

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTIONS PETITION APPEAL NO. 123 OF 2017

JOHN ORWA.....APPELLANT

VERSUS

ORANGE DEMOCRATIC

MOVEMENT PARTY & 3 OTHERS.....RESPONDENTS

(Being an appeal from a decision of the Political Parties Disputes

Tribunal (PPDT) in Complaint No. 241 of 2017 made on 22nd June 2017)

JUDGMENT

1. The matter is an appeal from the decision of the Political Parties Disputes Tribunal (PPDT) Complaint No. 241 of 2017. The grounds of appeal are set out in the memorandum of appeal herein dated 23rd June 2017. It is stated that the PPDT made mistakes in finding that the 3rd Respondent, George Okinyi Omamba, had not been served with notice to appear for a hearing before the 1st respondent's branch tribunal, in ordering the 1st and 2nd respondents, Orange Democratic Party and National Elections Board of ODM Party, to recall his nomination and to instead nominate the 3rd respondent, in ignoring the evidence of the 1st respondent's branch tribunal, in relying overly on a consent that had been entered into on 16th June 2017 to enjoin the 3rd respondent to the PPDT proceedings and in exercising jurisdiction it did not have, among others. The Appellant would like the PPDT ruling of 22nd June 2017 in Complaint No. 241 of 2017 set aside and substituted with a judgment allowing the amended complaint dated 19th June 2017, his name reinstated as the 1st respondent's candidate for the seat of member of County Assembly for Kanyamkago Ward, and costs of the appeal.

2. The factual background from the record before me is that the appellant had participated in the party primaries for the relevant county ward. The 3rd respondent was declared winner of the contest and was awarded the provisional nomination certificate. The appellant was dissatisfied with the process and outcome, and challenged the results at the local tribunal of the 1st respondent, which ruled in his favour in its determination of 29th April 2017 in Appeal No. 7 of 2017. His case is that the said determination was ignored by the 1st respondent, hence his complaint to the PPDT. The PPDT heard him and granted orders in his favour on 18th May 2017, holding that he was the candidate entitled to be nominated to contest the subject seat. When that order was not acceded to by the 1st respondent, the appellant moved the dispute resolution committee of the Interested Party, the Independent Elections and Boundaries Commission (IEBC), which made an order on 7th June 2017 in which it held the appellant to be the person entitled to nomination in terms of the decision of the PPDT of 18th May 2017.

3. The 1st Respondent complied with that PPDT order and issued the Appellant with a nomination certificate dated 15th June 2017, whereupon the Interested Party issued a clearance to the Appellant. The facts on the circumstances leading up to the next development are hazy, but the following day, 16th June 2017, the Appellant and the 3rd Respondent, through counsel, executed a consent which was lodged in

court the same day, whose effect was to set aside the orders of the PPDT of 18th May 2017 and to reopen the matter for fresh hearing. The effect of the consent order was to render useless the finding of the Interested Party since the latter rested on the order of the PPDT of 18th May 2017. The matter was heard and a determination was made on 20th June 2017 to the effect that the 3rd Respondent was the person entitled to the nomination certificate. The PPDT rapped the Appellant for prosecuting his cases against 3rd Respondent, both before the 1st Respondent local tribunal and the PPDT, without having properly served the 3rd Respondent.

4. The appeal was argued orally on 28th June 2017 by Mr Ombwayo, counsel for the Appellant. Mr Oronga responded for the 3rd Respondent, while Mr Makori stated the case for the 1st and 3rd Respondents. Mr Ombwayo argued that the decision of the 1st Respondent's local tribunal which had held in his favour had not been invalidated by the PPDT and it therefore stood. He stated that the PPDT fell into error in finding that the 3rd Respondent had not been served. Mr Oronga argued that the PPDT was properly within its mandate to hear the dispute afresh as it related to party primaries. His position was supported by Mr Makori.

5. I note that Mr Ombwayo conceded by consent to vacate the earlier order of the PPDT and committed to a rehearing of the matter. The parties have not explained why this became necessary. I can only surmise that it had something to do with the 3rd Respondent not having been served with the necessary process. I do not think the Appellant can be heard to complain that the PPDT should not have found that there was no proper service. On jurisdiction of the PPDT to hear the matter afresh, I do note that the parties consented to that process, so the Appellant cannot turn around now and allege that the PPDT could not possibly revisit the matter when he acquiesced to the rehearing. The orders made by the PPDT on 20th June 2017, no doubt, contradict the orders that the Appellant alleged were made by the 1st Respondent's local tribunal. The decisions of that alleged tribunal cannot override those of the PPDT, so it cannot be said that the said decision of the local tribunal of the 1st Respondent was still valid. In any event, the 1st and 2nd Respondents have not acknowledged the alleged decision.

6. The decision being challenged was made on merit, after the PPDT had heard both parties. It has not been demonstrated that the PPDT fell into error in any way. I find no merit at all in the appeal herein, and I shall accordingly dismiss the said appeal, as encapsulated in the Memorandum of Appeal dated 23rd June 2017, with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH DAY OF JUNE, 2017.

W. MUSYOKA

JUDGE