**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**(R. MWONGO, PJ)**

**ELECTION PETITION APPEAL NO 27 OF 2017**

**TOM ODEGE……..…….…….APPELLANT /APPLICANT**

**VERSUS**

**HON. EDICK PETER OMONDI ANYANGA……..…….1ST RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT…..…..…..…… 2ND RESPONDENT**

**FREDERICK OGENGA……3RD RESPONDENT**

**JUDGMENT**

**Background**

1. The appellant, the 1st Respondent and the 3rd Respondent, among others, participated in the nominations for the Orange Democratic Movement Party ("the Party") nominations for Nyatike Parliamentary elections on 24th April, 2017. According to the appellant, on 29th April, 2017 he was awarded the Party Nomination certificate. He attached a photocopy of it to his affidavit in support of his application.

2. In the meantime, the 1st Respondent had filed an appeal before the Party National Appeals Tribunal (NAT) against the decision of the returning officer declaring the 3rd Respondent as the winner. At the NAT, the parties were the 1st and 3rd Respondents only. The NAT issued its determination on 29th April, 2017, where it found that:

> ***"The entire exercise was flawed and it is not possible to establish the winner, as clearly there was no vote counting….Therefore this Tribunal directs:***
>
> > ***1. That the provisional nomination certificate issued to Frederick Ogenga,*** *[the 3rd Respondent herein]* ***is hereby withdrawn***
> >
> > ***2. The National Elections Board is hereby directed to undertake a new nomination exercise in the manner established by the party constitution as well as the nomination and election rules;"***

3. The 1st Respondent appealed against the decision of the NAT to the Political Parties Disputes Tribunal (PPDT) in pursuance of the provisions of the Political Parties Act, No 11 of 2011, in Complaint No 104 of 2017. The parties in that appeal were the 1st Respondent and the 2nd Respondent, the Party, only. The PPDT issued its decision on 9th May, 2017. It allowed the 1st Respondent's appeal and nullified the nomination certificate issued to the 3rd Respondent. More significantly, the PPDT directed as follows:

> ***"That in light of the incomplete tallying of the votes, the justice of the case demands that the ODM NEB proceeds to nominate the Claimant*** *[Hon Edick Peter Omondi Anyanga]* ***for the position of the Member of the National Assembly for Nyatike Constitutency, Migori County within 48 hours of this judgment"***

4. According to the appellant, following the hearing of Complaint No. 104 of 2017 in the PPDT, he learnt from the media on 11th May, 2017, that the PPDT had directed that the 1st Respondent be issued with a nomination certificate for the Nyatike MP seat. On the same day, the appellant filed a motion before the PPDT seeking stay of the Tribunal's decision, and or setting aside or review thereof.

5. The record of proceedings of 12th May, 2017 of the PPDT show that the appellant's oral application to be enjoined in the Complaint was dismissed by the PPDT which determined that: *"The proposed 2nd Interested Party cannot apply to be enjoined after a decree has been issued"*, and proceeded to dismiss the application.

6. The appellant, aggrieved by the decision of the PPDT, has appealed to this court. His memorandum of appeal urges that:

> ***"1. The Honourable Tribunal erred in law and fact in failing to join the Appellant in Complaint No. 104 of 2017.***
>
> ***2. The Honourable Tribunal erred in law and in fact in summarily dismissing the application by the Appellant.***
>
> ***3. The Honourable Tribunal erred in law and in fact in directing that the 1st Respondent be awarded the nomination certificate to contest for the Nyatike parliamentary elections in the coming general elections.***

The memorandum further seeks orders that:

> ***"a. The whole ruling of the Honourable Tribunal delivered by the said Tribunal on the 12th May, 2017 be set aside.***
>
> ***b. The whole judgment and decree of the Honourable Tribunal delivered by the said Tribunal on the 9th May, 2017 be set aside.***
>
> ***c. The Honourable Court direct that the nomination certificate issued to the Appellant by the 2nd Respondent on the 29th May, 2017 is valid.***
>
> ***d. The Honourable Court direct that the (sic)***
>
> ***e. 2nd Respondent forward the name of the Appellant to the Independent Electoral and Boundaries Commission (IEBC) as the 2ND Respondent's candidate for the Nyatike parliamentary elections in the coming general elections."***

7. At the hearing, the appellant was represented by Mr Wakwaya and the 1st Respondent by Mr Omuga. The 2nd Respondent, the Party, was represented by Mr Owuor. The 3rd Respondent was not represented.

