



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 132 OF 2017**

**CAROLINE NYABOKE NYARUMBA.....APPELLANT**

**VERSUS**

**JUBILEE PARTY.....1<sup>ST</sup> RESPONDENT**

**VINCENT AMENYA MARUBE.....2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the entire Judgment of the Political Parties Dispute Tribunal, (Kyalo Mbobu, Hassan Abdi, & James Atema, Tribunal Members) dated 4<sup>th</sup> July, 2017*

*in*

*Complaint No. 328 of 2017)*

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**JUDGMENT**

1. *Carolyn Nyaboke Nyambura* “the appellant” herein is a member of the Jubilee Party (1<sup>st</sup> respondent).

*Vincent Amenity Marube* “2<sup>nd</sup> respondent” is also a member of the *Jubilee Party* (1<sup>st</sup> respondent).

2. The appellant and 2<sup>nd</sup> respondent hail from South Mugirango Constituency. The 2<sup>nd</sup> respondent contested during the party primaries on a Jubilee party ticket for the seat of Member of Parliament. The party primaries for the said party were conducted on either 27<sup>th</sup> April, 2017 or 27<sup>th</sup> June 2017. I say so because in her complaint before the Political Party Dispute Tribunal (PPDT) at paragraph 3, the appellant stated that the primaries were conducted on 27<sup>th</sup> June, 2017. However, in her supporting affidavit and the certificate of urgency, she states that the primaries were conducted on 27<sup>th</sup> April, 2017.

3. The appellant was not a contestant in the South Mugirango primaries, but filed the complaint before the PPDT in her capacity as a voter.

4. The main complaint that was raised before the PPDT was that the 2<sup>nd</sup> respondent at the time of the nomination by the Jubilee party (1<sup>st</sup> respondent) was a registered member of the Orange Democratic Movement Party (ODM).

5. The respondents before the PPDT were;

(i) Jubilee Party, 1<sup>st</sup> respondent (now 1<sup>st</sup> respondent).

(ii) Vincent Amenya Marube, 2<sup>nd</sup> respondent (now 2<sup>nd</sup> respondent)

The respondents before the PPDT did not file any responses save for the preliminary objection (P.O) raised by the 2<sup>nd</sup> respondent.

6. To support her claim, the appellant who was the complainant produced a print out from the Registrar of Political Parties portal showing that the 2<sup>nd</sup> respondent was a member of Jubilee Party from 1<sup>st</sup> June, 2017 (**CNN 2B**).

7. She also produced a letter from ODM (**CNN 2A**) saying the 2<sup>nd</sup> respondent was its member as at 24<sup>th</sup> May, 2017. The PPDT considered the matter and dismissed both the P.O and the complaint. At paragraph 17 – 19 of its Judgment, the PPDT stated as follows;

***“17. The Claimant has sought to have the nomination of the 2<sup>nd</sup> respondent nullified on the basis that he belonged to two political parties at the time of the nomination exercise. In support of the claim, she adduced two undated printouts of a search ostensibly carried out on the website of the Office of the Registrar of Political Parties. Moreover, there is no averments as to the date when the search was carried out.***

***18. Furthermore, the letter from the Orange Democratic Movement is dated 24<sup>th</sup> May, 2017 while the disputed exercise was carried out on 27<sup>th</sup> June, 2017. There is nothing on record to indicate that the 2<sup>nd</sup> respondent was a member of two political parties on 27<sup>th</sup> June, 2017 which is the material date. There is on official record, such as a membership list indicating that the 2<sup>nd</sup> respondent was a member of two political parties on the material date. The two undated search results were not sufficiently probative of the Claimant’s allegations. The Claimant’s assertions would have been more credible if she had applied to the Registrar of Political Parties and obtained an official confirmation of the party membership status of the 2<sup>nd</sup> respondent on the material date.***

***19. Since this is an electoral dispute, involving not just the parties before the Tribunal, but also an electorate whose choice of representative is at state, it behoves the Claimant to produce clear, cogent, consistent evidence in support of her assertions. Consequently, we find the Claimant has not proved, on a balance of probabilities, that she merits the prayers sought.”***

8. It is this Judgment by the PPDT delivered on 4<sup>th</sup> July, 2017 that is the subject of this appeal.

The grounds she raised in the appeal are as follows;

***(i) The Hon. Tribunal erred in law and fact in failing to annul and quash the certificate issued by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent.***

***(ii) The Hon. Tribunal erred in law and fact in disregarding the evidence adduced by the complainant regarding the membership of the 2<sup>nd</sup> respondent on grounds that it did not aver the dates it was carried out.***

***(iii) The Hon. Tribunal erred in law and fact in disregarding the complaint and dismissing the complaint even when the respondent did not put a response to the said complaint to prove the contrary.***

***(iv) The Hon. Tribunal erred in law in disregarding the submissions by the complainant and assuming that the 2<sup>nd</sup> respondent might have resigned either of the Jubilee party and Orange***

***Democratic Movement party in between the 24<sup>th</sup> May, 2017 and 27<sup>th</sup> May, 2017 when the Elections were being conducted.***

9. The 2<sup>nd</sup> respondent filed a P.O in respect of the Appeal saying it was *res judicata*. Due to limited timelines, it was agreed that the PO could be argued alongside the Appeal.

10. **Mr. Otwal** for **Mr. Ombati Omwanza** for the appellant submitted on the issue of the 2<sup>nd</sup> respondent being a member of both Jubilee Party and ODM party as at the time of the party primaries. It was his submission that this contravened the law under the Political Parties Act and the Elections Act. He faulted the PPDT for ignoring the appellant's evidence which had not been challenged before it. That it considered the issue of resignation by the 2<sup>nd</sup> respondent which had not been raised before it.

11. On the P.O raised, he submitted that the parties in the ***Court of Appeal, Civil Case No. 171 of 2017*** were not the same as the appellant as she was not a party to the case.

12. The 1<sup>st</sup> respondent filed a replying affidavit by Mary Karen-Sorobit. **M/s Mboce** for the 1<sup>st</sup> respondent raised the issue of *res judicata* in respect of Civil Appeal No. 171 of 2017 in which the issue before this Court was dealt with. She also accused the appellant of delay in filing the appeal. It was her submission that the documents produced before the PPDT were unsubstantiated and so could not be relied on.

13. She argued that documents from the Registrar Political Parties portal were not reliable. She took issue with paragraph 7 of certificate of urgency saying it was misleading. The said paragraph states that the respondent will not suffer prejudice if the prayers sought were granted.

14. The 2<sup>nd</sup> respondent filed a P.O together with grounds of opposition. **M/s Samali** submitted on them raising two issues. Firstly, she stated that contrary to Mr. Otwal's submission on the evidence tendered before the PPDT, the Judgment by the said Tribunal proved that the evidence was considered. This can be gleaned at in paragraphs 17 – 19 of the said Judgment which has been produced at paragraph 7 above.

15. Secondly, she submitted that the Judgment in Court of Appeal, Civil Appeal No. 171 of 2017 determined the issue being raised in this appeal. That before going to the Court of Appeal, the matter originated as PPDT Case No. 146 of 2017; it went to the High Court as EPA No. 76 of 2017 and finally in the Court of Appeal as Civil Appeal No. 171 of 2017.

16. She submitted that Jubilee party was a party to all the three stages of the proceedings. That the appellant as a member of Jubilee Party was well represented by the Jubilee Party (2<sup>nd</sup> respondent) by virtue of Section 7 of the Civil Procedure Act.

Section 7 of the Civil Procedure Act provides;

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

**Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

17. I have considered the grounds of appeal, the P.O, the grounds of opposition, the replying affidavit and the submissions by Counsel.

From what has been placed before me including the Judgment of the Court of Appeal, Civil Appeal No. 171 of 2017, it is clear that this matter is not new before the Courts.

18. The contest has been between the 2<sup>nd</sup> respondent and one Zablon Rashid Minyonga, both of South Migirango Jubilee Party and contesting for the party primaries for the seat of Member of Parliament for the said Constituency.

19. Justice Lesiit, vide her Judgment on 31<sup>st</sup> May, 2017 in E.P.A No. 76 of 2017 set aside the decision of the PPDT on a review application directing the 1<sup>st</sup> respondent to issue a nomination certificate to **Zablon Rashid Minyonga**. She directed the Jubilee Party to resolve the issue between the two contestants and announce the party's nominee within 48 hours.

20. Zablon Rashid Minyonga filed an appeal in the Court of Appeal against the Judgment by Lesiit J. and the appeal was heard on 19<sup>th</sup> June, 2017 and a Judgment dismissing the appeal was rendered on 21<sup>st</sup> June, 2017. In effect, the Court of Appeal confirmed the nomination of Vincent Amenya Marube (2<sup>nd</sup> respondent) by the Jubilee Party (1<sup>st</sup> respondent) for the seat of South Migirango.

21. It is curious to note that the appellant herein moved to the PPDT on 29<sup>th</sup> June, 2017 with her complaint in PPDT Complaint No. 328 of 2017. This was eight (8) days after the Court of Appeal rendered its Judgment.

22. What the appellant was asking the PPDT to do was to annul the nomination of the 2<sup>nd</sup> respondent alleging at the time of his nomination, he belonged to two political parties which is against the law. Section 14 (4) and (5) of the Political Parties Act is very clear on this.

23. The mere fact that there was no response filed by the respondents at the PPDT, did not mean the appellant would automatically get the Orders sought. She had a burden to prove the allegation. It was not enough for her to get copies of documents from a portal and present them to Court as evidence. Electronic evidence is only admissible if there is compliance with Section 106 B of the Evidence Act. There was no such compliance by the appellant, hence the findings by the PPDT at paragraph 17 – 19 of its Judgment.

24. After the dismissal of her complaint, the appellant is now before this Court seeking a reversal of the Judgment of the PPDT. In effect, what the appellant is asking this Court to do is to annul the nomination of the 2<sup>nd</sup> respondent by the Jubilee Party (1<sup>st</sup> respondent) which the Court of Appeal has confirmed.

25. The appellant was not a contestant for that seat. The contestant Zablon Rashid Minyonga was defeated in the Court of Appeal in Court of Appeal No. 171 of 2017. He now thinks that what he was unable to get through his appeal at the Court of Appeal he can get it from this Court by fronting the appellant as a new complainant.

26. The appellant cannot pretend to be more caring about the party interests than the party itself. The Jubilee Party has no issues with its nominated candidate. She was not contesting any seat. What then is her interest?

The appeal was filed on 21<sup>st</sup> July, 2017 when the Judgment appealed from was rendered on 4<sup>th</sup> July, 2017. The explanation by the Counsel, Mr. Otwal, on this is not convincing. The receipt shows it was paid for on 21<sup>st</sup> July, 2017 and that is the date it was filed. There was deliberate delay in spite of the strict timelines in these matters in order to punish the respondents herein.

27. I deliberately chose to deal with the issues raised herein to lay bare the games that the appellant was upto. I would otherwise have just dealt with the P.O and dismissed the appeal since the Court of Appeal had already sealed the fate of Zablon Rashid Minyonga.

28. The upshot is that the appeal lacks merit and is an abuse of the due process of law. It is hereby dismissed with costs.

Orders accordingly.

**Delivered, signed and dated this 26<sup>th</sup> day of July 2017 at NAIROBI**

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**HEDWIG I. ONG'UDI**

**HIGH COURT JUDGE**