



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA, AT NAIROBI
ELECTION PETITION APPEAL NO. 94 OF 2017

IBRAHIM ABDI ALIAPPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT 1ST RESPONDENT

ABDIRIZAK ISMAIL SHEIKCH2ND RESPONDENT

INDEPENDENT ELECTROAL &

BOUNDARIES COMMISSION3RD RESPONDENT

(Being an Appeal against the Judgment of the Political Parties Dispute Tribunal, (Kyalo Mbobu, James Atema & Hassan Abdi, Tribunal Members) dated 28th April, 2017

in

Complaint No. 258 of 2017)

JUDGMENT

1. The ruling that is being challenged by the Appellant was delivered on 6th June, 2017 by the Political Parties Disputes Tribunal (PPDT). The Tribunal allowed an application to have the 2nd Respondent enjoined as a party to the proceedings after it had rendered its Judgment. It also directed that 1st Respondent to initiate a fresh process of determining its nominee for the position of Member of County Assembly for Galbet Ward, Garissa Township Constituency Garissa County and forward the same to the Independent Electoral Boundaries Commission (IEBC) within 72 hours of the Ruling.

It also revoked the Nomination Certificates issued to both the Appellant and 2nd Respondent.

2. A brief background to what led to all this will suffice. On 3rd April 2017, the 1st Respondent issued a direct nomination certificate to the 2nd Respondent for the Galbet Ward. The Appellant then filed a complaint at the Party’s National Appeal’s Tribunal (NAT). The NAT allowed the appeal on 25th April, 2017 and directed the Party’s National Elections Board to conduct primaries of the Galbert Ward.

The 1st Respondent on 29th April, 2017 issued a direct Nomination Certificate to the Appellant, and the same was never challenged.

3. On 15th May, 2017 the Appellant filed a claim at the PPDT vide complaint No. 258 of 2017 seeking an order to compel the 1st Respondent to forward his name to IEBC. In the complaint, he had only sued the 1st Respondent, who never entered appearance nor filed any responses. The PPDT entered Judgment in his favour after hearing him. Thereafter, the 2nd Respondent filed an application for joinder as a party and setting aside of the Tribunal Judgment. The said application was heard and a Ruling delivered on 6th June 2017 which is the subject of this appeal.

4. The Appellant listed the following as his grounds of appeal;

1. The learned Members of the Honourable Tribunal erred in law and fact in hearing and determining an Application for joinder by the 2nd Respondent, who was not a party to the proceedings.

2. The learned Members of the Honourable Tribunal erred in law and fact in entertaining an Application by a person who was not a party to the suit despite having given a Judgment on the matter.

3. The learned Members of the Honourable Tribunal misapprehended and misapplied the law in allowing an Application for joinder in a suit which it had already heard and determined.

4. The learned Members of the Honourable Tribunal misapplied the law and facts in placing reliance on documents whose credibility and authenticity could not be verified.

5. The learned Members of the Honourable Tribunal misapplied and misapprehended the laws and facts in entertaining a matter it was functus officio and by a person who was not a party to the proceedings.

6. The learned Members of the Honourable Tribunal misdirected themselves in hearing and determining a matter it did not have jurisdiction over and in light of the fact that the Appellant had already been cleared by the Independent Electoral and Boundaries Commission and that the 2nd Respondent had not challenged the issuance of the Nomination Certificate to the Appellant either at the National Appeals Tribunal or the Political Parties Dispute Tribunal.

7. The learned Members of the Honourable Tribunal misapplied the law in failing to consider the fact that the 1st Respondent was served with the Application and Complaint but never entered any appearance or put in any defence but only did so after Judgment had been entered and duly executed.

5. When the appeal came for hearing, **Mr. Ochieng** for the Appellant argued that the 1st Respondent was served with the complaint and hearing notices for the matter at the PPDT and chose to do nothing. That, following the Judgment at the PPDT, the Appellant submitted his papers and was cleared by the IEBC for his participation in the polls. He submitted that the PPDT erred in entertaining a person who was not a party in the initial proceeding. This amounted to re-opening a case where a Judgment had been rendered.

He argued that the authenticity of the documents relied on by the Tribunal was in doubt. He finally submitted that the application by the 2nd Respondent was a back door attempt to challenge the nomination of the Appellant.

6. **Mr. Makori** for the 1st Respondent in opposing the appeal collapsed the Appellant's grounds of appeal into two, namely;

i. Whether the PPDT had jurisdiction to deal with the application by the 2nd Respondent.

ii. Whether the PPDT could review its own orders.

7. He submitted that the PPDT in its ruling considered all the issues in this matter. Further that in so doing, it operated under Section 80 Civil Procedure Act, Order 45 Civil Procedure Rules and Rule 24 (1) and (2) of the PPDT Procedures and Regulations. He argued that the NAT had enjoined both Respondents but when the Appellant went to the PPDT, he only sued one party (2nd Respondent). There was therefore concealment of material facts.

8. He further submitted that after the enjoinder of the 2nd Respondent, the Court was now able to consider the documents filed by the Appellant and those by the 2nd Respondent. He urged the Court to dismiss the appeal as the PPDT had made the correct decision, as not one party was favoured.

9. **Mr. Arum** for the 2nd Respondent aligned himself to the submissions by Mr. Makori for the 1st Respondent. It was his submission that the Appellant having sued both Respondents before the NAT could not sue only one party before the PPDT. That the 1st Respondent nominated the 2nd Respondent as per their party rules and issued him with a certificate on 3rd April 2017 and the source of the one to the Appellant issued on 29th April, 2017 is not clear.

