



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO. 4 OF 2017

ERIC KYALO MUTUA.....APPELLANT/APPLICANT

VERSUS

WIPER DEMOCRATIC MOVEMENT, KENYA.....1ST RESPONDENT

GIDEON MUTEKI MUYUNGI.....2ND RESPONDENT

(Being an appeal from the judgment of the Political Parties Disputes Tribunal dated 6 May 2017 in Complaint No 43 of 2017)

JUDGMENT

Introduction

1. The Appellant filed the appeal herein on 7 May 2017. He sought relief on an urgent basis. A brief case management session on 8 May 2017 resulted in the parties agreeing to hear the appeal and skirt the intermediary application. The appeal was admitted and then slated for hearing on 9 May 2017.
2. On the hearing date, however, the 2nd Respondent filed a cross appeal besides various affidavits.
3. With the typed proceedings of the cause before the Political Parties Dispute Tribunal ('PPDT') availed alongside the original file of records, both the appeal and cross appeal were heard on 8 May 2017.
4. After hearing argument and considering the matter, I issued the following orders *ex tempore* and in disposal of the appeal:

a) The appeal is hereby allowed.

b) The decision of the Political Parties Disputes Tribunal rendered on 6 May 2017 and contained in a judgment of the same date is hereby set aside in so far as it directed that the 1st Respondent ensures that the interests of the Appellant and all the members in the 19 polling stations alluded to by the 1st Respondent be taken care of in the party nominations exercise in a transparent and democratic process and in its stead substituted with an order that the 1st Respondent do conduct free, fair, transparent and democratic repeat nominations for candidate for the position of Member of the National Assembly for Mwingi Central Constituency in all the 48 polling stations within the Constituency.

c) Such repeat nomination exercise to be conducted within the next 72 hours.

d) The cross-appeal is dismissed.

e) Each party shall bear its own costs of both the appeal and of the cross- appeal.

5. I then reserved the reasons. What follows are reasons for allowing the appeal and for the dismissal of the cross-appeal.

Litigation history

6. The Appellant and the 2nd Respondent are both members of the 1st Respondent, a political party duly registered in accordance with the laws of Kenya. The Appellant and the 2nd Respondent were nomination candidates for the position of a member of National Assembly for Mwingi Central Constituency under the 1st Respondent's ticket. Together with a third aspirant, Musikali Mutemi, the Appellant and the 2nd Respondent contested in the nomination exercise conducted by the 1st Respondent on 24 April 2017. On 25 April 2017, the returning officer declared the 2nd Respondent the winner of the contest.

7. The Appellant was unhappy with a number of issues or irregularities relating to the nomination process and exercise that occurred on 24/25 April 2017. He sought relief through the 1st Respondent's internal dispute resolution mechanism. When the Appellant failed to obtain relief from the 1st Respondent he declared a dispute with both Respondents and lodged a complaint with the Political Parties Disputes Tribunal ('PPDT') on 1 May 2017. He sought certain relief from the PPDT. The relief was sought pursuant to Section 40 of the Political Parties Act, No. 11 of 2011 ('the Act'). Before the PPDT, the Appellant met with partial success prompting him to file the instant appeal under Section 41(2) of the Act.

8. On the morning of the hearing, the 2nd Respondent also filed a cross-appeal. It contested the jurisdiction of the PPDT in the first place.

Factual setting

9. The factual background of this matter is well documented in two rulings rendered by the PPDT. For better context, I will repeat partially the facts as may be necessary.

10. I must first note that a fresh set of facts also emerged at the hearing of the appeal. The Appellant was stated to have resigned from the membership of the 1st Respondent. Copies of a resignation letter as well as a letter from the Registrar of Political Parties ("the Registrar") were availed through affidavit evidence. The Appellant contemptuously dismissed the allegation, adding that his removal from membership had been engineered by the 1st Respondent.

11. Before the PPDT however the following facts had emerged.

12. The Appellant having paid to contest for nomination as the 1st Respondent's candidate for the seat of member of the National Assembly for Mwingi Central Constituency in the general elections scheduled for 8 August 2017 duly participated in the nomination process. The 1st Respondent agent, a returning officer, for the nomination exercise at the end of the exercise declared the 2nd Respondent the winner. The Respondents accepted the declaration. The Appellant did not. He challenged the decision by lodging an appeal with the 1st Respondents National Appeals Tribunal ("the NAT") and the PPDT respectively on 26 April 2017 and 2 May 2017.

13. In both his appeal before the NAT and the complaint before the PPDT, the Appellant complained that the nomination exercise had not been free, fair, transparent or democratic. The Appellant complained of an irregularly appointed Returning Officer, Deputy and Presiding Officers. The Appellant cried foul over

missing voting materials, especially ballot papers. The Appellant lamented over skewed ballot papers lacking serial numbers and with contestants names not alphabetically listed. The Appellant also detailed polling stations where no voting took place and where ballot boxes were stuffed.

14. Additionally, the Appellant particularized the violence, intimidation threats and transportation as some of the irregularities which marred the exercise. Finally, the Appellant complained of double voting, pre-marked ballot papers, involvement of the 2nd Respondent in the process, non-use of the party membership list or register in the nomination exercise and the illegal transportation of voters.

15. The Respondents gave their respective versions and after hearing the parties (on 27 April 2017 before the NAT and on 6 May 2017 before the PPDT), the NAT, according to the Appellant dismissed his appeal while the PPDT agreed with the Appellant and allowed his complaint by setting aside the nomination certificate which had been issued to the 2nd Respondent. The PPDT then ordered the 1st Respondent to ensure that the interest of the complainant and all the members in 19 polling stations be taken care of in the party nomination exercise in a transparent and democratic process.

16. Prior to the PPDT's judgment on 6 May 2017, the PPDT had in a crisp ruling rendered on 4 May 2017 overruled a preliminary objection as to its (PPDT's) jurisdiction. The objection had been raised by the 1st Respondent on the basis that the NAT was still seized with the matter.

The Appeal

17. The appeal before this court challenged only one aspect of the PPDT's decision. The Appellant was satisfied with the PPDT's decision to set aside the nomination certificate issued to the 2nd Respondent by the 1st Respondent. The Appellant was also satisfied with the PPDT's decision on costs. The Appellant however was not happy with the way the PPDT disposed of the complaint. The Appellant was particularly critical of one order. The Appellant aggrieved with the disposal of the PPDT which read as follows:

“That the 1st Respondent ensures that the interest of the complainant and all the members of the 19 polling stations alluded to by the 1st Respondent be taken care of in the party nomination exercise in a transparent and democratic process”.

Arguments in court

The Appellant submits

18. The Appellant's case was urged by Mr. N. Kitonga SC.

19. Foremost, Senior Counsel pointed out that the impugned order was incapable of any enforcement as it was vague and ambiguous. Counsel pointed out that the order had also not been sought by the Appellant before the PPDT and the PPDT in issuing the order acted in excess of its powers. Then referring to the case of **Galaxy Points Co. Ltd –v- Falcon Guards Ltd [2000] 2 EA 385**, Senior counsel submitted that as parties must be bound by their pleadings, the court too is bound. The rationale, submitted counsel, is to ensure that a party is aware of the case it is facing and this extends the principle of fair hearing.

20. Mr. Kitonga then pointed out that there was adequate evidence before the PPDT which showed that the nomination exercise was flawed beyond repair. He said that it had been conducted without adherence to the party's constitution and the Elections Act. He submitted that the process was also riddled with massive irregularities from the get go when the party register required by Section 31(2D) of the Elections Act was not availed.

21. Mr. Kitonga then urged that there was adequate evidence that the 1st Respondent could not conduct party nominations and thus it was only appropriate if the only disposal order upheld was the one that set aside the 2nd Respondent's nomination certificate and no more.

22. The Appellant's Counsel then attacked the cross-appeal by the 2nd Respondent as an abuse of the process. According to the Appellant the cross-appeal could not lie as it did not originate from the judgment of the PPDT but rather from an earlier ruling which was never challenged by the Respondents. Additionally, Mr. Kitonga relayed to the court the fact that the Respondent had through a Judicial Review Application No. 217 of 2017 challenged the ruling it now purported to lay a cross- appeal on.

23. On the issue of the Appellant's resignation from the 1st Respondent, Counsel insisted that the letters allegedly showing the Appellant as having resigned were forgeries which could not be relied upon. Counsel pointed out the forgery indicators as lack of letter head, dissimilar signatures and misspelling of the Appellant's name. Counsel also drew courts attention to s.14 of the Political Parties Act 2014 where it is clear that notification to the Registrar must originate from the political party and not the individual member.

1st Respondent Replies

24. Mr. G.M. Sore appeared for the 1st Respondent.

25. According to Mr. Sore there was absolutely nothing wrong with the order impugned by the Appellant and all that the court always needed was to ensure that it invoked the overriding objective to attain justice and that is what obtained in the instant case. Counsel submitted that if the order was not clear the proper avenue was to seek a review or an interpretation of the same. It was not for the court to interpret the PPDT's orders.

26. Counsel defended the PPDT's decision insisting that the nomination process in question was largely free and fair and that the PPDT had identified only 19 polling stations where there were problems.

27. Mr. Sore then proceeded to submit that the PPDT had no jurisdiction in the first place to entertain the Appellant's complaint as it was already before the 1st Respondents internal dispute resolution mechanism process. Counsel however submitted that they had already moved the court through judicial review to quash the determination by the PPDT that it had jurisdiction.

28. For completeness, Mr. Sore urged the court to dismiss the appeal as the Appellant was no longer a member of the 1st Respondent, and the appeal was now purely an academic exercise.

The 2nd Respondent also replies

29. Mr. Eric Masese urged the 2nd Respondent's case.

30. Counsel stated that the PPDT had no power to hear the Appellant's complaint before it as the Appellant had lodged an appeal before the 1st Respondents National Appeals Tribunal (NAT). This, according to Mr. Masese , robbed the PPDT of jurisdiction and as the matter before the NAT was still pending the proceedings before the PPDT were a nullity from the get go. In this regard counsel referred the court to the case of **Francis Mutuku v Wiper Democratic Movement & 2 Others [2015]eKLR** and s. 40(2) of the Political Parties Act. It was counsel's submissions that the appeal before the NAT was yet to be settled.

31. Counsel also submitted that the Appeal had simply been overtaken by events as the Political Parties Registrar had confirmed that the Appellant was no longer a member of the 1st Respondent. Counsel urged me to make an unfavourable inference from the Appellant's failure to summon the registrar of political parties to clarify the latest position on the Appellant's membership.

32. On the merits of the appeal, Mr. Masese submitted that the appeal lacked merit as there was evidence that the nomination exercise was, by and large, free and fair. The minor irregularities which the PPDT had identified, according to counsel, did not affect the outcome.

The Appellant's rejoinder

33. Mr. Kitonga reiterated the appellant's position that he was still a member of the 1st Respondent and further that the process of nomination as conducted had been entirely shambolic.

34. Counsel then pointed out that the Appellant was not obliged to go back to the PPDT once the decision was made for an interpretation as the PPDT was then *functus officio*. According to counsel, the PPDT made a clear finding of irregularity and it had no alternative but to set aside the nomination certificate which it did. Counsel urged the court to ensure that the 1st Respondent was disciplined.

Determination

35. Having heard the parties and perused the documents on record, I was able to isolate four core issues as the appeal was argued.

36. Firstly, is whether or not the PPDT had jurisdiction to entertain the Appellant's complaint in the first instance? Secondly, which is a loop to the first issue, is whether this court may entertain both the Appeal as well as the cross-appeal. Thirdly, whether on the strength of the evidence before the PPDT, the PPDT could make the orders that it made and finally whether the orders as made were defective and of no effect. A corollary issue is what orders ought to be made by this court in the event that either the appeal or the cross-appeal is successful.

37. Before embarking on an analysis of the issues, I must first point out that this being a first appeal, this court is entitled to re-evaluate the facts or evidence *de novo* and come to its own independent findings and conclusions. Like the proceedings before the PPDT, reliance is to be placed affidavit evidence untested by any cross-examination.

The remit of the PPDT

38. The Respondents have both questioned the jurisdiction of the PPDT. They had done so before the PPDT as well and the PPDT found that it had jurisdiction both in fact and in law.

