



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 83 OF 2017

BETWEEN

ROBERT PUKOSEAPPELLANT

VERSUS

ALWIN CHEPYAGAN SASIA.....1ST RESPONDENT

NATIONAL ELECTIONS BOARD JUBILEE PARTY 2ND RESPONDENT

THE DIRECTOR OF GENERAL

ELECTIONS OF JUBILEE PARTY.....4TH RESPONDENT

JUDGMENT

1. This is an appeal from the ruling and order of **PPDT** dated 26th May 2017 by which it ordered the 2nd respondent to repeat nomination for Member of National Assembly for **Endebes Constituency**, Trans Nzoia County within **96 hours** from that date. The **PPDT** also cancelled the nomination certificate issued to **Dr. Robert Pukose**, the appellant herein.
2. Being aggrieved with that ruling and order, the appellant filed the present appeal seeking to overturn the decision of **PPDT**.
3. The facts of this appeal are not in dispute. The appellant and **Alwin Chepyagan Sasia**, the 1st respondent herein, contested for nomination certificate for Member of Parliament for **Endebes constituency** under **Jubilee Party**, the 3rd respondent herein. The first respondent had been dissatisfied with the outcome of the nomination and lodged a complaint with **IDRM** of his party on 29th April 2017. The **IDRM** considered the complaint and determined that there was no reason to interfere with the outcome of the nomination where the appellant had garnered **9186 votes** against the 1st respondent's **6931 votes** and dismissed that complaint.
4. The 1st respondent was not satisfied with the decision of **IDRM** and filed a complaint with **PPDT**. **PPDT** heard the complaint and in its judgment dated 16th May 2017, it ordered re tallying of votes to determine the winner. There was an alternative order that if re tallying was not viable, the party was to repeat nomination in the constituency.
5. On 22nd May 2017, the 1st respondent filed a motion seeking the following orders:

a. That summons be issued to the director of Election to appear before the Honorable Tribunal and show cause why he should not be committed to jail for such term as the tribunal may deem fit.

b. That the director of Elections be cited for contempt for this Honorable Tribunal and be committed to jail for six months for being flagrantly contemptuous and willfully disobedient of the orders of this Honorable Tribunal given on 16th May 2017.

c. An order committing the 3rd respondent to civil jail for a period not exceeding six (6) months for contempt of this Honorable Tribunal.

d. An order to nullify any nomination certificate issued to any other person other than the applicant herein and the applicant's name be reflected on the party list.

6. After hearing arguments from Counsel for the parties, the **PPDT** allowed the motion, revoked the nomination certificate issued to the appellant, and directed the party to conduct fresh nomination to determine its nominee for Member of National Assembly for that constituency within 96 hours. These are the orders that triggered this appeal.

7. In the memorandum of appeal, the appellant faulted the **PPDT** for ordering repeat nomination when the application before it was for contempt; that the **PPDT** was in error in ordering a repeat nomination even after the 3rd and 4th respondents had complied with its orders for re tallying; that **PPDT** acted in error in determining matters that were not before it; and that the **PPDT** disregarded submissions by parties on jurisdiction to hear contempt proceeding, and ordering fresh nomination without first determining if the 3rd and 4th respondents were in contempt.

8. There was a further complaint that **PPDT** erred in making orders adverse to the appellant, yet he had not been found to be at fault and that by making orders for repeat nomination when parties had only addressed the issue of contempt. The **PPDT** fell into error.

9. At the hearing of this appeal, **Mr. Getonga**, learned counsel for the appellant submitted that **PPDT** did not have jurisdiction to entertain contempt. Counsel referred to the decision of **Salah Yakubu Salah v Secretary General of KANU Election Petition Appeal No 13 of 2017** for that proposition. Learned Counsel submitted that the application that led to this appeal should not have been entertained because **PPDT** did not have jurisdiction to determine contempt in view of **section 6** of the **Contempt of Court Act, 2016**.

10. Counsel went on to argue that there was breach of **Articles 47** and **50** of the constitution on the right to fair administrative action and fair hearing respectively. Counsel argued that **PPDT** heard submissions on contempt but rendered a decision for repeat nomination rather than on contempt, and without hearing parties on the same. Learned Counsel referred to the motion dated 22nd May 2017 to show that the orders that were granted had not been prayed for in that motion. In Counsel's view, **PPDT** erred and he prayed that the appeal be allowed.

11. Miss Ng'ania, Learned Counsel for the 2nd to 4th respondents, supported the appeal, and submitted that **PPDT** had no jurisdiction to deal with the issue of contempt, and that it became *functus officio* once it made its decision of 16th May 2017. Counsel referred to a number of decisions in their list of authorities to support their submissions. Counsel faulted the **PPDT** for ignoring *stare decisis* to wit the decision in the case of **Salah Yakubu Salah (supra)** which held that **PPDT** did not have jurisdiction to deal with contempt and which it was referred to.

12. Learned Counsel contended that the party had complied with **PPDT's** order of 16th May 2017 and conducted re tallying, hence it fell into an error in ordering fresh nomination when that order was no prayer for. According to counsel, if the 1st respondent was dissatisfied with re tallying, the option he had was to file a fresh complaint but not seek contempt.

13. **Mr. Mwangi**, learned Counsel for the 1st respondent, on his part opposed the appeal, and submitted that there was no re tallying as ordered by **PPDT**. Counsel submitted that there was an attempt to re tallying but the 1st respondent was not happy with the process because there was a dispute on polling centers where **Form 3Ds** were not original. Counsel referred to the replying affidavit to the motion dated 22nd May 2017, which showed that there was re tallying but argued that the affidavit was not correct. **Mr. Mwangi** referred to an affidavit sworn on 11th May 2017 by the 1st respondent's agent supporting the complaint before **PPDT**, and submitted that **PPDT** had jurisdiction to hear the application and grant the orders.

14. Counsel submitted that the matter before the **PPDT** was not on contempt and **PPDT** rightly proceeded to determine the motion before it. Counsel cited authorities to support his contention that the appeal was for dismissal.

15. I have considered this appeal, submissions by Counsel, and authorities cited. This appeal raises one main issue; that is whether **PPDT** was right in ordering repeat nomination in its ruling of 26th May 2017, when that was not the prayer before it. As seen from the facts of this appeal, **PPDT** had ordered re tallying of votes which the 1st respondent had sought. It also made an alternative order for fresh nomination in case re tallying was not possible. Re tallying or repeat of nomination were to take place **within 96 hours** of that order. The consequence of those orders was that parties were to elect which order to follow. Either to go for re tallying or go for fresh nomination if re tallying was not possible.

16. According to the appellant, the 2nd 3rd and 4th respondents, re tallying was conducted. However, the 1st respondent maintained that there was no re tallying. The 1st respondent filed an application dated 18th May 2017 which was dismissed because **96 hours** had not lapsed. He then filed the application dated 22nd May 2017 seeking what were clearly orders to cite the 4th respondent for contempt. The application did not contain a prayer for fresh nomination. After hearing that application, **PPDT** ordered the party to hold fresh nominations. Learned Counsel for the appellant contended that **PPDT** made a decision that had not been sought and entertained an application for contempt without jurisdiction.

17. As observed earlier, where there is the main order and an alternative, it is up to parties to elect which one to comply with. This is because there were timelines set by **PPDT** to meet in complying with whichever order. It did not mean that they had to try to implement one and if they failed, they would try to implement the alternative. This would not achieve the desired effect of the order; that is get the winner within the limited time.

18. I have perused the record of the **PPDT**, and more particularly, the replying affidavit on behalf of the 2nd, 3rd and 4th respondents sworn on 26th May 2017 and filed on the same day, being a response to the 1st respondent's motion dated 22nd May 2017. Paragraph 5 of that affidavit stated that after the order by **PPDT** for re tallying, a meeting was held on 17th May 2017 in the presence of the 1st respondent and the other parties, and they all agreed to proceed with re tallying as ordered. Minutes of that meeting were attached to that affidavit. According to **paragraph 5(m)**, the Chairperson of the 2nd respondent went through all **Form 3Ds** and separated the 4 disputed polling stations but they decided to do re tallying in **6 polling stations** as follows:

i. Titmet

Alwin Sasia 62 votes - Dr. Pukose 533 votes

ii. Swan Custom

Alwin Sasia had 26 votes – Dr. Pukose had 370 votes

iii. Nanyapong Primary School

Alwin Sasia had 85 votes – Dr. Pukose 119 votes

iv. Tester Borne

Alwin Sasia 100 votes – Dr. Pukose 361 votes

v. Kwokiwo Primary School

Alwin Sasia had 112 votes – Dr. Pukose 414 votes and

vi. Cheptikh Primary School

Alwin had 69 votes - Dr. Pukose 427 votes.

19. The deponent concluded at paragraph 6 of the affidavit, that on the basis of the re tallying the **tally Form 3Ds**, that the 1st respondent had disputed were confirmed to be genuine and that the tally showed the appellant to be the winner with **9186 votes**, while the 1st respondent garnered **6774 votes**.

20. The contents of that affidavit were not responded to and **Mr. Mwangi** confirmed in court during the hearing of the appeal, that the 1st respondent did not file a response to that affidavit. The averments in the affidavit, therefore, remained uncontroverted.

21. The motion before **PPDT** dated 22nd May 2017 was on contempt. It also sought an order nullifying any nomination certificate issued to any other person, other than the 1st respondent and that the 1st respondent's name be reflected in the party list as the one nominated.

22. The 1st respondent intended to enforce the orders of **PPDT**, and filed that application hoping to get the respondents cited for contempt, the nomination certificate given to the appellant nullified and one issued to him as the nominated candidate for **Endebes Constituency**.

23. Contempt is a discretionary power exercised by a court to enforce compliance with its orders. **Wikipedia encyclopedia** defines contempt as *an act of deliberate disobedience or disregard for the laws, regulations, or decorum of a public authority such as a court or legislative body*. It defines contempt of court as *behavior that exposes or defies the authority of the court*. **Black's Law Dictionary 9th Edition**, on the other hand defines contempt as;

“the act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice

24. Contempt proceedings are governed by the **Contempt of court Act 2016**. **Section 4(1)(a)** of the Act states that *civil contempt is the willful disobedience of any judgment decree direction, order or other process of a court or willful breach of an undertaking given to a court*. **Section 5(b) (c)** provides that *superior courts have power to punish for contempt of court and uphold the dignity and authority of subordinate courts*. **Section 6** provides that *subordinate courts have power to punish for contempt committed on the face*. A reading of these provisions is clear that subordinate courts and by extension tribunal can only punish for contempt on the face but not contempt away from the face of the court or for breach of judgment and decrees committed outside the court or tribunal. See **Secretary General; Kenya Africa National Union v Hon Salat Yakub Salah** (supra)

25. This means that PPDT could not hear and determine the motion dated 22nd May 2017 on the issue of contempt. How then could PPDT make the order for fresh nomination? In my view, this order was made in error. The order could not be made first before the **PPDT** determined the plea for contempt. Contempt being a discretionary power given to a court to ensure that its orders and judgments are enforced, the Court exercising that powers must first decide whether or not there was contempt, and thereafter decide

how to deal with it. It may punish or direct compliance.

26. In the present appeal, **PPDT** ordered repeat nomination which means it was enforcing the alternative order it made on 16th May 2017, an order made without first determining whether there had been contempt, hence forcing the contemnor to comply. Furthermore, **PPDT** was faced with a motion that sought specific orders that is; to find contempt and cancel a nomination certificate issued to any other person except the 1st respondent. Faced with such a scenario, **PPDT** had only two options; hear the motion and allow it as prayed, or if it had jurisdiction, make orders that would meet the end of justice. Being conscious of ensuring that its orders were complied with, **PPDT** subconsciously converted the motion from one of contempt to that of review and made the impugned orders.

27. Had **PPDT** directed its mind to the totality of the matter, the facts before it as contained in the replying affidavit, and applied the law, it would probably have come to a different conclusion.

28. For the foregoing reasons, I am satisfied that this appeal has merit and is allowed. The ruling and order of **PPDT** dated 26th May 2017 is set aside. Each party do bear their own costs.

Dated and Delivered at Nairobi this 2nd day of June 2017

E C MWITA

JUDGE