10. According to him the party nominated the 2nd Respondent and sent his name to IEBC as shown in list at page 31 – 43.

11. In a rejoinder, Mr. Ochieng explained that in their application before the PPDT, all material facts were disclosed including annexures. The certificate of 3.4.2017 had been withdrawn and so there were no two certificates.

He argued that the 2nd Respondent could not have been enjoined because the issue before the PPDT was in respect of the Party (1st Respondent) only. It was not about who had been validly nominated or whose certificate was valid, but it was about the forwarding of the Appellant's name to IEBC. He asked the Court to compare the authenticity of the letters at pages 26 and 156.

12. I have considered the record and the submissions plus the grounds of appeal.

The PPDT upon considering what was before it did a ruling which was delivered on 6th June, 2017. Upon consideration of all that is before me, I will want to deal with only one issue which should determine this appeal. The issue is whether the PPDT had the jurisdiction to entertain the application dated 29th May, 2017 and grant the orders it did.

13. The PPDT derives its jurisdiction from the Political Parties Act which provides;

Section 40 (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 partners; and***
- (f) *appeals from decisions of the Registrar under this Act;***
- (fa) *disputes arising out of party primaries.***

(2) *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 mechanisms.

Section 41 (1) The Tribunal shall determine any dispute before it expeditiously, but in any case shall determine a dispute within a period of three months from the date the dispute is lodged.

(2) An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.

(3) A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court.

(3A) The Chief Justice may, in consultation with the Tribunal, prescribe regulations for determination of disputes under this section.

(4) The Tribunal shall apply the rules of evidence and procedure under the Evidence Act (Cap. 80) and the Civil Procedure Act (Cap. 21), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.

14. It is not disputed that the complaint No. 258 of 2017 before the PPDT was heard ex parte and a judgment rendered. This was because the party (1st Respondent) which had been sued, though served did not enter appearance nor file any response.

Order 10 Civil Procedure Rules which the PPDT applies deals with consequences of non-appearance, default of defence and failure to serve. Order 10 Rule 11 CPR provides;

“Where Judgment has been entered under this Order, the Court may set aside or vary such Judgment and any consequential decree or Order upon such terms as are just.”

Order 45 CPR deals with Review. This is what it provides;

Order 45 Rule 1 (1) Any person considering himself aggrieved –

a. By a decree or order from which no appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2 (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

15. The application for review may be made by *“any person aggrieved”*.

In his application before the tribunal and in particular paragraph 6 and 7 of the Memorandum of claim, the Appellant states:

Paragraph 6: “The NEB however exercised its powers and issued the complainant with direct nomination in light of the findings by the ODM Tribunal.

Paragraph 7: The NEB has however forwarded the name of a stranger to the IEBC as a nominee of the ODM for the position of Member of County Assembly.”

16. I find these two paragraphs to be quite interesting for the following reasons;

i. When the 1st Respondent issued a direct nomination to the 2nd Respondent – it was very offensive to the Appellant, because he expected party primaries to be conducted and none was conducted. Even after the Order by the NAT for party primaries to be conducted, none were conducted.

ii. When the 1st Respondent issued a direct nomination to him (Appellant) this was quite alright despite the fact that the 2nd Respondent was also contesting.

iii. The Appellant was aware that the 1st Respondent had forwarded a name besides his to the IEBC as its nominee for the Galbet Ward. Obviously, he knew who it was, but for reasons best known to him, he prefers to refer to this Nominee as a “stranger”.

iv. The PPDT on the onset ought to have moved *suo moto* and directed him to enjoin the “stranger” as a party to the proceedings. This “stranger” whose name had been forwarded to the IEBC too, had a legitimate expectation to have his name appear on the ballot come election time.

17. Under the Civil Procedure Rules, the PPDT has power just as the Court has the power to review and/or set aside its judgment on the grounds set in Order 45 Rule 2 (1) Civil Procedure Rules.

Rule 24 of the PPDT (procedure) regulations 2017 provides as follows;

24 (1) A party against whom a decision has been made under regulations 20 and 21 may apply to the Tribunal to set aside the decision.

(2) The Tribunal shall not set aside any decision unless it is satisfied that the party has given sufficient cause of non-appearance.

18. My finding is that the PPDT has the requisite jurisdiction under the Political Parties Act, Civil Procedure Act, Civil Procedure Rules, PPDT (Procedure) Regulations 2017, to set aside and review its Orders and decrees.

19. Having found that, the next issue would be whether the PPDT in this matter exercised that power judiciously. As I have stated above, the “stranger” as mentioned by the Appellant had his name forwarded to IEBC. Any order revoking the forwarding of his name to IEBC would adversely affect him. He/she therefore had a right to be heard before such a decision was arrived at. This is provided for under Articles 47 and 50 of the Constitution. In any event, if the Appellant had been issued with a Nomination Certificate as he claims, the next obvious step was for the 1st Respondent to forward his name to IEBC. Why did he have to sue the Party (1st Respondent) to compel it to forward his name? There was no evidence to show they had refused to do so.

20. I find that the PPDT well exercised its discretion in enjoining the 2nd Respondent to the proceedings, heard all the parties on the matter and made a determination. Further, due to the mangled manner in which the nomination had been done, the PPDT deemed it fit to have the Party (1st Respondent) sort out its own mess. It did not therefore favour any party but referred them all back to the 1st Respondent (NEB) to determine its nominee for the position of Member of County Assembly for Galbet Ward Garissa Township.

21. In conclusion, I find that the Appeal lacks merit and I dismiss it. Let each party bear his own costs.

Orders accordingly.

Delivered, signed and dated this 8th day of June 2017 at NAIROBI

HEDWIG I. ONG'UDI

HIGH COURT JUDGE