



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**ELECTION PETITION APPEAL NUMBER 31 OF 2017**

**WIPER DEMOCRATIC MOVEMENT**

**OF KENYA.....APPELLANT**

**VERSUS**

**BERNARD MUIA TOM KIALA .....RESPONDENT**

**AND**

**HON. WAVINYA NDETI.....INTERESTED PARTY**

**JUDGMENT**

1. The Respondent and the Interested Party as of 6 May 2017 were both members of the Appellant, a political party registered in accordance with the laws of Kenya. On 6 May 2017, the Appellant pursuant to an order issued on 5 May 2017 by the Political Parties Disputes Tribunal (“the PPDT”) conducted a repeat nominations’ exercise for the Appellant’s candidate for the gubernatorial seat of Machakos County.

2. According to the Appellant, the Interested Party again won the repeat exercise. The Interested Party scored a staggering 227,947 votes, while the Respondent’s tally was 4508 votes. Unsurprisingly, the Respondent was unhappy. The Appellant confirmed the Interested Party’s win and issued her with a nomination certificate.

3. In the meantime, the Respondent moved to the PPDT and sought various reliefs on the basis that the repeat nominations exercise was neither free nor fair and had not been conducted in accordance with the Appellant’s constitution and nominations rules. The Respondent complained of want of adequate notice, woeful tallying, voter bribery and lack of electoral materials.

4. Through an ex parte motion under urgency, the Respondent moved the PPDT to restrain the Appellant by way of injunction from forwarding the name of the Interested Party to the Independent Electoral and Boundaries Commission (IEBC), a constitutional organ charged with conducting and supervising the national elections. The order was sought without notice and pending hearing of the motion.

5. On 12 May 2017, the PPDT certified the Respondents motion as urgent and granted the following case management and substantive orders:

***a. That the Notice of Motion dated 10/5/17 [is] hereby certified urgent.***

***b. That the complainant [do] serve all affected parties forthwith. Leave granted to serve by substituted means.***

***c. That the Respondents [be and are] granted upto 13/5/2017 to file their respective replies and submissions***

***d. That the matter [be] scheduled for mention on Monday 15/5/2017 at 10.00am for order of compliance and judgment date***

***e. That interim orders [are hereby] granted pending the hearing and determination of this application restraining the 1<sup>st</sup> Respondent by way of injunction from forwarding the name of the 2<sup>nd</sup> Respondent to the Independent Elections and Boundaries Commission.***

6. The fifth order was a substantive order. It was limited to subsist until the hearing of the application *inter partes*. The Appellant upon service with the application and order was apparently not amused and promptly moved this court by way of an appeal on 14 May 2017. The Respondent also filed an application seeking to vacate the PPDT's orders of 12 May 2017.

7. I certified both the application and appeal as urgent on 14 May 2017 and through the court's deputy registrar directed service. The application was listed for hearing on 15 May 2017 but on consultation, counsel for the Appellant agreed to have the appeal fast-tracked for hearing and lay aside the application. I consequently fixed the hearing of the appeal for 16 May 2017. It was however not until 17 May 2017 when the hearing proceeded at 0830hrs.

8. Both Mr P.K. Muite SC and G.M. Sore who urged the Appellant's case asserted that the PPDT lacked the requisite jurisdiction to issue the orders it made on 12 May 2017. Counsel was firm that the complaint ought not to have been entertained in the first instance. Counsel revealed to the court that the substantive order had been vacated by the PPDT and the Interested Party discharged from the proceedings before the PPDT but that the dispute was still being entertained by the PPDT. Counsel added that there was need for the court to thus intervene on appeal.

9. The gist of the Appellant's argument was pegged on section 40(1)(d) of the Political Parties Act , No 11 of 2011 ( "the Act") which is to the effect that the PPDT has jurisdiction to entertain disputes between an independent candidate and a political party but that the nature of the dispute in the instant case was not the sort contemplated by section 40(1)(d) of the Act. Counsel insisted that there was actually no dispute between the Appellant and the Respondent *qua* independent candidate.

