



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OKWENGU, GATEMBU & MURGOR J.J.A)**

**CIVIL APPEAL NO. 199 OF 2017**

**BETWEEN**

**FREDRICK ODHIAMBO OYUGI ..... APPELLANT**

**AND**

**ORANGE DEMOCRATIC**

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

**JANE WANGUI ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya*

*at Nairobi (Kimaru, J.) delivered at Nairobi on 22<sup>nd</sup> June, 2017*

*in*

**ELECTION PETITION APPEAL NO. 113 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> July 2017, this Court partially allowed the appellant’s appeal and ordered that the dispute between the parties be remitted back to the 3<sup>rd</sup> respondent, the Independent Electoral & Boundaries Commission (the IEBC) for hearing and determination on merits within 48 hours of delivery of the judgment. Each party was to bear its own costs of the appeal. We reserved our reasons for doing so which we now give.
2. The appeal arose from a judgment of the High Court (Kimaru, J) given on 22<sup>nd</sup> June 2017 upholding a decision of the Dispute Resolution Committee of IEBC declining to entertain the appellant’s complaint on

the grounds that the appellant should have referred the complaint to the Political Parties Disputes Tribunal.

### **Background**

3. The appellant, Fredrick Odhiambo Oyugi, and the 2<sup>nd</sup> respondent, Jane Wangui aspired to be candidates, as nominees of the 1<sup>st</sup> respondent, the Orange Democratic Movement (ODM), for the position of Member of the National Assembly for Embakasi North Constituency, Nairobi City County during the 8<sup>th</sup> August 2017 general elections. To that end, they participated in ODM's nomination election exercise that was conducted on 30<sup>th</sup> April 2017.

4. Following that nomination exercise, the appellant asserts that ODM's returning officer for Embakasi North Constituency declared him the winner and issued him with a provisional nomination certificate on the same day, i.e. on 30<sup>th</sup> April 2017. He was subsequently issued with the final nomination certificate on 3<sup>rd</sup> May 2017.

5. The appellant states that his victory was not challenged and was therefore surprised when he learnt that ODM submitted the 2<sup>nd</sup> respondent's name to IEBC as its nominee for the said position.

6. On learning that the 2<sup>nd</sup> respondent's name had been submitted to IEBC, the appellant appears to have gone into a panic. On 24<sup>th</sup> May 2017 he lodged a complaint (Complaint No. 302 of 2017) with the Political Parties Disputes Tribunal (the PPDT). On 29<sup>th</sup> May 2017 he lodged an application for Judicial Review (Judicial Review Application No. 272 of 2017) before the High Court. On 31<sup>st</sup> May 2017 he withdrew the application before the PPDT. On 5<sup>th</sup> June 2017 he withdrew the Judicial Review application before the High Court.

7. The appellant then filed a complaint with the IEBC's Dispute Resolution Committee (Complaint No. 315 of 2017) on 5<sup>th</sup> June 2017. The Dispute Resolution Committee of the IEBC took the view that the dispute should have been resolved by the PPDT and dismissed the complaint in a ruling delivered on 9<sup>th</sup> June 2017.

8. The appellant was aggrieved by the decision of the Dispute Resolution Committee of the IEBC. He appealed to the High Court in Election Petition Appeal No. 113 of 2017.

9. In its judgment delivered on 22<sup>nd</sup> June 2017, the High Court (Kimaru, J.) concurred with the Dispute Resolution Committee of the IEBC and dismissed the appellant's appeal. In the Judge's view, IEBC lacked jurisdiction to hear the dispute arising out of the nomination of candidates by political parties. The Judge was also of the view that the appellant, being aware that the 2<sup>nd</sup> respondent had also been issued with a nomination certificate, failed to act with due diligence to prosecute his complaint before the proper forum within the strict timelines as stipulated by law.

10. The appellant was dissatisfied with that judgment and instituted the present appeal.

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

11. The appellant set out seven grounds of appeal in his memorandum of appeal, which he condensed into two main complaints during the hearing of the appeal. The first is that the learned Judge erred in failing to consider that the IEBC and the PPDT have concurrent jurisdiction in relation to disputes relating to or arising from nominations. The second being that the learned Judge failed to find that the appellant's right to legitimate expectation had been violated.

12. Learned counsel Mr. J. Hassan who held brief for Prof. T. Ojienda SC, for the appellant, referred us to the appellant's written submissions and submitted that the jurisdiction of the IEBC in relation to disputes relating to or arising from nominations is conferred under Article 88(4)(e) of the Constitution; Section

4(1) of the Independent Electoral & Boundaries Commission Act; and Section 74 of the Elections Act.

13. Counsel drew our attention to a memorandum of understanding entered into between IEBC and PPDT under which IEBC purported to donate its powers to the PPDT and submitted that IEBC cannot shirk from its constitutional and statutory obligation by entering into such a memorandum of understanding.

14. Counsel submitted further that the appellant's legitimate expectation that his name would be submitted to IEBC as ODM's nominee or candidate for the said position was breached. For an exposition on the doctrine of legitimate expectation, counsel invited us to consider the decision of this Court in **Royal Media Services Limited & 2 others v Attorney General & 8 others [2014] eKLR**; and the High Court decision in **Kalpana H. Rawal v Judicial Service Commission & 3 others [2015] eKLR** arguing that the appellant had a legitimate expectation that ODM would respect the will of the electorate by submitting his name, as the winner of the nomination exercise, to the IEBC as the duly nominated candidate for the contested seat with 2,910 votes relative to 870 votes garnered by the 2<sup>nd</sup> respondent.

15. Opposing the appeal, learned counsel for the 1<sup>st</sup> respondent Mr. M. Owuor relied on his written submissions that he briefly highlighted. He submitted that the appellant had failed to exhaust ODM's internal dispute resolution mechanisms as required under Section 40 of the Political Parties Act; that under ODM's Nomination Rules, the appellant was required to register his complaint with ODM within 48 hours of the nomination exercise; that the appellant delayed in lodging his complaint before the IEBC; and that the appellant was guilty of forum shopping.

16. Counsel urged that it is not open to this Court, whose jurisdiction is limited to matters of law, to consider which candidate garnered more votes than the other or who won during the nomination exercise as those are matters of fact outside the mandate of this Court.

17. Learned counsel for the 2<sup>nd</sup> respondent Ms. J. N. Odiya who also held brief for Ms. Olao for the 3<sup>rd</sup> respondent opposed the appeal. She referred to the written submissions filed on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and urged that both the IEBC and the High Court were correct with regard to the jurisdiction of the IEBC; that the appellant should have pursued his grievances with the PPDT; and that there was no evidence to prove that the PPDT had ceased its operations by the time the appellant lodged the dispute. Counsel relied on a decision of the High Court in **Francis Gitau Parsimei & another v The National Alliance Party & others [2012] eKLR** to support the argument that a court or tribunal cannot exercise jurisdiction over an electoral dispute that falls within an exclusive competence of a different court or tribunal. According to counsel, the appellant was guilty of forum shopping by filing claims in different fora.

18. The 3<sup>rd</sup> respondent maintained that under Section 39 and 40 of the Political Parties Act, any grievances in respect of issuance of nomination certificates are matters for determination by the PPDT.

19. According to counsel, the IEBC was also justified in declining jurisdiction in this matter on account of a memorandum of understanding it had entered into with the PPDT on 28<sup>th</sup> March, 2017, under which IEBC and PPDT delineated their respect roles with respect to resolution of disputes arising from nominations.

### **Analysis**

20. Under Section 41(2) of the Political Parties Act, the jurisdiction of this Court on an appeal from the High Court is confined to points of law. The Section provides that:

***“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.”***

21. The only issue of law that arose in this appeal is whether the IEBC and the High Court erred in taking the view that IEBC lacked jurisdiction to resolve the dispute. In that regard, it is common ground that the

appellant presented his complaint to the Dispute Resolution Committee of the IEBC after ODM had presented the 2<sup>nd</sup> respondent's name to IEBC as its nominee for the position in question.

22. IEBC is established under Article 88(1) of the Constitution. Its jurisdiction with respect to electoral disputes relating to or arising from nominations is conferred by the Constitution and by statute. Article 88(4)(e) of the Constitution provides that IEBC is responsible for conducting or supervising referenda and elections to any elective body or office established under the 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;”*** [emphasis added].

23. The above provision is replicated verbatim under Section 4(e) of the Independent Electoral and Boundaries Commission Act No. 9 of 2011:

**“As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the 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;”**

24. Further provision is also made under Section 74(1) of the Elections Act No. 24 of 2011:

**“74. Settlement of certain disputes**

- **Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for 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.”**

25. Those provisions speak for themselves. The jurisdiction of the IEBC in relation to disputes relating to or arising from nominations is conferred by the supreme law of the land and reiterated in the two statutes.

