



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJA) CIVIL APPEAL NO. 168 OF 2017**

**BETWEEN**

**GABRIEL BUKACHI CHAPIA ..... APPLICANT**

**AND**

**ORANGE DEMOCRATIC**

**MOVEMENT ..... 1<sup>ST</sup> RESPONDENT**

**EDWIN SIFUNA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgment of the High Court of Kenya at Nairobi (Ong’undi, J) on 26<sup>th</sup> May, 2017 in*

**NAIROBI H. C. ELECTION PETITION APPEAL NO. 64 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 26<sup>th</sup> June 2017, this Court dismissed the appellant’s appeal from the judgment of the High Court (Ong’undi, J) dated 26<sup>th</sup> May 2017 and reserved reasons for doing so. We now give our reasons for dismissing the appeal.

**Background**

2. The appellant, Gabriel Bukachi Chapia, is a member of the Orange Democratic Party, (the Party) the 1<sup>st</sup> respondent. Aspiring to be nominated by the Party to vie for the position of Senator for Nairobi County during the 8<sup>th</sup> August 2017 general election, he submitted an application for nomination of a senate candidate to the Party on 9<sup>th</sup> March 2017. At the close of the period set by the Party for members to apply for nomination, the appellant was the only candidate for nomination for the position of Senator for Nairobi County. At a ceremony of the Party held on 3<sup>rd</sup> April 2017, the appellant was issued with a nomination certificate.

3. Subsequently, the Party took the view that the appellant “*had not shown or demonstrated that he had the financial and logistical ability and capability to mount a successful campaign*” for the County of

Nairobi Senate seat. According to the appellant, the current Governor, Nairobi County, Evans Kidero, requested him on three occasions, on 11<sup>th</sup> April 2017, 29<sup>th</sup> April 2017 and 4<sup>th</sup> May 2017, “to withdraw from the race of Nairobi City County Senatorial race on an ODM ticket” because he “had very slim chances of clinching the seat during the General Elections.”

4. At a meeting held on 5<sup>th</sup> May 2017 between the appellant and his 15-member campaign committee, the leader of the Party, the current Governor, Nairobi County, and the 2<sup>nd</sup> respondent, the appellant was again requested to step down. According to the respondents, the appellant was persuaded to do so on the grounds that he did not have enough resources; was not well known or established to win the position in the forth coming General Election and on account of coalition realignment.

5. On his part, the appellant contends that he was only prepared to withdraw his candidature provided the Party undertook in writing to either nominate him to the Senate or the National Assembly or give him an alternative significant role in the Party. The appellant says that those requests were declined.

6. Later that day (5<sup>th</sup> May 2017), there was a delegates meeting of the Party held at Kasarani Gymnasium Nairobi at which the 2<sup>nd</sup> respondent was unveiled as the Party’s nominee for the position of Senate, Nairobi County. According to the appellant, he watched

*“in horror on television as the master of ceremonies introduced Mr. Edwin Sifuna as its Senatorial candidate for Nairobi City County”*

7. The appellant was aggrieved. On 12<sup>th</sup> May 2017, he lodged a statement of claim dated 11<sup>th</sup> May 2017 with the Political Parties Disputes Tribunal seeking, among other reliefs: a declaration that he is the duly nominated candidate of the Party for Senator, Nairobi City County; a declaration that the announcement made on 5<sup>th</sup> May 2017 during the national delegates meeting of the Party that the 2<sup>nd</sup> respondent is the Party’s Senate candidate for Nairobi County is illegal, null and void.

8. The respondents defended the claim before the PPDT. The 2<sup>nd</sup> respondent complained that the appellant had “not made any effort to invoke the jurisdiction of the 1<sup>st</sup> respondent’ National Appeals Tribunal, rendering the present claim/complaint an abuse of process.”

The 2<sup>nd</sup> respondent also lodged a notice of preliminary objection to the appellant’s complaint asserting that the PPDT lacks jurisdiction; and that “the complaint is premature, unfounded and is an abuse of process.”

9. In a judgment delivered on 16<sup>th</sup> May 2017 the PPDT held that:

***“This dispute was never brought subjected [sic] to any kind of internal dispute resolution mechanism, to give the party a good faith chance to resolve it in the first instance. In those circumstances, we find that this dispute was filed prematurely before us.”***

10. The PPDT did not stop there. It went ahead to issue orders in these terms:

***“(a) An order be and is hereby issued that the dispute between the Claimant and the 2<sup>nd</sup>***

***Respondent over the position of Member of Senate, Nairobi County is referred back to the 1<sup>st</sup> Respondent’s National Elections Board to nominate its Senate candidate in Nairobi County.***

***(b) In the interest of party unity, let each party bear its costs of this petition.”***

11. The appellant was not satisfied. He petitioned the High Court, in Election Petition Appeal No. 64 of 2017, to set aside the judgment of the PPDT asserting, among other complaints, that the judgment of the PPDT was based on wrong factual and legal premise that the appellant’s nomination certificate had been

rendered null and void; that the PPDT had ignored other issues that required determination; that the PPDT was wrong to hold that the dispute was premature given that the mandate of the National Appeals Tribunal had expired. The respondents opposed the appeal.

12. In its judgment that is the subject of the present appeal, the High Court (Ong'udi, J) dismissed the appellant's appeal having found and held that:

***“(i) The matter between the parties herein falls under S.40(1)(a), (b) and (fa) of the Political Parties Act and ought to have been first filed, heard and determined by the 1<sup>st</sup> Respondent's NEB.***

***(ii) The Tribunal acted within its jurisdiction when it referred the matter to the 1<sup>st</sup> Respondent to nominate its senator candidate for Nairobi.”***

13. Still dissatisfied, the appellant lodged the present appeal.

### **The appeal and submissions by counsel**

14. Learned counsel represented the parties. Mr. Kibe Mungai appeared for the appellant. Mr. B. Onyango held brief for Mr. A. Oluoch for the 1<sup>st</sup> respondent. Mr. D. Anzala appeared for the 2<sup>nd</sup> respondent. Counsel relied on their respective written submissions, which they highlighted before us.

15. According to counsel for the appellant, there are three issues in this appeal, namely: whether the appellant properly invoked the jurisdiction of the PPDT under Section 40 (1)(fa) of the Political Parties Act; whether the appellant is the validly nominated senatorial candidate of the 1<sup>st</sup> respondent for Nairobi County; and whether the 2<sup>nd</sup> respondent was validly nominated by the 1<sup>st</sup> respondent vide certificate dated 29<sup>th</sup> April, 2017 or pursuant to the judgment of the PPDT dated 16<sup>th</sup> May, 2017.

16. Counsel urged that, having found, as it did, that the appellant's claim before it was premature, the PPDT did not have any basis for referring the matter to the 1<sup>st</sup> respondent's National Elections Board (NEB); and that it was not open to the PPDT to grant reliefs that were not sought or pleaded. In that regard, counsel cited this Court's decision in **Global Vehicles Kenya Limited v Lenana Road Motors [2015] eKLR**.

17. Counsel further submitted that the mandate of NEB, as set out in Rule 3 of the 1<sup>st</sup> respondent's Election and Nomination Rules, does not include a mandate to determine the dispute that was referred to it by the PPDT. Counsel went on to say, that when the dispute arose on 9<sup>th</sup> May 2017, the appellant could not invoke the Party's internal dispute resolution mechanism as all political parties were required, under Regulation 27(4) of the Elections (Party Primaries and Party Lists) Regulations, 2017, to have determined all party disputes by 7<sup>th</sup> May, 2017; and that he appellant was therefore entitled to approach the PPDT directly under Section 40 (1)(fa) of the Political Parties Act; that Section 40(1)(fa) confers original jurisdiction on the PPDT, which is not subject to prior invocation of the party's internal dispute resolution mechanism.

18. As to the validity of the nomination, counsel submitted that the appellant's nomination certificate issued on 3<sup>rd</sup> April 2017 was never challenged before the PPDT or the court; that a press statement issued by the IEBC directing political parties when party primaries should be held did not affect the validity of the nomination certificate; and no evidence was presented to show that the appellant was ever requested to return the nomination certificate for reissue.

19. Counsel asserted that the judgment of the High Court did not meet the requirements prescribed under Order 21 Rule 4 and 5 of the Civil Procedure Rules in that it did not address all the issues that called for determination. In that regard counsel referred the Court to **Ochieng v Amalgamated Sawmills Ltd [2005] 1 KLR 151**; and **Flannery & another v Halifax Estate Agencies Ltd (2000) 1 ALL ER 373**.

20. Opposing the appeal, Mr. B. Onyango for the 1<sup>st</sup> respondent relied on written submissions and urged that it was incumbent upon the appellant, under Section 40 of the Political Parties Act, to exhaust the 1<sup>st</sup> respondent's internal dispute resolution mechanisms before moving the PPDT or the High Court. At the very least, counsel argued, the appellant should have demonstrated that he made an attempt to invoke the 1<sup>st</sup> respondent's internal dispute resolution mechanism or sought leave before instituting a claim directly before the PPDT.

21. Regarding the certificate of nomination issued to the appellant on 3<sup>rd</sup> April 2017, counsel submitted that the same had been recalled and nullified by the Party's Central Committee on account of a directive issued by the IEBC on 5<sup>th</sup> April, 2017; that considering that the appellant did not have financial and logistical ability to mount a successful campaign for the seat, the 1<sup>st</sup> respondent was at liberty to nominate the 2<sup>nd</sup> respondent pursuant to the powers given to it under Regulation 3.3 of the Elections and Nomination Rules in the 1<sup>st</sup> respondent's Constitution as read with Section 17 of the Elections (Political Party Nominations) Regulations, 2017; that the appellant accepted the decision of the Central Committee of the 1<sup>st</sup> respondent in that regard but subsequently reneged on the agreement; and that under Section 2 of the Political Parties Act, the 1<sup>st</sup> respondent made a selection of its candidate and that accorded with Article 38 of the Constitution.

22. Mr. Anzala for the 2<sup>nd</sup> respondent relied on written submissions that he highlighted and also urged that the appellant should have exhausted alternative legal remedies by invoking the 1<sup>st</sup> respondent's internal dispute resolution mechanism before moving the PPDT or the High Court. In support, he relied on a decision of the High Court in Misc. App No. 232 of 2017 Peter Wambua Makau v The PPDT and others as well as a decision of this Court in Narok County Council v Trans

Mara County Council and another [2000] eKLR.

23. Counsel argued that the assertion by the appellant that the mandate of the National Appeals Tribunal of the 1<sup>st</sup> respondent expired on 7<sup>th</sup> May 2017 did not have any basis; the appellant had not shown that he had brought the dispute to the attention of the 1<sup>st</sup> respondent or to the NEB of the 1<sup>st</sup> respondent; that the appellant did not hold a valid nomination certificate to warrant the grant of the orders he had sought before either the PPDT or the High Court; and that the appellant could not rely on the provisions of Section 13(2) of the Elections Act, 2011 as his name had never been forwarded to the IEBC; that the allegations of bias are baseless; and that the 1<sup>st</sup> respondent was entitled to select a candidate of its choice.

### Analysis

24. 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.”***

25. The question that arises in this appeal is whether the High Court erred in upholding the decision of the PPDT declining to entertain the appellant's complaint on the basis that it was premature because the appellant did not, in the first instance, exhaust the 1<sup>st</sup> respondent's internal dispute resolution mechanism.

26. Section 40 of the Act deals with the jurisdiction of the PPDT. 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.”

27. Section 40(2) of the Act provides:

**“(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”**

28. In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanisms.

29. Section 40(1)(fa) of the Act relating to **“disputes arising out of party primaries”** was introduced through an amendment to the Act with the object of addressing **“the challenge of concurrent jurisdiction with other bodies handling electoral disputes.”** [See the memorandum of objects and reasons of the Political Parties (Amendment) Bill]. Section 40(1)(fa) of the Act did not, altogether, introduce an entirely new category of disputes. As this Court held recently in the case of **Dr. Lilian Gogo vs. Joseph M Nyamuthe and 4 others, Civil Appeal No. 135 of 2017 Nairobi**, 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. As the Court stated in that case:

***“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 2<sup>nd</sup> 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, 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.”***

30. In that case the Court acknowledged that there may be disputes that fall outside of the categories set out under paragraphs a, b, c, and e of Section 40(1) of the Act that can be taken directly to the PPDT. In this case, however, the dispute is between a member of the political party and the political party and falls under Section 40(1)(b) of the Act and is required, under Section 40(2) of the Act to be heard by the party’s internal dispute resolution mechanism before the PPDT can take cognizance of it. There is ample authority for the proposition 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 followed. [See **Speaker of the National Assembly vs. Hon. James Njenga Karume, Civil Application No. 92 of 1992 (2008) 1KLR 425** and also **Kimani Wanyoike vs. Electoral Commission & another [1995] eKLR.**]

31. The learned Judge of the High Court was therefore right in upholding the decision of the PPDT that the complaint before the PPDT was premature. As submitted by the respondents, no material was

presented either before the PPDT or the High Court by the appellant to support the assertion that the 1<sup>st</sup> respondent's National Appeals Tribunal was not operational as at 5<sup>th</sup> May 2017 when the appellant says he learnt with shock that the 2<sup>nd</sup> respondent had been declared to be the 1<sup>st</sup> respondent's nominee for the position in question. We are however in agreement with counsel for the appellant that having found that the complaint was premature, the PPDT should have stopped there and „downed its tools?.

32. It is for those reasons that this Court dismissed the appellant's appeal in its judgment delivered on 23<sup>rd</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**