



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: NAMBUYE, MUSINGA & GATEMBU , JJA)
CIVIL APPEAL NO.164 OF 2017

BETWEEN

PAMELA AWUOR OYOO.....APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

VICTOR RODERS OCHIENG.....2ND RESPONDENT

INDEPENDENT AND BOUNDARIES COMMISSION.....3RD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (L. Kimaru, J) Dated 1st June, 2017

in

Election Petition Appeal No. 88 of 2017)

JUDGMENT OF THE COURT

The appeal was exhaustively argued before us on the 21st day of June, 2017 by learned counsel **Mr. Julius Juma**, instructed by the firm of **Julius Juma and Company Advocates** for the appellant; learned counsel **Denis Onyango**, instructed by the firm of **Viola & Onyango Company Advocates** for the 2nd respondent, and learned counsel **Kibet Ronald**, instructed by the firm of **Murugu, Rigoro & Co. Advocates**, for the 3rd respondent. There was no representation for the 1st respondent but with had notice. In a judgment dated the 23rd day of June, 2017, we dismissed the appellant’s appeal against the judgment of the High Court (**L. Kimaru, J**) dated the 1st day of June, 2017. We now proceed to give reasons for the said dismissal.

The background to the appeal is that both the appellant **Pamela Awuor Oyoo** (the appellant) and the 2nd respondent **Victor Rodgers Ochieng** (the 2nd respondent) were among candidates who participated in the Orange Democratic Movement (ODM) Party Primaries held on the 25th April, 2017. Each claimed to

have been declared the winner at the conclusion of the exercise and issued first with a provisional nomination certificate on the same date of the 25th day of April, 2017 and the final nomination certificate on the 29th day of April, 2017.

The litigation resulting in this appeal was triggered on the 10th day of May, 2017 when the appellant saw the 2nd respondent parading himself on social media as the **ODM** nominee for Migosi County Assembly Ward Kisumu County. Her efforts to seek the intervention of the 1st respondent's NAT were allegedly fruitless as its officials had allegedly gone into hiding. She had no alternative but to the Political Parties Dispute Tribunal (PPDT) for intervention. She sought three reliefs from the PPDT, namely:-

“(i) An order barring the 1st respondent from submitting the name of the 2nd respondent as the nominee in respect of Migosi County Assembly ward.

(ii) An order directing the 1st respondent to submit the name of the appellant to IEBC as the nominee for Migosi County Assembly ward.

(iii) An order barring IEBC from accepting any other name as nominee of Migosi Ward a part from the appellant”

The proceedings before the PPDT were *ex parte* resulting in the orders issued on the 18th day of May, 2017 in favour of the appellant, namely:-

“(a) That the claimant's case be and is hereby allowed.

(b) That the 1st respondent be and is hereby restrained from submitting the 2nd respondent's name as the nominee in respect of Migosi County Assembly Ward, Kisumu County.

(c) That, in the event that the 1st respondent has issued the final nomination certificate to the 2nd respondent or any individual other than the claimant for the position of the member of County Assembly, Migosi Ward, Kisumu County, the same is hereby declared null and void.

(d) That the 1st respondent be and is hereby ordered to submit the name of the claimant to the IEBC as the nominee in respect of Migosi ward, Kisumu County.

(e) That the 1st respondent be and is hereby ordered to bear the costs of this suit.”

The 2nd respondent was aggrieved. He filed a Notice of Motion before the PPDT dated the 20th day of May, 2017 seeking the review and setting aside of the orders of the PPDT dated the 18th day of May, 2017, but which he abandoned, and, instead filed election petition Appeal No. 88 of 2017, raising various grounds. The merit disposal of that appeal is what resulted in the impugned judgment of **Luka Kimaru, J** dated the 1st day of June, 2017, *vide* which the learned Judge reversed the orders of the PPDT granted on the 18th day of May, 2017 set them aside and in its place thereof substituted there with an order as follows:-

“In the premises therefore, the appeal lodged by the appellant is hereby allowed. The orders issued by the Tribunal in its judgment dated 18th May, 2017 are hereby set aside in their entirety. It is substituted by the order of this Court declaring the appellant, victor Rodgers Ochieng as the nominee for Orange Democratic Movement Party for Member of County Assembly for Migosi Ward Kisumu County. If IEBC has accepted the 1st respondent as the 2nd respondent notice nominee for the said seat, such acceptance is hereby revoked. Any certificate issued by IEBC to the 1st respondent recognizing her as the nominee for the 2nd respondent for the said seat of Member of County Assembly for Migosi Ward, Kisumu County is hereby cancelled and declared

null and void and of no legal effect or consequences. The Independent Electoral and Boundaries Commission (IEBC) shall accept the nomination papers presented by the appellant as the duly recognized nominee of Orange Democratic Movement Party for the said position of Member of County Assembly for Migosi Ward Kisumu County. The 1st respondent shall pay the cost of the appellant both at the PPDT and before this Court on this appeal. It is so ordered.

The appellant was aggrieved and she is now before us on appeal raising seven grounds of appeal. In them, she complains that the learned Judge of the High Court fell into error when he admitted and acted on evidence introduced at the appellate stage without giving the appellant sufficient opportunity to respond to them; when he ruled that the appeal was properly before him despite the knowledge that the 2nd respondent had an application for review pending before the PPDT raising similar issues as those in the appeal; when he ruled that the appellant could not approach the PPDT before exhausting the ODMs internal Dispute Resolution mechanism (IDRM); and lastly when he declared the 2nd respondent as the ODM nominee for County Assembly, Migosi Ward Kisumu County using a false tally sheet signed one day after the 2nd respondent had been issued with a nomination certificate.

The appeal was disposed off by way of written submissions, orally highlighted in court, and buttressed by case law cited by the respective parties.

On the denial of a fair hearing, learned counsel **Mr. Julius Juma** submitted that the appellant was denied a fair hearing as she was not given adequate time within which to prepare and meet the 2nd respondent's appeal. It is counsel's contention that learned of the filing of the appeal against his client through a phone call on the 31st day of May, 2017, inviting him to attend Court that same day at 4.00pm in connection with the hearing of the appeal. He duly attended Court at 4.00pm and sought an adjournment to get instructions from his client, which he was given, but only limited to up to the next day of 1st June, 2017 at 9.00 am, when the appeal was heard and concluded. It is therefore his submission that, due to the short adjournment he was given, he was unable to call for and introduce supportive evidence to rebut those of the 2nd respondent, on the basis of which the learned judge acted to reverse the decision of the PPDT.

To buttress the above submission, **Mr. Juma** cited the case of **SelvaraJan versus Race Relations Board [1976] 1 ALLER 12** at page 19 where **Lord Denning** held *inter alia* that an investigating body is under a duty to act fairly and where the consequences of such an investigation are likely to expose any party to a prosecution or some other proceedings; or is likely to affect such a party adversely or even deny him a remedy already accrued, such a party should be given a fair opportunity to respond to any allegations made against such a party.

On the introduction of new evidence on appeal, **Mr. Juma** submitted that that the learned Judges action of admitting and acting on evidence that was never placed before the PPDT when it dealt with the appellant's complaints before it not only contravened **Order 42** of the Civil Procedure Rules but also prejudicial to the appellant, as it was contrary to natural justice and therefore unconstitutional.

To buttress the above submission, **Mr. Juma** referred to two persuasive decisions from the Court of Appeal of England without giving their full citations. The case of **BereZousky versus Michaels & Others as consolidated with a Glouchkou versus Michaes and others**; and **David Kinuthia Macharia versus the Immigration Appeal Tribunal**, both for the proposition that where as the Court is entitled in the exercise of its discretion to admit new evidence on appeal, the adversary who stands to be prejudiced by such new evidence deserves the right to counter the same by equally filing further evidence.

On the declaration of the winner of the Member of County Assembly Migosi Ward, Kisumu County, by the learned Judge, **Mr. Juma** submitted that, the learned Judge's action was contrary to regulation 18.8 of the **ODM** nomination Rules, which requires the Returning Officer to issue a nomination certificate only after tabulating, collating and announcing all results received from polling stations. In the instant appeal, the learned Judge had before him the decision of **George Onyango Oloo versus ODM & 3 Others [2017] eKLR**, in which no appeal had been preferred, and which related to the same nomination exercise as the subject of the appeal, and in which the Court had made a finding that the returning officer subject

of the said case and who was also the returning officer of the nomination subject of the appeal before him, had in fact been kidnapped as at the time he was alleged to have tallied the results and issued a nomination certificate to the 2nd respondent. The learned Judge ought not to have ignored that authentic finding argued Mr. Juma.

Turning to the regularity or otherwise of the procedure followed by the appellant to address her grievances, **Mr. Juma** submitted that the appellant was in order when she approached the PPDT to intervene on her behalf, before exhausting the Internal Party Dispute Resolution Mechanism (**IDRM**) as the complaint lodged with the PPDT by her fell within the ambit of complaints provided for under **section 40 (1) (a) (fa)** as complaints that could be intervened by the PPDT in the first instance. Second, the appellant had given a plausible explanation as to why she did not do so which the learned Judge had no reason to disregard.

Learned counsel Mr. **Denis Onyango** opposed the appeal on the grounds that the 2nd respondent participated in the ODM party primary nomination exercise for member of County Assembly Migosi Ward Kisumu County on the 25th day of April, 2017 and was declared the victor and issued with a nomination certificate; that it was not until the evening of the 18th day of May, 2017 when he learned that the PPDT had reversed his victory in favour of the appellant; that he moved timeously to the PPDT and presented an application for review of the orders issued by the PPDT on the 18th day of May, 2017 with an attendant prayer seeking conservatory orders pending hearing interpartes of the application for review that for unknown reasons, the PPDT declined to accede to his request for conservatory orders PROMPTING him to lodge an appeal before the High Court.

On want of jurisdiction, **Mr. Onyango** submitted that want of jurisdiction in the PPDT to entertain the appellant's claim was based on the learned Judges correct construction of **section 40(a)** as qualified by section 40(2) of the Political Parties Act which is couched in mandatory terms. Neither was there proof that the appellant attempted to approach the party's IDRDM before approaching the PPDT; that the learned Judge rightly faulted the purported service upon the 2nd respondent of the processes that were filed before the PPDT as the service purportedly employed to effect service on the 2nd respondent as was APP was not provided for in **Rule 10** of the PPDT's Regulations which provides for only two modes of service, namely, Direct service and advertisement in a newspaper of national circulation. The PPDT was therefore in breach of the rules of natural justice when it issued an adverse order against the 2nd respondent without giving him an opportunity of being heard by it.

On the failure to accord the appellant fair hearing **Mr. Onyango** submitted that the appellant was accorded a fair hearing as the learned Judge only acted on the evidence that she herself (appellant) had presented before the PPDT, and what the 2nd respondent had presented before the PPDT when seeking review of the orders that had been granted in his favour by the PPDT. Second, nothing prevented her from introducing any new material before the Judge if she had any; and lastly that the appeal before the High Court was basically decided on a point of law as to whether the PPDT had jurisdiction to entertain her complaint in the first place before she exhausted the ODM IDRDM procedures; In **Mr. Onyango's** view, this be determined without the Court having recourse to any evidentiary facts before it.

Turning to the allegations of the alleged kidnapping of the returning officer, **Mr. Onyango** submitted that the appellant's submission is contradictory and self detecting as she could not have been declared a winner if the Returning officer had been kidnapped. She therefore feigned her success.

Mr. Kibet Ronald for the 3rd respondent on the other hand submitted that the only issue as far as the 3rd respondent was concerned was whether the appellant has any cause of action against the 3rd respondent. In **Mr. Kibet's** view, the appellant has no cause of action against it as none of the grounds of appeal raised before this Court touches on the 3rd respondent; that the respondent as a constitutional body is mandated to perform its functions in accordance with both the Constitution and National legislation; that it has no role to play with regard to party nomination primaries under the Political Parties Act under which the PPDT is established. The role that the 3rd respondent played with regard to the issues in

controversy herein was what it was mandated to do under **Articles 88(1), 82 (1) (b) and 88 (5)** of the Constitution, namely to comply with the judgment and decree of the High Court with regard to the clearance of the 2nd respondent as a nominee for Member of County Assembly Migosi Ward Kisumu County. Likewise, the 3rd respondent will abide by the outcome of the litigation of the appeal under review as it has a duty to respect the rule of law.