26. The PPDT is established under Section 39 of the Political Parties Act. Its jurisdiction is set out under Section 40 of the same statute in this terms:

**“40. Jurisdiction of Tribunal.**

**(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) dispute between coalition partners; and***

***(f) a disputes arising out of party primaries.***

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

27. On the face of those provisions conferring jurisdiction on IEBC and the PPDT respectively, there is no doubt that both the IEBC and the PPDT are clothed with the power to deal with disputes arising from nominations.

28. Section 40(fa) of the Political Parties Act mandating the PPDT to hear and determine disputes arising from party primaries is a recent addition to Section 40 of the Political Parties Act introduced through the Political Parties (Amendment) Bill, 2016. The intention in making that amendment was stated in Clause 19 of the memorandum of objects and reasons to that bill as aimed at addressing ***“the challenge of concurrent jurisdiction with other bodies handling electoral disputes.”***

29. The conferment of jurisdiction on the PPDT to hear and determine disputes relating to party primaries under the Political Parties Act cannot however oust the jurisdiction of the IEBC to adjudicate over a dispute arising from nominations provided such jurisdiction is properly invoked. Neither can that jurisdiction be taken away from IEBC by a memorandum of understanding.

30. In ***Kyalo Peter Kyulu vs. Wavinya Ndeti & 3 others [2017] eKLR***, a judgment of this Court on appeal from a decision of the High Court (Odunga, J), this Court agreed with a distinction made by the High Court between the jurisdiction of the IEBC and that of the PPDT in the following terms:

***“117. ...In my view the IEBC Committee exercises original jurisdiction under section 74 of the Elections Act unlike the Political Party Dispute Tribunal which exercises an appellate jurisdiction. Accordingly, in matters which purely fall within section 74 of the Elections Act and within the exclusive jurisdiction of the IEBC Committee, it is my view that the Committee is not deprived of jurisdiction by the mere fact that the complainant did not lodge his complaint with the Party’s Internal Dispute Resolution Mechanism.***

***118. Whereas the PPDT and the IEBC have jurisdiction over electoral disputes, the Court must interpret their jurisdiction in a manner that does not render one statutory tribunal redundant. The Court must in such matters adopt a purposive interpretation of the respective electoral statutes. Therefore to interpret their jurisdiction in a manner that gives leeway to parties to either bypass one or ignore decisions made by the other would militate against the purpose for which the two Tribunals were set up.***

***119. It is now clear that the PPDT deals with disputes arising from party primaries and this is clear from its jurisdiction. The IEBC on the other hand, it is my view, deals with nomination disputes that do not fall within the jurisdiction of the PPDT since appeals from the PPDT do not lie to the IEBC but to the High Court. If it were the position that the IEBC Committee would be free to determine issues which had already been determined by the PPDT without an appeal being preferred to the High Court, that position would amount to elevating the IEBC to an appellate Tribunal over the decisions of the PPDT. That scenario would also imply that even where a decision of the PPDT has been the subject of the High Court’s appellate jurisdiction, the IEBC might still be at liberty to entertain such a matter under the guise of resolving a nomination dispute. To my mind that would clearly be contrary to the principle of judicial hierarchy and would be incongruous to the statutory scheme and subversive of the true legislative intent.”***

31. However, whilst agreeing with the High Court, this Court qualified that pronouncement by observing that the jurisdiction of the PPDT extends beyond “appellate”. No doubt the High Court was addressing the issue of jurisdiction of the IEBC and the PPDT from a hierarchical perspective. There can be no doubt, based on the constitutional and statutory provisions to which we have referred that the IEBC and the PPDT have jurisdiction in relation to disputes arising from nominations.

32. That said, and as this Court recently noted in the case of **Eric Kyalo Mutua vs. Wiper Democratic Movement and another Civil Appeal No. 173 of 2017**, there is “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” so as “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,”

33. In our judgment therefore, the learned Judge of the High Court fell into error in upholding the decision of the IEBC that it did not have jurisdiction to hear and determine the appellant’s dispute.

34. Being of that view, we ordered that the dispute be remitted back to IEBC for hearing and determination on merits. Being of that view, it was therefore not open to this Court to determine or pronounce itself on the merits or otherwise of the appellant’s claim.

35. It is for those reasons that the Court partially allowed the appellant’s appeal in terms of the judgment of the Court delivered on 21<sup>st</sup> July 2017 by ordering the dispute to be determined by IEBC on merits.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of September, 2017.**

**H. M. OKWENGU**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**