



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(R. MWONGO, PJ)

ELECTION PETITION APPEAL NO 126 OF 2017

ORANGE DEMOCRATIC MOVEMENT.....APPELLANT /APPLICANT

VERSUS

HON. EDICK PETER OMONDI ANYANGA.....1ST RESPONDENT

TOM MBOYA ODEGE..... 2ND RESPONDENT

JUDGMENT

Background

1. The parties in this suit have been in the courts and other dispute resolution proceedings since the first Party nominations for the Nyatike Parliamentary elections on 24th April, 2017, when according to the appellant, on 29th April, 2017 he was awarded the Party Nomination certificate.

2. On 21st June, 2017 the Court of Appeal (Nambuye, Musinga and Kairu JJAs) in CA 166/2017 consolidated with CA 167/2017 directed the ODM Party:

“...to conduct fresh nomination exercise for Member of National Assembly for Nyatike Constituency by way of universal suffrage within 48 hours from 4.00pm today.”

3. The Party conducted the said nomination as ordered by the Court of Appeal on 23rd June 2017, and Tom Odege was declared the winner. On 25th June, 2017, the ODM Party conveyed the outcome of the Court of Appeal ordered nominations by letter to IEBC in terms of **section 31(2)(a)** of the **Elections Act, 2011**. Shortly after, on 27th June 2017, the 2nd Respondent was invited to IEBC to present his nominations papers which he did on 28th June 2017. Following this

4. Edick Anyanga, the sitting MP and 1st Respondent herein, was dissatisfied with the outcome and filed a complaint directly before the Political Parties Dispute Tribunal (PPDT) (Dispute No 326 of 2017) on 28th June, 2017. The complaint alleged, inter alia, that the fresh nominations were conducted outside the 48 hours directed by the Court of Appeal; that non- members were allowed to vote and aspirants who had resigned from the Party were on the ballot papers; that only 35 of 117 polling stations were used and some of them were not supplied with ballot papers; that the Party Register was not used. The complainant sought that the repeat nominations be declared a nullity and that an order be made that he remained the

duly elected nominee of the ODM Party for Nyatike Constituency.

5. It is not in dispute that the 1st Respondent did not file a complaint with the ODM Party dispute resolution organs after the repeat party nomination ordered by the Court of Appeal.

6. It appears that at some stage in the complaint, the IEBC was introduced and sued as the 3rd Respondent. However, upon arguments on a preliminary objection to such joinder, the PPDT ruled that:

“...the [objection] raises fundamental issues on the jurisdiction of the Tribunal because of the 3rd Respondent. We concede that the Tribunal has no jurisdiction over the 3rd Respondent under section 40 of the Political Parties Act, 2011....”

Consequently, the IEBC was struck out as a party to the complaint.

7. A second preliminary objection to the PPDT’s jurisdiction was filed by the 2nd Respondent on 29th June, 2017, on the grounds that:

“The jurisdiction of the [PPDT] has been improperly invoked on the grounds of the provisions of Rule 18.8 and Rule 19.2.3 of the [ODM Party] Nomination Rules”

In submissions on the second objection before the PPDT, it was also argued that pursuant to **section 13(1)** read together with **section 13(2)** of the **Elections Act, 2011**, once a nominee was duly certified by the IEBC, that certification cannot be changed, as the 2nd Respondent’s rights have crystallised.

8. The PPDT in its ruling dated 30th June, 2017, dismissed the preliminary objection, on the ground that:

“The Tribunal is empowered under section 40(1)(fa) of the [Political Parties Act, 2011] to resolve disputes arising from party primaries....”

Appeal

9. It is the PPDT’s ruling of 30th June, 2017 aforesaid, which is presently the subject of appeal in this court. In the appeal the appellant asserts the following grounds, briefly stated:

- a. The Tribunal erred by holding it had jurisdiction to entertain the complaint in the face of Article 88(4)(e) of the Constitution read together with section 74(1) of the Elections Act.
- b. The Tribunal erred in holding it had jurisdiction in view of section 13(2) of the Elections Act having failed to exhaust its internal dispute resolution mechanism
- c. The Tribunal erred in failing to uphold the preliminary objection when the complaint before it violated the provisions of regulation 7,8(1) and 9(2)(b) and (c) of the Political Parties Dispute Tribunal (Procedure) Regulations, 2017.
- d. The Tribunal failed to hold that the complaint had been overtaken by events.

10. At the present time, the 2nd Respondent, Tom Odege has been gazetted by the Independent Election and Boundaries Commission (IEBC) as the duly nominated ODM Party candidate, at *No. 1576*, for the Nyatike Parliamentary election, Migori County, in *Gazette Notice No. 6253* published in the Special Issue of the Kenya Gazette on 27th June, 2017.

11. The parties in their submissions repeated the history of the case and the arguments which had been made before the PPDT. There is no need to set them out at length as the gist thereof is contained in the background already set out herein.

12. The core issue before this court is whether the PPDT had jurisdiction to hear the complaint.

Analysis and Determination

13. In its ruling, the PPDT upheld its jurisdiction on the basis of **section 40(1)(fa)** of the **Political Parties Act** which provides:

“(1) the Tribunal shall determine –

(fa) disputes arising out of party primaries”

Section 2 of the **Political Parties Act** defines “*party primaries*” as follows:

“means the process through which a political party elects or selects its candidates for a forthcoming general election or for a forthcoming by-election” (emphasis supplied)

14. In its preliminary objection, the 2nd Respondent stated that PPDT’s jurisdiction had been improperly invoked in light of the provisions of **Rules 18.8** and **19.2.3 of the ODM Nomination Rules**. Rule 18.8 deals with the process of announcement of results and issuance of nomination certificates. **Rule 19.2.3** provides:

“The National Appeals Tribunal shall determine appeals arising from elections of National officials and nominations in respect of Presidential elections, Governors, Senators, Members of the National Assembly, and County Women Representatives”

The question is whether this provision applies in light of **section 40(1)(fa)** of the **Political Parties Act (PPA)**.

15. The court was referred to the Court of Appeal decision in the case of **Dr Lilian Gogo and Joseph Mboya Nyamuthe and 4 Others [2017] eKLR**. There, the court dealt with the specific question whether the PPDT can hear and determine a dispute arising out of party primaries before such a dispute is heard and determined by the internal political party dispute resolution mechanism. The court discussed at length the provisions of **section 40(1)** and **40(2)** of the **PPA** and the reasons for the amendment in 2016 of the PPA to introduce **section 40(1)(fa)** with the object “*to address the challenge of concurrent jurisdiction with other bodies handling electoral disputes*”.

16. In **Gogo** the Court of Appeal finally determined the issue of the PPDT’s jurisdiction over party primaries in light of **section 40(1) (fa)** as follows:

“24. In our view, that amendment did not introduce an entirely new category of disputes as was urged by counsel for the 1st respondent. Disputes arising out of party primaries between members of a political party or between a member of a political party and a political party, or between political parties or between coalition partners were already catered for under paragraphs a, b, c, and e of Section 40(1) of the Act. Such disputes are subject to Section 40(2) of the Act and must first be subjected to the internal party dispute resolution mechanism before the PPDT takes cognizance of them.

25. A common denominator of the categories of disputes that must in the first instance be submitted to the internal political party dispute resolution mechanism is that the disputants would all be subject to the political party and therefore subject to such party’s internal party dispute resolution mechanism. It is also instructive that under Section 9 of the Act as read with paragraph 23 of the 2nd Schedule to the Act, it is a mandatory statutory requirement that every political party must have provision in its constitution and rules for “internal party dispute resolution mechanism in accordance with Article 47 and 50 of the Constitution.” Also noteworthy is Section 13(2A) of the Elections Act, Act No. 24 of 2011 that requires a political party to hear and determine “all intra party disputes arising from political party nominations”

within thirty days.

26. *There could well be disputes that arise out of party primaries that do not fall within the categories of disputes set out under paragraphs a, b, c, and e of Section 40(1) of the Act in which case such disputes can be taken directly to PPDT.*

27. *In the present case, there is no doubt that the dispute arose out of party primaries of the 2nd respondent. That dispute is between members of the same political party. Although it is a dispute arising from the party primaries, it is nonetheless a dispute that falls under paragraphs a, b, c, and e of Section 40(1) of the Act that is required to be heard by the party's internal dispute resolution mechanism before the PPDT can take cognizance of it. That is the procedure dictated by Section 40 of the Act. In Kimani Wanyoike vs. Electoral Commission & another [1995] eKLR, this Court upheld the proposition advanced in Speaker of the National Assembly vs. Hon. James Njenga Karume, Civil Application No. 92 of 1992 (2008) 1KLR 425 that "where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*

28. *We are therefore satisfied that the learned Judge of the High Court fell into error in holding, without qualification, that the PPDT has jurisdiction to hear disputes arising out of party primaries and that in all cases involving disputes arising out of party primaries, an aggrieved party "is not necessarily bound by the party nomination rules and regulations which require that such aggrieved party do appeal to the party national appeals tribunal."*

17. In light of the foregoing decision it is clear that the PPDT's jurisdiction under **section 40(1)(fa)** PPA is not an all-encompassing and uninhibited jurisdiction whenever a party primary has been conducted. In applying **section 40(1)(fa)** of the PPA, the PPDT has first to await the conclusion of intra party dispute resolution mechanisms before seizing jurisdiction where the complaint arises from a dispute in a party primary.

18. The Court of Appeal also affirmed that **Section 13 2A** of the **Elections Act** was consistent with the theme of exhaustion of intra party dispute resolution mechanisms before engaging other dispute resolution organs.

19. Accordingly, I agree with the Appellant that its objection to the PPDT invoking its jurisdiction notwithstanding the provisions of **Rule 19.2.3** of the **ODM Party Nominations Rules** had merit. As such, the PPDT's decision to take jurisdiction was a fatal error, and consequently, its ruling appealed against herein and any subsequent determination made pursuant to the hearing in Complaint 326 of 2017, are void ab initio.

20. The PPDT also upheld its jurisdiction in the face of the argument before it that **section 13(2)** of the **Elections Act** decreed the finalisation of the nominations 90 days before the elections scheduled for 8th August, 2017. That after the repeat nominations ordered by the Court of Appeal, the ODM Party had submitted the name of the winner to IEBC pursuant to **section 31 2A** of the **Elections Act**, hence removing any dispute from the purview of the PPDT.

21. Having found, as I have, that the PPDT did not have jurisdiction, this issue is a moot discussion which need not engage the court in use of precious judicial time, in an environment of electoral disputes that have extremely tight timeframe.

Disposition

1. The appeal is hereby allowed and the ruling of the PPDT dated 30th June, 2013, is hereby annulled.

2. As the PPDT had no jurisdiction to entertain the proceedings in Complaint No 326 Of 2017, the same are hereby declared void ab initio and any decisions by the PPDT made therein pursuant to its

seizing jurisdiction are hereby declared null and void.

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.....