**The Parties' Submissions and Analysis**

8. The appellant argues that as a contestant for the MP position in the Nyatike nominations – an undisputed fact – and being the holder of a nomination certificate, the PPDT erred in law and in fact in summarily dismissing his application for joinder. He points out that he was never informed of any complaint filed before either the NAT or the PPDT. He contends that the 1st Respondent was guilty of non-disclosure of material information in failing to notify the PPDT of the correct position.

9. Counsel asserted that the refusal to enjoin the appellant, as an interested person in the nominations, was a contravention of his constitutional right to a fair hearing under **Article 50** of the **Constitution**. He contended that there were numerous legal authorities that held that a person or entity may be enjoined in a suit at any time of the proceedings and even after the rendering of a determination. These arguments cover the appellant's first two grounds.

10. The appellant's second ground is that the PPDT erred in directing that a nomination certificate be issued to the 1st Respondent, when in fact the Party's NAT had ordered the Party to conduct a fresh nomination exercise. He contended that there was insufficient evidence before the PPDT to enable it to reach that decision.

11. Through its counsel, the Party substantially supports the appeal. Counsel submitted that the Party was contemplating an appeal of its own or a cross appeal herein. Nothing has however been filed on its behalf. Counsel confirmed that the NAT found the nominations process had been marred by irregularities. Further, Counsel asserted that after the NAT decision annulling the original nomination exercise, the Party's National Elections Board (NEB) proceeded to award a nomination certificate by direct nomination. The Party, he said, disagreed with the PPDT's decision on two grounds: First, in receiving and relying on results from the nomination exercise which the NAT had discredited; and second, that PPDT ought not to have awarded the nomination to any of the contestants following the NAT findings.

12. In opposition to the appeal, the 1st Respondent raised a preliminary objection on the jurisdiction of the court. He challenges the propriety and standing of the appellant's appeal at the PPDT on 11th May, 2017, when in fact the appellant had not previously filed any complaint in the Party's NAT. In other words, the appellant not having been a party to the matter in the PPDT could not properly, under **Section 40** of the **Political Parties Act**, file an appeal there or in the High Court. Accordingly, counsel argued, the PPDT had no jurisdiction to hear the appellant in seeking to set aside the determination of the PPDT. Equally, the appellant appeal in the High Court could not be entertained in the High Court on appeal from PPDT.

13. On the main grounds of appeal, counsel pointed out that the appellant should have started his process at the NAT dispute resolution mechanism level. His complaint that the 1st Respondent did not include him in the PPDT proceedings had no merit as he had not participated in the NAT proceedings, and his exclusion from the PPDT proceedings was in order. He could have no grievance having not filed any complaint with the NAT.

14. Counsel also submitted that the NAT had ordered the Party to conduct fresh elections but did not do so. Accordingly, the 1st Respondent took it upon himself to appeal to the PPDT and enjoined the Party. He noted that the Party was represented by two advocates, who said nothing about the various nomination certificates.

15. It was submitted that the appellant's application before the PPDT was for setting aside the judgement of PPDT, a remedy that could not be granted *ex parte*, to a person who was not a party to the proceedings before the PPDT. What the applicant ought to have been urging the court was to order the PPDT to enjoin him before the Tribunal so it could urge its case there. The orders sought in this court for setting aside of the PPDT judgment or for the court to direct that the appellant's nomination certificate be declared as valid cannot therefore lie.

16. Finally, Counsel submitted that the ODM Party's submissions on direct nominations should be

dismissed. He pointed to **Rule 18.1** of the ODM **Party Elections and Nominations Rules** which state that direct nominations are possible, except in the zones set out in the **Schedule** at page 40-41 of the **Rules**, which excludes Migori County in Zone B.

17. The appellant's counsel, in his closing response, urged that the preliminary objection be dismissed summarily, as counsel had reverted to disputed facts in support thereof. He recalled that the legal position on preliminary objections is that they ought to raise only pure points of law where facts are not in dispute.

18. Further, counsel pointed out that there was nothing in the **Schedule** or **Rule 18** of the Party **Rules** suggesting that Migori is not capable of being designated for direct nomination, and added that in fact the Governor's nomination there was direct.

**Issues for Determination**

19. Having carefully listened to the parties representations and considered the documents availed, the following issues fall for determination:

**a. Whether:**

**i. the PPDT erred in not enjoining the appellant in the appeal; and whether**

**ii. the PPDT had jurisdiction to hear the appellant**

**b. Whether the PPDT was entitled to order that the nomination certificate be issued to the 1st Respondent**

**The issue of Joinder of the appellant**

20. The appellant's position on this issue is simply that, as a person who was affected by the decision of the PPDT, the tribunal ought to have given him a hearing in the proceedings, rather than lock him out. On his part, the 1st Respondent relied on the decision of Kimaru J in **Election Petition Appeal No 7 of 2017** for the proposition that a person who was not involved in the appeal at the Party's internal dispute resolution mechanism level had no *locus standi* to mount an appeal at the PPDT. In that case Kimaru J stated:

> ***"In their submissions before PPDT, it was apparent that the Appellants made presentations as if they were the ones appealing from that decision made in Complaint No.23 of 2017. This court agrees with the decision of the PPDT to the effect that the Appellants were not parties to that complaint and therefore lacked the requisite locus standi to mount an appeal against that decision to the PPDT. It is only the complainant in that case who had locus to to lodge an appeal to PPDT if he was aggrieved by the decision"***

21. In the above case (Appeal No 7), the court found that the appellants there did not lodge a complaint before the party's internal dispute resolution mechanism to entitle them to lodge an appeal to PPDT. In the present case, Counsel argued that **Section 40(1)(fa)** read together with **Section 40(2)** of the **Political Parties Act** does not oblige a disputant to pass through the internal party mechanism route before being granted audience by the PPDT. This is a tenable argument because **Section 40(2)** excludes disputes under section **40(1)(fa)** from the list of disputes that must first undergo the party dispute resolution mechanism.

22. In my view, there is a more potent reason to argue that locking out the appellant would be untenable. The record of appeal in the present dispute shows that the PPDT had on 9th May, 2017 made its determination. On 11th May, it dismissed the appellant's application to be enjoined on grounds that it had rendered its decision and a decree had been issued. In effect, the PPDT was stating that it had become *functus officio*, having rendered its decision.

23. Was the tribunal *functus officio*? I don't think so. **Regulation 33** of the Political **Parties Disputes Tribunal (Procedure) Regulations** provides for review by PPDT of its decisions. The PPDT itself mulled over that question. The proceedings of 12th May, 2017 reflect its consideration thereon as follows:

> ***"Order: The proposed 2nd Interested Party cannot apply to be enjoined after a decree has been issued.***
>
> ***Can he apply for review since he was not a party to the proceedings.***
>
> ***Accordingly, the application dated 11th May, 2017 is hereby struck out for being incomplete."***

24. This court fully appreciates the politically-harsh tension-filled climate, the tight hearing timeframes and sheer volume of appeals that the Tribunal was grappling with all at the same time. However, the Tribunal appears to have ignored **Regulations 33(1), (2)** and **(33)(3)** of the **Political Parties Tribunal (Procedure) Regulations, 2017** which make provision for review by the Tribunal of its own decisions. The provisions state as follows:

> ***"(1) The Tribunal may, of its own motion or upon application by an aggrieved party, review its decisions or orders***
>
> ***(2) A person aggrieved by a decision of the Tribunal may, within fourteen days of the date of the decision or order, apply to the Tribunal for a review***
>
> ***(3) The law applicable to reviews before the High Court in civil matters shall, with the necessary modifications, apply in reviews before the Tribunal"*** (emphasis supplied)

Clearly, the PPDT had power, under its own rules to initiate a review even without being moved by a party, or to wait to be moved by an aggrieved person.

25. It is true that the appellant sought to be enjoined. But he also sought review as expressly indicated in his Notice of Motion at Paragraph 3:

> ***"This Honourable Tribunal be pleased to review and or set aside the judgment delivered on the 9th May 2017 and consequential orders"*** (emphasis supplied).

Further, in paragraphs 10 and 13 of his Supporting Affidavit Tom Odege, the appellant, states that he would be adversely affected to the extent that he too held a nomination certificate, and that he believed that the Tribunal had *"jurisdiction to review its decision"*.

26. What, ultimately, the appellant was seeking was a hearing as an aggrieved person: one who had participated in the party nominations, had been issued with a nomination certificate and had no notice of the appeal; but then had made a discovery from the media. That was that his certificate was useless as the PPDT had formally ordered grant of the Nyatike nomination certificate to the 1st Respondent, the same constituency for which he held a nomination certificate.

27. A similar situation arose in the Court of Appeal in the case of **JMK v MWM & Another [2015] eKLR.** I will quote fairly liberally from that case because of its similarities with the present case. The appellant in that case was found by the Industrial Court to be liable for sexual harassment and judgment was entered against him, despite his not being a party to the suit. Aggrieved by the decision of the court, the appellant sought review and setting aside of that court's judgment, but the judge declined. The Court of Appeal noted that when the appellant applied to be made a party to the proceedings, there were no pending proceedings before the Industrial Court to which he could have been made a party.

28. In that case, the Court of Appeal stated:

***"The appellant however had not applied solely to be added as a party to the suit; he had also applied for review and setting aside of the judgment of the court to give him an opportunity to be heard. In other words, the appellant was effectively applying for review and setting aside of the judgment of the Industrial Court and an order for de novo hearing of the suit, which would afford him an opportunity to be heard. The learned judge properly found, in our view, that the Court had jurisdiction to review and set aside its judgment. However, he declined to do so on the grounds that the issues that the appellant was raising could only be raised in an appeal rather than in an application for review.***

***On our part, we entertain considerable doubt whether the appellant could have been able to appeal to this Court against the judgment of the Industrial Court when he was not a party to the suit whose judgment aggrieved him and had not otherwise participated in the proceedings. Both the Industrial Court Act, 2011 and the Industrial Court (Procedure) Rules made thereunder confer wide jurisdiction on the court to review and set aside its judgment. Section 16 of the Act provides as follows:***

> ***"The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules."***

***Rule 32 (1) of the Procedure Rules, on the other hand provides as follows:***

> ***" 1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—***
>
> ***(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or***
>
> ***(b) on account of some mistake or error apparent on the face of the record; or***
>
> ***(c) on account of the award, judgment or ruling being in breach of any written law; or***
>
> ***(d) if the award, the judgment or ruling requires clarification; or***
>
> ***(e) for any other sufficient reasons."***

***The rules do not define "aggrieved person" but it defines "party" to mean "<u>a person</u>, a trade union, an employer, employer's organization or any corporate body <u>directly involved or affected by an appeal, or claim to which the Court has taken cognizance</u> or who is a party to a collective agreement referred to Court for registration." (Emphasis added). A person who is directly affected by an appeal, or claim to which the Court has taken cognizance is deemed by the rules to be a party, and we do not find any reason why such a person cannot be an aggrieved party for purposes of applying for review of a decree or order of the court."***

29. To my mind, the facts described in the above decision and the legal regime of the Industrial Court Rules is rather similar to what is found in the PPDT procedure regulations earlier highlighted. The Court of Appeal continued in **JMK v MWM**:

***"In this appeal, the appellant was entitled to contend, as he did, that the judgment of the Industrial Court which directly affected him, was in breach, not only of the law, but also of the Constitution in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1). He was also entitled to contend that to the extent that the judgment found him guilty of sexual harassment without affording him an opportunity to be heard, that in itself constituted sufficient reason for review of the judgment.***

***The courts of this land have been consistent on the importance of observing the rules of natural***

***justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456, Nyarangi, JA asserted at page 459:***

***"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."***

***At page 460 the learned judge added:***

***"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

***And in MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206, at page 210, this Court stated as follows:***

***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

30. In the end, the Court of Appeal held that the appellant ought to have been afforded an opportunity to be heard, and that the Industrial Court ought to have reviewed and set aside its judgment to afford the appellant such an opportunity.

31. In the present case, the PPDT mulled over whether it could review its determination but decided, on a wrong principle in my view, that it could not because its final decision had resulted in a decree or, alternatively, because the appellant was not a party to the proceedings. The PPDT failed to take into account its procedure regulations which allowed ***"a person aggrieved",*** not only a ***"party",*** to seek review.

32. I am persuaded by the position of the Court of Appeal and would adopt its posture on this issue. I therefore find and hold that the PPDT should have heard appellant and reviewed its judgment to the extent that it affected the appellant herein.

**Jurisdiction of the PPDT**

**33. Section 40** of the **Political Parties Act** provides as follows:

***"40 Jurisdiction of Tribunal***

***(1) The Tribunal shall determine -***

***(a) …..***

***(b) disputes between a member of a political party and a political party***

***(c) ….***

***(d) ….***

***(e) ….***

***(f) ….***

***(fa) disputes arising out of party nominations"***

***(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b),(c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanism"***

34. With regard to disputes arising out of party primaries, there is no requirement pursuant to **sub-section (2)** of **section 40**, for the dispute to be heard through the party internal dispute resolution mechanism.

35. But even without considering this argument, and in light of my holding in respect of the rights of an aggrieved person who was not enjoined or heard in the proceedings, I have no doubt that the PPDT had jurisdiction, not least because in my view it had an inherent obligation to hear the appellant.

36. I will not belabour the point and will leave it at that on this issue.

**Whether the PPDT was entitled to order the issuance of the nomination certificate to any particular individual**

37. In light of the decision already reached on the issue of the review, this is a moot question that need not be resolved for the ultimate determination of the present appeal.

**Determination**

38. I therefore determine that the appellant should have been heard and a review conducted by the PPDT. By not hearing the appellant on the basis of the material placed before it which, *prima facie*, disclosed that the appellant held a Party nomination certificate for the subject seat, the PPDT was guilty of a breach of the rules of natural justice.

39. To that extent, the PPDT had jurisdiction to hear the appellant.

**Disposition**

40. The appeal is hereby allowed to the extent that this matter is hereby remitted back to the Political Parties Dispute Tribunal for:

a. a hearing on a review of the appellant's application for review and setting aside; and

b. thereupon for a determination on the outcome of the overall complaint before it taking into account the aforesaid application.

41. No order as to costs is made as this is a matter with a public interest element.

**42. Orders accordingly.**

**Dated and Delivered at Nairobi this 18th Day of May , 2017**

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**RICHARD MWONGO**

**PRINCIPAL JUDGE**

Delivered in the presence of:

1. Mr Wakwaya for the Appellant/Applicant

2. Mr Omuga for the 1st Respondent

3. No Representation for the 2nd Respondent

4. No Representation for the 3rd Respondent

Court Clerk Jeff Omuse