



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELECTION NOMINATION APPEAL NO 35 OF 2017

SALMA FLORENCE BWOGI OCHIENG.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT PARTY.....RESPONDENT

(Being an Appeal from the Ruling of the Political Parties Dispute Tribunal in PPDT Case No. 417 of 2017 Delivered on 1st August 2017 at the Milimani Law Courts)

JUDGMENT

1. This is an Appeal from the Judgment and Decree of the Political Parties Dispute Tribunal, PPDT, (**M. O. Lwanga, Desma Nungo and Paul Ng’otho**), delivered on 1st August 2017 in PPDT Case No 417 of 2017.

2. In that judgment, the PPDT allowed the complaint by **Salma Florence Bwogi Ochieng**, the appellant, and ordered **Orange Democratic Movement Party (ODM)**, the respondent, to compile its Gender top up list for the City County of Nairobi, after it was found to have been improperly done. The respondent was also directed to file with IEBC its updated nomination list that addresses the accountability concerns raised by the claimant.

3. The appellant was not satisfied with this decision and lodged a Memorandum of Appeal to this Court dated, 22nd August 2017 and raised three grounds of appeal namely:-

1. The learned Tribunal erred in fact and law by making of a blanket and ambiguous order despite the fact that the appellant herein had sought specific orders that her name be restored in position (9) in the final list of ODM Party Nairobi County Assembly Gender top up party list to be submitted to IEBC for Gazzettment.

2. The learned Tribunal erred in law and fact by failing to make remedial orders prayed by the Appellant even after finding that the appellant’s name was un procedurally and illegally removed from the final Nomination list of ODM Party Nairobi County Assembly Gender top up Party list to be submitted to the IEBC for Gazettement.

3. The learned Tribunal erred in law and fact by failing to consider or take into account the evidence raised at the trial Court and the pleadings thereof thus coming to an ambiguous judgment.

4. From those grounds, the appellant beseeched this Court to allow the appeal and order the respondent to restore her name at No (9) in the final gender top up Party list for Nairobi County Assembly to be submitted to IEBC by the respondent for purposes gazetting.

5. On being served with the appeal, the respondent filed a cross appeal through a Memorandum of Appeal dated 23rd August 2017 and filed in Court the following, day 24th August 2017. On its part, the respondent raised five(5) grounds of appeal to the effect that;-

1. The learned members of the tribunal erred in fact and in law in finding that the applicant's name was removed from the cross appellant's party list of candidates for nomination to the Nairobi County Assembly.

2. The learned members of the tribunal erred in fact and in law in finding that the cross appellant did not exercise its discretion transparently.

3. The learned members of the Tribunal erred in fact and in law in making their findings in 1 and 2 above on the basis of hearsay.

4. The learned members of the tribunal erred in fact and law in failing to appreciate that the appellant had outlined the process and criteria used in coming up with the party list of candidates for nomination to the Nairobi County Assembly, and

5. That the learned members of the Tribunal erred in fact and law in finding that the respondent's party list for Nairobi County Assembly lacked merit.

6. The respondent, therefore, prayed that the entire Judgment of the tribunal delivered on 1st August 2017 and the Decree arising therefrom be set aside.

7. At the hearing of the appeal, **Mr Dome** appearing with **Miss Mwae** for the appellant, submitted that PPDT made a blanket and ambiguous judgment and order despite the fact that the appellant had sought a specific order to have her name restored as No 9 in the party's gender top up list of nominees to be sent to IEBC. Counsel referred to the complaint at page 16 of the record of appeal to show the specific prayer the appellant had sought before PPDT.

8. Learned counsel submitted that the reason why the appellant took her complaint before PPDT, was because two persons who had been included in the party top up list forwarded to IEBC were not qualified for nomination by the party because they were not life members of the party by 6th June 2017, the deadline set by the party for submissions of applications as per the party guidelines, (page 85 of the record of appeal).

9. According to learned counsel, Emilly Ondeje Oduor became a member of the party on 5th July 2017 while Apondi Jackline Achieng became a member on 8th June 2017 (pages 83 – 84 of the record). The appellant's counsel contended that the petitioner was replaced by **Oduor Emily Ondeje**, who appears at No 9 in the party top up list, while Jackline appears at No 15 (pages 69 and 70 of the record). Counsel submitted that Emily's name should be removed so the appellant can take up that place and her name placed at No. 9 instead of that of Emily.

10. Regarding the Cross Appeal, Counsel submitted that it has no merit and should be dismissed, contending that the party never followed its own guidelines. He prayed that the appeal be allowed and Cross Appeal be dismissed.

11. Mr Oduor, learned Counsel for the respondent, opposed the appeal submitting that he did not agree with the judgment of PPDT. Counsel submitted that the appellant's name was not removed from the respondent's party top up list. He submitted that although the appellant had applied for nomination, her application was considered but was not successful. According to Counsel, the reasons why the

applicant's name did not succeed were stated at paragraph 12 of the affidavit sworn by Olga Karani, sworn on 22nd July 2017 and filed before the PPDT (pages 76 – 79 of the record).

12. Learned counsel contended that the party has mandate to nominate persons it wishes, and referred to Section 34(b) of the Elections Act, 2011 and regulation 13A of the General Regulations, 2012, to the effect that names should be submitted in accordance with the Constitution and Party rules. According to Counsel, the Court or PPDT could only order the Party to come up with a new list but not to order that a particular person be included in the party list and in a particular place.

13. On the Cross Appeal, Counsel submitted that PPDT erred in concluding that the appellant's name was removed from the list when there was no evidence to support such a finding. Counsel further contended that PPDT was wrong in finding that the respondent did not exercise its discretion transparently. According to Counsel, under rule 20 of the Party Nomination Rules, NEC has absolute and exclusive discretion to nominate members to be in the party top up list.

14. Mr Oduor contended that the NEC of the respondent exercised its discretion hence its decision cannot be faulted. Counsel faulted PPDT for acting on hearsay arguing that there was no evidence to support the appellant's case that her name had been removed from the list. He urged that the appeal be dismissed, Cross Appeal allowed and the entire judgment and decree of PPDT set aside.

15. I have considered this appeal, submissions by Counsel for the parties, and perused the record. The appellant is a life member of the respondent (ODM party). She applied for nomination to the party's gender top up list for Nairobi City County. She says she was placed in that list but her name was later removed and replaced by that of Emily Oduor at number 9. According to the appellant, Emily Oduor was not a life member of the party by the deadline set for submitting application, on 6th June 2017 and did not, therefore, qualify to be placed in the party list.

16. The appellant filed a complaint before PPDT which succeeded and PPDT ordered the respondent to come up with a new list taking into account the respondent's concerns but the decision did not please the appellant hence this appeal. The appellant faults PPDT's decision because she had specifically sought that her name be restored in the list and in particular placed at number. 9 which PPDT did not grant.

17. In urging this appeal on behalf of the appellant, counsel submitted that the PPDT made a blanket and ambiguous order as opposed to the specific request the appellant had sought before it. On their part, the respondent also disagreed with the decision of PPDT and filed a cross appeal. They opposed the appeal, and more particularly, the appellant's prayer that her name be included at number 9 in the list, arguing that the appellant's name had not been in the list in the first place hence it could not be restored in the party list.

18. It was also contended that PPDT relied on hearsay and erroneously concluded that the party's NEC was not transparent in its decision. The respondent maintained that Emily and Jackline were party members and qualified to be in the party gender top up list. The respondent's counsel relied on the same grounds to urge the Cross appeal.

19. The appellant's claim before PPDT had sought the following reliefs;

1. *"The ODM Party List for Members of County Assembly be annulled*

2. *SALMA FLORENCE BWOGI OCHIENG, the claimant's name herein be restored back to position (9) in the ODM County Assembly list.*

3. *Costs*

20. After hearing the complaint, the PPDT made the following orders.

" a. the respondent do compile the gender top up list for Nairobi County in line with its

procedures and rules while incorporating the County process in an accountable manner and process.

b. that an updated nomination list that addresses the accountability concerns brought up by the claimant do issue to IEBC.

21. The appellant contended that the order by the PPDT is vague and ambiguous and, in effect, did not answer her desire hence she asked this Court to allow her appeal and direct the respondent to include her name in the nomination list and specifically at number 9 in place of Emily Oduor.

22. I have gone through the record of appeal and the judgment of PPDT. According to the appellant's claim before the PPDT, she had applied for nomination to the Nairobi City County Assembly. She later received a text message from a contact within the party whose cell phone contact she gave as **0720623676**, (an employee of the respondent), asking her to forward her particulars or personal details through a given email address which she did. The contact later informed her that she had been placed at number 9 on the party nomination list.

23. However, when IEBC published the list, the appellant's name was missing in that list. She therefore had reason to believe that her name had been arbitrarily removed and replaced with that of Emily. According to her affidavit in support of her claim before PPDT, the appellant deposed that she applied for nomination and paid kshs 35.000 including life membership fee, and that she is aware that after consideration of the applications, she was placed at position 9 in the list the respondent generated and presented to IEBC.

24. At paragraph 10 of her affidavit, the appellant deposed that the list published by IEBC had her name missing and, instead, the name of Emily Oduor appeared where her name was. She concluded that the list was unfairly drawn up and that the party's constitution and rules were not followed.

25. In support of this, the appellant's counsel submitted at the hearing of the appeal that the said Emily and Jackline were not life members of the party by close of time for submitting applications, that is 6th June 2017. Reliance was placed on the records obtained from the Registrar of Political Parties which showed that Jackline and Emily were registered in the party on 8th June 2017 and 5th July 2017 respectively. The PPDT rejected this argument and held that party membership status is a matter for the party and only the party could tell when one joined it as a member.

26. For my part, I have perused the record of PPDT and considered evidence on record as well as the response by the respondent. I have also examined the documents relied on by both sides in the tribunal. It is not in dispute that the appellant, Emily and Jackline are members of the respondent party. The only question is at what time each of them joined the party. The appellant says she has been a life member for long, which is not disputed, and that the other two joined the party after the deadline for submitting applications.

27. However, in answer to this, the respondent attached a payment receipt to show that Emily had been a member of the party long before the deadline set for receiving applications. When asked by the Court, counsel on both sides could not tell the date of that receipt, yet they had had that document (evidence) for long since it was part of the record before PPDT.

28. On the question of party membership, I agree with the finding of PPDT that only the political party can tell when one joined its ranks. Membership is not about when the office of the Registrar of Political Parties was notified of that membership. Had the parties shown that the receipt showing that Emily joined the respondent as a life member after 6th June 2017, perhaps the finding of this Court would have been different. However, in the absence of evidence to that the contrary, I am unable to agree with the appellant that Jackline and Emily joined the party on the 8th June 2017 and 5th July 2017 respectively as shown in the records of the Office of the Registrar of Political Parties.

29. Regarding the contention that the appellant's name was removed from the party list and replaced by that of Emily, I am not equally persuaded by this contention. First, in her statement of claim before PPDT, the appellant stated that her name was not in the list published by IEBC. In the affidavit, she deposed that she was informed by some contact that her name was at No. 9. She did not allude to any credible evidence that her name was there or that she had seen it in the list, except what she was told by employees of the respondent party.

30. There is no dispute though that the appellant applied for nomination and that her application was considered. The respondent did not tell what criteria was used to determine those who made it to the final list. Moreover the appellant appears to have applied for the gender top up position, but according to the affidavit of Olga Karani filed before PPDT, the appellant was considered for the youth docket, a position she had not applied for. No explanation was given and she does not appear to have been notified of this. No criteria that had been used in arriving at that final list was also disclosed. I agree with the finding by PPDT that there was no transparency in the process leading to the generation of the respondent's top up list.

31. In faulting the PPDT's decision, the appellant's counsel had argued that his client's name should have been at No. 9 and, therefore, wanted this Court to order that her name be placed at that number 9 in that list and that of Emily removed. However, I do not agree with the appellant's counsel on this. There was no evidence except what the appellant stated that she was at No. 9, on the list. She may have been on the list but she did not depose that she saw the list herself and that in fact her name was at No. 9. For that reason, it was difficult for the PPDT and it would be untenable for this Court to order that her name be restored to the list and at Number 9.

32. The work of the PPDT was to consider and determine if there were anomalies in coming up with the party list and make appropriate orders. Neither can this court fault the PPDT on that nor order that the appellant be placed on the list at Number 9 unless there was concrete evidence to that effect that was placed before PPDT and the PPDT overlooked that evidence.

33. The appellant argued that she had been a longstanding member of the party while those who found themselves in the list were late comers. In my view, that is why PPDT allowed the complaint and ordered that the respondent comes up with a new list and consider the appellant's concerns while coming up with the new list.

34. The respondent's counsel contention was that the respondent's NEC had discretion to decide who was to be on the party list in accordance with its Nomination rules. Rule 20 on nomination of the respondent's party list provides in general terms that NEC shall nominate and present a list of members to the Commission in accordance with Section 34 of the Election Act, and that qualifications and disqualifications prescribed for members of Parliament and County Assembly shall apply to the party list.

35. Section 34(4) of the Elections Act provides that a political party which nominates a candidate for election under Article 177(1) (b) and (c) of the Constitution shall also submit a party list to the Commission. Sub Section (6) states that the party list submitted to the Commission should be in accordance with the constitution or nomination rules of the political party concerned. That would mean the nomination should be done as required by the Constitution or party rules.

36. Even though the party nomination rules give the respondent's NEC mandate to decide who ends up in the party list, the rules don't say what process should be followed, and how that would lead to the nomination. In other words, the process used to pick members is opaque and no one can tell how people made it to the party list.

37. The party is accountable to its members who are entitled to know why and how the respondent ended up with the names on its party gender top up list. If the Constitution requires that elections be done in a free, fair and transparent manner, the respondent cannot hold its nominations in a non-accountable, opaque and non-transparent manner. That explains why the PPDT was of the view that the process was not accountable, and on that, I agree with the tribunal.

38. From what I have stated above and given the evidence on record, I do not find merit in this appeal. The PPDT having nullified party list and I see no reason to interfere with its decision.

39. Regarding the cross appeal, the respondent argued that PPDT relied on hearsay in finding in favour of the appellant. PPDT mainly nullified the list due to lack of transparency and accountability. The respondent has not shown that PPDT was fell into error on this to warrant this Court's interfering with the Tribunal's decision.

40. In the end I find that both the appeal and cross appeal have no merit and are hereby dismissed. I order that each party do bear their costs in the appeal and cross appeal

Dated Signed and Delivered at Nairobi this 30th Day of August 2017

E C MWITA

JUDGE