



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(R. MWONGO, PJ)
ELECTION PETITION APPEAL NO 129 OF 2017

BOAZ ABWAO KIVANDA.....APPLICANT /APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT1ST RESPONDENT

RUEBEN KEYA..... 2ND RESPONDENT

JUDGMENT

Background and appeal

1. The ODM nominations for the East Kanyamkago Ward, Uriri Constituency, Migori County was first done on 24th April 2017, according to the Appellant. Disputes have persisted in respect of the outcome of that first nomination and subsequent dispute resolution processes since.

2. On 25th April, 2017 the Appellant filed a complaint with the ODM Party Migori County Election Appeal Tribunal (Appeal No 19 of 2017). On the same day, the Party Tribunal granted the applicant a temporary injunction restraining the ODM from issuing a nomination certificate to Ruben Keya, the 2nd Respondent herein. On 29th April, 2017, the Party Tribunal recommended:

“...that the interim certificate issued to Rueben Keya the 6th Respondent be cancelled and a final Certificate of Nomination for ODM East be Kanyamkago Ward be issued to Boaz Abwao Kivanda for 2017 General elections or in the alternative:

a) A repeat nominations be done in Arambe, Manyatta and Ndhim Jope Polling stations”

3. It appears that the Party Tribunal decision was not complied with since, on 17th May, 2017, the Appellant filed a complaint with the PPDT in Complaint No 273 of 2017. It alleges that the ODM National Elections Board had “*refused to obey the ruling in Appel No 19 of 2017 dated 29th April 2017*”. The complainant also sought to cancellation of the interim nomination certificate issued to the 2nd Respondent, Ruben Keya, and issuance of a certificate to him.

4. The PPDT found the complaint to be unopposed, and Ruben Keya was not indicated as a party to the proceedings. By a judgment dated 25th May, 2017, the PPDT ordered the ODM Party:

“1..... to issue the final nomination certificate for Member of County Assembly East Kanyamkago Ward to the claimant (Boaz Kivanda) in accordance with the ruling of the Orange Democratic Movement Party Migori County Elections Appal Tribunal dated 29th April, 2017.

2. Notification to issue to the Independent Electoral and Boundaries Commission”

The formal decree was issued by PPDT on 31st May, 2017.

5. It appears that the Appellant also filed a complaint on 7th June, 2017 against ODM Party before the IEBC Dispute Resolution Committee in Complaint No 82 of 2017. pages 37 -42 of the Memorandum contain the relevant documents of complaint. The Decision of the IEBC Dispute Resolution Committee is dated 8th June wherein they summarised the case before them, analysed the law, and determined:

“ Upon considering the complaint and evidence adduced, the Committee finds that the Complainant’s case has merit. The Complainant should the enforcement of those orders in accordance with the procedure provided by the law”

6. By a certificate of urgency filed on 19th June 2017, Ruben Keya, sought to be enjoined in the PPDT proceedings. He also applied for stay of execution of the PPDT decision of 25th May, 2017 on grounds that he had never been served or given an opportunity to be heard, and prayed for an interim injunction restraining ODM from submitting the Appellant’s name to IEBC.

7. On 20th June, 2017, the PPDT issued orders that:

“1. That the Application be served upon complainant and respondent.

2. That leave be and is hereby granted to Interested Party/Applicant to file and serve additional documents.

3. That parties to all file responses and written submissions.

4. That all parties to come for mention (to confirm compliance) on 22nd June 2017 at 2.15pm.

5. That mention notice to issue...”

8. The Interested Party, Ruben Keya filed his submissions on 21st June, 2017. Appellant filed his Replying affidavit on 22nd June 2017 and submissions on 23rd June 2017.

9. On 29th June 2017, the PPDT issued both a “Ruling” signed by three of its members and a document styled “Orders” signed by the Deputy Registrar. The Ruling of 29th June, 2017 has the following effect:

- Sets aside the PPDT Judgment (referred to as a ‘decision’) of 25th May 2017
- Declares Reuben Keya as the Respondent’s nominated candidate for Member of County Assembly for East Kanyamkago Ward
- Demands **“the notification of this judgment to issue to the IEBC forthwith”**

10. On its part, the Orders of 29th June 2017 have the following effect:

- Set aside the decision of the Tribunal dated 25th May 2017
- Enjoin Rueben Keya as an Interested Party in the matter
- Grant an interim injunction restraining the ODM Party from submitting the name of Boaz Abwao Kivanda to the IEBC as its nominated candidate for East Kanyamkago Ward

11. It is these proceedings in the PPDT Complaint No 273 of 2017 that are the subject of the present appeal. When these discrepancies in PPDT proceedings became apparent the court called for, and received, the original PPDT file for clarification.

12. This appeal seeks to set aside the ruling of 29th June 2017; and to reinstate and hold valid *“the nomination of the Appellant by the IEBC as the ODM nominee to contest the 2017 General election...”*

13. At the present time, the the Appellant, Boaz Abwao Kivanda, Tom Odege has been gazetted by the Independent Election and Boundaries Commission (IEBC) as the duly nominated ODM Party candidate, in the *Third Schedule at No. 9742*, for the East Kanyamkago Ward election, Uriri Constituency, Migori County, in *Gazette Notice No. 6253* published in the Special Issue of the Kenya Gazette on 27th June, 2017.

14. The Appellant’s arguments are essentially that the PPDT erred in setting aside a judgment on its own motion, doing so without proper consideration of the material before it and before the ODM County Elections Board; and that PPDT erred in issuing orders which cannot be executed on account of the publication of nominees by IEBC in the Kenya Gazette.

15. In my view, the core issue revolves around the question whether the 2nd Respondent was aware of the proceedings at either the Party Tribunal or the PPDT.

16. In paragraph 8 of his Replying affidavit in the PPDT the Appellant asserts that the 2nd Respondent was served with the petition together with the interim orders through a licensed process server. He attached an Affidavit of service deponed by one Julius Juma Otindo dated 26th April 2017, in which the deponent avers that he went to the home of Mr Keya and served him with the ODM Tribunal Order of 25th May 2017.

17. In paragraph 4- 6 of the Affidavit of service the process server deponed:

“4. ...The Petitioner pointed to me the home of the 6th Respondent...”

5....I proceeded to the said home and found that the Respondent was celebrating or having a feast with his supports

6. I introduced myself to one Ruben Keya 6th Respondent and told him the purpose of my visitation and thereafter I served him the abovementioned court order...”

18. In paragraph 6 his supplementary affidavit, the 2nd Respondent uavers that the service is untrue because:

- The server was pointed to his home not to him
- That he was not at home on that day

I find it curious that the PPDT did not engage in an exercise to verify this disputed information as to service. It is clear that from 25th April, 2017 up to mid June 2017 the Appellant was entering every office in which elections disputes were capable of being heard both at Migori and in Nairobi. I is curious that all the time the 2nd Respondent did not hear of the actions in those tribunals until 15th June when he says he heard from members of the public as he went about his duties at the county offices.

19. The proceedings and the decisions of PPDT do not disclose that the issue of service was carefully and conclusively canvassed by the tribunal. In paragraph 2 of the Ruling the tribunal sets out that the 2nd Respondent says he was not served, and at paragraphs 3 and 4 the Tribunal points out that an affidavit of service was adduced. At paragraph 8 the Tribunal states:

“the Affidavit of service on record of one John Otindo demonstrates that service was effected on the Interested Party. However the Interested Party did not attend nor was he heard during the IDR proceedings”

20. If the Tribunal considered or found that service is demonstrated, how is it that the absence of the 2nd Respondent’s absence from the proceedings can be excused? In my view, a finding that there was service was sufficient to make a finding that the 2nd Respondent was indolent regarding his right or took the matter for granted.

21. The PPDT is established under **section 39** of the **Political Parties Act**, and under **section 41(4)** must:

“...apply the rules of evidence and procedure under the Evidence Act (Cap 80) and the Civil Procedure Rules (Cap 75) with the necessary modifications...”

22. In my view, for setting aside to be justified on grounds that a party did not appear for lack of notice of proceedings, there must be a specific plea or application in that regard to entitle the court to take such a step (see Order 12 Rule 7). The only prayer made to the Tribunal by the 2nd Respondent was for stay of execution of its judgment of 25th May, 2017, for an interim injunction to restrain the ODM from submitting the name of the Appellant and for joinder.

Conclusions

23. I entertain serious doubts that the PPAT was entitled to set aside its judgment, particularly in light of its finding that service was demonstrated as earlier indicated.

24. For this reason I would allow the appeal to the extent that the PPDT had set aside its decision of 25th May, 2017.

25. Further in light of the fact that the Appellant has been gazetted by IEBC on 27th June, 2017, and in light of the fact that no prayers have been sought to interfere with the said gazette notice, and further weighing the public interest that would be affected by any order affecting the said gazette notice and the tight timeframe for election process and the fact that only 31/2 weeks are remaining to the election date, I am disinclined to interfere with the said gazette notice.

Disposition

1. The appeal is hereby allowed and the ruling and orders of the PPDT dated 29th June, 2013, setting aside its decision of 29th May, 2017 is hereby annulled.

2. The order in the said ruling granting an interim injunction is of no effect as having overtaken by events upon issuance of a Gazette Notice on 27th May, 2017.

3. No order as to costs is made as this is a matter with a public interest element.

4. Orders accordingly.

Dated Delivered at Nairobi this 13th Day of July , 2017

RICHARD MWONGO, PRINCIPAL JUDGE

Delivered at Nairobi this 13th Day of July, 2017 by

HON JUSTICE J SERGON

Delivered in the presence of:

1.for the Appellant/Applicant

2.for the 1st Respondent

3.for the 2nd Respondent

Court Clerk.....