



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & MUSINGA, JJ.A)

CIVIL APPEAL NO. 191 OF 2017

BETWEEN

STEPHEN P. O. AGULO.....APPELLANT

AND

JULIUS NYAMBOK.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

RETURNING OFFICER, ODM.....3RD RESPONDENT

(Being an appeal against the Judgment and Order of the High Court of Kenya at Nairobi (S. N. Mutuku, J.) dated the 17th May, 2017 in Election Petition No. 26 of 2017)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (**Mutuku, J.**) dismissing the appellant's appeal from the decision of the Political Parties Disputes Tribunal (PPDT)

[2] The appellant, **Stephen P. O. Agulo**, the first respondent **Julius S. Nyambok** and several other candidates are members of the 2nd respondent, Orange Democratic Movement Party (ODM) who contested for nomination as Members of County

Assembly (MCA) for Homa-Bay Central Ward in ODM's party primaries held on 24th April 2017. The successful candidate was to be the party's candidate for MCA in the general elections to be held on 8th August 2017.

[3] After the nomination exercise in the Homa-Bay county, the appellant was declared by the Returning Officer (3rd respondent), as the duly nominated candidate for Homa-Bay Central Ward. The 1st respondent and other unsuccessful candidates filed an appeal before the Homa-Bay County Tribunal - The party's **Internal Dispute Resolution Mechanisms (IDRM)** tribunal. The tribunal considered the petition alongside other numerous petitions arising from MCA's nominations in the county and reached a verdict on 28th April 2017 in respect of each petition.

In respect of nomination for Homa-Bay Central Ward, the tribunal made the following decision:

“Many of the allegations by 5 joint petitioners were largely not proved but the tribunal found that Stephen P. O Agulo appeared in the ballot twice and this was a serious election offence. He is the same person as Stephen Peter Odhiambo and the votes having been cast separately were merged and counted for him. This was wrong.

Recommendation

The petition by the 5 candidates has no merit and is dismissed.

The nomination of Stephen P. O. Agulo is nullified and the nomination certificate shall be given to Julius S. Nyambok.”

[4] On 4th May 2017, the 1st respondent filed a statement of claim before the PPDT alleging that in spite of the decision of the party’s tribunal nullifying the nomination of the appellant, the 3rd respondent had gone ahead to declare the appellant the winner and to issue him with a nomination certificate. He sought various injunctions and declarations, *inter alia*, that awarding the nomination certificate to the appellant was illegal, null and void. The 1st respondent also filed a notice of motion, in essence to restrain the appellant from presenting the nomination certificate to the Independent Electoral and Boundaries Commission (**IEBC**) pending the determination of the claim. The appellant filed a replying affidavit sworn on 7th May 2017 in response to the motion.

However, the PPDT granted the interim orders on 5th May 2017 and fixed the claim for hearing on 7th May 2017.

[5] The appellant filed a response to the claim. By the statement of response, the appellant averred, *inter alia*, that he was neither served nor notified of the petition before the Homa-Bay County Tribunal nor informed of the outcome; that upon reading the Kenya Gazette published by IEBC, he noticed that two names with same identity card numbers appeared in the Gazette and informed ODM that only the name of Stephen P. O. Agulo should appear; that he has never been known by the name Stephen Peter Odhiambo but the two names appeared in the ballot papers; and that the 1st respondent did not say what effect the irregularity had on the results of the nominations.

He further averred that he garnered more votes than the 1st respondent and that his nomination was valid.

[6] The PPDT identified only one issue for determination, namely, whether the decision of the tribunal ought to be upheld and said:

“...It is not disputed that there was an IDR process and a decision issued on 28th April 2017 nullifying the nomination process for Homa-Bay Central Ward, and directing that the Claimant be issued with nomination certificate. The 2nd respondent (appellant herein) sought to impugn that decision on the basis that he was not party to the proceedings at the Homa-Bay County Appeals Tribunal. However, this Tribunal is not satisfied that the IDR decision was arrived at without participation of the 2nd respondent. As pointed out by the Claimant, if the same were true, he would have approached this Tribunal and sought to nullify that decision as it directly affected him by cancelling his nomination certificate. He did not. We therefore find his assertions doubtful”.

The tribunal proceeded to make a finding that it found no reason to disturb the decision of the Appeals Tribunal and upheld the decision.

[7] The appellant appealed to the High Court against the decision of the PPDT. Although the memorandum of appeal contained several grounds of appeal, he faulted the decision of the PPDT on three

main grounds, viz, failing to find that he was never invited by Homa-Bay County Tribunal to defend himself; failing to take into account the overwhelming evidence that he was not invited to the hearing of the appeal, and in ignoring the fact that the 1st respondent did not rebut facts in his replying affidavit, that he did not attend the hearing of the appeal.

[8] The High Court made a finding that the proceedings giving rise to the appeal were not interlocutory proceedings; that the omission by the appellant to incorporate the replying affidavit in the record of appeal was not a procedural technicality but a failure to produce evidence and that there was no evidence to make the court reach a contrary decision that the appellant did not participate in the appeal before Homa-Bay Appeals Tribunal. The appeal was dismissed with no orders as to costs.

[9] The memorandum of appeal raises four main grounds of appeal. Firstly, that the High Court erred in fact and in law in failing to consider that the appellant could not have challenged the decision of the Homa-Bay County Tribunal as he was never invited during the hearing of the appeal. Secondly, in failing to consider that there was no decision and that the appellant could have challenged the purported decision which was neither signed nor stamped; thirdly, in failing to consider that the proceedings before the PPDT were defective, and fourthly, in rejecting the appellant's oral application for leave to file a supplementary record of appeal to include the omitted replying affidavit in the record of appeal.

[10] By **section 41(2)** of the Political Parties Act, an appeal lies from the decision of the PPDT, *inter alia*, to the High Court on points of law and facts and to this Court, on points of law. It follows that this Court can only entertain an appeal against the decision of PPDT on points of law only.

Mr. Ochindo, the appellant's counsel, has made extensive written submissions and cited several authorities augmented by oral submissions in order to show that the appellant's right to fair hearing and fair administrative action under Articles 50(1) and 47(1) of the Constitution respectively, were infringed by the Homa-Bay County Appeals tribunal. Similarly, **Mr. Ayieko**, learned counsel for 1st respondent, has made written and oral submission in reply and contends that the appeal is fatally defective as it raises issues of fact.

[11] The issues raised in this appeal relating to the right of fair hearing are substantially similar to the issues raised in the High Court.

The fact that the 1st respondent appealed against the Homa-Bay County Appeals Tribunal from the decision of the Returning Officer is not disputed. The appellant's contention was that he was not invited to participate in the appeal and thus he was not aware of the appeal and the decision until he appeared before the PPDT.

The findings of the tribunal in respect of all appeals arising from MCA nominations in Homa-Bay County were filed before the PPDT. Contrary to the contention of the appellant, the findings are signed by the three members of the tribunal and bear a stamp of ODM.

The PPDT considered the finding of the tribunal relating to the Homa-Bay Central Ward to be genuine and made a finding that the appellant contested the validity of the decision on the basis that it was arrived at without his participation. The PPDT identified the only issue arising from the appeal before it as whether the decision of the tribunal ought to have been upheld.

Further, the appellant did not contend in the High Court that the decision did not exist or that it was not genuine. From the foregoing, we find that the Homa-Bay county tribunal made a decision dated 28th April 2017 regarding the nomination in issue.

[12] The appellant does not contend that the PPDT did not afford him a fair hearing. The complaint of breach of the right to fair hearing and fair administrative action is directed at the Homa-Bay County appeals tribunal.

The issue whether the appellant was heard by the Homa-Bay County Appeals Tribunal is a question of fact and not law. Both the PPDT and the High Court made a finding that the appellant did not prove that he was not given an opportunity to be heard. Both gave reasons for that decision – the fact that the appellant did not file a complaint before PPDT. The inference of fact drawn from the conduct of the appellant was reasonable.

[13] In any case, the appellant did not refer to the ODM Election and Nominations Rules which establish the IDRMT tribunal to show that he was entitled to be heard and the form of hearing stipulated by the Rules. This was important as the party’s tribunal is an informal tribunal as opposed to the PPDT which is a statutory tribunal guided by the Evidence Act and the Civil Procedure Rules where appropriate.

[14] Lastly, the appellant complains that the High Court denied him an opportunity to file a replying affidavit which he had filed in the PPDT and which was omitted in the record of appeal filed in the High Court. That affidavit was in response to the application for interlocutory injunction.

[15] The affidavit has been irregularly incorporated in the record of appeal before the court by way of a supplementary affidavit. The appellant in addition filed a response to the claim in the PPDT which the PPDT considered. The affidavit addresses the same issues as the response to the claim – that the appellant won the nomination fairly and the fact that the ballot papers contained two names did not affect the result. The appellant admitted in his response to the claim that the ballot papers contained two names but claimed that it was not due to his fault and that he unsuccessfully took steps to have the irregularity corrected. Apparently, that is the main issue he feels he should have been heard on by the party’s tribunal. The PPDT exercises original jurisdiction. It heard the appellant on the issue and decided that the decision of the party’s tribunal should be upheld. In the circumstances, the failure by the High Court to allow the appellant to introduce the replying affidavit did not cause any prejudice to the appellant.

[16] In conclusion, we find that the appeal to this Court having been based on finding of fact is incompetent and does not lie.

[17] There is no good reason why the appellant should not pay the costs of this appeal to the 1st respondent.

[18] Accordingly, the appeal is dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 21st day of July, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR