



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 130 OF 2017

ABDIRIZAK ISMAIL SHEIKH..... APPELLANT

V E R S U S

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

IBRAHIM ABDI ALI.....2ND RESPONDENT

(Being an appeal from the decision of the Political Parties Tribunal at Nairobi in Complaint no. 327 of 2017 by Hon. Kyalo Mbobu, James Atema and Hassan Abdi)

JUDGEMENT

1. This judgement is the outcome of the appeal against the decision

of the Political Parties Disputes Tribunal vide complaint no. 327 of 2017. Abdirizak Ismail Sheikh, the appellant herein, put forward the following grounds:

- 1. The learned members of the honourable tribunal erred in law and fact in clearing and determining the complaint dated 327 of 2017 and varying its orders in 258/17 and 319 of 2017 without jurisdiction and contrary to the Political Parties Act.***
- 2. The learned members of the honourable tribunal erred in law and fact in entertaining the complaint yet the complainant had not exhausted all the internal party mechanism before the National Appeals Tribunal.***
- 3. The learned members of the honourable tribunal misapprehended and misapplied the law in allowing the complaint that was res-judicata issues having being determined in complaint no. 258/17 and High Court Election Petition Appeal no. 94/17 and 319 of 2017 between the same parties and the subject nomination.***
- 4. The learned members of the honourable tribunal erred in law and fact in placing reliance and documents whose credibility and authenticity could not be verified and had disregarded the affidavits and video evidence on record.***
- 5. The learned members of the honourable tribunal misapprehended and misapplied the laws and facts in entertaining a fresh matter yet it was functus officio and by a person who was a party to the proceedings in 258/17 and 319 of 2017 and High Court Election Petition no. 94 of 2017.***

6. The learned members of the honourable tribunal misdirected themselves in hearing and determining a matter in which it did not have jurisdiction over and in light of the fact that the appellant had already been cleared and gazette by the IEBC on 27/6/2017 and that the 2nd respondent had not challenged the issuance of the certificate of nomination and clearance by the IEBC of the appellant either at the National Appeals Tribunal.

7. The learned members of the honourable tribunal misapprehended and misapplied the laws and disregarded the appellant preliminary objection dated 29/6/2017 and in finding that the complaint no. 258 and 319 were all in favour of the complaint.

8. The learned members of the honourable tribunal misapplied the law in finding that the exercise was marred with fundamental irregularities without any proof and the 1st respondent had contravened the party constitution and election guidelines in nominating the appellant and that it did not obey the Tribunals Orders.

2. When the appeal came up for hearing, this court invited learned counsels from both sides to make oral submissions.

3. Before considering the merits or otherwise of the appeal, let me first set out the history behind this appeal. On 3rd April 2017, Orange Democratic Movement (ODM), the 1st respondent herein, issued a certificate of direct nomination to the appellant as a candidate for MCA Galbet Ward. Ibrahim Abdi Ali, the 2nd respondent herein, felt aggrieved by the aforesaid decision hence he was prompted to file a complaint before the 1st Respondent leading to the revocation of aforesaid nomination certificate. It is said that the 1st respondent intimated to the parties that upon cancellation of the nomination certificate issued to the appellant, it would conduct Party primaries to pick the nominee of Galbet ward. When the appellant noticed that the 1st respondent was reneging on its word, the 2nd respondent decided to lodge a complaint to the ODM National Elections Appeals Board which board rendered its decision on 28.4.2017 directing the 1st respondent to carry out primaries in Galbet Ward. It would appear no primaries were conducted by the 1st respondent. On 29.5.2017, the 2nd respondent proceeded to present the nomination certificate issued to him by the 1st respondent on 29th April 2017 to IEBC. The 1st respondent delayed to forward to IEBC the name of the 2nd respondent prompting the 2nd respondent to lodge a complaint before the Political Parties Disputes Tribunal seeking to compel the party to do so. In its decision delivered on 17.5.2017, PPDT directed the 1st respondent to forward the 2nd respondent's name to IEBC for gazette as the aspirant for Member of County Assembly for Galbet Ward and pursuant to the aforesaid decision, the name of the 2nd respondent was forwarded to the I.E.B.C whereby the 2nd respondent's name was cleared to run for the aforesaid seat. Being dissatisfied with the aforesaid decision the appellant filed an application no. 258 of 2017 on 6th June 2017 in which he successfully sought for *inter alia*, an order directing the 1st respondent to conduct fresh process to determine the nominee for Galbet Ward. Being aggrieved, the 1st respondent appealed to this court against the PPDT's decision. This court dismissed the appeal and upheld the PPDT's decision. It would appear the appellant further filed a complaint before the I.E.B.C Dispute Resolution committee to challenge the 2nd respondent's nomination. The appellant succeeded in convincing the I.E.B.C Dispute Resolution Committee. Being aggrieved, the 2nd respondent filed a Judicial review application to impugn the IEBC's decision. This court referred the dispute back to IEBC to hear it afresh. I.E.B.C reheard the complaint afresh and in the end it declared the appellant as the 1st respondent's nominee for Member of County Assembly, Galbet Ward, Garissa County.

4. Pursuant to the aforesaid decision, the appellant was issued with a direct nomination certificate. Being aggrieved, the 2nd respondent filed a complaint before PPDT to challenge the decision of the 1st respondent to give direct nomination to the appellant. PPDT heard the complaint and decided in favour of the 2nd respondent by nullifying the appellant's nomination certificate and ordered the 1st respondent to conduct fresh nomination within 72 hours. It is said that the primaries were conducted on 21.6.2017. The 2nd respondent herein was of the view that the primaries were marred by irregularities and was therefore

prompted to file a complaint before PPDT. The 2nd respondent claimed before the PPDT that there was chaos in KEFRI polling station to the extent that no votes cast were tallied PPDT proceeded to nullify the nomination exercise and directed the 1st respondent to carry out fresh primaries vide its decision delivered on 11.7.2017. Being dissatisfied with that decision, the appellant preferred this appeal.

5. When the appeal came up for hearing, learned counsels were invited to make oral submissions. Mr. Arum, learned advocate for the appellant argued that the decision of PPDT made on 11.7.2017 was contrary to Section 13 of the Elections Act. It is stated that the complaint was filed after the 1st respondent had issued the appellant with a nomination certificate after party primaries conducted on 21.6.2017 where the appellant had been declared the winner. The learned advocate also pointed out that the appellant's name was subsequently forwarded to I.E.B.C which then proceeded to have the appellant's name gazetted as the 1st respondent's nominee for M.C.A, Galbet Ward on 27.6.2017. The learned advocate further argued that the appellant's name having been gazetted, the PPDT lacked jurisdiction to entertain any dispute. The appellant complained that PPDT failed to consider his preliminary objection. It is also argued that there were video evidence showing that the 2nd respondent caused chaos which gave rise to the irregularities the 2nd respondent now seeks to have the party primaries nullified. Mr. Arum stated that in the circumstances the party had a right to nominate its candidate in the manner it did.

6. Mr. Makori, learned advocate for the 1st respondent stated that the primaries were conducted in a free and fair manner as shown in the affidavit evidence. The learned advocate further pointed out that PPDT failed to address itself to the issues raised before it. He was also of the view that PPDT lacked jurisdiction to hear and determine the dispute after the appellant's name was gazetted as the nominee for the 1st respondent for Galbet Ward.

7. Miss Oduor, learned advocate for the 2nd respondent opposed the appeal. She pointed out that the 1st respondent had failed to adhere to its constitution and Article 91 of the Constitution of Kenya, 2010. It is argued that there was no fair and free nomination process. She also pointed out that since the 1st respondent decided to categorise Garissa County under Zone A, there was no room for direct nomination. The learned advocate further stated that the irregularities the 2nd respondent pointed fundamentally affected the outcome of the party primaries. She was also of the view that PPDT had jurisdiction to hear and determine the dispute since it was a new cause of action.

8. Having considered the rival submissions and the material placed before this court, it is apparent that the critical issue which was ably argued by learned counsels is the question of jurisdiction. I have already stated that the appellant and the 1st respondent are of the view that the political Parties Disputes Tribunal was rendered *functus officio* hence it lacked jurisdiction to entertain the 2nd respondent's complaint after the appellant's name had been forwarded and gazetted as the 1st respondent's nominee for the position of M.C.A, Galbet Ward. The 1st respondent is of the submission that since his complaint was a new cause of action, PPDT had jurisdiction to entertain it. It is not in dispute that the 2nd respondent filed his complaint before the Political Parties Dispute Tribunal on 28th June 2017. It is also not in dispute that I.E.B.C published in the Kenya gazette notice, the name of the appellant as the 1st respondent's nominee for the position of Member of County Assembly for Galbet Ward, Garissa County.

9. The 2nd respondent has correctly pointed out that the 2nd respondent's complaint was a new cause of action hence the PPDT had jurisdiction to entertain it. However, it has already been pointed out that by the time the 2nd respondent was filing his complaint, IEBC had already received and gazetted the name of the appellant as the 1st respondent's nominee for Galbet Ward. With respect, I am persuaded by the arguments of Messrs Arum and Makori, learned advocate, that in the circumstances, the Political Parties Dispute Tribunal had no jurisdiction to entertain the 2nd respondent's complaint pursuant to the provision of Section 13 of the Elections Act. The PPDT also erred when it failed to consider and determine the question of jurisdiction yet it was raised and argued before it.

10. On this singular ground, I find this appeal to be meritorious. The appeal is allowed. Consequently the

ruling and the consequent order issued by PPDT dated 11.7.2017 is set aside and is substituted by an order striking out and dismissing the 2nd respondent's complaint. The appellant's nomination as the 1st respondent's candidate to vie for the position of M.C.A of Galbet Ward, Garissa County remains valid as gazetted by I.E.B.C.

11. Each party to meet its own costs.

Dated, Signed and Delivered in open court this 20th day of July, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent