



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 42 OF 2017

PETER OLUOCH OWERA.....APPELLANT/APPLICANT

V E R S U S

DAVID RUONGO OKELLO.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT..... 2ND RESPONDENT

(Being an Appeal from the judgement and decree of the Political Parties Dispute Tribunal of Kenya at Nairobi delivered on 13th May, 2017 by Hon. Kyalo Mbobu, James Atema and Hassan Abdi vide Complaint No. 132 of 2017))

JUDGEMENT

1. Peter Oluoch Owera and David Ruongo Okello, the Appellant and 1st Respondent herein respectively, participated in the Orange Democratic Movement (ODM) (the 2nd Respondent herein) party primaries for the position of the member of County Assembly, Huruma Ward, Mathare Constituency, Nairobi County held on 30th April 2017. The 1st respondent claimed he won the nominations but the 2nd Respondent instead of issuing him with a nomination certificate it gave the same to the Appellant. The 1st Respondent appears to have approached the 2nd Respondent's Internal Resolution Dispute Mechanism but his complaint was not heard and determined. Consequently he filed a complaint to the Political Parties Dispute Tribunal. The dispute was eventually heard and determined in favour of the 1st Respondent. In its judgment delivered on 13th May 2017, the Political Parties Dispute Tribunal ordered *inter alia* the 2nd Respondent with a nomination certificate for the position of Member of County Assembly, Huruma Ward, Mathare Constituency, Nairobi County. The Appellant being aggrieved by the aforesaid decision preferred this appeal.

2. On appeal, the Appellant put the following grounds:

1. The honourable tribunal erred in law and fact in failing to find that it lacked jurisdiction to entertain the claimant's claim pursuant to Section 40(2) of the Political Parties Act No. 11 of 2011.

2. The honourable tribunal erred in law and fact in declare the 1st Respondent the winner in the 2nd Respondent's nomination elections for candidate for Member of County Assembly Huruma Ward in the 8th August 2017 general election on an Orange Democratic Movement Ticket since it lacked the requisite jurisdiction as provided by law.

3. When the appeal came up for hearing, this court directed the parties to file and exchange written

submissions. Learned counsels were further invited to make oral highlights. I have re-evaluated the dispute which was before the PPDT. I have also considered rival oral and written submissions. The first ground of appeal is in respect of the question as to whether or not the Political Parties Disputes Tribunal had jurisdiction to entertain the 1st Respondent's complaint. It is the submission of Mr. Wanyanga, learned advocate for the Appellant that the 1st Respondent filed his complaint before the Political Parties Disputes Tribunal without first exhausting the 2nd Respondent's Internal Dispute Resolution Mechanism contrary to Section 40(2) of the Political Parties Act no. 11 of 2011. The learned advocate pointed out that the PPDT did not refer to any records that illustrate that the complainant had brought for the complaints with his Political Party's Internal Dispute Resolution Mechanism in opposition of the issuance of the nomination certificate to the Appellant by the 2nd Respondent. The Appellant was of the firm view that the 1st Respondent did not lodge with the party's Internal Dispute Resolution Mechanism and that is why no evidence was produced before the tribunal to that effect. The Appellant accused the PPDT for citing delay by the Internal Party Mechanism to address the 1st Respondent's complaint to give itself the jurisdiction to entertain the 1st Respondent's complaint. Mr. Aduda, learned advocate for the 1st Respondent vehemently opposed this ground of appeal. It is the submission of Mr. Aduda that the Political Parties Disputes Tribunal had jurisdiction to hear and determine the 1st Respondents complaint since he had demonstrated before the tribunal that he made attempts to have his complaint resolved by the 2nd Respondent's Internal Party Dispute Resolution Mechanism but that did not take place because the body charged to hear and determine his complaint had become moribund.

4. The parties to this appeal had argued the question relating to the jurisdiction of the Political Parties Disputes Tribunal to entertain the complaint. In its judgment, the PPDT considered the preliminary point and appreciated the fact that under Section 40(2) of the Political Parties Act, a complaint is not justiciable before it, unless a party has exhausted the Political Party's Internal Dispute Resolution Mechanism. The tribunal further noted in its judgment that the 2nd Respondent herein by a letter dated 9th May 2017 had indicated that its Internal Resolution Mechanisms had closed shop. For this reason the PPDT ruled that it had jurisdiction to hear and determine the complaint. The tribunal relied on its decision in **Ibrahim Abdi Ali =vs= Mohamed Abdi Farah & Another PPDT complaint no. 29 of 2015** in which it held *inter alia*: “that where a party can show that he made honest attempts at resolving the dispute within the party but the party's process was not satisfactory for such reasons as delay, the individual cannot be faulted for moving to the tribunal even where his party has not concluded a hearing and a determination of his matter.”

5. I have carefully examined the material placed before this court via the record of appeal and the rival oral and written submissions. The 1st Respondent filed his complaint at the Political Parties Disputes Tribunal on 8th May 2017. The tribunal declined to hear the complaint because it felt that the 1st Respondent had not exhausted the 2nd Respondent's Internal Disputes Resolution Mechanism and proceeded to adjourn the hearing of the complaint generally. The 1st Respondent was then prompted to lodge a complaint with the 2nd Respondent's appeals tribunal and upon receipt of the same, it wrote back acknowledging receipt of the complaint by stating that the 2nd Respondents county appeals tribunal being an ad hoc body had since closed shop. On 9.5.2017 the 1st Respondent moved PPDT whereof he filed a further affidavit to demonstrate proof of having filed his complaint with the 2nd Respondents Internal Dispute Resolution Mechanism. Annexed to the further affidavit is a letter from the 2nd Respondent stating that its party county appeal tribunal had been disbanded. Upon receipt of the aforesaid averments the Political Parties Dispute Tribunal granted the 1st Respondent orders to restrain the 2nd Respondent from submitting any nomination certificate to IEBC pending the hearing and determination of the complaint before it. I am satisfied with the manner the tribunal dealt with the preliminary objection. The dispute before the PPDT giving rise to this appeal arose from party primaries. I have carefully examined the provisions of Section 40(2) of the Political Parties Act and it clearly stated that the PPDT shall not hear and determine the disputes specified as (a), (b), (c) and (e) unless the same first passed through the political parties internal dispute resolution mechanisms. However the dispute from party primaries which is specified as (fa) is not listed as amongst those disputes which must first pass through the Party Internal Dispute Mechanism. In view of this finding, I am satisfied that the Tribunal had

jurisdiction to entertain the 1st Respondent's complaint.

6. Having disposed of the appeal on the preliminary point, let me now address my mind on the second ground which is to the effect that the tribunal is faulted for declaring the 1st Respondent herein as the winner of the 2nd Respondents nomination elections as a candidate for the member of County assembly, Huruma Ward in the 8th august 2017 general election since it lacked jurisdiction to do so in law. Though the Appellant put forward this ground, there was no further elaboration in the written and oral submissions. In my view, the ground is similar to the first ground touching on jurisdiction. My determination therefore on this ground is similar to the holding made in respect of the first ground. In other words, the appeal on jurisdiction is found to be without merit.

7. The third and final ground ably argued by the parties is the objection as to the admissibility of CD(VCD) evidence. The Appellant argued that the PPDT erred by admitting CD(VCD) evidence contrary to the provisions of Section 106B of the Evidence Act. It is argued that the 1st Respondent failed to tender a certificate duly executed by a person occupying a responsible position in relation to the operation of the relevant device or management of the relevant activities specified in Section 106B of the Evidence Act.

8. The 1st Respondent opposed this submission arguing that the strictly complied with the law of evidence. The material availed to this court vide the record of appeal and via written submissions indicates that the 1st Respondent was granted leave to file the further affidavit dated 12th May 2017 containing an audio visual recording of the returning officer, one Mr. Jared Owade Odhiambo declaring the 1st Respondent as the winner of the nominations. Annexed to the further affidavit are certificates meant to comply with the provisions of Section 106B of the Evidence Act. It is also on record that the aforesaid returning officer, Jared Owade Odhiambo, had filed an affidavit on 11.5.2017 indicating that he had declared the 1st Respondent as the winner. The averments in the affidavit of the returning officer were never controverted by the Appellant by another affidavit or by cross-examination. I have perused the judgment of the PPDT and it is apparent that the tribunal expressed itself in part over this issue as follows:

“In the premises we are satisfied by the uncontroverted evidence in the affidavit of the returning officer that the complainant herein won the nominations having garnered 657 votes against 590 votes obtained by the 2nd Respondent.”

9. There is no dispute that the returning officer who conducted the nominations swore an affidavit whose contents the tribunal took note as hereinabove. Mr. Jared Owade Odhiambo, was therefore the primary source of the information contained in the CD (VCD) and has deponed that he declared the 1st Respondent herein as the winner. In the circumstances the Political Parties Disputes Tribunal cannot therefore be said to breached the law of evidence in admitting the evidence.

10. In the end, I find the appeal to be without merit. It is dismissed in its entirety with each party meeting its own costs. For the avoidance of doubt, the decision of the Political Parties Disputes Tribunal is upheld. Therefore Orange Democratic Movement (ODM), the 2nd Respondent herein should forthwith issue David Ruongo Okello, the 1st Respondent herein, with the nomination certificate for the position of Member of Nairobi County Assembly, Huruma Ward, Mathare Constituency, Nairobi County.

Dated, Signed and Delivered in open court this 22nd day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent