



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 16 OF 2017**

**SAMUEL OWINO WAKIAGA.....APPEALANT**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT PARTY....1<sup>ST</sup> RESPONDENT**

**CYPRIAN OTIENO AWITI .....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....INTERESTED PARTY**

*(Appeal from the judgment of the Political Parties Tribunal (Hon. Kyalo Mbobu James Atemi & Hassan Abdi Dei delivered on 7th day of May, 2017 in PPDRT Case No. 52 of 2017)*

**J U D G M E N T**

1. This appeal emanates from a judgment of the Political Parties Dispute Resolution Tribunal (hereinafter the PPDRT) delivered on 7<sup>th</sup> May, 2017, in which the Appellant's complaint dated 2<sup>nd</sup> May 2017 was dismissed. The grounds in the Memorandum of appeal are that the PPDRT erred in fact and law by:

(i) failing to find that by the 1<sup>st</sup> Respondent's organ, the National Executive Counsel (hereinafter NEC) purporting to donate its powers to another organ the central committee to directly nominate the 2<sup>nd</sup> Respondent as its candidate for governor of Homa Bay County, the 1<sup>st</sup> Respondent was acting in excess of its powers as provided in its own constitution.

(ii) purportedly acting on the decision of the Central Committee organ to issue a direct nomination on the basis of power purportedly donated to it by the NEC which did not have the power to make that decision.

(iii) directly nominating the 2<sup>nd</sup> Respondent as its candidate for Governor of Homa Bay County, and the 1<sup>st</sup> Respondent failing to give written notice to the Applicant who was an aspirant and who competed in the botched primaries or at all in direct breach of the express provisions of the Fair Administrative Action Act.

(iv) failing to find that the 1<sup>st</sup> Respondent did not invite the Appellant to attend any interview or at all, having competed in the botched primaries to determine his suitability and competence for the position of Governor.

(v) failing to find that the 1<sup>st</sup> Respondent did not invite public participation of the people of Homa Bay County as stakeholders in any form to help reach a decision on the candidate for governorship having reached the decision to nominate a candidate by a means other than universal adult suffrage in breach of the provisions of the fair administrative Action Act.

(vi) making a wrong conclusion.

(vii) failing to find that the 2<sup>nd</sup> Respondent's actions were unlawful, arbitrary, malicious, capricious, based on wrong interpretation of the law, unreasonable, discriminatory, actuated by bad faith, based on extraneous considerations against his legitimate and rightful expectation and a breach of the rules of natural justice.

2. Contemporaneously with the appeal the Appellant has filed a Notice of Motion under certificate of urgency dated 10<sup>th</sup> May, 2017 and prayed for orders that pending the hearing and determination of the this application, the court do grant a stay of execution of the orders given by the PPDRT on 7<sup>th</sup> May 2017 dismissing the Appellant's complaint; that the 1<sup>st</sup> Respondent be stopped from submitting the name of the 2<sup>nd</sup>

Respondent to the Interested Party as its candidate for Governor of Homa Bay County; that the 1<sup>st</sup> Respondent be compelled to nullify the certificate issued to the 2<sup>nd</sup> Respondent and be stopped by way of a permanent injunction from submitting the name of the 2<sup>nd</sup> Respondent to the Interested Party as its candidate.

3. Due to constraints of time, the court bypassed the application and allowed the parties to argue their appeal directly.

4. The backdrop to this appeal is that the 1<sup>st</sup> Respondent placed an advert on 22<sup>nd</sup> November, 2016 inviting interested aspirants of various positions to apply to contest for its tickets. The Appellant and others sought and were allowed to contest for the gubernatorial seat in the Party primaries on the 1<sup>st</sup> Respondent's ticket. On 24<sup>th</sup> April, 2017 primaries were held but were so flawed that a winner could not be determined as was held by the Internal Dispute Resolution mechanism (IDRM) which heard and determined the initial complaint. The Nomination certificate which had been issued was withdrawn.

5. Subsequently, the 2<sup>nd</sup> Respondent was given the certificate of nomination pursuant to **Article 7.5** of the Party's **Constitution** and **Rule 3.3** of their **Nomination and Election Rules** as a direct nominee. The Appellant complained to the PPDT which held that it could not interfere with a decision arrived at pursuant to the Party rules. It is against that decision of the PPDT that the Appellant has appealed to this court.

6. Counsels filed written submission which they highlighted at the hearing. Mr. Onyango learned counsel for the Appellant submitted that the 1<sup>st</sup> Respondent created a legitimate expectation for the participant that if he did things right as required by the Party he could emerge as the winner. He referred to the case of **Council of Civil Service Union and other v Minister for the Civil Service**, in which Lord Diplocks stated thus:

**“when legitimate expectation is created and then taken away abruptly without explanation the person to whom it was directed suffers injury.”**

He argued that the parties bungled the primaries herein and then purported to do a direct nomination and therefore, the Appellant has suffered loss, damage and injury. That although he was not guaranteed to win, the Appellant was denied the chance to stand before his electorate to say he fought a good fight.

7. Counsel contended that fair administrative action gives life to **Article 47** of the **Constitution of Kenya** and **Section 4(3)** of the **Fair Administrative Act** and where an administrative act is likely to affect a person the Administrator shall give the affected person notice and an opportunity to be heard. Counsel urged that the Appellant's right to run for office is grounded in **Article 38** of the **Constitution** but he also has a right to fair administrative action under **Article 47** of the **Constitution**.

8. Counsel argued first, that when the Party decided that it would determine its candidate not by universal suffrage but by direct nomination it became an administrative action and should have been subjected to fair procedure. That the Appellant only learnt of the decision in the media and was not given a chance to state why he thought he was the better person to fly the Party's flag. He submitted that the Respondent failed to devise a fair method to invite public participation by any other means if not by a adult suffrage, and its decision was arbitrary and unfair.

9. Counsel contended further that the decision was made by the Central Committee which purportedly acted on power donated to it by the NEC at a meeting held on 22<sup>nd</sup> February 2017. It was his argument that a written approval either by letter or memo was necessary to donate the powers and not by way of minutes. Secondly, he stated that the NEC is the supreme organ of the 1<sup>st</sup> Respondent and nowhere in its Constitution is it stated that it can donate power to the Central Committee or any other organ. For those reasons, counsel opined that the decision was of no consequence and is therefore null and void, and ought to be quashed.

10. Prof. Ojienda learned counsel, for the 2<sup>nd</sup> Respondent submitted that in its decision, the PPDT found from the 1<sup>st</sup> Respondent's Constitution that NEC donated its powers to the Central Committee properly. That Article 7.5 of the Party's Constitution allows the NEC to set up committees that it deems necessary from time to time, to give them terms of reference, and to also approve and implement reports and recommendations. That the NEC acted within its powers and the PPDT was correct to affirm the decision of the NEC to nominate the 2<sup>nd</sup> Respondent as the gubernatorial candidate for ODM, Homa Bay, and if the court finds that the NEC had power to delegate, on that ground alone this appeal should fail.

11. Counsel pointed out that in the elections the first candidate garnered 157,000 votes while Mr. Magwanga who came closest to him had 93,000 votes, yet the last candidate who garnered 2000 votes only is the one who has come to court. He urged that the court to strike out the appeal which in his view is incompetent since it omitted the prayers which are a mandatory part of the pleadings and the court cannot act in vacuo.

12. On the argument that the court should strike out the decision of the PPDT because the parties failed to hold interviews to identify its candidate, Counsel contended that the party complied with the Party's Constitution and Election and Nomination Rules. He referred to several decisions which have held that the court will not delve into the affairs of parties. Counsel asserted that none of the findings of the PPDT have been challenged in this appeal but instead the Appellant has raised extraneous issues which were not raised before the PPDT, and the court has not been told which provision of the 1<sup>st</sup> Respondent's Constitution has been violated.

13. Counsel submitted that the court cannot police the affairs of the party committees but its concern is only with the constitutionality of the process. The court should only intervene where a party has demonstrated violation of their constitutional right, and Article 38 must be interpreted as a double edged sword targeting both persons and the political party.

14. Mr. Oluoch learned counsel for the 1<sup>st</sup> Respondent agreed with the submissions of Prof Ojienda on the competence of the appeal. He

submitted that there is no appeal herein but only a rendition of a litany of events that took place in Homa Bay. He pointed out that the court sits under the jurisdiction of **Section 40 Political Parties Act** which presupposes that the jurisdiction below was properly invoked and that parties were properly before the PPDT.

15. Mr. Oluoch argued that what should be properly before this court is what was placed before the IDRМ from which the dissatisfied party moved to the PPDT and from there to the High Court. This he said, was reiterated in the decision of **Civil Appeal No. 7 of 2017 Hezron Opiyo v Prof. Peter Anyang Nyongo**. The Appellant herein who was dissatisfied with the results of the gubernatorial nomination of Homa bay went to the NAT and on 29<sup>th</sup> April, 2017. The NAT agreed with him and recalled the nomination certificate. According to Counsel, that was the end of that story.

16. Thereafter the Party invoked its powers under section 3.3. of its Nomination and Elections Rules to issue a direct nomination. The said power is anchored under Article 7.5(3) of the Party's Constitution which among other things allows them to delegate powers to other organs of the party such as the Central Committee. The Central Committee is established under Article 7.5.

17. Counsel submitted further that Section 17 recognizes the powers of parties to give direct nominations and that the court therefore cannot be invited to decide how the party is supposed to communicate. In this case the minutes of the Central Committee authorized the said Committee to act and on 29<sup>th</sup> April 2017 the Central Committee sat in exercise of that mandate and made a decision. Their minutes are referred to in judgment of the PPDT.

18. Counsel argued that the issue of the nominations being flawed was addressed by the NAT and the certificate was cancelled. That the Appellant should have started afresh at the IDRМ on the issue of direct nomination and escalated to the PPDT and thereafter to the High Court. He urged the court to strike out the appeal with costs since the parties did not exhaust the IDRМ.

19. Mr. Makori learned counsel together with Mr. Oluoch appearing for the 1<sup>st</sup> Respondent stated that the bundle submitted to the court was not complete, but the affidavit therein contains the crux of the issues raised at PPDT. That the second finding in the judgment of the NAT annexed to the supplementary affidavit dated 14<sup>th</sup> May 2017 shows that the NAT mandated the Party to identify a nominee in accordance with the party rules. That the Appellant wishes to sequester the party from presenting a candidate who garnered the most votes and whom the party has nominated pursuant to its rules. He urged the court to dismiss the appeal.

20. From the grounds of appeal and the submissions of the parties the issues that arise for determination are whether;

(i) the appeal is properly before this court in view of the fact that there no prayers pleaded.

(ii) The IDRМ was exhausted to entitle the court to intervene in this dispute.

21. The absence of prayers in the appeal although not excusable may be overlooked by the court in light of **Article 159(d)** of the **Constitution of Kenya**. The court is cognizance of the pressures that litigants in the cases being laid before the court emanating from disputes involving party primaries are working under. In these appeals there are several reliefs open to the court to provide and sitting as the court of justice, the court will be able to gauge the relief that most commends itself to the circumstances of a given case and provide it, in a case such as this where there was an omission to state the prayers.

22. On whether the IDRМ was exhausted I note that the Appellant being aggrieved by the 1<sup>st</sup> Respondent's decision challenged the said decision through the 1<sup>st</sup> Respondent's IDRМ, the NAT which delivered its judgment and ordered that:

**“the provisional certificate issued to Hon. Cyprian Awiti as the Homa Bay Gubernatorial Candidate be and is hereby withdrawn.**

**the party does proceed to determine a party nominee for ODM Homa Bay Gubernatorial elections in a manner compatible with the party Constitution, nomination and elections (sic)”**

Pursuant to the judgment of the NAT the 1<sup>st</sup> Respondent declared the 2<sup>nd</sup> Respondent the winner relying on the resolution of a meeting of its organ, the Central Committee which met on 29<sup>th</sup> April, 2017.

23. It is my considered view that from that moment on the first process of nomination ended and the second process of identifying a nominee begun pursuant to the orders of the NAT. The Central Committee which deliberated and identified a nominee is created under Article 7.5.3(f) of the 1<sup>st</sup> Respondent's Constitution and does have powers under Article 7.5 A.2 of its Constitution where its functions are outlined. It is not the duty of the court to macro-manage parties and direct them on such mundane matters such as how to communicate with its organs.

24. **Section 40(2)** of the Political Parties Act on the other hand provides in my view not merely in directory but in mandatory terms *inter alia* that,

**“notwithstanding subsection (1) the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanism.”**

It was therefore necessary to subject the new decision to the IDRМ before it was escalated to the PPDT and the High Court.

25. On the political doctrine question raised by Prof. Ojienda, the rationale for requiring that political disputes are heard within the

mechanism established under the provisions of the Political Parties Act, was addressed by Majanja J in the case of **Francis Gitau Parsimei vs National Alliance Party and Another Nairobi Petition No. 356 of 2012 [2012] eKLR**, as follows:

**“[4] At the core is whether this court should intervene to stop the electoral process so that a party who claims that his or her rights have been infringed can agitate his rights before the court. To determine this issue, the Constitution must be read as a whole. On the one hand there is the Bill of Rights which protects, inter alia, the political rights of the petitioners. These rights are enforceable under the provisions of Article 22. Article 22 offers the petitioners direct access to the High Court to enforce fundamental rights and freedoms. There is also Article 258 which entitles any person to move the court where the Constitution is contravened or is threatened with contravention. The petitioners have exercised the option to invoke these provisions to move the court.**

**[5] On the other hand, it must be clear that political rights are exercised through a political process involving many actors; the citizens and institutions. This is the process provided for under the provisions of Chapter Seven of the Constitution titled, “Representation of the people”. These provisions are operationalized by the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 and the Political Parties Act, 2011. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions.”**

26. Majanja J also clarified when parties may approach the PPDT for dispute resolutions in the case of **George Okode & Others vs orange Democratic Movement & Others Petition No. 294 of 2011**, thus:

**“To my mind, the provisions of Section 40(2) of the Political parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners’ grievance and the parties involved.”**

27. In the case of **Francis Mutuku vs Wiper Democratic Movement - Kenya & Others [2015] eKLR**, Mumbi Ngugi J held thus:

**“The law is clear with regard to circumstances such as are now before me, and courts have expressed themselves quite succinctly on this point; where there are specialised procedures provided by law or the Constitution for the resolution of disputes they should be followed. See in this regard the case of *Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Other (2008)3 KLR (EP)*; *Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP)*; *Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP) 425* and *Alphonse Mwangemi Munga & 10 Others vs African Safari Club Ltd Petition No. 564 of 2004. ....***

**The circumstances of this case dictate that this Court, despite its wide jurisdiction under the Constitution, does not assume such jurisdiction. The dispute is clearly a dispute that falls within the mandate of the institutions in which the Political Parties Act vests jurisdiction. It involves a member of a political party and his political party. That party has an internal dispute resolution mechanism. The law requires that the said mechanism be exhausted; that a party dissatisfied with the outcome of the internal party dispute resolution process takes his grievance to the Political Parties Tribunal, and if unhappy with the outcome, has a right to appeal to the High Court. It would be to undermine and defeat the mechanism and institutions provided by law, which are underpinned by the Constitution, to hold otherwise.”**

28. I have re-evaluated the arguments of both parties presented in the PPDT bearing in mind that the parties are entitled to demand of me as the court of first appeal a decision on both questions of fact and of law. I have therefore weighed the conflicting arguments to draw my own conclusions.

29. I note that the PPDT considered the question of the legality of the direct nomination by the Central Committee and found that pursuant to Rules 3.3 and 18.1 of the Elections and Nomination Rules, the party may proceed to nominate a candidate by either automatic nomination or by conducting primaries by way of universal suffrage.

30. The PPDT noted that initially, in this case, the Party had opted to conduct primaries by way of universal suffrage. When the results of this exercise were nullified by NAT it made an order in which it directed the Party to proceed in a manner compatible with the Party Constitution, and Nomination and Election Rules. The PPDT found that by being asked to identify its candidate, the party was given the opportunity to decide its mode afresh after the nullification of the primaries held on the 24<sup>th</sup> April, 2017. The PPDT made the following findings:

**“It is our finding that in granting direct nomination, the party acted in compliance with the NAT decision, the party constitution, and Elections and Nomination Rules.”**

31. Having considered the grounds of the appeal and the rival arguments of counsels on record, I am in agreement with the findings of the PPDT, which in any case have not been challenged in the grounds of the Appellant. I also find that the appeal is prematurely before this court, the dispute having not been subjected to the IDRDM.

For the foregoing reasons the Appeal fails. Each party to bear its own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 16<sup>th</sup> DAY OF May, 2017.**

.....

**L. A. ACHODE**

**JUDGE**

In the presence of .....for the Appellant

In the presence of .....for the 1<sup>st</sup> Respondent

In the presence of .....for the 2<sup>nd</sup> Respondent