orders that aggrieved the 1<sup>st</sup> Respondent to motivate her to file her Complaint with the PPDT.

I am alive to the law that bars introduction of new evidence during appeal. No party should be allowed to do so without leave of the court as the law states. What I am concerned about here is that the Appellant has explained the reasons behind the verbal decision dismissing the 1<sup>st</sup> Respondent’s claim and the reasons why the written decision was to be issued later. This has not been denied by the 1<sup>st</sup> Respondent. Further, if this court were to find that the 1<sup>st</sup> Respondent went before the PPDT before the NAT decided her claim it would mean that she went to that Tribunal before exhausting the internal party disputes resolution mechanism. This would be against the law and would leave PPDT without jurisdiction to entertain the 1<sup>st</sup> Respondent’s claim.

Having considered all the evidence in respect of this issue, it is my finding that the signed ruling of the NAT is not new evidence. I am persuaded that the signed ruling is what NAT finally prepared after they had already made their decision of the claim by the 1<sup>st</sup> Respondent and which NAT had communicated verbally. This is normal for a court/tribunal to do and unless it is shown that the written ruling contains matters that were not canvassed before it or is contrary to the verbal decision already communicated to the parties, then, it is my finding that there is no prejudice on the part of the 1<sup>st</sup> Respondent.

### **Conclusion**

In concluding this matter, it is my considered view, and I so find, that PPDT did not have jurisdiction to make order declaring the 1<sup>st</sup> Respondent dully nominated to vie for the position of Woman Representative for Nyandarua County. PPDT did not have jurisdiction to compel the 2<sup>nd</sup> Respondent to issue her with a certificate of nomination. In granting those orders it usurped the role of the 2<sup>nd</sup> Respondent and ignored the doctrine of sovereignty and will of the people of Nyandarua to nominate the person of their choice. PPDT breached the Constitution, the Elections Act, the Political Parties Act, 2<sup>nd</sup> Respondent’s constitution and nomination rules.

PPDT failed to consider the Appellant's evidence in rebuttal to the allegations made by the 1<sup>st</sup> Respondent. PPDT also failed to consider that there was no evidence in support of the allegation of irregularities and malpractices made against the Appellant. I have considered all the evidence presented before NAT and PPDT and I find that there is no evidence in support of the allegations made against the Appellant before the NAT and the PPDT. I have found no evidence that the 1<sup>st</sup> Respondent was not aware that polling went on up to 27<sup>th</sup> April 2017 and the reasons for the extension of that time. I have found no evidence of collusion between the Appellant and the 2<sup>nd</sup> Respondent or concealment of evidence. I have found no evidence that the Appellant or her agents burnt the ballot papers. I am persuaded by the evidence by the Appellant explaining the reasons behind the burning of the ballot papers.

I find that there is no evidence to show that the results as declared were not the genuine results. I am alive that no election or nomination can be free from some irregularities but in respect to the matter before me and without evidence to the contrary, my finding is that whatever irregularities that may have existed were not so serious as to affect the nomination exercise to an extent that they were not free and fair.

I agree with the Appellant in the issues she has raised in the grounds contained in the memorandum of appeal. I find that the appeal has merit and it succeeds. I proceed to grant the prayers sought in the appeal as follows:

**i. This Appeal is hereby allowed.**

**ii. The decision of the Political Parties Disputes Tribunal in Complaint No. 210 of 2017 is hereby set aside.**

**iii. The decision of the County Returning Officer and the 2<sup>nd</sup> Respondent's National Appeal's Tribunal declaring the Appellant as the nominee of the Jubilee Party Nyandarua County Woman Representative is hereby upheld.**

**iv. Each party shall bear its own costs of this Appeal.**

Orders shall issue accordingly.

**Dated, signed and delivered this 19<sup>th</sup> day of May 2017.**

**S. N. MUTUKU**

**JUDGE**