10. According to Mr Muite, the court as well as the PPDT loses jurisdiction once a complainant decides to be an independent candidate. For this proposition, counsel referred to the case of **Sammy Kilukei & 300 Others v Jubilee Party & Another HCEPA No 10 of 2017 (unreported)**

11. Mr Muite further submitted that when the Respondent filed the complaint before the PPDT, there was non-disclosure of material facts, as the Respondent had failed to disclose that he was no longer a member of the Appellant party but rather only tried pose as a member. Senior counsel referred the court to paragraph 4 of the complaint which reads thus:

***“At all material times to this complaint the Appellant was an aspirant for the position of Governor, Machakos County Government through the 1<sup>st</sup> Respondent's candidature and or ticket.”***

12. Mr Omwanza, who appeared for the Respondent was of the view that the appeal was not merited and that as the orders challenged had already been vacated the appeal warranted a dismissal. Mr Omwanza however conceded that the PPDT could still make similar orders. Counsel also faulted the Appellant for not providing the court with the full record of the proceedings before the PPDT.

13. Additionally, Mr Omwanza submitted that the PPDT was rightfully seized of the dispute pursuant to

the provisions of section 40 (1)(d) of the Act. And, in wrapping up his submissions counsel urged the court to exercise restraint on and extend respect to the PPDT. For this submission counsel referred to the decision of the court in **Diana Kethi Kilonzo & Another v Independent Electoral and Boundaries Commission & 10 Others [2013]eKLR**.

14. The Memorandum of Appeal delimited some odd seven grounds. It sought that the orders of the PPDT of 12 May 2017 as extracted on 13 May 2017 be set aside, vacated or quashed.

15. Even though the appeal herein was argued before the record of the proceedings in the PPDT was laid before the court, both counsel were in agreement that the court could well call for the file and peruse the same in their absence. I found no difficulty with that approach, given that the appeal was an interlocutory one. Additionally, counsel were also in agreement on the factual aspect of the dispute and I must in this respect commend counsel for their courtesy and sober approach. I, of course, called for the PPDT file of record and read through.

16. There is no controversy that the appeal concerned only the orders of 12 May 2017. There is also no controversy that the said orders were made ex parte. There is further no controversy that the order has since been unconditionally discharged and vacated by the PPDT. It is also a common cause that the Respondent is no longer a member of the Appellant party and that when the Respondent filed the complaint before the PPDT on 10 May 2017 he had ceased being a member of the Appellant party.

17. Back to the grounds of appeal.

18. The grounds largely centre on the fact that the complaint before the PPDT as lodged by the Respondent is frivolous. The appeal is also grounded on the fact that the PPDT had no jurisdiction to entertain the appeal before it as the Respondent was no longer a member of the Appellant. The Appeal before the PPDT was also stated to have been lodged out of malice and simply to bar the Interested Party from participating in the general elections slated for 8 August 2017.

19. I have listened to counsel and considered both the submissions as well as the documents on record. The first issue is whether the appeal is competently before this court and, if so, whether it has any merit.

20. The appeal before the court originated from an ex parte order made under urgency. The order was made pursuant to the provisions of Order 40 Rule 4 of the Civil Procedure Rules and the inherent powers of the PPDT.

21. I start by pointing out that ex parte orders are genuine and valid judicial orders. Courts will often make such orders in the first instance after careful and impartial consideration and where the court is convinced that the issuance of such an order is just and equitable in the circumstances of each case. Ex parte orders are ordinarily provisional. They have no element of finality but may have a final effect if couched in mandatory terms. They will thus be set aside after hearing inter partes or even upon a simple application of by the affected and aggrieved party who deems the order oppressive. Even where there is no express provision for setting it aside, judge made law has seen to it that applications to set aside ex parte orders are entertained: see **Cozens v North Devon Hospital Management Committee [1966] 2 QB 330**

22. The orders made herein were ex parte. They were not of a final determination. The fifth limb of the order made it clear that the injunctive orders, which the Appellant deemed oppressive, were to subsist until a scheduled hearing after service. The Respondent was also directed to serve the application. The PPDT was satisfied that the circumstances of the case demanded that a preliminary or provisional order was issued.

23. In that case, my view is that, the proper approach ordinarily was for the aggrieved party to move the PPDT and seek to set aside the non-final order rather than move on to appeal. The PPDT had the inherent jurisdiction to set aside the order if the circumstances showed that it should not have been made in the first place. In the instant case, the contention is that the Respondent was guilty of material non-disclosure

as he appeared before the PPDT and sought/obtained the ex parte orders. There could have been material non disclosure but the PPDT was better placed to determine whether despite the non-disclosure, the orders would still have been warranted.

24. As it were, the parties ultimately appeared before the PPDT and having heard both parties the PPDT unconditionally discharged and vacated the substantive ex parte order made on 12 May 2017.

25. I am not entirely convinced that appeal was warranted and indeed Order 43 Rule 1 of the Civil Procedure Rules does not grant an aggrieved party an automatic right of appeal. Appeals from ex parte orders may only be made with the leave of the court.

26. Besides, successive events including the discharge of the exparte orders would dictate that any orders to be made by this court *in re* the ex parte order would simply be of no consequence.

27. I must however grapple with the issue of the PPDT's jurisdiction as it was advanced as one of the reasons for moving this court.

28. The issue of the PPDT's jurisdiction was not raised before the PPDT as should have been the case: see **Rafiki Enterprises Limited v Kingsway Tyres & Another Civil Application No. 375 of 1996 (UR) (Unreported)** .The issue only came up after this appeal had been filed. The Appellant however raised it as a first instance ground ( see Ground No 3 of the Memorandum of Appeal). It is urged that the PPDT had no powers or authority to deal with the application and make orders as the Respondent was no longer a member of the Appellant party.

29. I would view it quite differently.

30. Section 40(1)(d) of the Act is in my view relatively clear. The PPDT has the power to adjudicate over disputes between political parties and independent candidates. The Respondent is admittedly an independent candidate. He has recourse under section 40(1)(d) of the Act against a political party if he is aggrieved. His recourse is before the PPDT.

31. The Appellant's counsel strongly submitted that the nature of the dispute did not warrant the invitation of the PPDT's jurisdiction. Counsel gave examples of what he deemed appropriate disputes for that matter. The examples were countenanced by the Respondent's own examples.

32. In my view, it is inappropriate to start pigeon-holing types and nature of disputes which ought to fall under section 40(1)(d). It may be a foolhardy exercise because one may never stop. What is important is to ascertain the parties as being the independent candidate and a political party. The next step is to reflect on whether there exists a genuine grievance which warrants the PPDT's interrogation and ultimate intervention. Effectively thus, the exercise of indexation of the disputes which may come in all forms is best left to the PPDT to handle and sieve through.

33. I need however add that a reading of section 40(1)(fa) of the Act, which grants the PPDT powers to resolve " disputes arising out of party primaries" would evidently point to a situation where an independent who is aggrieved with certain happening in the party primaries would be entitled to move the PPDT. That is a plausible inference when one reads sections 40(1)(d) and 40(1)(fa) of the Act.

34. In the instant case, the Respondent was a member of the party as they underwent a nomination process. He thereafter resigned. His complaints before the PPDT all relate to the happenings during the party primaries. Those are matters within the PPDT's remit by dint of the provisions of section 40(1)(fa) of the Act. It is for the PPDT to determine the position and the nature of the dispute and whether the exercise would be purely moot and academic or not. The Respondent may not be entitled to the orders sought but that is for the PPDT to decide and not this court by way of a determination in an interlocutory appeal. The PPDT had the jurisdiction. The remit exists.

35. In the end, I do not find that the instant interlocutory appeal , in any event, is properly before this

court and is also wanting in merit.

36. It is dismissed but with no order as to costs.

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

***J.L.ONGUTO***

**JUDGE**