



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: NAMBUYE, MUSINGA & GATEMBU JJA)
CIVIL APPEAL NO.146 OF 2017

BETWEEN

HEBERT MUGANDA.....APPELLANT

VERSUS

WILFRED OLUOCH ODALO.....1ST RESPONDENT

JOHN OBONYO.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3RD RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....4TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of

Kenya at Nairobi (F. Tuiyot, J) Dated 23rd May, 2017

in

Election Petition Appeal No. 54 of 2017)

REASONS FOR THE JUDGMENT OF THE COURT

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

The appeal was exhaustively argued before us on the 7th day of June, 2017 by learned counsel Mr. **Ochieng Opiyo**, instructed by the firm of **Ochieng Opiyo and Company Advocates** for the appellant, **Herbert Muganda (Herbert)**, **Ochich T.L.O** instructed by the firm of **Ochich T.L.O and Company Advocates** for the 1st respondent, **Wilfred Oluoch Odalo, (Wilfred)**; and **George Wandati**, instructed by the firm of **Wandati and Company Advocates**, for the 3rd Respondent, the Orange Democratic Movement (ODM). There was no representation for the 2nd respondent, **John Obonyo (John)**, and the 4th respondent, the **Independent Electoral and Boundaries Commission (IEBC)**, but with notice. In a

judgment dated the 12th day of June 2017, we allowed the appeal against the impugned judgment of **F. Tuiyot, J.** dated the 23rd day of May, 2017 on terms as follows:

“(1) The judgment, orders and decree of Hon. F. Tuiyot, J dated the 23rd day of May, 2017 be and is hereby set aside.

(2) The Nomination of Wilfred Oluoch Odalo as the Member of County Assembly (MCA) for Mabatini Ward, Nairobi County, for the Orange Democratic Movement (ODM) Party in respect of the Primary held on the 30th day of April, 2017 be and is hereby nullified.

(3) The Orange Democratic (ODM) Party, the 3rd Respondent herein, be and is hereby directed to conduct a fresh nomination exercise for the position of Member of County Assembly (MCA) for Mabatini Ward, Nairobi County, in accordance with the party’s constitution and the prevailing party nomination Rules within two (2) days from the date hereof. Each party to bear its own costs of the appeal.”

We now proceed to give reasons for allowing the appeal.

The background to the appeal is that, **Hebert, Wilfred** and **John** were among aspirants who participated in the ODM party primary nomination exercise held on the 30th day of April, 2017, for the nomination of the position of Member of the County Assembly, (MCA) for Mabatini Ward, Nairobi County. At the close of the exercise, a dispute arose as to who the winner was. A **Mr. Jared Owade (Jared)** whom **Herbert, John** and **ODM** assert was rightfully appointed by the chairperson, ODM National Elections Board (NEB), **Mrs. Judith Pareno**, and as confirmed by the chairman ODM elections committee, Nairobi, **Omar Yusuf Mohammed**, as the Returning officer for Mathare Constituency, declared **Hebert** the winner of the said nomination exercise, and issued him with a nomination certificate, while another person by the name of **Mr. Thomas Odoyo Omune, (Thomas)** alleging to be the Returning Officer for Mabatini Ward, and who also exhibited a letter of appointment from the chairperson ODM NEB, declared **Wilfred** as the winner of the said nomination exercise, and also issued him with a nomination certificate. Both opposing winners were aggrieved. They moved to the Special County Appeals Tribunal of **ODM**, which after due deliberations over the dispute, granted the following reliefs;

“(1) The 1st appeal by Mr. Hebert Muganda has succeeded and therefore allowed.

(2) The 2nd appeal by Mr. Wilfred Oluoch Odalo has not succeeded and therefore disallowed.

(3) The interim certificate issued to Mr. Wilfred Oluoch Odalo is hereby revoked.

(4) The Nomination of Mr. Hebert is therefore upheld and the interim nomination certificate upheld, despite the mind boggling number of votes”

Wilfred and **John** were aggrieved by the above findings and filed complaints numbers 127/2017 and 152/2017 before the PPDT, which were consolidated and heard together, resulting in the dismissal of the complaint lodged by **John**, but allowing that lodged by **Wilfred**, pursuant to which the PPDT issued an order compelling ODM to issue **Wilfred** with a nomination certificate for the position of MCA Mabatini Ward, Nairobi County, within 12 hours from the date of the order.

ODM was aggrieved and unsuccessfully moved the same PPDT, seeking an order for stay of execution of the orders granted on the 11th day of May, 2017 and an order for the review and setting aside of the said orders.

Hebert, who had not been party to the proceedings before the PPDT, was aggrieved as the orders granted by the PPDT on the 11th day of May, 2017 had divested him of the reliefs that had been granted to him by the County Special Appeals Tribunal. He filed High Court Election Petition Appeal Number 54 of 2017,

citing various grounds. The determination of the said appeal is what resulted in the impugned judgment of **F. Tuiyot, J.** dated the 23rd May, 2017 in which the learned Judge dismissed the appeal.

Herbert is now before us on a 2nd appeal, citing 14 grounds of appeal. In summary, **Herbert** complains that the learned Judge fell into error when he upheld the findings of the PPDT which were not only contradictory but also tainted with an illegality as it sustained the nomination of **Wilfred**, who had been declared winner by an unauthorized person, contrary to the ODM Regulations and Rules governing party primary nominations. There was therefore a miscarriage of justice.

The appeal was disposed of by way of written submissions, as highlighted and buttressed by case law cited by the parties' respective counsel.

In his submission before us, learned counsel **Mr. Ochieng Opiyo** submitted that **Jared** as the duly appointed and designated ODM Returning Officer for Mathare Constituency, as confirmed in writing by **Judith Pareno**, the chairperson ODM NEB, and **Omar Yusuf Mohammed** chairperson, ODM Elections Committee, Nairobi County, was the only person authorized under Regulation 18.8 of the ODM Regulations 2016, to declare the winner of the primary nomination exercise for MCA Mabatini ward. In **Mr. Ochieng's** view, the learned Judge should not have, in the circumstances, upheld the declaration of **Wilfred** as the winner of the aid nomination exercise, as **Thomas**, the purported "Ward Returning Officer", had no mandate to make such a declaration. **Mr. Ochieng** continued to submit that there was also evidence on the record to demonstrate that the said nomination exercise was marred by irregularities and was therefore not credible. By upholding the declaration of **Wilfred** by **Thomas**, as the successful nominee for MCA Mabatini Ward, Nairobi County in disregard of all the irregularities that has been highlighted by the learned Judge himself in paragraphs 15, 16 and 17 of the impugned judgment, the learned Judge condoned an illegality, which this Court is urged not to allow to stand as in doing so will be tantamount to not only condoning but also perpetuating an illegality, urged **Mr. Ochieng**.

To buttress the above submissions, learned counsel **Mr. Opiyo** cited the case of **Omega Enterprises (Kenya) Limited versus Kenya Tourist Development Corporation Limited and 2 Others [1998], eKLR**, in which this court cited with approval the case of **Macfoy vrs United Africa Co. Ltd [1961] 3 All E.R. 1169**, in which Lord Denning delivered the opinion of the privy council at page 1172 (1) thus:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

Learned counsel **George Wandati** for ODM supported the appeal, and reiterated the submissions of **Mr. Ochieng Opiyo**, that **Jared** was the duly appointed and acknowledged ODM Returning Officer for Mathare Constituency, and the only one with the mandate to declare the results of all the candidates who participated in the primary nomination exercise, in line with regulation 18.8 of the ODM Regulations; that by upholding **Thomas's** declaration of **Wilfred**, as the winner of the said nomination exercise, the learned Judge failed to properly appreciate and apply the principle of Agency law which stipulates that it is only a duly appointed agent who can bind its principal. In this regard, stressed **Mr. Wandati**, it is only the actions of **Jared** which could bind ODM.

On the decision handed out by the PPDT, **Mr. Wandati** submitted that the learned Judge failed to appreciate that the said decision was contradictory as the PPDT disallowed the claim of **John**, but allowed that of **Wilfred** and yet both complaints emanated from the same set of circumstances. The learned Judge therefore upheld an illegality which should not be condoned or perpetuated by this Court.

To buttress the above submissions, **Mr. Wandati** cited the case of **Omega Enterprises Kenya Limited vs Kenya Tourist Development Corporation Limited and 2 others**(supra); and **Koinange investment and Development Limited vs Robert Nelson Ngethe**[2014][eKLR, in both of which the principle enunciated by Lord Denning in the **Macfoy vrs United Africa Co. Ltd** (supra) that a nullity is a nullity

and void *ab initio* and nothing can be founded on it was approved.

Learned Counsel **Mr. Ochich TLO** in a brief response to **Mr. Ochieng's** and **Mr. Wandati's** submissions, submitted that the jurisdiction of this Court has to be confined to points of law only. On that account he faulted grounds 1, 2, 3,4,6,9 and 12 of the grounds of appeal, which in **Mr. Ochieng's** view purport to invite this Court to interrogate issues of fact. These are therefore misplaced and not justiciable as laid, he added.

To buttress this argument, **Mr. Ochich** cited the case of **Kenya Breweries Limited versus Godfrey Odoyo, C.A No. 1279 of 2007** for the principle that on a second appeal, the Court of Appeal has to resist the temptation of delving into matters of fact and confine itself to matters of law only, 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.

Turning to the remainder of the grounds of appeal, **Mr. Ochich** urged us to discount totally grounds 7, 9, 10, 11, and 14 as in them, the appellant purports to raise new issues that were not raised before the High Court.

To buttress his submissions on this issue, **Mr. Ochich** cited the case of **Stephen Wang'ang'a Njoroge vs Stanley Ngungi Njoroge and another, [2017] eKLR** for the proposition that in general, a litigant is precluded from taking a completely new point of law for the first time on appeal; and that the jurisdiction of an appellate court is not to decide a point which had not been the subject of argument and decision of the lower court, unless the proceedings and the resultant decision of the lower court were illegal or were made without jurisdiction.

In reply to **Mr. Ochich's** brief submission, **Mr. Ochieng** added that the learned Judge failed to evaluate the impact of irregularities committed in the course of the said primary nomination exercise on the credibility of the entire nomination exercise as highlighted in paragraphs 15, 16 and 17 of the impugned judgment, all of which, according to **Mr. Ochieng**, went to vitiate the nomination exercise. Further, that the learned Judge also failed to appreciate that what was in contest was the legitimacy of the declaration of **Wilfred** as the winner of the nomination exercise for MCA Mabatini Ward, Nairobi County, and not the number of votes garnered by each of the aspirants.

Our jurisdiction to intervene in this appeal is enshrined in **section 41 (2)** of the **Political Parties Act**. It provides;

“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”

By dint of the above provision, we have to confine our determination to matters of law only, unless we are convinced that the learned Judge misapprehended the facts or erroneously applied the law to those facts. See **Kenya Breweries Kenya Limited vs Godfrey Odoyo** (supra)

In resolving the competing interests before him, the learned Judge identified **section 41** of the **Political Parties Act** as the source of his mandate; highlighted both the background of the appeal and the role of a first appellate court as being key factors in the disposal of the competing interests before him; identified Rules 18.6 and 18.8 as the Election and Nomination Rules governing the conduct of the ODM primary nomination exercise subject of the appeal before him and then drew out two issues for determination, namely:-

1. *Who were the Returning and Presiding Officer(s) for the nomination exercise held on the 30th day of April, 2017 for the position of member of MCA Mabatini Ward, Nairobi County.*
2. *Whether the declaration of Wilfred as the winner of the ODM party nominee for the position of MCA, Mabatini Ward, Nairobi County reflected the will of the people.*

In response to the first issue, the learned Judge made findings that in line with the provisions of Rule 18.6 and 18.8 of the ODM nomination Rules 2016, it is the Presiding Officer of a ward who tallies the votes cast and then hands these to the Constituency Returning Officer, who declares the winner of the nomination exercise; that there is no such a position of a “Ward Returning officer” and on that account, faulted paragraph 17 of the decision of the PPDT. Further that both **Jared** and **Thomas** relied on the documents on the record to support their assertions that they were duly appointed and acknowledged as Returning Officer for Mathare Constituency in the case of **Jared** and an alleged Returning Officer for Mabatini Ward in the case of **Thomas**, but the learned Judge never made a finding as to which of the two had the mandate to legitimately declare **Wilfred** as the winner for nomination for the position of MCA, Mabatini Ward.

Turning to the second issue, the learned Judge took note of the propositions made by Lord Denning in **Morgan vs Simpson [1974] 3 A II ER 722** with regard to the parameters for determining as to whether any declared outcome of an election reflects the will of the people or otherwise, namely:-

a) If the Election was conducted so badly that it was not substantially in accordance with the law as to elections it is vitiated, irrespective of whether the result is affected or not.

b) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls, provided that it did not affect the result of the election.

c) But even though the election was conducted substantially in accordance with the law as to elections nevertheless, if there was breach of the rules or mistakes at the polls and it did affect the result, then the election is vitiated.

Drawing inspiration from the above propositions, the learned Judge made the following observations;

“ there will always be flaws in an election, but where there is substantial compliance with the law or Rules governing the elections and an election court is able to ascertain the will of the people, then it should as much as possible endeavor to give it effect, as a primary objective of an election such as this, is to give the voters an opportunity of expressing their choice of who should bear the flag of the party in the upcoming, national election”

.....

.....for purposes of ascertaining the will of the people, what is more crucial would be the outcome of voting at the polling station. It is at this ground zero where by casting the ballot papers, the voter expresses his choice and therefore a count of the votes cast is the outcome of the election at the polling station”.

From the above observations, the learned Judge was alive to the fact that he had to choose between two contrasting versions as to how the people of Mabatini Ward, Nairobi County, had expressed their will with regard to the choice of their MCA nominee for the forthcoming elections. The version that favoured **Wilfred** was drawn from an affidavit deposed by one **Mark Wayoyi Wanyanga** filed before the PPDT, in which the said **Wanyanga**, who had described himself as the Presiding officer for Mabatini Ward, and annexed an appointment letter to that effect, deposed that Mabatini Ward had only two polling stations, namely “special” and “polytechnic”; that voting kicked off at around 9.30 a.m on that day and went on smoothly upto the closing; that violence and darkness interfered with the tallying of votes; that with the concurrence of the Returning Officer, aspirant’s agents and the polling clerks, the tallying of the votes was shifted to the party headquarters – Orange House, where the votes were tallied and **Wilfred** emerged the winner.

In contrast was the version that **John** had presented before the PPDT, namely, that he was one of the aspirants for the said MCA nomination exercise; confirmed that the polling stations were only two as mentioned above; that the voting kicked off and went on smoothly upto the end. The point of departure of

John's version from that of **Wanyanga**, was that according to **John**, votes cast at "special" polling station were counted and he emerged the winner, while votes cast at "Polytechnic" Poling station were not tallied to determine the winner, as violence broke out, and the ballot boxes and papers were destroyed. It was therefore, not possible to tell who the overall winner was from the said nomination exercise and that is why he had asked the PPDT to nullify the entire exercise and order a repeat.

On alleged occurrence of violence and irregularities, the learned Judge made observation that **Jared** had filed a report with the ODM NEB on how the nomination exercise was carried out at Mabatini Ward, in which he mentioned violence that had erupted at the said Ward, disrupting the tallying of votes as a result of which a **Mr. Omollo**, who **Jared** mentioned was the presiding officer for Mabatini ward, consulted him and they agreed to move the exercise of tallying of votes to the ODM Headquarters at Orange House, where according to **Jared**, only votes for "special" polling station were tallied, and it is the results of that tallying that **Jared** used to declare **Herbert** as the winner of the said nomination exercise.

After weighing the above two contrasting versions, the learned Judge settled for **Mr. Wanyanga's** version as being plausible because he, (**Mr. Wanyanga**) had sworn an affidavit to that effect. In contrast, neither **Jared** nor **Mr. Omollo** mentioned both in **Jared's** letter and that of the ODM chairman election committee Nairobi, swore affidavits as to which Presiding Officer tallied the votes and the outcome of that tallying. In the learned Judge's view, the assertions of **Jared** could not be used to discount the assertions of **Mr. Wanyanga** who tallied the votes and enumerated the votes cast for each aspirant. On that account, the learned Judge held that it was **Mr. Wanyanga's** version that Wilfred was the winner that expressed the will of the people of Mabatini ward, as their choice of their nominee for MCA Mabatini Ward, and on that account dismissed the appeal.

We have given due consideration to the above reasoning of the learned Judge, in light of the totality of the record, while bearing in mind the warning highlighted above, that we have to restrain ourselves from delving into matters of fact unless we are convinced that the learned Judge misapprehended those facts or misapplied the law to those facts, and therefore arrived at the wrong conclusion in the matter, which warrants our inference, we have to confine ourselves to matters of law.

Regarding the first issue, we agree with the findings of the learned Judge, that regulation **18.6** provides for the position of a presiding officer whose mandate is to tally the votes cast per polling station, and then forward the results to the Returning Officer to make the announcement as to who the winner is. It provides;-

"18.6, presiding officers shall count and tally votes cast at each polling station and forward them to the constituency returning officer who shall make the final tally before announcing result of the election in respect of the MCA representatives and a Member of the National Assembly"

We also agree that **Rule 18.8** on the other hand, provides for the position of a Returning Officer for the Constituency, whose mandate is to announce the results of the votes tallied by the presiding officer, declare the winner and then issue a nomination certificate to the winner. It provides;-

- i) Each Returning officer shall tabulate and collate certified results received from presiding officers at the Polling stations level and promptly announce the results in the presence of all the candidates or all the agents.**
- ii) The returning officer shall thereafter issue a certificate of return showing the total number of votes garnered by each candidate in every polling station and which shall be signed by either the candidate or their agent or a certified copy of which shall be immediately forwarded to the County Elections Board which shall in turn certify the same and transmit it to the NEP**

....."

Applying the above provisions to the rival arguments herein ,it is our finding that the learned Judge having construed the above provisions and come to the conclusion that neither rule 18.6 nor 18.8 or any other rule in the ODM Nomination Rules 2016, provides for the position of “Ward Returning Officer”, he ought to have declared the action of **Thomas** who declared **Wilfred** as the winner of the ODM nomination exercise in Mabatini Ward, in his capacity as the “Ward Returning Officer” as an action in futility and therefore null and void. In our view, the learned Judge’s failure to do so amounts to a misapprehension of both the facts and the law. It therefore calls for our interference, which we hereby do, by declaring the declaration of **Wilfred** by **Thomas** as the winner for the ODM MCA Nomination exercise, Mabatini Ward an exercise in futility and therefore null and void, as **Thomas** was not the officer mandated by Rule 18.8 of the ODM nomination Rules to validly execute that function.

Turning to the second issue, the position in law as alluded to by the learned Judge is that, votes have to be cast, tallied by the presiding officer duly appointed and designated for the particular ward, handed over to the Returning officer for the Constituency, to announce the results generally, then declare the winner and issue a nomination certificate to the winner. In the appeal under review, the learned Judge, discounted the process that led to **Jared** declaring **Herbert** as the winner for lack of supportive affidavits from both **Jared** and **Omollo** on how the votes were tallied by **Omollo** and then handed over to **Jared** to declare **Herbert** as the winner. The learned Judge instead relied on the deposition of **Wanyanga** on how the votes were tallied by **Wanyanga** before **Wilfred** was declared as the winner. The learned Judge did not however make a finding that it was **Jared**, the duly appointed and acknowledged Returning Officer for Mathare Constituency who received the tallied votes from **Wanyanga**, made the announcement, declared **Wilfred** as the winner and then issued a nomination certificate to **Wilfred**. Lack of mention of **Jared’s** participation in the declaration of **Wilfred** as the winner leaves the action of **Thomas** as the only probable mode used to declare **Wilfred** the winner, which action we have already ruled above, that it was an exercise in futility and therefore null and void. The declaration of **Wilfred** as the winner of the said nomination exercise therefore stood vitiated, and as such, there is no way it could be said to represent the expression of the will of the people of Mabatini Ward, for a nominee for the position of MCA in the forthcoming elections. This coupled with allegation of existence of irregularities regarding the tallying of votes for the “Polytechnic” Polling station which the learned Judge did not reconcile, discredited the entire exercise which called for the intervention of the court in terms of the judgment delivered on the 12th day of June 2017.

Those are the reasons for the judgment.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 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