



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 35 OF 2017

KENNEDY OMONDI OBUYA.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST RESPONDENT

JAIRO ATENYA ASITIBA.....2ND RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES COMMISSION.....3RD RESPONDENT

(Being and appeal from the Judgment and order of the Political Parties Dispute Tribunal of Kenya at Nairobi delivered on 8th May, 2017 by Hon. Milly Ondongo, Desma Nungo, Paul Ngotho and Dr. Adelaide Mbithi Complaint No. 58 of 2017.

JUDGMENT

Orange Democratic Movement (ODM) party held its nominations on 30th April, 2017 to select its nominee for the Member of County Assembly (MCA) seat in the Nairobi County Assembly for Imara Daima Ward. The Appellant in this appeal, Kennedy Omondi Obuya claims that he won the contest and was rightfully declared the duly nominated candidate for the ODM party of the said seat. The 2nd Respondent, Jairo Atenya Asitiba also asserts that he was declared the winner during the nomination exercise and therefore should have been issued with the ODM's nomination certificate in respect of the particular ward.

From the pleadings, affidavits and documentary evidence filed before the Political Parties Disputes Tribunal (PPDT), it was apparent that an attempt was made to disrupt the counting of the votes at the designated tallying center at Embakasi Girls Secondary School to the extent that a decision was made by the Presiding Officer to complete the counting process at the constituency tallying center at Nyayo Stadium. The report prepared by the Presiding Officer of the Ward, Mr. Gideon Sati Awounda dated 1st May, 2017 addressed to the Nairobi County Returning Officer Mr. Simon Owiti gives a detailed sequence of events that took place during the counting of the votes. In respect of the MCA ballot, he stated as follows:

“During the counting exercise for the MCA ballot which started around 23h 15, one or more of the agents of the contestants, who had been officially allowed in the room to oversee the exercise communicated with the aspirants’ supporters creating noise and confusion in and out of the counting room, bringing the exercise to a premature halt. Up to this point, the police officers present had capacity to manage the crowd but as the crowd appear more agitated and stones landing on the door, question marks started emerging over whether the police would continue with the same efficiency with the worst case scenario projected at the possibility of lights going off. I made a decision to seal all my reports into the same ballot box where there were cast votes,

counted and uncounted, for delivery to Nyayo Stadium where the exercise could be concluded in the presence of my returning officer (RO)."

According to the 2nd Respondent, this narrative by the Presiding Officer did not actually take place. He insisted that the counting of the votes was concluded at Embakasi Girls Secondary School. He was subsequently declared the winner. The 2nd Respondent disputes that Gideon Sati Awounda was the Presiding Officer during the said nomination exercise. According to the 2nd Respondent, the returning officer was Stephen Odhiambo Odhiambo. He recorded a witness statement in support of the 2nd Respondent's claim before the PPDT. This confused state of affairs resulted in two tallying sheets being presented before the PPDT and later, on appeal, to this court.

In the tallying sheet relied by the 2nd Respondent, the results were listed as follows:

1. Jacob Ombewa Opiata	18
2. Daniel Otieno Wara	55
3. Kennedy Omondi Obuya	173
4. Innocent Nyamweya Nyagaka	02
5. George Ouma Owino	02
6. Jairo Atenya Asitiba	181
7. Joseph Orwara Naftal	10
8. Nitah Wamaitha	0
9. Patrick Otieno Wandhala	20

According to this tallying sheet, the winner was the 2nd Respondent. However, this court noted that the tallying sheet did not indicate the name of the Presiding Officer. Neither did it contain any signature of the official who prepared the tallying sheet. On his part, the Appellant produced a tallying sheet which indicated the Presiding Officer as Gideon Sati Awounda. The said Presiding Officer signed the tallying sheet. He listed the particulars of votes cast for each candidate as follows:

1. Jacob Ombewa Opiata	36
2. Daniel Otieno Wara	55
3. Kennedy Omondi Obuya	201
4. Innocent Nyamweya Nyagaka	02
5. George Ouma Owino	01
6. Jairo Atenya Asitiba	181
7. Joseph Orwara Naftal	07
8. Nitah Wamaitha	0
9. Patrick Otieno Wandala	8

It was not surprising that the Appellant and the 2nd Respondent, respectively, relied on the tallying sheet

that each produced seeking to have the PPDT declare either of them the rightful nominee resulting from the said nomination exercise.

From the evidence on record, it is not disputed that after the nomination exercise the ODM party issued the nomination certificate to the Appellant. The 2nd Respondent was aggrieved by this decision. He asserted that he was the winner of the nomination exercise and therefore he was the rightful person who should have been issued with the nomination certificate. Instead of invoking the ODM party's Internal Dispute Resolution Mechanism (IDRM) as provided under **Section 40(2)** of the **Political Parties Act**, the 2nd Respondent filed his complaint directly to the PPDT. The 2nd Respondent did not state why he chose to ignore this established mechanism before approaching the PPDT. The 2nd Respondent was required to, as a first step, activate the political party's IDRM before lodging a complaint before the PPDT unless he could establish that such forum did not exist within the political party or that he had been prevented or frustrated for no justifiable reason from accessing the said party's IDRM. From the pleadings filed before the PPDT, it is not clear why the 2nd Respondent chose to side step the ODM party's internal dispute resolution tribunal.

Be it as it may, upon the complaint before the PPDT being filed, as provided by the law, the 2nd Respondent was required to serve the Appellant through the known mode of service provided under Order 5 of the Civil Procedure Rules. Instead of serving the Appellant by personal service or substituted service as recognized by the law, the 2nd Respondent chose to serve the Appellant by a mode unknown in law. According to paragraph 4 of Affidavit of service sworn by Atenya Rodgers Asitiba, an advocate of the High Court of Kenya:

“THAT I embarked on the process of tracing the 2nd Respondent whose whereabouts were unknown and nobody was willing to disclose his location and his bodyguards wouldn't let anyone near his location. I managed to get his cellphone number and email address where I forwarded the said court order, certificate of urgency application, a hearing notice and petition and sent him a text and called him to confirm receipt of the above mentioned documents on his Whatsapp and email address (k.obuya2012@yahoo.com). He assured me he will check his email as soon as possible.”

The Appellant denies that he was served with the pleadings. He further denies having been received the documents either through email or through a Whatsapp message. It is not clear how the 2nd Respondent was able to ascertain that the cellphone owned by the Appellant had capacity for the Whatsapp app to be activated. The affidavit of service did not indicate the cellphone number of the Appellant which if the circumstances necessitated, may have aided the PPDT if it wanted to verify if indeed service was effected by the 2nd Respondent upon the Appellant. On re-evaluation of the evidence placed before this court, it is clear that the 2nd Respondent did **NOT** effect proper service upon the Appellant to entitle the PPDT to proceed with the hearing of the complaint lodged before it in the absence of the Appellant.

The PPDT proceeded ex parte and heard the complaint lodged by the 2nd Respondent. It subsequently rendered a verdict nullifying the nomination certificate issued by the ODM party to the Appellant for the Imara Daima Ward and further ordered the 1st Respondent to issue the nomination certificate in respect of the said ward to the 2nd Respondent. The Appellant's attempt to review and set aside the said verdict was disallowed by the PPDT. The Appellant told this court that the PPDT rendered an oral ruling when it dismissed his application for review. The 2nd Respondent did not dispute this assertion. To confirm this claim, this court called for and perused the record of the PPDT. It became apparent to the court that indeed such oral ruling was indeed rendered. There is no written ruling in the PPDT's file though it is indicated that a ruling was delivered on 13th May, 2017. It is the PPDT's refusal to review its decision that prompted the Appellant to lodge the appeal before this court.

From the memorandum of appeal and the submission made by Prof. Ojienda for the Appellant and Mr. Onduso for the 2nd Respondent, the following were the issues that emerged for determination by this court;

(i) Whether the PPDT had jurisdiction to hear the complaint lodged before it by the 2nd

Respondent?

(ii) Whether the Appellant was served with the complaint to entitle the PPDT to proceed with the hearing of the complaint ex-parte?

(iii) Whether the PPDT properly exercised its discretion when it declined to favourably consider the application for review that was filed before it by the Appellant?

(iv) What orders should issue in respect of the ODM party's nominations for the MCA for the Imara Daima Ward?

This court shall determine the issues in the enumerated order and in so doing render its Judgment in this appeal. As regards issue (i), it was clear that the PPDT appreciated that the 2nd Respondent should have first invoked the ODM party's Internal Dispute Resolution Mechanism (IDRM) before lodging the complaint before it. Obviously, this was in compliance with **Section 40(2) of Political Parties Act** that gives primacy of resolving political disputes between members of a political party and the party itself to the political party's Internal Dispute Resolution Mechanism. Although **Article 40 (i) (fa) of the Political Parties Act** gives jurisdiction for the PPDT to directly hear a complaint relating to party primaries, nevertheless, it behooves the aggrieved person to give reasons why he/she did not activate the party's IDRM before approaching the PPDT. In the present appeal, it was clear to this court that the 2nd Respondent did not give any cogent reason or reasons for his failure to first lodge his complaint before the ODM party's IDRM. The undated letter marked "JAA1" annexed to the affidavit of the 2nd Respondent dated 4th May, 2017 does not seek any remedy from the ODM party's IDRM. Instead, the letter is addressed to the Chairperson of the ODM's Election Board which had no mandate to determine any dispute arising out of the nomination exercise. It was evident to this court that the PPDT prematurely assumed jurisdiction before the 2nd Respondent had exhausted the party's IDRM.

On issue (ii), the 2nd Respondent claimed that he served the Appellant with the documents lodged before the PPDT by email and through a message posted on Whatsapp. The said service was allegedly effected on 5th May, 2017. As stated earlier in this Judgment, the 2nd Respondent's process server did not provide in the affidavit of service the cellphone number that he purportedly sent the Whatsapp message. Further the 2nd Respondent did not tell the PPDT or this court how he ascertained the email address that he sent the documents to was actually the appellant's email address. The Appellant denied receiving the email or the Whatsapp message. The 2nd Respondent did not present any contrary evidence to disprove or contravert the Appellant's assertion. The Appellant explained to the satisfaction of this court that at the time he was allegedly served he was bereaved. He had just lost his mother and was involved in the funeral arrangements and the actual funeral. He annexed a funeral program in the affidavit filed in support of his application before the PPDT seeking to review the Judgment of the PPDT. Again, this assertion was not disputed by the 2nd Respondent. It was not converted having re-evaluated the facts in dispute in this issue, this court finds that the Appellant was indeed not served with the pleadings that were filed before the PPDT. This court further holds that the mode of effected service upon the Appellant was improper as the same is not contemplated by the law in the absence of leave being granted by the PPDT for substituted service to be so effected. The Appellant's complaint to the effect that the PPDT proceeded with the hearing of the complaint lodged by the 2nd Respondent before ascertaining that the Appellant was indeed served has merit. The Appellant was condemned unheard without any legal justification. The PPDT therefore erred when it proceeded to hear the complaint in the absence of a necessary party, that is, the Appellant.

In respect on issue (iii), the PPDT declined to grant the Application by the Appellant which sought to review the Judgment of the PPDT. On re-evaluation of the facts of this appeal, it was clear to this court that the PPDT erred and misdirected itself when it failed to appreciate the fact that the Appellant had not been served with the pleadings before it to entitle the tribunal to proceed exparte. A cardinal principle of the law is that no one can be condemned without being given a hearing. This is moreso when it concerns the right of the people to elect political leaders of their choice. Once it became apparent to the PPDT that the Appellant had not been served, it should have reviewed its decision and allowed the Appellant to ventilate his case so that a decision on its merits could be rendered. On the last issue i.e. issue (iv), the

dispute herein concerns the determination of who won the nomination in respect of the MCA seat that was organized by the ODM party.

When all is said and done, in any such nomination exercise, the purpose is to determine who garnered the highest number of votes to entitle him or her to be issued with a nomination certificate by the political party. It is a game of numbers. Unless electoral malpractices are established, the will of the people expressed by the voters (in this case registered voters who are members of the ODM party) must be respected. In the present appeal, the Appellant established to the satisfaction of this court that he garnered the highest number of votes in the nomination exercise for the MCA seat of Imara Daima Ward that was held on 30th April, 2017 by the ODM party. To prove this fact, the appellant annexed a copy of the tallying sheet duly signed by the Presiding Officer of Imara Daima Ward that indicated that he had won the nomination. The tallying sheet produced in court by the 2nd Respondent was not signed by the Presiding Officer nor did it indicate who the Presiding Officer was.

Although a person purporting to be the Presiding Officer swore an affidavit confirming the contents of the tallying sheet, this court holds that contents of the unsigned tallying sheet cannot form a basis for declaration of results. It was evident to this court that an attempt was made to disrupt the counting of the votes at Embakasi Girls Secondary School when it became apparent to some candidates that they would lose. This prompted the Presiding Officer to transfer the ballot box together with all the ballot papers, both counted and uncounted, to Nyayo Stadium where the constituency tallying center for Embakasi South Constituency was based. The detailed report prepared by the Presiding Officer clearly shows that the results contained in the tallying sheet annexed to the Appellant's court documents was the correct, legitimate and proper results. In this game of numbers it is clear who the winner of the nomination for the MCA seat for Imara Daima Ward is; it is the Appellant.

The upshot of the above reasons is that the appeal lodged by the Appellant against the decision of the PPDT is for allowing. It is hereby allowed as a result of which the following orders are issued;

(i) The Judgment of the PPDT issued on 8th May, 2017 and the resultant decree extracted therefrom is hereby set aside.

(ii) The Appellant, Kennedy Omondi Obuya is hereby declared the ODM party's lawful nominee for the position of MCA Imara Daima Ward, Embakasi South Constituency. He shall be issued with the nomination certificate by the ODM party.

(iii) The provisional certificate and/or final certificate issued to the 2nd Respondent Jared Atenya Asitiba is hereby ordered cancelled and revoked. It is null and void. He is not lawful the nominee for the above cited MCA seat.

(iv) There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MAY 2017.

L. KIMARU

JUDGE