39. The Respondents transubstantiated their arguments to this court. It is once again the Respondents contention that the PPDT had no jurisdiction to accept and entertain the Appellant's complaint as the Appellant was already adjudicating an appeal before the 1st Respondent's NAT when it filed its complaint with the PPDT. According to the Respondents, the Appellant's appeal before the NAT is yet to be determined. The Appellant's curt response is that the PPDT had jurisdiction as the appeal before the NAT was finalized on or about 2 May 2017. Additionally, the Appellant contends that the mode of challenging the PPDT's jurisdiction before this court, through a cross-appeal is wanting.

40. My view, at the risk of repeating the tired phrase, is that jurisdiction is everything. Without it, a judicial tribunal or court cannot move an inch in the process of adjudication disputes: see **The Owners of the Motor Vessel "the Lillian SS" v Caltex Oil Kenya Ltd [1989] KLR 1**. Jurisdiction is obtained through legislation or the Constitution. Where a court or tribunal acts in the absence of jurisdiction, such action will be void and every proceeding which is founded on it is also bad and incurably bad: see **Mcfoy v United Africa Company Ltd [1961] 3 All ER 1169**.

41. *A fortiori*, the question of jurisdiction may be raised at any time and need not even be raised by way of a formal cross-appeal as no court of law should uphold an order when it is shown that the court below (or the tribunal for that matter) had no jurisdiction. The decision must be deemed erroneous as the proceedings were a nullity: see **Tajdin –v- H.H. The Aga Khan [1969] E A 613** where jurisdiction had been purportedly conferred by consent. The decision was set aside.

42. I find that this court is entitled to entertain the question of jurisdiction on appeal in the circumstances of this case whether raised informally or formally but with notice to the Appellant. The Appellant had notice of this issue, late as it was and opted, nay confirmed, that he was ready to argue the point.

43. It is not in controversy that the Appellant had lodged an appeal with the NAT pursuant to Rule 6.2 of the 1st Respondent's Elections and Nominations' Rules. What is in controversy is whether as at the time of filing the complaint with the PPDT, the appeal before the NAT had been determined. The Appellant says it had, the Respondents say it had not been determined. Ultimately, the PPDT found as a fact that the Appellant's efforts at proving his dispute through the NAT was suffering from inexplicable internal frustrations and that since the Appellant had taken all the necessary steps to resolve the dispute internally he could not be faulted especially in view of the stringent time lines involved in the process of electioneering.

44. There is no doubt that the Respondents had a tenable point when they stated that s. 40(2) of the Political Parties Act dictates that disputes between members of a political party or between a member of a political party and a political party must first go through the internal party mechanisms before the PPDT entertains the same. Indeed, this approach is given further weight by the provisions of Section 13(2A) of the Elections Act 2011 which stipulates as follows.

“2A. A political party shall hear and determine all intra party disputes arising from political party nominations within thirty days”

45. Clearly, political parties must endeavor under their respective constitutions and party nomination rules to hear disputes arising from party nominations first.

46. The two provisions, s. 40(2) of the Political Parties Act and s. 13 (2A) of the Elections Act, do however raise the effect of divesting the PPDT of its jurisdiction to hear disputes arising from party nominations where a party has not yet prompted the intra party dispute resolution mode.

47. The PPDT must not be heard to, and neither should it, say that the non filing of a dispute with the party's internal process, *simpliciter* prohibits a party from moving to the PPDT for relief. The PPDT has original jurisdiction and may actually entertain the dispute in appropriate circumstances. The statutory backing is founded under Section 40(1)(fa) which stipulates that the PPDT has jurisdiction to entertain and “determine disputes arising from party primaries”. And, Section 2 of the Political Parties Act defines a party primary as;

“the process through which a political party elects or selects its candidates for a forthcoming by-election”.

48. Evidently, in so much as the relatively less adversarial intra party dispute resolution is encouraged, the statute also expressly grants powers to the PPDT to directly handle disputes having their origins in party nominations. There is concurrent jurisdiction and a party may either land before the PPDT or the party's internal dispute resolution mechanism. It consequently, entails a balancing act between the two statutes and the PPDT must be in a position to invoke the doctrine of appropriateness long enshrined in the cases of **Sim v Robinow [1892]19 L R 665** and **The Spiliada [1987] AC 460**. See also the case of **Patrick Musimba v National Land Commission & 4 Others (No. 1) [2016]eKLR** where both **Sim v Robinow (supra)** and **The Spiliada (supra)** were cited with approval and followed.

49. Where appropriate consequently the PPDT should entertain the dispute or alternatively determine that the better forum would be the political party's internal dispute resolution mechanism and refer the dispute to the relevant party organ. The PPDT may however not decline jurisdiction or dismiss a complaint simply because a dispute is yet to be filed before the party's dispute resolution organ.

50. The instances may be various but to my mind, I can immediately identify a situation where time is evidently headed beyond a party's grasp. I may also cite a situation where the political party is evidently bent on frustrating a member. Likewise, there may be an instant where the dispute involves a non-member with a member but off a party primary process. The legislature must have had such instances in mind.

51. *In casu*, the PPDT had the necessary remit pursuant to Section 40(1) (fa) of the Political Parties Act

and correctly held that it was appropriate to have the dispute determined by it in view of the circumstances of the dispute.

52. I now move to the question of an imprecise order.

53. I have little doubt in my mind that a judicial order ought and must be a precise and unequivocal positive or negative command. The whole idea behind judgments and orders in ultimate disposal of a case is to help dispose of the conflict. An imprecise and apparently inconclusive order will not help either party or even the process of administration of justice. It is for little reason that in **Owino v Madowo [1987] KLR 450**, the Court of Appeal stated that;

“a judgment is the official and authentic decision of a Court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination, the final decision of the court resolving the dispute and determining the rights and obligations of the parties. It is the law’s last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceedings”.

54. It is essential that the disposal portion of the judgment is clear and must leave no doubt as to the way the conflict has been determined.

55. I have perused the impugned order also made in ultimate disposal of the complaint. It may not assist if read in isolation. It is imprecise. It is unclear as to what the PPDT wanted done in the 19 polling stations. It does not assist in enforcement of the judgment. It does not assist in determining finality. The parties were left in suspense. I would agree with the Appellant to this extent. A clearer order running the theme of the judgment would have placed the parties in better stead.

56. I however do not agree with the Appellant that the tribunal had no powers to make the order.

57. The dispute before the PPDT entailed a party primary. The process was impugned and a substantive order made setting aside a certificate which had been issued. The time set for the party primaries under the law had also lapsed. To give efficacy to the order, to give efficacy to the determination, the PPDT had the hermetically inherent jurisdiction to fashion appropriate orders. It did so but fell short of precision.

58. The Appellant’s extended argument was also that this court on appeal may also not correct the order or issue any other order. My brief answer to the Appellant on this is that Order 42 Rule 32 of the Civil Procedure Rules is relatively clear on the powers of an appellate court. It stipulates thus;

“The court which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such Respondents may not have filed any appeal or cross-appeal.”

59. This court may make, on appeal any order it deems efficacious for purposes of settling and definitely determining the issues in dispute.

60. Before I deal with the appropriate orders that ought to have been made by the PPDT in the circumstances of the case and which ought to be made on this appeal, I may wish to briefly address the issue of the Appellant’s alleged resignation from the 1st Respondent.

61. The Respondents stated that the Appellant has since resigned from the membership of the 1st Respondent with the consequent result that the appeal was spent and the court could now only engage in an academic exercise. The Appellant brushed off the allegations and insisted that he is still a member of the 1st Respondent.

62. If I was to find that the Appellant has truly resigned from the membership of the 1st Respondent, then I would hold that the succession of events since the appeal was filed has destroyed the live nature of the dispute and any further adjudication would be moot. There would be nothing to adjudicate save to speculate and decide what the future holds hypothetically.

63. I am however not prepared to determine the Appellant's status. He contests his alleged resignation and has apparently a genuine reason to do so when he states that his resignation has been stage managed.

64. Ideally, under s. 14 of the Political Parties Act the resignation details that the Registrar is expected to act upon must originate from the Political Party to the Registrar. The instant one did not do so.

65. Secondly, the nub of both appeal and cross- appeal was not the Appellant's resignation. It was whether or not the nomination process was free and fair. The resignation issue has been visited far too late in the day.

66. Thirdly, to determine whether the Appellant had resigned would be to rob the PPDT of its jurisdiction. It would also rob the Appellant of its undoubted right to challenge any factual findings on appeal, as all appeals to the Court of Appeal must be on issues of law only.

67. I am ready to extend the benefit of doubt to the Appellant when he insists that he has never resigned from the 1st Respondent party. I must hasten to add that this will not prohibit the 1st Respondent from seeking any damages by way of indemnity from the Appellant if it ultimately turns out the Appellant had indeed resigned voluntarily from the 1st Respondent.

68. I now come to what orders I ought to make on this appeal if any and why.

69. The original complaint challenged the nomination process undertaken by the 1st Respondent. Ultimately, the PPDT found that the circumstances warranted the nomination certificate issued to the 2nd Respondent being set aside and it did. The parties as I have indicated elsewhere in this judgment were then left in limbo. The Appellant believed there was no order for a repeat of the nominations. The Respondents thought otherwise.

70. I have closely perused the documentation availed before the PPDT. Complaints of irregularities appear to transgress the constituency in its entirety. In at least 40% of the constituency polling stations there was admittedly no voting. In areas where voting took place, violence was reported without contest. All the Respondents could state was to admit that there was violence but complain that the Appellant's agents caused it. In some polling stations voting commenced extremely late in the day.

71. Generally, there is affidavit evidence of some wrong doing or negligence or mistakes which was material to the outcome of the nominations. The PPDT identified in particular 19 stations but these are simply where voting did not take place. The PPDT failed to reflect on the effect of the irregularities on the other polling stations. The focus by the PPDT appears to have been more on the possible regular votes lost rather than even the irregular votes which the Appellant brought to focus especially at a polling station known as Musila Garden. Neither did the PPDT reflect on the issue of double voting at Kalisasi polling station.

72. My view is that it was not enough for the PPDT to simply limit everything to the 19 polling stations identified by the 1st Respondent as the stations where no voting took place. The PPDT needed to reflect on the effect and impact of the irregularities, some proven, in the other polling stations.

73. Before the PPDT, and transubstantially before this court, the Appellant in my view discharged the burden that the nomination process was not free and fair and in accordance with both the Constitution of the 1st Respondent as well as all relevant laws. The PPDT did not however apply the proper test which is whether there is substantial compliance with the law, the party's Constitution, nomination rules and election laws. There was clearly an apparent focus on the quantitative result (have as many number of

polling stations vote as possible) and an avoidance of the qualitative result (ensure that the entire process in all the polling stations is simple, transparent, free and fair). There ought always to be a mixture of both and not simply magical numbers.

74. The facts and circumstances called for the adoption of a common sense and robust approach: a repeat of the exercise in the entire constituency.

75. Let me also address an issue raised by the Respondents counsel as to the timelines set by the Independent Electoral and Boundaries Commission (IEBC) for the purposes of the August 8 general elections.

76. At the commencement of the hearing, the Respondent's counsel expressed worry about the set IEBC timelines. At the conclusion of the hearing counsel again sought the court's guidance on the same.

77. My brief view is that the IEBC timelines cannot bind the dispute resolution process being undertaken by independent organs established under the Constitution. The PPDT and this court may not be held hostage by the timelines set purely for administrative purposes so long as the dispute is still alive and before the two bodies constitutionally mandated to resolve political disputes. Only statutory time lines may direct this court whilst determining a matter. This court as well as the PPDT will not be swayed into declining a complaint or dispute simply because the parties are set to be caught up with time set by the IEBC which may itself fly in the face of statutory timelines. Disputes will be determined on their merits and all factors considered including the timelines and appropriate orders made as each individual case may be deserving of.

Conclusion and disposal

78. I find the PPDT had the requisite jurisdiction to entertain the complaint.

79. I find the impugned PPDT's order was imprecise. There is always need for clarity and where possible clear statements on timelines and when such time ought to start running where the time line is set in terms of hours and not days.

80. I also find that the PPDT ignored the qualitative aspect and effect of the irregularities.

Disposal

81. My orders in this appeal still remain as outlined in paragraph 4 above.

Costs

82. Accepting without deciding the matter of costs, that this court does have power to issue a costs order, I am of the view that the circumstances of this matter are such that no adverse order as to costs be made. Rather, each party ought to bear its own costs.

Dated, signed and delivered at Nairobi this 15th day of May, 2017.

J. L. ONGUTO

JUDGE