



IN THE COURT OF APPEAL  
AT NAIROBI  
(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJ.A)  
CIVIL APPEAL NO.173 OF 2017

BETWEEN

ERIC KYALO MUTUA.....APPELLANT

AND

WIPER DEMOCRATIC MOVEMENT-KENYA....1<sup>ST</sup> RESPONDENT

GIDEON MUTEMI MULYUNGI.....2<sup>ND</sup> RESPONDENT

*(An Appeal from the Judgment of the High Court of Kenya*

*at Nairobi (Muchelule, J) delivered on 8<sup>th</sup> June, 2017*

*in*

**H. C. ELECTION PETITION APPEAL NO. 93 OF 2017)**

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**Reasons for the Judgment of the Court**

**(Rule 32(5) of the Court of Appeal Rules)**

1. In a judgment delivered on 21<sup>st</sup> June 2017 this Court dismissed the appellant's appeal from the judgment of the High Court (Muchelule, J) dated 8<sup>th</sup> June 2017 and reserved the reasons for the judgment. We now give our reasons for dismissing the appeal.

**Background**

2. The appellant sought the nomination of the 1<sup>st</sup> respondent for the position of Member of National Assembly Mwingi Central Constituency in a nomination exercise conducted on 24th April 2017. He was dissatisfied with the manner in which that exercise was carried out. He filed an appeal with the National Appeal Tribunal (NAT) of the 1st Respondent, which was dismissed.

3. Aggrieved by the decision by NAT, the appellant lodged a complaint with the Political Parties Disputes

Tribunal (the PPDT) on 2nd May 2017. The PPDT heard that complaint. In a judgment delivered on 6th May 2017, the PPDT set aside the nomination certificate that had been issued by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent and ordered a repeat of the nomination exercise in 19 polling stations.

4. On 7th May 2017 the appellant appealed against part of the judgment of the PPDT to the High Court. The High Court allowed the appeal and ordered a repeat of the nomination exercise in the entire Constituency, as opposed to the 19 Polling Stations as had been ordered by the PPDT.

5. A repeat nomination exercise was conducted on 11<sup>th</sup> May 2017 and the results announced on 12<sup>th</sup> May 2017 in which the 2<sup>nd</sup> respondent was declared the winner.

6. According to the appellant, the repeat nomination exercise was a sham as it did not accord with the law, was flawed and marred with irregularities. He lodged a complaint with NAT within the prescribed 48 hours' period and paid the requisite filing fee. NAT did not address his appeal. The appellant was then compelled to lodge a complaint with the PPDT which he did on 25<sup>th</sup> May 2017 vide Cause No. 306 of 2017. He asserted that there were serious irregularities during the repeat nomination exercise that included violence orchestrated by the 2<sup>nd</sup> respondent; no voter register was used; the votes cast exceeded the number of registered members; irregular ballot papers were used; voters were transported; and that there was double voting and stuffing of ballot papers.

7. In its judgment delivered on 2nd June 2017, the PPDT dismissed the appellant's complaint, having found that he had "*not submitted sufficient evidence that the repeat nomination exercise was conducted in violation of the Constitution of Kenya, the Elections Act, and the party election and nomination rules as alleged in the Complaint before it.*"

8. Dissatisfied, the appellant lodged an appeal to the High Court, being Election Petition Appeal No. 93 of 2017, contending that he had discharged his burden of proof before the PPDT; that the PPDT did not properly evaluate the evidence; that the PPDT erred in making the determination that there was no sufficient evidence to enable it allow the complaint.

9. In its judgment delivered on 8<sup>th</sup> June 2017 (the subject of the present appeal), the High Court (Muchelule, J) dismissed the appellant's appeal. The court upheld the contention by the respondents that the appeal was overtaken by events because the 1<sup>st</sup> respondent had already issued a nomination certificate to the 2<sup>nd</sup> respondent, who had subsequently been cleared by the Independent Electoral and Boundaries Commission (IEBC). The Judge held that "***once a candidate has presented his nomination papers to the IEBC, and the IEBC has cleared him, there can be no change to that candidature***" by reason of Section 13 of the Elections Act, 2011 under which "***the only way there can be change is if there is death, resignation or incapacity of the nominated candidate, or if the nominated candidate has violated the electoral code of conduct. None of these situations obtains here.***"

10. Regarding the merits of the appeal, the learned Judge reviewed the evidence regarding the alleged irregularities and agreed with the decision of the PPDT that the appellant did not discharge his burden of proof. Dissatisfied, the appellant lodged this appeal.

### **The appeal and submissions**

11. Mr. Omwanza Ombati, learned counsel for the appellant referred us to the appellant's memorandum of appeal and submitted that new affidavit evidence pertaining to the plea that the appeal had been overtaken was wrongly introduced on appeal before the High Court as that was not a matter before the PPDT; that in light of Section 31(2D) of the Elections Act that requires a candidate to be selected by members of a political party whose names appear on the party membership list, the Judge erred in proceeding on the basis that the 1<sup>st</sup> respondent had a discretion to agree on a different criteria for persons entitled to participate in party primaries.

12. Counsel urged that having demonstrated that there was no party membership list used during the repeat nomination exercise, the evidentiary burden shifted to the respondents. As to whether the appellant discharged his burden of proof, counsel referred to the Supreme Court decision in **Mary Wambui Munene vs. Peter Gichuki King'ara [2014] eKLR** and urged that the evidence provided by the appellant regarding irregularities was not rebutted and the court erred in holding that the appellant had not discharged his burden of proof.

13. Counsel faulted the learned Judge for holding that the appellant's complaint was overtaken by events by reason of Section 13 of the Elections Act dealing with circumstances when a political party may change the name of its nominee after submitting a name to IEBC. Counsel argued that the PPDT and the High Court have a duty and the mandate to entertain disputes arising from nominations and to issue orders to uphold the rule of law and for the ends of justice notwithstanding Section 13 of the Elections Act.

14. Mr. Geoffrey Sore, learned counsel for the 1<sup>st</sup> respondent, submitted that a nomination certificate having been issued, jurisdiction over the matter lay with the IEBC. In that regard, counsel referred to Article 88(4) of the Constitution and Sections 13 and 74 of the Elections Act. Counsel argued that neither the PPDT nor the High Court had jurisdiction over the matter and that the court was right to hold that the matter was overtaken by events. Counsel referred to a High Court decision of Lenaola, J (as he then was) in **Billy Elias Nyonje vs. National Alliance Party of Kenya and another [2013] eKLR**.

15. Agreeing with the decision of the High Court, counsel submitted further that the appellant had failed to discharge his burden of proof to establish the irregularities that he alleged marred the repeat nomination exercise.

16. Learned counsel for the 2<sup>nd</sup> respondent, Mr. E Masese, opposed the appeal and referred to Section 107 of the Evidence Act and the decision of the Supreme Court of Kenya in **Raila Odinga & 5 others vs. IEBC & 3 others [2013] eKLR** and submitted that the burden of proving the allegations made by the appellant lay with him; and that the High Court was right in holding that the appellant did not discharge his burden of proof. Counsel urged that the appellant made generalized allegations before the PPDT that were not established.

17. According to counsel, there is no basis for this Court to interfere with the decision of the High Court.

### **Analysis**

18. We have considered the appeal, the submissions and the authorities cited by counsel. Our mandate, in an appeal such as this, is limited under Section 41(2) of the Political Parties Act to points of law. It provides that:

***“(2) An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.”***

19. There are two questions that require consideration in this appeal. The first is whether the learned Judge of the High Court was right in holding that the PPDT did not have jurisdiction to entertain the dispute in light of Section 13 of the Elections Act. The second issue is whether the conclusion by the court that the appellant failed to discharge his burden of proof is well founded.

20. We start with the jurisdiction of the PPDT. The PPDT is established under Section 39 of the Political Parties Act. Its jurisdiction is spelt out under Section 40 of that Act. It provides that:

**“(1) The Tribunal shall determine-**

**(a) disputes between the members of a political party;**

**(b) disputes between a member of a political party and a political party;**

**(c) disputes between political parties;**

**(d) disputes between an independent candidate and a political party;**

**(e) disputes between coalition partners; and**

**(f) appeals from decisions of the Registrar under this Act;**

**(fa) disputes arising out of party primaries.”**

21. The jurisdiction of the IEBC on the other hand in relation to “*disputes relating to or arising from nominations*” stems from the Constitution. Article 88(4)(e) of the Constitution provides that:

**“(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-**

...

**e. the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;”**

22. Section 4(e) of the Independent and Electoral and Boundaries Commission Act replicates that constitutional provision.

23. On the face of those provisions there is no doubt that the IEBC and the PPDT are clothed with the power to deal with disputes arising from nominations. Parliament acknowledged the concurrent jurisdiction of the two bodies when enacting Section 40(1)(fa) of the Political Parties Act introduced through the Political Parties (Amendment) Bill, 2016 in which under Clause 19 of the memorandum of objects and reasons it was indicated that the object of amending the Political Parties Act to introduce Section 40(1)(fa) was to address “***the challenge of concurrent jurisdiction with other bodies handling electoral disputes.***”

24. Section 13 of the Elections Act on which the learned Judge relied provides for timelines within which a political party should nominate its candidates and the circumstances under which a political party may change the candidate nominated after the nomination of that person has been received by the IEBC. It does not, with respect, oust the jurisdiction of the PPDT or the court under Sections 40 and 41 respectively of the Political Parties Act to adjudicate over a dispute arising from nominations provided such jurisdiction is properly invoked.

25. The decisions of the High Court in **Billy Elias Nyonje vs. National Alliance Party of Kenya and another** (above) and **John Pesa Dache vs. IEBC & another [2013] eKLR** to which we were referred do not, in our view, support the proposition advanced that the jurisdiction of the PPDT and the High Court to hear and determine disputes arising from nominations is ousted by Section 13 of the Elections Act. To that extent, the learned Judge of the High Court erred in concluding that the PPDT did not have jurisdiction over the matter by dint of Section 13 of the Elections Act.

26. That said, there is, undoubtedly, an urgent need for law reform with a view to providing a clear and orderly framework for resolution of disputes arising from or relating to nominations so as to avoid a conflict or clash of jurisdictions between the IEBC under Article 88(4)(e) of the Constitution and that of the PPDT under Section 40 of the Political Parties Act. To avoid parallel streams of adjudication of disputes arising from nominations that might lead to confusion and conflicting approaches and decisions, and for good order, perhaps the legislators might consider undertaking the necessary reforms.

27. We turn to the question whether the conclusion reached by the PPDT and by the High Court that the appellant failed to discharge his burden of proof was well founded. In addressing this issue, we bear in mind, as already indicated, that our mandate is limited to matters of law. In **Kinyanjui Kamau vs. George Kamau Njoroge [2015] eKLR** this Court reiterated the words of Onyango Otieno, JA in **Kenya Breweries Ltd V Godfrey Odoyo, Civil Appeal No. 127 of 2007**, where the learned Judge stated that:

***“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”***

28. The PPDT reviewed the material presented before it by the appellant in support of the claims that there was violence during the repeat nomination exercise; that the elections were conducted without any voter register; that non-members of the 1<sup>st</sup> respondent were permitted to vote as the total number of votes exceeded the number of registered voters; that irregular ballot papers were used; that there was transportation of voters; double voting; and stuffing of ballots, before concluding that the appellant had “not submitted sufficient evidence that the repeat nomination exercise was conducted in violation of the Constitution of Kenya, the Elections Act, and the party election and nomination rules”.

29. On appeal, the High Court carefully reviewed and analysed the material presented by the appellant before expressing the view that:

***“One has to remember that the burden was always on the appellant to prove the claims, and that the standard was higher than in ordinary civil cases. Further, it has to be remembered that in any election or nomination there may be irregularities or malpractices. However, not every irregularity or malpractice committed in the conduct of an election or nomination will affect the validity of the exercise. The irregularities have to be so pervasive and/or so widespread that they put the integrity of the election or nomination to question. There was no proof that the alleged or proved irregularities or malpractices were widespread or pervasive.”***

30. The appellant did not, in our view, demonstrate to this Court that the conclusions reached by either the PPDT or by the High Court were based on a misapprehension of the evidence. We are therefore unable to interfere with the decision of the High Court.

31. It is for those reasons that this Court dismissed the appellant’s appeal in its judgment delivered on 21<sup>st</sup> June 2017.

**Reasons dated and delivered at Nairobi this 28<sup>th</sup> day of July, 2017.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**