



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION NO. 26 OF 2017**

**STEPHEN P. O. AGULO.....APPELLANT**

**VERSUS**

**JULIUS S. NYAMBOK.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT (ODM) PARTY.....2<sup>ND</sup> RESPONDENT**

**RETURNING OFFICER.....3<sup>RD</sup> RESPONDENT**

**Appeal from the judgment of the Political Parties Disputes Tribunal delivered in Nairobi on 10<sup>th</sup> May 2017 (Mr. M. O Lwanga, Desma Nungo, Paul Ngotho and Adelaide Mbithi)**

**JUDGMENT**

**Introduction**

Stephen P. O Agulo (hereinafter “the Appellant”) is a member of the 2<sup>nd</sup> Respondent. He was vying for nomination on 2<sup>nd</sup> Respondent’s ticket for the Member of County Assembly for Homa Bay Central Ward in Homa Bay County in the nomination exercise conducted by the 2<sup>nd</sup> Respondent on 24<sup>th</sup> April 2017. He is challenging the judgment and decree delivered by the Political Parties Disputes Tribunal (hereinafter “the PPDT”) on 10<sup>th</sup> May 2017 in the PPDT’s Case No. 63 of 2017. In that judgment, the PPDT ordered the 2<sup>nd</sup> Respondent (who was the 1<sup>st</sup> Respondent in the matter before the PPDT) to issue the nomination certificate for Member of the County Assembly, Homa Bay Central Ward, Homa Bay county to Julius S. Nyambok, the 1<sup>st</sup> Respondent in this appeal. The Appellant felt aggrieved by that decision and preferred this appeal.

Simultaneously with the Memorandum of Appeal, the Appellant filed a Notice of Motion under certificate of urgency seeking stay of execution of the judgment and order of the PPDT pending the hearing and determination of the application and of the appeal. The application was presented before this court on 13<sup>th</sup> May 2017. Orders for stay pending the hearing and determination of the application were issued and the appeal was fixed for hearing on 15<sup>th</sup> May 2017.

**Background**

To put the matter into perspective, some historical background is necessary. The ODM Party, 2<sup>nd</sup> Respondent in this appeal, conducted its nominations for the position of Member of County Assembly for Homa Bay Central Ward on 24<sup>th</sup> April 2017. The Appellant was declared the winner by the 3<sup>rd</sup>

Respondent. This decision aggrieved the 1<sup>st</sup> Respondent in this Appeal who petitioned the Party's Homa Bay County Tribunal. The Tribunal ruled in his favour. The 1<sup>st</sup> Respondent moved to the PPDT in Case No. 63 of 2017 seeking an injunction to restrain the ODM Party or its servants or agents from issuing the nomination certificate to the Appellant. He also sought an order restraining the Appellant from presenting nomination certificate to the Independent Electoral and Boundaries Commission (IEBC) and an order to restrain the IEBC from accepting the nomination certificate from the Appellant. PPDT ruled in his favour and upheld the decision of the Homa Bay Appeals Tribunal. It is this decision by the PPDT that the Appellant is contesting in this Appeal.

### **Memorandum of Appeal**

In his memorandum of appeal, the Appellant has listed seven grounds as follows:

1. That the Honourable members of the Tribunal erred in fact and law in subordinating Articles 47 and 50 of the Constitution with their own views.
2. That the Honourable members of the Tribunal erred in fact and law in upholding that the only issue for determination was that of the Homa-Bay County Appeals Tribunal decision and ignoring all other fundamental issues emanating from the said decision.
3. That the Honourable members of the Tribunal erred in fact and law in failing to consider that the Applicant was never invited by the Homa-Bay County Appeals Tribunal to defend himself against the accusations leveled against him by the 1<sup>st</sup> Respondent.
4. That the Honourable members of the Tribunal erred in fact and law by failing to take into account the overwhelming evidence placed before it showing that the Applicant was not invited to the hearing of the Petition filed against him by the 1<sup>st</sup> Respondent challenging the Applicant's win and subsequent granting of the provisional certificate to the Applicant by the 1<sup>st</sup> Respondent.
5. That the Honourable members of the Tribunal erred in law and fact in making a terminal order to the Applicant's nomination as a Member of the County Assembly of Homa-Bay Central Ward to contest for the forthcoming General Election. The order is disproportionate and more appropriate remedies were available in the circumstances.
6. That the Honourable members of the Tribunal erred in law and fact in ignoring the fact that there was no rebuttal of the Applicant's Replying Affidavit of his non-attendance to the Homa-Bay County Appeals Tribunal.
7. That the Honourable members of the Tribunal erred in law and fact in delving into extraneous matters not pleaded or argued before them.

The Appellant is seeking the following orders:

- i. That the appeal be allowed.
- ii. That the judgment and decree delivered and issued by the Honourable Tribunal on 10<sup>th</sup> May 2017 be set aside.
- iii. That the appellant be awarded cost of this appeal.

On 15<sup>th</sup> May 2017 when the matter came up for inter partes hearing of the Notice of Motion dated 13<sup>th</sup> May 2017, it was agreed that the Appellant dispenses with the hearing of the Notice of Motion and instead proceed to argue the main Appeal. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were not present in court. This court was satisfied that process was served on the two parties and therefore went on to hear the Appeal irrespective of their absence.

## Submissions

Mr. Achiando for the Appellant argued grounds 1, 2, 3, 4 and 6 together and grounds 5 and 7 separately. He submitted that the Homa Bay Appeals Tribunal made its decision basing it on a letter of appeal presented to it by the 1<sup>st</sup> Respondent; that the Appellant was not invited to attend the hearing or to respond to the issues raised in the letter of appeal; that the Appellant was neither served with the Appeal nor was he aware of it and therefore he could not respond to it. Mr. Achiando relied on **Judicial Service Commission v. Gladys Boss Shollei & another [2014] eKLR** to support argument on the issue of right to a fair hearing. Counsel further cited **Judicial Service Commission v. Mbalu Mutava & another [2015] eKLR** on the issue of the application of the rules of natural justice. Counsel further referred this court to Section 23 of the 2<sup>nd</sup> Schedule of the Political Parties Act in regard to the contents of the constitutions or rules of political parties. He submitted that Section 23 of that schedule requires that political parties' constitutions shall contain internal party dispute resolution mechanism in compliance with Article 47 and 50 of the Constitution. He submitted that the Homa Bay Appeals Tribunal breached the law in failing to invite the Appellant to rebut the issues raised against him. Counsel further submitted that the 1<sup>st</sup> Respondent did not challenge the issue that the Appellant was not invited to the hearing.

On the issue of the two names appearing on the ballots counsel submitted that had the Appellant been given an opportunity to respond to this issue, a fair determination would have been reached. Counsel urged that the appeal be allowed and that the judgment of the PPDT be set aside. He also prayed for costs of this Appeal.

On the other hand, Mr. Odero for the 1<sup>st</sup> Respondent submitted that the appeal is fatally incompetent and ought to be dismissed. He submitted that the Appellant went before the PPDT by way of a Claim and Notice of Motion dated 4<sup>th</sup> May 2017 supported by an affidavit of the same date; that in response to the Notice of Motion the Appellant filed a Replying Affidavit setting out facts sworn on 7<sup>th</sup> May 2017; that this Affidavit is omitted in this Appeal and does not form part of the Appeal Record. Counsel submitted that the factual position can only be viewed from the missing Affidavit and that there is no way this anomaly can be cured. It was submitted that the Appeal before this court arises from the interlocutory proceedings before the PPDT and finally Mr. Odero submitted that there is nothing to replace setting aside of order 2 and therefore the Appeal has no legs to stand on and ought to be dismissed.

In response Mr. Achiando submitted that the Appeal does not emanate from interlocutory orders and that Counsel for the 1<sup>st</sup> Respondent is arguing the Appeal on a point of technicality which is curable under Article 159 of the Constitution. Finally, Mr. Achiando submitted that he has noted the omission to attach the Replying Affidavit. However, this omission is not prejudicial to the Appellant. He urged the court to determine the Appeal on merit.

By virtue of Section 41 (2) of the Political Parties Act, an Appeal lies from the decision of the Tribunal (PPDT) to this court on points of law and facts. Being the first appellate court therefore, this court must evaluate the evidence tendered before the PPDT and arrive at its own conclusion. It is immaterial whether that independent conclusion agrees with that of the PPDT or not.

I have read all the documents that were filed before the PPDT. The Claim before the PPDT was filed by the 1<sup>st</sup> Respondent with the intention of giving effect to the decision by the Homa Bay Appeals Tribunal by seeking restraining orders as shown in this judgment. Before the PPDT, the 1<sup>st</sup> Respondent filed a Statement of Claim simultaneously with a Notice of Motion brought under certificate of urgency. The Notice of Motion was supported by an affidavit sworn by the 1<sup>st</sup> Respondent. The Statement of Claim was also supported by a Verifying Affidavit by the 1<sup>st</sup> Respondent. A letter dated 26<sup>th</sup> April 2017 addressed to the 2<sup>nd</sup> Respondent's National Election Board was also attached to the documents filed at the PPDT. The decision of the Homa Bay Appeals Tribunal, copies of ballot papers and a further affidavit by the 1<sup>st</sup> Respondent pursuant to an order of the PPDT also formed part of the documents filed at the PPDT. The Appellant prepared and filed a Statement of Response. The Replying Affidavit by the Appellant to the PPDT in respect of Case No 63 of 2017 is missing as submitted by Mr. Odero and admitted by Mr.

Achiando. I have read all these documents and the judgment of the PPDT. I wish to state that I do not agree with Mr. Odero for the 1<sup>st</sup> Respondent when he submitted that this Appeal emanates from interlocutory orders. The drafters of the judgment by PPDT started that the Claimant approached the Appeal by way of Notice of Motion. It may be an oversight on their part to include a statement that there was a Claim filed simultaneously with the Notice of Motion. Be that as it may, the judgment made orders that disposed of the matter placed before the PPDT and therefore there was nothing else left for them to adjudicate.

In determining the issues before me, I wish to state that the rules of natural justice and right to a fair hearing are available to all parties before a court. Article 47(1) of the Constitution guarantees every person right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and Article 50 on fair hearing. These rights apply to all parties equally whether those parties are before the internal party dispute resolution mechanism like the Homa Bay Appeals Tribunal, PPDT or this court. The gist of the Appellant's complaint is that he was not given a fair hearing at the Homa Bay Tribunal. He appeared before the PPDT and had a chance to articulate all the issues. The PPDT pronounced itself in its judgment. The relevant paragraph of that judgment by the PPDT reads as follows:

***“From the foregoing, it is not disputed that there was an IDRM process and a decision issued on 28<sup>th</sup> April nullifying the nomination process for Homa Bay Central Ward, and directing that the Claimant be issued with a nomination certificate. The 2<sup>nd</sup> Respondent sought to impugn that decision on the basis that he was not party to the proceedings at the Homa Bay County Appeals Tribunal. However, this Tribunal is not satisfied that the IDRM decision was arrived at without the participation of the 2<sup>nd</sup> Respondent. As pointed out by the Claimant, if the same were true, he would have approached this Tribunal and sought to nullify that decision as it directly affected him by cancelling his nomination certificate. He did not. We therefore find his assertion doubtful.”***

I have not found any evidence on record to make this court decide contrary to the decision of the PPDT on the issue that the Appellant did not participate in the proceedings before the Homa Bay Tribunal. This is the Tribunal that took away his “victory” by nullifying his nomination and awarding the certificate to the 1<sup>st</sup> Respondent. It is telling that the Appellant did not approach the PPDT to file a Claim against the 2<sup>nd</sup> Respondent and the ODM Party. He rode on the Claim by the 1<sup>st</sup> Respondent and argued his case but the PPDT did not rule in his favour.

Now, turning on the omission to include the Replying Affidavit to the Record of Appeal, it was submitted by the counsel for the Appellant that this is a procedural technicality that is curable by Article 159 (2) (d) of the Constitution. This Article reads as follows:

***“In exercising judicial authority, the courts and tribunals shall be guided by the following principles -***

***(d) justice shall be administered without undue regard to procedural technicalities;”***

I want to differ from this submission. Omitting to attach a document or to produce a document that supports one's case in my view is not a procedural technicality. To my mind this anomaly is similar to a party coming to court to argue his/her case without his/her evidence to support that case. That to me, by any stretch of imagination, cannot be a procedural technicality.

In this judgment, I am posing the following questions:

- i. Did the PPDT subordinate Articles 47 and 50 of the Constitutions to their own views?
- ii. Was the PPDT in error in identifying the only issue before them as whether it ought to uphold the decision of the Homa Bay Tribunal?

- iii. Did the PPDT fail to consider that the Appellant did not participate in the proceedings before the Homa Bay Appeals Tribunal?
- iv. Is the order by the PPDT nullifying the Appellant's nomination disproportionate?
- v. Did the Tribunal delve into extraneous matters not pleaded?

Basing my decision on the evidence before me and the law, I answer the above questions in the negative. In my view the PPDT considered the issues argued before it and made a reasoned decision.

From the Statement of Response of the Appellant before the PPDT, the Appellant states that he garnered 2,618 votes compared to the 1<sup>st</sup> Respondent's 1, 969 votes. The decision by the Homa Bay Appeals Tribunal on page 23 of the Record of Appeal, stated that:

***“Many of the allegations by the 5 joint petitioners were largely not proved but the tribunal found out that Stephen P. O Agulo appeared in the ballot twice and this was a serious election offence. He is the same person as Stephen Peter Odhiambo and the votes having been cast separately were merged and counted for him. This was wrong.”***

I think I have said enough to demonstrate that this Appeal has no merit. It is not lost to this court that the Appellant did not seek to address the alleged mistakes by the Homa Bay Appeals Tribunal. He had the chance to do so before the PPDT and by extension before this court but he has failed to do so. The PPDT pronounced itself. This court now pronounces itself that the Appeal by the Appellant filed in this court on 13<sup>th</sup> of May 2017 is hereby dismissed. I hesitate to order costs of this Appeal to the 1<sup>st</sup> Respondent. Instead I order that each party shall bear its own costs. The decision by the PPDT contained in its judgment dated 10<sup>th</sup> May 2017 is hereby upheld. Orders shall issue accordingly.

**Dated, signed and delivered this 17<sup>th</sup> day of May 2017.**

**S. N. MUTUKU**

**JUDGE**

**Present**

Mr. Okweh Achiango for the Appellant

Mr. Odero for the 1<sup>st</sup> Respondent