In reply to the respondents submission, **Mr. Juma** submitted that though no specific complaint has been directed against the 3rd respondent by the appellant in the grounds of appeal raised, it is a necessary party to this appeal for purposes of execution of the orders that may result from the disposal of this appeal.

The invitation to intervene in this appeal is donated by **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”

The question that arises before us is whether the High Court erred when it reversed the PPDT. In doing so the High Court had this to say:-

“This Court holds that whereas section 40 (1) (fa) of the Political Parties Act grants an aggrieved party from a dispute arising out of party primaries direct access to the PPDT, nevertheless, such aggrieved party is required to give cogent evidence that he or she attempted to access the party’s IDRМ and was either frustrated or thwarted from presenting his or her complaint to the said IDRМ. In the present appeal, it was clear that the 1st respondent did not make any effort to access the party’s IDRМ before lodging the complaint before the PPDT. There is no document which was exhibited by the 1st respondent which showed that he (sic) had attempted to access the 2nd respondent’s IDRМ and was frustrated or prevented from doing so.

The second issue for determination is whether the appellant was served when the 1st respondent lodged her complaint before the PPDT. The 1st respondent agrees that she served the appellant through a short message text sent to his mobile phone. She also said that she photographed the pleadings and sent them to the appellant’s mobile phone through the Whatsup App. The appellant insists that he was not served. It was clear to this Court that such service is not contemplated under the Political Parties Disputes Tribunal (Procedure) Regulations, 2017. Rule 10 of the said Regulations provides thus:-

“(1) the complainant shall serve the complaint on the respondent within seven days of filing the complaint with the Tribunal.

(2) A complaint shall be served by

(a) Direct service;

(b) Advertisement in a newspaper of national circulation.”

From the above Rule, it is clear that the appellant was not properly served. The appellant’s complaint that he was condemned unheard is therefore valid. The 1st respondent explained that she was granted leave by the PPDT to serve the appellant in the manner that she did. That could be the case. However, the Tribunal had no jurisdiction to ride roughshod on its own rules so as to satisfy the legal requirement of service. The tribunal acted contrary to the rules of natural justice that prohibits a tribunal or a court from condemning any party before giving him or her a hearing. It was clear to this Court therefore that the orders issued by the Tribunal were issued in the absence of the Appellant who was an affected party and whose presence was necessary before the Tribunal rendered its decision.

The third issue for determination is who as between the appellant and the 1st respondent was rightfully declared the winner during the primaries that were held by the 2nd respondent for the said seat for member of County Assembly for Migosi Ward in Kisumu County. Although the 1st respondent claimed that she won during the said nomination exercise, she did not present any credible evidence before either the Tribunal or this Court to support her assertion that she was the winner. Other than the provisional nomination certificate which was apparently signed by an unauthorized person, and a final nomination certificate which may have been dubiously acquired, the 1st respondent did not present any tangible evidence to prove that she won during the said nomination exercise.

On the other hand, the appellant provided a tallying sheet duly signed by the presiding officer Laban Bosire Ouko which clearly showed that he had won the said nomination exercise. For added measure, the presiding officer wrote a letter to the National Elections Board of the 2nd respondent confirming that indeed the appellant had won during the said nomination exercise. The said presiding officer issued the provisional nomination certificate to the appellant. The appellant was also issued with the final nomination certificate by the 2nd respondent. This Court therefore holds that the appellant presented credible evidence before this court that he was the one who was declared the rightful winner for the member of County Assembly seat for Migosi Ward, Kisumu County, after the said nominations exercise organized by the 2nd respondent that were held on 25th April, 2017.”

We have considered the above findings of the learned judge in the light of our restricted mandate donated by **section 41(2)** of the Political Parties Act as well as the rival submissions highlighted above especially those made by the appellant and the 2nd respondent. Our take on the same is that the core issue of law for our determination is whether the PPDT had jurisdiction to entertain the appellant’s complaint in the manner it was presented before it.

Section 40 of the Political Parties Act provides as follows;-

“(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) Appeals from decision of the Registrar under this Act*
- (g) (fa) disputes arising out of party primaries.*

Section 40 of the said Act is not a standalone section. It has to be read in conjunction with **section 40 (2)** of the Act which provides:-

“(2) notwithstanding, sub section (1) the tribunal shall not hear or determine a dispute under paragraphs (a), (b) (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanism”

It is not disputed that the appellant was alive to this requirement. That is why she stated in the paperwork she presented before the PPDT that efforts to reach the 1st respondent’s IDRM officials for intervention

on her behalf were fruitless as its officers had allegedly gone into hiding. The issue as to whether the above assertion was plausible or otherwise was a point of interrogation before the High Court. The learned Judge upon evaluating the record before him ruled in favour of the 2nd respondent; that the said assertion had no supportive proof and on that account faulted the proceedings before the PPDT.

The appellant has taken issue with that faulting asserting that she was not accorded sufficient opportunity to avail the said proof. The 2nd respondent in a rejoinder submitted that it was not open to the appellant to attempt to introduce such proof before the High Court. Such proof ought to have been availed to the PPDT before it even settled down to deliberate on the issue. The learned Judge agreed with the 2nd respondent on this assertion and in finding no such proof found basis for faulting the PPDT's jurisdiction.

On our own, we agree with the learned Judge's finding that once the appellant was alive to this requirement, it was imperative upon her to ensure that the PPDT was properly clothed with jurisdiction before proceeding to invite it to intervene on her behalf. Failure to do so was fatal to her case.

The above is sufficient to dispose of the appeal. However, for purposes of the record, since the other issues were also argued, we find it prudent to make findings thereon though not on an in depth manner. On the issue of service of the papers filed by the appellant before the PPDT on to the 2nd respondent, we agree with the learned Judge and as submitted by **Mr. Onyango** that the mode of service employed by the appellant to effect service of her complaint before the PPDT onto the 2nd respondent was not the one provided for under the PPDT's rules. It was therefore flawed. Had the PPDT been properly clothed with jurisdiction, this no doubt would have been a ground for vitiating its decision.

As for the alleged improper introduction and acting on documents not tendered before the PPDT, the appellant's assertion is that what the learned Judge acted upon to reach the impugned decision is not what was before the PPDT, but that which had been introduced by the 2nd respondent after he had failed in his bid to have the PPDT review its decision of 18th May, 2017. The 2nd respondent has countered that submission by asserting that the record that was before the PPDT inclusive of the documentation he had filed in support of his application for review is what was transmitted to the High Court for the trial of the appeal; that it was therefore not true as claimed by the appellant that the said documents were being introduced before the High Court for the first time. Further that even in the absence of the said documents, the learned Judge could have reached the same decision on lack of jurisdiction in the PPDT to entertain the appellant's claim as this was point of law in the first instance; and on the basis of the totality of the documentation she herself had presented before the PPDT in the second instance which did not include supportive proof that the hand made any attempt to approach the party IDRMs procedures and her efforts were thwarts.

We agree with the 2nd respondent's above assertions that the learned Judge could dispose of the issue of jurisdiction based on the documents the appellant herself had presented before the PPDT to show that efforts to invoke the party's IDRMs procedure before approaching the PPDT had been frustrated. The learned judge found as a fact that apart from making allegations to the effect that such efforts were frustrated, there was no supportive proof and indeed none had been placed on the record before him and now before us. We affirm that finding. We also reiterate the earlier stand that want of jurisdiction was a pure point of law and could be determined without having recourse to facts.

It is for those reasons that this Court dismissed the appeal in its judgment of 23rd June, 2017.

REASONS DATED AND GIVEN 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 FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR