



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 179 OF 2017

BETWEEN

JECONIA OKUNGU OBUTU.....1ST APPELLANT

JULIUS OOKO OKAYO.....2ND APPELLANT

AND

ORANGE DEMOCRATIC MOVEMENT PARTY....1ST RESPONDENT

SIAYA COUNTY RETURNING OFFICER.....2ND RESPONDENT

CORNEL RASANGA AMOTH.....3RD RESPONDENT

ENG. NICOLAS ODERO GUMBO..... 4TH RESPONDENT

CAREY OREGE.....5TH RESPONDENT

WILLIAM ODUOL.....6TH RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....7TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Chacha Mwita, J.) dated 9th June, 2017 and against the Judgment and Decree from the Political Parties Disputes Tribunal - Petition No. 200 of 2017 dated 2nd June, 2017

in

Election Petition No. 92 OF 2017)

JUDGMENT OF THE COURT

[1] This is an appeal from the Judgment of the High Court (Mwita, J) allowing the appeal by Cornel

Rasanga Amoth – the 3rd respondent in this appeal. The appeal by the 2nd respondent in the High Court was from the Judgment of the Political Parties Disputes Tribunal (PPDT) established under section 39(1) of the Political Parties Act – Act No. 11 of 2011 which judgment in essence nullified the nomination of the 3rd respondent as Orange Democratic Party (ODM) nominee for election as a Governor of Siaya County in the National General Elections to be held on 8th August, 2017.

[2] The background to the nomination disputes is briefly as follows:

On 25th April 2017, ODM conducted party primaries for nomination of candidates in Siaya County for the position of Governor, Senator, Member of National Assembly, Members of County Assembly and County Women Representative. After the elections, the 3rd respondent was declared the winner for the position of the Governor and was issued with a nomination certificate on 29th April 2017 by the party's National Election Board. There were other candidates for the position of a Governor – **Eng. Odera Gumbo, Carey Ogere and Willam Oduol**, the 4th, 5th and 6th respondents respectively. The 4th respondent who was the closest rival to the 3rd respondent appealed to the **National Appeal Tribunal (NAT)** established under Rule 19.21 of the ODM's Election and Nomination Rules.

[2.1] The jurisdiction of NAT includes determining appeals arising from elections of Governors. By a judgment dated 3rd May 2017, the appeal was dismissed.

Thereafter the 4th respondent opted to resign as a member of ODM and subsequently applied to **Independent Election and Boundaries Commission (IEBC)** to be nominated to contest gubernatorial election as an independent candidate. His application was successful and he was nominated on 1st June 2017.

[2.2] On 9th May 2017, the 1st and 2nd appellants filed a petition before PPDT as members of ODM and as voters alleging in essence that the gubernatorial nominations were conducted in contravention of the Constitution, the Election Act and ODM's Election and Nomination Rules. The appellants alleged that ODM failed to avail party register of members at polling stations and instead used the 2013 voters roll used by IEBC thereby disenfranchising the two appellants and all other members of ODM registered after 2013. The appellants also alleged that non members were allowed to vote; that there was over voting, ballot stuffing and other malpractices, including, changing the date and time of voting, late arrival of ballot papers, announcement of results when some results were being counted and tallied, and declaration of results by a person who was not the county returning officer.

[2.3] The petition was supported by affidavits sworn by various persons including the 4th respondent, Diana Akinyi Otieno, Shem Opinyo Waringa, Edwin Otieno Obara, Justus Odima Odimo, Esther Atieno Ochieng' and Dismus Omondi. Odhiambo Wakla, an advocate and chairman of the 3rd respondent's campaign secretariat swore a replying affidavit on behalf of 3rd respondent who was said to have been out of the country at the time. He admitted that there were logistical challenges such as delays but which did not affect the nomination exercise. He denied the existence of the malpractices alleged by the appellants.

[2.4] The 3rd respondent filed a notice of preliminary objection to the petition seeking an order that the petition be struck out on three grounds namely; that PPDT has no jurisdiction to entertain the petition alleging contravention or violation of fundamental rights under the Constitution; that PPDT lacked jurisdiction to deal with the petition as petitioners did not first exhaust ODM's internal dispute resolution mechanisms and that the petition has been filed to advance the interest of the 4th respondent who is no longer a member of the party.

The PPDT by a judgment dated 11th May, 2017 upheld the first ground of the preliminary objection holding that it had no jurisdiction to determine a question, whether a right or fundamental freedom

under the Bill of Rights has been denied or violated and dismissed the petition. The petitioner filed **Civil Appeal No. 41 of 2017** in the High Court against the decision and on 23rd May 2017. The High Court (**Sergon, J**) allowed the appeal and remitted the petition to PPDT for fresh hearing.

[2.5] On 25th May, 2017, PPDT recorded a consent order partly in the following terms:

“(i) ... the respondents are granted up to 30th May 2017, to file their respective responses to the petition herein.

(ii) ... the 1st respondent in particular to avail in its reply copies of –

(a) the final official tally of the Siaya County gubernatorial nominations held on 25th April 2017.

(b) The ODM party list members submitted to both the IEBC and RPP at least 120 days before the election pursuant to section 28 of the Elections Act, 2017.

(iii) ...the petitioner is granted corresponding leave to file a supplementary affidavit after service if need be..”

[3] After hearing the submission PPDT framed three main issues thus:

“(a) Does this tribunal have jurisdiction to hear and determine the dispute?

(b) Does the Tribunal have the jurisdiction to apply or interpret the Constitution in the limited context of Political Party Disputes?

(c) Did the 1st respondent conduct free and fair nominations for the position of Governor Siaya County?”

On the first two issues relating to jurisdiction of the tribunal, the tribunal held respectively that it had jurisdiction to entertain the dispute, notwithstanding that the petitioners had not first filed an appeal to NAT and that the tribunal had mandate to apply and interpret the Constitution and enforce the Bill of Rights in the limited context of disputes falling under section 40(1) of the Political Parties Act.

As regards the conduct of nominations, PPDT made findings, *inter alia*, that failure by ODM to file documents directed by the consent order fortified the petitioner’s claim that the results were declared prematurely and by a stranger to electoral process thus leading to unavailability of the official documents used in the process; that the 3rd respondent was declared as having been elected before tallying had been completed; that ODM did not use the ‘party list’ submitted to the Commission under section 28 of the Elections Act; that the nominations were unlawfully conducted without any reference to party list.

[4] On appeal to the High Court by the 3rd respondent, the High Court identified two issues which emerged from the appeal namely; whether PPDT had jurisdiction to determine the petition and grant declarations sought and whether the appellants had proved their case. On the first issue, the High Court held, in essence, that, PPDT had jurisdiction as the reliefs claimed and granted were reliefs that could ordinarily be granted in a normal complaint without necessarily using the word “declaration”.

On the second issue the High Court considered the averments in the petition and the affidavit evidence after which it made findings essentially, *inter alia*;

(i) Appellants did not show that they were party members and PPDT did not interrogate this issue.

(ii) Only party member could seek information sought from ODM vide consent order and that information was available also from IEBC.

(iii) The contents of the two CD's produced by the appellants was unknown and had no evidential value with respect to list of members.

(iv) The source of information on the use of IEBC 2013 register across the county was not provided and PPDT shifted the burden of proof to 3rd respondent.

(v) The alleged malpractice such as over voting were general statements which were not elaborated.

[5] In the final analysis the High Court made a finding thus:

“In my respectful view, PPDT abdicated its responsibility examining and determining the complaint based on the evidence before it but proceeded as though it was the duty of the 3rd respondent to disprove the complaint. The PPDT also dismissed the 3rd respondent saying that there was no affidavit to deny that the petitioners were members. I have seen submissions on record by the 2nd respondent and this was one of the issues raised in the submission but no decision was made on it.”

[6] By section 41(2) of the Political Parties Act, an appeal to the High Court from the decision of PPDT lies on points of law and fact and to this Court, on points of law. Further, by section 41(4), PPDT is required to apply the rules of evidence and procedure in the Evidence Act and the Civil Procedure Act with necessary modifications while ensuring that its proceedings do not give undue regard to procedure technicalities.

Section 13 of the Elections Act provides, amongst other things, that a political party shall nominate its candidates for an election under the Act in accordance with the Constitution and nomination rules. The ODM has its election and nomination rules and rule 23(1) provides:

“For purposes of conducting elections by universal suffrage, the NEB shall ensure that there are registers of all party members in all wards constituency and counties as the case may be.”

Rule 23.2. provides that:

“On the date determined for polling eligible voters as per the party register shall be identified by availing a national identity card, and voters card or passport.”

Regulation 20(1) of the Political Parties Regulation, 2012 provides:

“A political party membership card shall be in form PP 13 and shall be evidence of membership to that party.”

[7] The first category of grounds of appeal fault the learned judge for denying the appellants an opportunity to file documents in reply to the appeal and in relying on incomplete record, thereby denying the appellants a fair hearing and occasioning injustice to them.

Mr. Kibe Mungai, the appellants' counsel submitted that the learned Judge relied on incomplete record which led the judge assuming that certain issues had not been provided. The documents omitted from the record have not been mentioned in the written submissions. However, in the oral submission, the appellants' counsel referred to two issues- membership of ODM and the results of party primaries. It seems that the alleged omitted documents refer to those two issues.

Mr. Amuga, learned counsel for the 3rd respondent submitted that there was no room for filing new documents at appeal stage; that the appellants filed grounds of opposition to the appeal and a replying affidavit annexing documents which the learned Judge considered and that the appellants' counsel and other counsel agreed to proceed with the appeal if the original records of PPDT was made available.

[8] It seems from the submissions that the contention that the record is incomplete based on the fact that ODM did not avail the documents it was required to file by the consent order. However, the appellants did not institute further proceedings to compel ODM to avail the documents and PPDT determined the dispute without those documents. Moreover, those documents would constitute fresh evidence in the appeal and could not be produced without leave of the court. The record of the proceedings in the High Court show that even without those documents, the appellants' counsel agreed that the appeal should proceed to hearing. Even without the leave of the court, the appellants filed a replying affidavit annexing two CD's and a letter from IEBC which the learned judge considered. In the circumstances, there is no merit in these grounds of appeal.

[9] It is convenient to deal with the rest of grounds of appeal together. They all relate to the evaluation of the evidence by the learned judge and to the ultimate findings by the court. The appellants aver in the grounds of appeal, amongst other things, that the learned Judge erred in law in finding that PPDT unlawfully shifted the burden of proof to ODM; in setting aside the consent order; in finding that the appellants were not members of ODM; in validating a blatant disobedience of the court order; in failing to appreciate that by using IEBC's register instead of political party register the entire nomination was a nullity in law, and in failing to appreciate that the impugned nomination process was a process conducted by ODM and the challenge to the process was a challenge to ODM and not to any of the candidates in the nominations.

We have considered the respective submissions of counsel.

[10] The proceedings in the PPDT was initiated by filing a petition alleging breaches of Constitution, Election Act, and party's Election & Nomination Rules. It is clear from the petition particularly paragraph 17 that the appellants alleged that the party conducted the nomination in contravention of the law. The contraventions of the law are summarised in that paragraph thus:

“(a) there were no registers used which affected the elections in two ways:

(i) members were not allowed to vote; and non members were allowed to vote.

(b) There was clear and blatant disenfranchisement of members of the party which meant that nominations did not meet the constitutional threshold, and

(c) the process was marred with unabated malpractices which not only compromised the process but also led to the elections not being credible.”

[11] The issue of jurisdiction of PPDT to deal with a petition alleging violation of the Constitution and constitutional rights was raised and determined by PPDT and by the High Court. There is no cross-appeal against the decision of the High Court and we will let the issue to rest there. However, although the appellant states in ground 13 of the appeal that the petition was a challenge to the party and not a challenge to any of the candidates, and although the petition sought a declaration, *inter alia*, that there was no validly nominated gubernatorial aspirant, a specific order was sought to nullify the purported nomination exercise for the position of the Governor. It is clear that the petition in essence sought the nullification of the nomination of the 3rd respondent, howsoever the petition was framed.

[12] The nullification of the nomination process was based on the grounds pleaded which were essentially issues of fact. The appellants had the legal burden to prove all the facts unless they were admitted. The *locus standi* of the appellants was raised. They had to prove that they were members of the party and had a right to vote. They did not produce a member's card or a register.

They had to show that the 2013 IEBC's register and not the party's register was used. They had also to show that there was a post 2013 party register which contained their names and the names of all those they claimed were not allowed to vote. They had to show that the persons whose names did not appear in the register were allowed to vote

[13] The consent order recorded on 25th May 2017 did not state that the appellants were party members. It only required the party to avail the final tally of results and party's register of members. Apparently, the party did not participate either in the proceedings before PPDT or in the appeal and was not a party to the consent order. The party did not provide the required documents. The result is that those documents were not available in court.

Those are the documents that the appellants should have obtained from the party, or from IEBC or the Registrar of Political Parties to support their case before PPDT before they filed the petition. The PPDT considered the failure by the party to produce the documents as support of the appellants' claim. By so finding, PPDT failed to appreciate that it is the validity of the nomination of the 3rd respondent which was being challenged. It indeed shifted the burden of proof to the 3rd respondent.

[14] The High Court re-evaluated the evidence and made a finding that all the allegations made by the appellants in the petition were unsubstantiated. We agree with the findings of the High Court. There was no tangible evidence either documentary or otherwise in support of the petition. More importantly, the appellants did not prove and PPDT did not find that the irregularities affected the result of the nominations.

[15] Lastly, we agree with the 3rd respondent's counsel that this appeal does not serve any legitimate interest. The two appellants did not seek nomination in the elections. The 5th and 6th respondents who were unsuccessful in the nomination did not participate in this appeal and did not challenge the nomination of the 3rd respondent either before NAT or PPDT. The appeal is supported by the 4th respondent who has already left the party and has been nominated as an independent candidate. The 4th respondent lost in the appeal before NAT. The advocates who appeared for him are the same advocates appearing for the appellants. It is a reasonable inference to say that the appellants are pursuing the appeal on behalf of the 4th respondent.

For the foregoing reasons the appeal has no merit and is dismissed with no orders as to costs.

Dated and delivered at Nairobi this 14th day of July, 2017.

E.M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR