



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NUMBER 96 OF 2017

OSCAR OMOKE OCHOLLA.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1st RESPONDENT

ALEX OUDA OTIENO.....2nd RESPONDENT

JUDGMENT

Introduction

1. This is an appeal from the decision of the Political Parties Disputes Tribunal (“the PPDT”) rendered on 8 June 2017. The PPDT’s ruling was prompted by an application for the review of an earlier judgment delivered by the PPDT on 11 May 2017, in which a complaint by the 2nd Respondent was dismissed by the PPDT.

Background Facts

2. The brief background to the instant appeal is that the Appellant (“Oscar”) and the 2nd Respondent (“Alex”) are members of the 1st Respondent party (“ODM”). With a view to identifying and fielding a candidate in the forthcoming national elections, ODM invited her members to a nomination contest for the position of member of the National Assembly Langata Constituency within Nairobi County. The contest was held on 30 April 2017. The contest attracted eleven candidates. Both Alex and Oscar were in the mix.

3. At the end of the nominations’ exercise Oscar was declared the winner of the contest and was also issued with a provisional Nominations’ Certificate on 1 May 2017 by the returning officer Jeremiah Aganda Ochiel (“Jeremiah”). Later on 3 May 2017, ODM issued Oscar with a final Nominations’ Certificate.

4. Apparently, Alex had also been issued with a provisional Nominations’ certificate on 1 May 2017. The provisional certificate issued to Alex was signed by one James E Okoth also as the ODM Returning Officer for Langata Constituency.

5. Not having been issued with a final nominations certificate by ODM and faced with the prospect of losing out as the ODM nominee for the Langata Constituency seat, Alex moved the PPDT by way of a complaint.

6. The nub of the complaint before the PPDT was that the certificate issued to Oscar by Jeremiah was a

nullity as the latter was not the recognized returning officer. According to Alex, Jeremiah had been appointed a returning officer by ODM but was later dismissed and in his stead James E Okoth (“James”) appointed. Consequently, Jeremiah could not oversee and conduct the nominations’ process and indeed did not. Consequently as well, Jeremiah could not declare any results/winner or issue/sign a nomination certificate.

7. In a brief judgment, the PPDT found no merit in the complaint by Alex. The PPDT dismissed the complaint and affirmed the nomination certificate which had been issued to Oscar.

8. It is perhaps apposite to reproduce, in extenso, the penultimate paragraphs of the PPDT judgment, where the PPDT stated as follows:

“[17] The question then is whose nomination certificate is genuine? In answering the question, the Respondent made reference to an appointment letter dated 29 April 2017 issued by the 1st Respondent appointing Jeremiah Aganda Ochiel as the Returning Officer for Langata Constituency. The Complainant averred that Jeremiah Aganda Ochiel had been debarred from conducting the elections and his place substituted with James E Okoth who then performed the duties of the returning officer. This debarment and replacement has not been substantiated.

[18] This leads us to only one conclusion that ; Jeremiah Aganda Ochiel was duly appointed returning officer for Langata Constituency and hence authorized to sign and issue the provisional certificate. We therefore find that the[sic] Jeremiah Aganda Ochiel having been duly appointed by the 1st Respondent had the mandate of issuing the 2nd Respondent with a provisional nomination certificate.” (emphasis mine)

9. Two weeks later, on 26 May 2017, under urgency Alex was back before the PPDT. He asked the PPDT to review its judgment. He asked the PPDT to declare him the winner of the ODM nominations for the position of Member of the National Assembly, Langata Constituency. He asked the PPDT to compel ODM to issue him with a final nominations certificate. The PPDT obliged and Alex got his way.

10. Alex had predicated his application for review on new found evidence. He had gotten individuals to swear affidavits that Jeremiah had been dismissed as the returning officer and that it was James who held that mandate.

Hearing and submissions

11. At the hearing of the appeal, which hearing was fast-tracked at the request of the court and with the consent of the parties, counsel for the appellant Mr. Willis Otieno assisted by Mr. Evans Oruenjo was emphatic that the application by Alex never met the threshold of applications for review. Mr. Otieno insisted that there was never any new evidence discovered by Alex and if at all any discovery had been made, no new evidence was laid before the PPDT to have invited and warranted the review.

12. Counsel for the appellant further submitted that the issue as to who was the returning officer of ODM in Langata Constituency had been brought to rest with certainty and finality by a court of superior jurisdiction being the High Court and thus the PPDT could not revisit or reopen the issue. Counsel referred the court to Election Petition Appeals No. 47 of 2017 and No. 59 of 2017 determined by the High Court. Counsel consequently submitted that neither this court nor the PPDT could open the same issue again.

13. Mr. Dennis Mbuteti who appeared for Alex, both before the PPDT and before this court, submitted that the PPDT had jurisdiction to review its decision and the jurisdiction had been properly exercised. According to Mr. Mbuteti, Alex had brought himself within one of the limbs for review prescribed under Order 45 Rule 1 of the Civil Procedure Rules. Counsel added that the additional evidence which prompted the review had just been retrieved as there had been no time or opportunity to avail the evidence previously.

14. Mr. Mbuteti insisted that the issue as to who was the properly mandated and appointed returning officer for Langata Constituency for purposes of ODM party primaries was not res judicata, as the High Court in Election Petition Appeal No 47 of 2017 had simply relied on the decision of the PPDT which had since been revisited and reviewed.

Discussion and determination

15. I have considered the record of appeal in its entirety. I have also reviewed the entire file of records, including the proceedings of the PPDT. I have also reflected on the submissions made by counsel.

16. The core question in this appeal is whether the PPDT exercised and executed its power of review properly.

17. I, foremost, have no doubt that the PPDT had jurisdiction to entertain the application for review. Section 40(4) of the Political Parties Act, No 11 of 2011 stipulates that the PPDT

“...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”

18. The PPDT is a tribunal with powers equivalent to those of a subordinate court and the powers under the civil procedure rules have been imported to the PPDT by the provisions of s.40(4) of the Political Parties Act. Such powers include the power to review judgments and rulings from which an appeal is allowed but non is preferred.

19. The power of review is circumscribed under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. To be heard on review a litigant must bring himself within any one or a combination of the three factors set out under Rule 1 of Order 45.

20. Unlike appeals where an applicant may lodge and establish any ground to show that the decision maker made an error of fact or law, review applications are limited to prescribed and definitive grounds. The applicant must establish that there has been a 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 made. The application for review may also be pegged on the ground that there has been a mistake or error apparent on the face of the record. Finally, an applicant may move for a review on the basis of some “other sufficient reason”. This generic ground has been held to be analogous to the first two grounds: see **Kuria v Shah [1990] KLR 316**. Additionally, the application must be brought without any delay.

21. The applicant in the instant case evidently moved with the necessary alacrity. The application for review was filed with two weeks of the decision sought to be reviewed. There was evidently no delay. The application was also pegged on the discovery of new and important matter or evidence.

22. Under the stated ground the court could only proceed and order review once satisfied that the applicant had established that there was a new and important matter or evidence which was not available to the applicant and thus to the court at the time the decision was rendered and the decree passed.

23. I must also add that the new evidence or matter must be such as, to have an impact on and effect on the earlier decision once admitted and upon evaluation. It is not enough to simply state the newly admitted evidence and for the court to also confirm same. The court must do more and reflect and evaluate the new matter or evidence to determine whether it would have had an impact on the original decision had it been available at the time of the decision.

24. In the instant case, the evidence which Alex sought to produce and did produce as newly discovered evidence was intended to point out that contrary to the PPDT’s earlier findings, Jeremiah was never the returning officer. A positive finding to like effect would have definitely influenced the decision of the

PPDT. It was important evidence yes, but could it have been produced earlier?

25. The new evidence availed was evidence in the form of affidavits by three individuals. They all swore identical affidavits. The common thread was that they had also participated as contestants in the nominations process. They deposed as much. They all also deposed that it was James and not Jeremiah who was the returning officer.

26. The record before the PPDT does not reveal any submission that the evidence of the three gentlemen could not have been obtained earlier. The PPDT made no finding to that effect as well. I do not also see how it may be stated that the evidence of the three could not have been availed earlier. The three namely; John Kiema, Joash Odhiambo Olum and Bernard Adhiambo, all aspired to be nominated for the same position of member of National Assembly for Langata Constituency. It was not suggested by the 2nd Respondent, either before this court or before the PPDT, that the three deponents were unavailable. Rather, counsel submitted that due to constraints of time the evidence by the three individuals was not availed to the PPDT. In my view, that is an admission that the evidence did not constitute newly discovered evidence. The evidence was always available and due diligence would have eked it out prior to the original determination by the PPDT.

27. I must hasten to add that all parties appear to have been constrained time-wise and to entertain evidence on the basis that time had not allowed its availability would be to simply give a party a second bite of the cherry, an approach which must be eschewed by the court as litigation must come to an end.

28. I have also reflected on the three affidavits, which in the PPDT's view constituted new evidence. The ruling by the PPDT rendered on 8 June 2017 does not reveal any attempt at evaluating the new evidence.

29. Before the PPDT there was already documentary evidence that the duly appointed returning officer was Jeremiah. Then there was contested affidavit evidence by Alex that the appointment had been revoked. An affidavit was also sworn by the Oscar contesting this position held by Alex. The PPDT upon evaluation was not satisfied with Alex's contentions and held that in the face of the appointment letter the contention of the appointment having been revoked stood unsubstantiated. The three new affidavits simply reiterated the position of Alex. There was no substantiation of the alleged action by ODM of revoking the returning officer's appointment. There was simply similar evidence which did not substantiate the earlier allegations. I am also satisfied that the new evidence added no weight to Alex's case as had been held by the PPDT. There was in short, no new evidence that Jeremiah had been defrocked.

Conclusion

30. In the end, I hold the view that the PPDT erred when it failed to take note of the fact that the alleged new evidence with due diligence could have been availed earlier.

31. Secondly, I also find that the PPDT erred when it held a rather blank view that the alleged new evidence had an impact on PPDT's earlier determination. The essence of PPDT's earlier determination had been that in the absence of any written or documentary evidence to the contrary, it could not hold that the returning officer as appointed by ODM on 29 April 2017 had been replaced. The same position still stood and should not have changed simply because three additional affidavits were filed to repeat and reiterate what Alex had sworn to earlier.

32. The PPDT erred in reviewing its decision. I do not consequently deem it necessary to delve into the issue of fact preclusion or res judicata.

33. I would allow the appeal and also condemn ODM to pay costs to both Oscar and Alex. The conduct of ODM has not endeared itself to this court as the proceedings before the PPDT would reflect. This, in my view, is a dispute which could have been avoided had ODM timeously intervened or assisted both the PPDT and the parties by filing appropriate affidavit and documentary evidence to zero in on the appointed returning officer.

Disposal

34. My final orders are as follows:

a. The appeal succeeds and is allowed.

b. The ruling and orders of the Political Parties Disputes Tribunal rendered on 8 June 2017 in Complaint No 143 of 2017 are hereby set aside

c. The Appellant Oscar Omoke Ocholla is hereby affirmed as the duly nominated candidate on an Orange Democratic Movement ticket for the seat of Member of national assembly Langata Constituency for the general elections scheduled for 8 August 2017 and the Independent Electoral and Boundaries Commission is hereby ordered to accept the nomination certificate presented by the said Oscar Omoke Ocholla nominating him as the 1st Respondent's nominee to contest for the position of member of parliament for Langata Constituency.

d. The 1st Respondent shall bear and pay to both the Appellant and to the 2nd Respondent the costs of the appeal as well as of the application before the Political Parties Disputes Tribunal.

35. Orders accordingly.

Signed Dated and delivered at Nairobi this 13th day June of 2017

J. L. ONGUTO

JUDGE