



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & GATEMBU JJ.A)

CIVIL APPEAL NO. 215 OF 2017

BETWEEN

JOHN ORWA APPELLANT

AND

ORANGE DEMOCRATIC

MOVEMENT PARTY 1ST RESPONDENT

NATIONAL ELECTIONS

BOARD OF ODM PARTY..... 2ND RESPONDENT

GEORGE OKINYI OMAMBA.. 3RD RESPONDENT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION INTERESTED PARTY

(Being an appeal from the Judgment and Decree (Musyoka, J) delivered at

Nairobi on 30th June 2017

in

ELECTION PETITION APPEAL NO. 123 OF 2017)

REASONS FOR THE JUDGMENT OF THE COURT

(RULE 32(5) OF THE COURT OF APPEAL RULES)

1. In this appeal, the appellant challenged the Judgment of the High Court (Musyoka, J) dated 30th June 2017 upholding a decision of the Political Parties Disputes Tribunal (PPDT) given on 22nd June 2017 directing the interested party to gazette the 3rd respondent as the 1st respondent's nominee for member of

County Assembly for North Kanyamkago Ward, Migori County.

2. In a judgment delivered on 21st July 2017, this Court dismissed the appellant's appeal with an order that each party should bear its own costs and reserved reasons for doing so. We now give our reasons for dismissing the appeal.

Background

3. John Orwa, the appellant, and George Okinyi Omamba, the 3rd respondent, aspired to be candidates in the general elections which were held on 8th August 2017, as nominees of the 1st respondent, the Orange Democratic Movement (hereinafter "ODM") for the position of Member of County Assembly, North Kanyamkago Ward, Migori County. They participated in a nomination exercise undertaken by ODM on 24th April 2017 in which the ODM returning officer of that Ward declared the 3rd respondent as the winner with 3,445 votes against the appellant's 576 votes.

4. Dissatisfied, the appellant invoked the internal dispute resolution mechanism of ODM and filed a complaint (Complaint No. 7 of 2017) before Migori County ODM County Elections Appeal Tribunal on 25th April 2017 contending that the nomination exercise was flawed. He complained that the 3rd respondent was an active member of the People's Democratic Party (the PDP); and that violence that rendered voting impossible was perpetrated against him, his supporters and his agents.

5. In a ruling dated 29th April 2017, Migori County ODM County Elections Appeal Tribunal recommended that the provisional certificates that had been issued by ODM to the appellant as well as to one George O. Okik as winners or as nominees of ODM for the position of Member of County Assembly, North Kanyamkago Ward, Migori County "were illegally and unprocedurally issued" and that the same should be cancelled or withdrawn and that a final nomination certificate for the said position should be issued to the appellant.

6. Apparently, ODM and its National Elections Board, the 2nd respondent did not heed the ruling by Migori County ODM County Elections Appeal Tribunal. On 11th May 2017, the appellant lodged a complaint (Complaint No. 241 of 2017) with the PPDT seeking a permanent mandatory injunction to compel ODM and the 2nd respondent "to honour the decision of the Migori County ODM Elections Appeal Tribunal...and...issue the [appellant] with the final Certificate of Nomination" for the said position. He also sought a permanent restraining order to prevent the issuance of a nomination certificate to any other person.

7. The PPDT gave its judgment on 18th May 2017 agreeing with the appellant. Amongst the reliefs the PPDT granted was an order directed at ODM to issue the appellant with the final nomination certificate for the said position.

8. The appellant then moved to the Independent Electoral and Boundaries Commission, the interested party (IEBC) where he urged the Dispute Resolution Committee of the IEBC in Complaint No. 3 of 2017 dated 2nd June 2017 to hold that the 3rd respondent, who had apparently presented his nomination certificate, was not validly nominated and that the 3rd respondent's nomination was void. The appellant also urged IEBC to clear him to enable him contest for the said position as ODM's nominee during the 8th August 2017 general election.

9. The Dispute Resolution Committee of the IEBC agreed with the appellant in a decision rendered on 7th June 2017.

10. Thereafter, the appellant presented an application dated 13th June 2017 to the PPDT in Complaint No. 241 of 2017 seeking an order that the Secretary General of ODM and the Chairperson of the National Elections Board of ODM, the 2nd respondent, be "cited for contempt and committed to civil jail for 6

months... for wilfully disobeying an Order dated 12th May 2017, the judgment and decree dated 18th May 2017 in this cause.” In his affidavit in support of that motion, the appellant deposed that he had learnt on 28th May 2017 that the 3rd respondent had been nominated by ODM and his name sent to IEBC despite the orders of the PPDT and despite his objection before the IEBC Dispute Resolution Committee that was upheld.

11. On 16th June 2017 a consent letter was filed before the PPDT (in Complaint No. 241 of 2017) in which the parties compromised the application dated 13th June 2017 (referred to in paragraph 10 above) on terms that: Leave was granted to the 3rd respondent (who was hitherto not a party to the cause) to be enjoined as a 3rd respondent in the proceedings; judgment entered on 18th May 2017 was set aside; interim orders dated 12th May 2017 were reinstated “*pending the hearing and determination of the complaint or until further orders of the tribunal*”; appellant was granted leave to file an amended complaint “*to include his claim against the 3rd respondent*”; respondents be at liberty to respond to the amended complaint; that parties should file written submissions; and thereafter the PPDT to give directions on the judgment date.

12. Thereafter the PPDT heard the matter afresh and delivered judgment on 22nd June 2017 in which it dismissed the appellant’s amended Statement of Claim. In that judgment, the PPDT determined that it had jurisdiction to hear the matter despite the orders of the IEBC on the grounds that: the 3rd respondent was not served with and was not privy to the proceedings before the Migori County ODM County Elections Appeal Tribunal; the appellant failed to make the 3rd respondent a party in the proceedings before the PPDT; that the 3rd respondent was brought on board for the first time through the consent order recorded before the PPDT on 16th June 2017; that had these facts been brought to light earlier, neither the PPDT nor the IEBC would have made the decisions they had made.

13. In dismissing the appellant’s amended claim, the PPDT reasoned that it would not sanction the „*machination of the Complainant*” to deprive the 3rd respondent an opportunity to be heard; and that to do so would be contrary to Article 38. Consequently, the PPDT ordered:

“a. That the 1st & 2nd Respondents shall forthwith recall the nomination certificate issued to the Complainant herein and the same to be issued to the 3rd Respondent.

b. That the IEBC shall take urgent and immediate steps to remove from the final list of nominees for North Kanyamkago Ward, Migori County, the name of the complainant and replace the same with the name of the 3rd Respondent herein;

c. In the event the Complainant’s name has been duly gazetted as the ODM nominee for North Kanyamkago Ward, Migori County, the same should be forthwith degazetted by the IEBC and the 3rd Respondent’s name accordingly gazetted.”

14. Aggrieved by the judgment and orders of the PPDT given on 22nd June 2017, the appellant lodged Election Petition Appeal No. 123 of 2017 before the High Court. Musyoka, J heard that appeal and, as already indicated, dismissed it in his judgment delivered on 30th June 2017 the subject of the present appeal that was in turn dismissed by this Court on 21st July, 2017.

The Appeal and submissions by counsel

15. In his memorandum of appeal, the appellant complained that the High Court: failed to consider his appeal as set out in an amended memorandum of appeal he had lodged before the court; wrongly conferred on itself jurisdiction to nullify the decision of IEBC; misdirected itself on the issue of service; failed to appreciate that the decision of the Migori County ODM County Elections Appeal Tribunal had not been set aside or challenged; and misapprehended the evidence and acted on wrong principles of law.

16. Expounding on those complaints learned counsel for the appellant Mr. A. Ombwayo submitted that the High Court and the PPDT erred in failing to appreciate that the decision of Migori County ODM County Elections Appeal Tribunal in favour of the appellant was never vacated; that the PPDT and the High Court fell into error in concluding that the 3rd respondent had not been served to attend the proceedings before the Migori County ODM County Elections Appeal Tribunal and that the decision that Tribunal had already been implemented and the final nomination certificate issued to the appellant.

17. Counsel further submitted that the High Court failed to address the pertinent question whether the 3rd respondent won the nomination urging that the tallying sheets on the basis of which the 3rd respondent was allegedly issued with a nomination certificate were not authentic and verifiable. Counsel invited us to examine the tallying sheets on the basis of which the 3rd respondent claimed to have won the nomination stating that the same were handwritten and were not signed. Counsel relied on the decision of this Court in **Stephen Wang'ang'a Njoroge v Stanley Ngugi Njoroge & Another [2017] eKLR** to argue that it is within the mandate of this Court in an appeal of this nature to determine issues of law and fact.

18. Counsel concluded by saying that had the High Court considered the appellant's amended memorandum of appeal and properly addressed itself to the issue of service in relation to the proceedings before Migori County ODM County Elections Appeal Tribunal and the jurisdiction of the PPDT under Section 40 of the Political Parties Act, the court would have reached a different decision.

19. Opposing the appeal, Mr. S. Makori, learned counsel for the 1st and 2nd respondent submitted that the mandate of this Court is limited to matters of law by reason of Section 41(2) of the Political Parties Act, 2011. To buttress that point, counsel relied on decisions of this Court in **Kenya Breweries Ltd vs. Godfrey Odoyo Civil Appeal No. 127 of 2007**; and **Agnes Kwamboka Ombuna vs. Birisira Kerubo Ombuna [2014] eKLR**.

20. Mr. Makori further submitted that the learned Judge of the High Court was right in concluding that the effect of the consent order entered into by the parties before the PPDT setting aside PPDT's judgment dated 18th May, 2017 set aside all consequential orders. In his view, the orders of the IEBC were anchored upon or consequent to the judgment of the PPDT that was set aside.

21. According to counsel the PPDT properly addressed itself on issue of service on the 3rd respondent and reached the correct decision having been satisfied that the 3rd respondent had not had an opportunity to be heard before Migori County ODM County Elections Appeal Tribunal, the PPDT when it first considered the matter and before the IEBC dispute resolution committee.

22. For the 3rd respondent, learned counsel Mr. J. Oronga, opposed the appeal urging that this Court should not, under Section 41 of the Political Parties Act, deal with matters of fact; that the only point of law in this appeal is whether the PPDT had jurisdiction in light of the decision that was made by the IEBC dispute resolution committee. According to counsel, the complaint before the IEBC was anchored solely on the judgment of the PPDT that was subsequently set aside by consent and the PPDT rightly exercised jurisdiction.

Analysis

23. Under Section 41(2) of the Political Parties Act our mandate is limited to points of law. That section provides:

“(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.”

24. The only issue that arises is whether the learned Judge of the High Court was right to uphold the decision of the PPDT, which the appellant contends was made without jurisdiction on account of the nomination dispute having already been determined in the appellant's favour by Migori County ODM County Elections Appeal Tribunal and IEBC dispute resolution committee.

25. In rendering its decision on 22nd the question of its jurisdiction objection this way: June 2017, the PPDT addressed on the face of the appellant's

“The objection to the Tribunal’s jurisdiction is grounded on the fact that the subject nomination has already been the subject of a complaint before the IEBC’s Dispute Resolution Committee determined in favour of the Complainant herein on or about 7th June, 2017. We are tempted to agree with the complainant that we lack the jurisdiction to determine this complainant on merits. We would be sitting on appeal from the decision of the IEBC Dispute Resolution Committee. Ordinarily, our view of the matter is that the proper forum for the determination of disputes subsequent to a decision of the IEBC Dispute Resolution Committee acting under Article 88(4) (e) as read with section 74 of the Elections Act, 2011 is the High Court.”

26. The PPDT then found as a fact that the appellant had lodged his dispute with IEBC “well knowing” that the 3rd respondent had not been served with process nor participated in the proceedings before the Migori County ODM County Elections Appeal Tribunal; that when the appellant initially lodged its complaint with the PPDT with a view to enforcing the decision of the Migori County ODM County Elections Appeal Tribunal, he did not enjoin the 3rd respondent in those proceedings; that the subsequent consent entered on 16th June 2017 brought the 3rd respondent on board for the first time.

27. As already stated, the parties filed a consent letter before the PPDT on 16th June 2017 by which the 3rd respondent was joined in the proceedings for the first time and the earlier judgment of the PPDT entered in favour of the appellant on 18th May 2017 set aside. The consent expressly provided that ***“the judgment entered on 18-502017 be and is hereby set aside”***. It was also a term of the consent that the appellant would file an amended complaint to include his grievances against the 3rd respondent.

28. The complaint that the appellant had presented to the IEBC, and on the basis of which IEBC upheld the appellant's nomination certificate, was based on the judgment of the PPDT dated 18th May 2017. That judgment had in turn given effect to the decision of the Migori County ODM County Elections Appeal Tribunal. The decision of the IEBC was therefore anchored on the judgment of the PPDT given on 18th May 2017.

29. The judgment of the PPDT given on 18th May 2017 having been set aside, the decision of the IEBC could no longer hold. It would certainly have been tidy for the parties to also file consent with the IEBC setting aside the decision of IEBC for good order. However, the intention of the parties is clearly manifest from the consent filed in the PPDT on 16th June 2017. That intention was to start the dispute resolution process afresh with the 3rd respondent, a person directly affected, participating in the process. The PPDT was therefore right, in our view, when it concluded that it had the mandate to re-hear and determine the dispute.

30. We are therefore in agreement with the High Court when it stated in its judgment that:

“On jurisdiction of the PPDT to hear the matter afresh, I do note that the parties consented to that process, so the appellant cannot turn around now and allege that the PPDT could not possibly revisit the matter when he acquiesced to the rehearing.”

31. As Hancox, JA noted in ***Flora Wasike vs. Destimo Wamboko (1982 -1988)1 KAR 625***, ***“It is now settled law that a consent judgement or order has contractual effect...”*** It is not open to the appellant to attempt to resile from the consent agreeing to have the 3rd respondent made a party to the proceedings and to have the matter reheard.

32. It is for the foregoing reasons that this Court dismissed the appellant's appeal in its judgment delivered on 21st July 2017.

Dated and delivered at Nairobi this 29th day of September, 2017.

P. N. WAKI

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR