



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 7 OF 2017

HEZRON J. OPIYO ASUDI.....1ST APPELLANT

JOHN OKECH ONGERE.....2ND APPELLANT

VERSUS

PETER ANYANG NYONGO.....1ST RESPONDENT

ODM NATIONAL ELECTIONS BOARD.....2ND RESPONDENT

ODM NATIONAL APPEALS TRIBUNAL.....3RD RESPONDENT

ODM NATIONAL EXECUTIVE COMMITTEE.....4TH RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....5TH RESPONDENT

JUDGMENT

The Appellants, Hezron J. Opiyo Asudi and John Okech Ongere were aggrieved by the decision of the Political Parties Disputes Tribunal (PPDT) rendered in **Complaint No. 47 of 2017**. In the complaint, the Appellants sought to challenge the decision made by the 4th Respondent, ODM National Executive Committee to issue a direct nomination of the gubernatorial seat for Kisumu County to the 1st Respondent, Prof. Peter Anyang Nyongo. From the submission presented to this court by the Appellants, it was evident that the Appellants were dissatisfied with the manner in which the Orange Democratic Movement (ODM) Political Party conducted the gubernatorial nominations and thereafter used its failure to conduct proper and credible nominations, and the constraints of time, to justify its decision to issue a direct nomination to the 1st Respondent. The Appellants' appeal before PPDT was not, however, heard on its merits. This was because the Respondents raised preliminary objection to the entire appeal essentially on the grounds that the Appellants had not exhausted the ODM's Internal Dispute Resolution mechanism before lodging the complaint before the PPDT. At the relevant part of its Judgment, the PPDT held thus while interpreting its jurisdiction as provided under **Section 40** of the **Political Parties Act**:

“Clearly, while Sub-Section (1) outlines the delimitation of the Tribunal’s jurisdiction, Sub-Section (2) is emphatic that for that jurisdiction be invoked, the party internal dispute resolution mechanism MUST have first been invoked. Hence, while a matter may outrightly be before this tribunal under Sub-Section (1), the tribunal may decline to assume jurisdiction on the basis that the internal party dispute resolution mechanisms have not been invoked. The requirement for invocation of parties’ IDRM has its rationale. Article 4(2) of the Constitution declares in no uncertain words that Kenya shall be a multiparty democratic State founded on the national values and principles of governance referred to in Article 10. Hence there is need

for everyone, this Tribunal included, to promote and protect the multiparty system in our country. This is the rationale of Section 40 of the Political Parties Act; promoting political parties' internal democracy and autonomy. As a consequence this Tribunal has severally rendered itself on this issue and held that where the complainant approaches this Tribunal before exhaustion of internal party dispute resolution mechanisms, it will decline to assume jurisdiction”.

The PPDT upheld the preliminary objection raised by the Respondents. It dismissed the Appellants' complaint before it on the basis that it lacked jurisdiction to hear the matter in the absence of proof that the Appellants had first invoked the internal dispute resolution mechanisms of the ODM party. It is that decision that provoked the appeal.

In their memorandum of appeal, the Appellants raised six grounds of appeal challenging the decision of the PPDT. They were aggrieved that the Tribunal had failed to appreciate the meaning and import of the word “dispute” under **Section 40** of the **Political Parties Act** and the **Constitution** of Kenya. They faulted the Tribunal for failing to appreciate the fact that the Appellants, as members of a political party and as citizens of Kenya, were entitled to protect their political rights as enshrined under **Article 38** of the **Constitution**. The Appellants were aggrieved that the Tribunal failed to appreciate that it was required under **Article 159** of the **Constitution** to determine disputes on its merit rather than on technicalities.

The Appellants took issue with the fact that the Tribunal had failed to appreciate the glaring fact that the electoral malpractices committed by the 1st Respondent ought to attract appropriate sanction since the 1st Respondent had clearly failed to meet the standards set under **Chapter 6** of the **Constitution**. The Appellants were aggrieved that the Tribunal had ignored their plea that the 2nd and 5th Respondents had defied an order earlier issued by the Tribunal and therefore ought not to have been granted audience. Finally, the Appellants faulted the Tribunal for failing to take into consideration the fact that the ODM party had issued a direct nomination of the Kisumu gubernatorial seat without the input of other contestants contrary to fair administrative action practices. In the premises, the Appellants urged the court to allow the appeal, set aside the decision of the Tribunal and cancel the nomination certificate issued to the 1st Respondent and thereafter order fresh nominations to take place. The Appellants further urged the court to make an order barring the 1st Respondent from offering his candidature for the said gubernatorial seat.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Mwamu and Prof. Ojienda of the Appellants, Ms. Soweto and Mr. Obondi for the 1st Respondents and Mr. Oluoch for the 2nd, 3rd, 4th and 5th Respondents. From the submission made, it was clear to this court that the main issue in dispute is whether the PPDT properly interpreted its jurisdiction as provided under **Section 40** of the **Political Parties Act**. According to the Appellants, the Tribunal fell in error when it gave a restrictive interpretation of its jurisdiction instead of giving a purposive interpretation of its mandate. The Appellants argued that under **Section 40 (1)** of the **Act**, the Appellants were within their right to approach the Tribunal directly without reference to the ODM's internal dispute resolution mechanisms. The Appellants submitted that **Section 40 (1) (fa)** of the **Political Parties Act** was introduced on amendment by Parliament in 2016 so as to provide an avenue for those aggrieved by the conduct of party primaries to access the Tribunal directly without being subjected to the internal dispute resolution mechanisms of a political party. The thrust of the Appellants' submission was that the ODM party's internal dispute resolution mechanisms was biased and partisan in favour of the 1st Respondent, who is a national official of the party, and could not therefore, in the circumstances, be expected that it would render fair determination.

The Appellants further argued that in light of the malpractices and breaches of the law that was witnessed during the vitiated nominations, the reason given by the ODM party in giving the 1st Respondent a direct nomination was not tenable in the circumstances. The Appellants argued that the Tribunal should have overlooked any procedural technicalities and proceeded to address the complaints raised by the Appellants substantively. The Appellants invoked **Article 159** of the **Constitution** to support their contention that the Tribunal unduly and restrictively interpreted its jurisdiction that, in the end, resulted in the Appellants' complaint not being heard and resolved on its merits. Mr. Mwamu, Learned Counsel of

the Appellants cited several decided cases in support of the Appellants' assertion that the Tribunal ought not to have upheld the preliminary objection and dismissed the Appellants' appeal without considering the merits of their complaint.

In their responses, Ms. Soweto, Mr. Obondi and Mr. Oluoch for the Respondents made more or less the same argument in opposition to the appeal. They submitted that the Tribunal properly interpreted its jurisdiction where it upheld the preliminary objection raised by the Respondents. It was the Respondents' submission that the Tribunal correctly reached the determination that the Appellants ought first to have invoked the internal dispute resolution mechanisms of the ODM party before they filed their complaint before the Tribunal. In that regard, the respondents relied on **Section 40(2)** of the **Political Parties Act** in support of their assertion that the Appellants ought to have invoked the internal dispute resolution mechanisms of the party before lodging the complaint before the Tribunal.

The Respondents further argued that the allegation made by the Appellants to the effect that they were certain that they would not get a fair hearing if they made a complaint before the party's internal dispute resolution mechanism was not credible since the Appellants had not placed any evidence before the court that they had made effort or attempt to lodge a complaint before the ODM party's internal dispute resolution mechanisms and were either frustrated or thwarted in such attempt or effort. The Respondents urged the court to take into account the fact that the argument presented to the court on this appeal to the effect that the Appellants had direct access to the Tribunal by virtue of **Section 40 (1) (fa)** of the **Political Parties Act** was an issue that was not canvassed before the Tribunal. It was being raised for the first time on this appeal. The Respondents submitted that Appellants had, in their argument before the Tribunal, stated that they had indeed invoked the internal dispute resolution mechanisms of the party before filing the complaint before the Tribunal. The Respondents accused the Appellants of shifting positions and thus putting the Respondents in difficulty in respect to how they should respond to the Appellants' complaint on this appeal. The Respondents urged the court to uphold the decision of the Tribunal and dismiss the appeal with costs.

Section 40 of the **Political Parties Act** provides thus:

“(1) The Tribunal shall determine -

a. disputes between the members of a political party;

b. disputes between a member of a political party and a political party;

c. disputes between political parties;

d. disputes between an independent candidate and a political party;

e. disputes between coalition parties; and

f. appeals from decisions of the Registrar Under this Act;

(fa) disputes arising out of party primaries (2) Notwithstanding Sub-Section (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c), (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms”.

In the present appeal, it is the Appellants' contention, firstly that they had exhausted the internal dispute resolution mechanisms of the ODM party and secondly (*if the court were to find that they had not*) that they are entitled to direct access to the Tribunal in view of the subject matter of the dispute that they sought to canvass before the said Tribunal. In respect of the first limb of the argument advanced by the Appellants, upon perusal of the pleadings filed and the proceedings before the Tribunal, It was clear that the Appellants herein, being apprehensive that the ODM party may not conduct a free and fair nomination in respect of the Kisumu County gubernatorial seat, sought for the then appointed County elections board to be disbanded and in its place new officials, who were non-residents of Kisumu County,

be appointed to supervise the said elections. The National Elections Board of the ODM party did not oppose the complaint which was filed in **PPD Tribunal case No. 17 of 2017**. A consent was recorded in terms of the prayers sought by the Appellants herein. Paragraph 4 of the consent order is instructive. It was recorded as follows:

“THAT upon fulfillment of the above orders/conditions; the claim dated 11th April 2017 shall stand withdrawn with no orders as to costs.”

The consent was endorsed as the order of the Tribunal on 21st April, 2017. For all intents and purpose, it is therefore clear that the Appellants had no complaint pending determination before the tribunal. The Appellants claim that the terms settling the consent order were not complied with by the Respondents. They argued that the National Elections Board of the ODM party proceeded with the nominations without reconstituting the Kisumu County Elections Board as contained in the consent order. This court agrees with the Respondents that if indeed that was the case, the Appellants should have moved the Tribunal to punish the Respondent Election Board for being in contempt of the orders of the Tribunal.

It was not open for the Appellants to litigate the issue of disobedience of the consent order in another forum or in another complaint. In any event, this court is aware that contempt of court proceedings are quasi-criminal in nature and therefore the applicable standard of proof is higher than that applicable in ordinary civil cases. This court is unable to make any finding in regard to whether or not the ODM's National Election Board was in contempt of the orders of the Tribunal because the issue ought to have been raised in the complaint or proceedings that the order was recorded.

When the gubernatorial nominations were concluded, a candidate, Dr. Mcobewa was aggrieved and filed **Complaint No. 23 of 2017** before the ODM's internal dispute resolution tribunal. That Tribunal delivered its Judgment on 28th April, 2017. From the submission made, it is evident that no appeal was filed to the PPDT from the said decision. In their submission before the PPDT, it was apparent that the Appellants made presentations as if they were the ones appealing from that decision made in **Complaint No. 23 of 2017**. This court agrees with the decision of the PPDT to the effect that the Appellants were not parties to that complaint and therefore they lacked the requisite *locus standi* to mount an appeal against that decision to the PPDT. It is only the complainant in that case who had *locus* to lodge an appeal to the PPDT if he was aggrieved by the decision. This court's evaluation of the record clearly leads it to the irresistible conclusion that the Appellants did not lodge a complaint before the ODM's internal dispute resolution Board to entitle them to lodge a complaint or appeal to the PPDT.

As regard the further argument advanced by the Appellants that, notwithstanding the fact they may not have filed a complaint before the ODM's internal dispute resolution mechanisms, they ought to have been allowed to ventilate their complaint before PPDT pursuant to **Section 40(1) (fa)** of the **Political Parties Act**, this court takes the following view of the matter;

The Appellants invoked **Section 40 (1) (fa)** of the **Political Parties Act** for the first time during the hearing of the appeal before this court. The issue was not raised nor was it canvassed before the PPDT. An appellate court cannot entertain an issue that was not raised and canvassed before the court or Tribunal of first instance. An exception is provided under **order 42 Rule 27** of the **Civil Procedure Rules** where an application may be made before the appellate court for additional evidence to be provided. Such additional evidence or argument may not be allowed without the leave of the appellate court. In the present appeal, it was evident to this court that the Appellants raised the issue of direct access to the PPDT as new argument further to what they had presented before the PPDT.

This court's re-valuation of the facts presented before the PPDT leads to the conclusion that the Tribunal cannot be faulted for having upheld the preliminary objection raised by the Respondents to the complaint filed before it by the Appellants. It was clear that the Appellants complaint falls within the ambit of **Section 40 (2)** of the **Political Parties Act** that required the Appellants to ventilate their complaint first before the political party's internal dispute resolution mechanisms before approaching the PPDT. Other than making unproven allegation that they were apprehensive that the ODM's internal dispute resolution mechanism was biased and therefore will not likely be fair to them, the Appellants placed no evidence on

record to show that they made an attempt or attempts to have the dispute adjudicated by the party's internal dispute resolution mechanism and were frustrated or were thwarted. This court agrees with the PPDT that this court and the tribunal is placed under duty and obligation to promote multiparty politics by encouraging political parties and their members to first resolve their disputes internally through their own internal dispute resolution mechanisms before any aggrieved party lodges a complaint with either the PPDT or the court.

Enough said. It is clear from the foregoing that the appeal is for dismissal. It hereby dismissed. There shall be no orders as to costs as the dispute involves an element of public interest.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MAY 2017.

L. KIMARU

JUDGE