



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & MURGOR, JJA.)

CIVIL APPEAL NO. 208 OF 2017

SAMUEL OMONDI OKUMU.....APPELLANT

VERSUS

JOSHUA OKUMU NYABOLAH.....RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC)INTERESTED PARTY

(Being an appeal from the judgment/decision of the High Court of Kenya at Nairobi (Odunga, J.), dated 31st May, 2017

in

Election Petition Appeal No.237 of 2017)

REASONS FOR DECISION OF THE COURT

[1] Samuel Omondi Okumu, the appellant herein and Joshua Okumu Nyabolah, the respondent herein were contestants in the ODM party nominations for the position of Member of County Assembly for East Kamagak Ward, Kasipul Constituency in Homabay County. Following the nomination exercise done on 24th April, 2017, the appellant was issued by the ODM party with a certificate of nomination for the Member of County Assembly position. The respondent lodged a complaint with the County Party Dispute Tribunal (CPDT) sitting at Homabay on the grounds that he was in fact the winner in the nominations and not the appellant. On 28th April, 2017, the CPDT having heard his complaint directed that the certificate issued to the appellant be cancelled and a nomination certificate issued to the respondent. The ODM party officials did not however comply. This forced the respondent to move to the Political Parties Dispute Tribunal (PPDT) where he lodged a complaint.

[2] On 7th May, 2017, the PPDT having heard the dispute, allowed the respondent's complaint and ordered the ODM party to issue a nomination certificate to the respondent in accordance with the decision of the CPDT. Still, the ODM party did not comply. This forced the respondent to move the High Court seeking *inter alia* an order of committal against the ODM Party Officials for disobeying the PPDT order; a declaration that the respondent was the one validly nominated as the ODM party candidate for Member of County Assembly for East Kamagak Ward, Kasipul Constituency; and an order that the ODM party complies with the order of PPDT and forward the respondent's name to IEBC for gazettelement.

[3] The respondent's petition was heard by the High Court (Odunga, J). In a judgment dated 31st May, 2017, the learned judge ruled: that the respondent's complaint having been allowed by the PPDT, the decision of the PPDT must be complied with in order to uphold the respondent's constitutional right to a free fair and regular elections. The learned Judge however declined to deal with the issue of contempt, maintaining that the contempt proceedings were brought in the wrong forum, as they ought to have been pursued in the court/Tribunal that issued the orders alleged to have been defied, and not in a separate suit. Consequently, the learned judge allowed the respondent's petition to the extent of issuing declarations and orders that the ODM Party be directed to withdraw any other names submitted to the IEBC; and that the ODM party shall issue a nomination certificate to the respondent as the party's nominee for the position of Member of County Assembly of East Kamagak Ward, Kasipul Constituency in Homabay County in accordance with the decision of the PPDT made on 9th May, 2017.

[4] The respondent next moved to the IEBC Disputes Resolution Committee (IEBC Committee), and filed a complaint requesting the IEBC to implement the orders made by Odunga, J., by inter alia, compelling the ODM Party to issue him with a certificate for clearance to vie for Member of County Assembly East Kamagak, and gazetting his name as a contestant for the Member of County Assembly during the elections. On 8th June 2017, the IEBC Committee allowed the respondent's complaint ruling that the decision of the High Court was binding upon it. Consequently, the IEBC revoked the nomination of the appellant, and the ODM issued the respondent with a nomination certificate and a letter confirming that the name of the appellant had been substituted with that of the respondent.

[5] This triggered the appeal now before us in which the appellant by a memorandum of appeal dated 30th June 2017, has challenged the judgment of the High Court delivered on 31st May, 2017 contending *inter alia* that the learned judge erred in failing to find that the appellant was in fact the duly nominated candidate of ODM Party for the position of Member of County Assembly for East Kamagak Ward; in failing to appreciate that the appellant was not personally served with the court process in relation to the proceedings arising from the CPDT and the PPDT respectively; in failing to appreciate that party primaries are the sole preserve of political parties; in failing to appreciate that the appellant was denied a right to fair administrative action; and in failing to appreciate that his (the learned judge's) decision conflicts with the IEBC's constitutional and legal powers to resolve disputes that arise out of party primaries.

[6] The parties duly exchanged and filed written submissions that were orally highlighted before us. For the appellant, it is submitted that the respondent was not duly nominated or selected at the party primaries; that the appellant was in fact the duly nominated candidate for ODM party primaries; that the appellant was not served with the proceedings in the High Court or the Tribunal; the party primaries are the preserves of political parties and that it is the returning officer who has the mandate to declare who has been validly nominated; and that the IEBC was the constitutional body with powers to deal with disputes arising from elections and the court could not usurp those powers.

[7] It was further submitted that the appellant was nominated by ODM party in accordance with section 13 of the Elections Act and the purported change or alteration of the nomination of the appellant contravened **section 13(2)** of the Elections Act. The appellant therefore argued that the respondent was neither the duly nominated candidate for ODM party, nor can an order of a superior court supplant the cardinal rule and standing of the Elections Act.

[8] In addition it was posited that the IEBC's decision nullifying the nomination of the appellant made on 8th June, 2017, was devoid of legal standing and *ultra vires* the IEBC's rules and procedure of settlement of disputes pursuant to legal notice No.139 of 2012; that the decision of the IEBC, PPDT and the judgment of the High Court negates the fundamental legal position provided in the Political Parties Act and the Elections Act; that the appellant was duly nominated by the ODM party following party primaries that were carried out in line with universal suffrage, and the High Court could not override Article 38(2) of the Constitution, nor could it override the sovereign will of the people to determine who becomes their representative.

[9] Relying on the case of Hassan Joho and Another vs. Suleiman Seyid Shabal & 2 Others [2014]

eKLR, it was submitted that the victory of a duly nominated candidate ought not to be taken away rightly, even where the nomination is susceptible to be faulted. Finally, it was pointed out that personal service of court process on a concerned party was imperative and a necessary concomitant to effective implementation of fair administrative action. The Court was urged to find that since the appellant was not served with the initial complaint in the ODM's appeals tribunal, the resultant process did not satisfy the letter and spirit of the constitution and law.

[10] For the respondent it was pointed out that the appeal is against the judgment of the High Court and not against the decision of the CPDT or the PPDT. It was argued that the suit subject of the judgment of the High Court was an enforcement suit having its origin in a dispute involving the party primary elections/nominations of the ODM party, and the decision made by the CPDT and the PPDT; that the appellant has failed to follow the dispute resolution procedure provided under section 41 of the Political Parties Disputes Act; that there was no proper appeal before the Court as the setting aside of the judgment of the High Court would not affect the decision of the PPDT or the CPDT. The Court was thus urged to dismiss the appeal, as it was simply an abuse of the Court process, and only intended to interfere with the respondent's campaign.

[11] The IEBC did not file any written submissions. However during the hearing of the appeal Learned Counsel Mr Ambani who appeared for the IEBC made oral submissions. Counsel faulted the appellant for misleading the Court. Counsel pointed out that contrary to the appellant's contentions, the nullification of the appellant's nomination was first ordered by the CPDT and not by the High Court; that in line with that nullification the PPDT directed that a nomination certificate be issued to the respondent; that the Learned Judge merely mandated the IEBC to enforce the order of the PPDT; that the IEBC was only dealing with the issue of enforcement and not the dispute concerning who should be nominated by the IEBC; and that the appellant not having challenged the decision of IEBC, the same remains intact.

[12] In response to the submissions made by the respondent and the interested Party, counsel for the appellant Mr Awiti submitted that Article 164(3) of the Constitution gives the Court of Appeal the jurisdiction to hear appeals from any other court or tribunal as prescribed by an Act of Parliament, and that the Political Parties Act by section 41 (2) had prescribed such appellate jurisdiction. Conceding that the judgment of the High Court was dealing with enforcement, counsel urged the Court to consider whether the High Court could supersede the express constitutional provisions or statutory powers of an independent body such as the IEBC. Counsel faulted the learned Judge for failing to probe the finding of the PPDT that the Respondent did not satisfy section 40 of the Political Parties Act, as that was a weighty legal issue that could determine the centrality of the High Court judgment.

[13] In addition, Mr Awiti maintained that the nomination of the appellant was nullified by the IEBC and not PPDT. He argued that the nullification amounted to the flouting of sections 13 and 25 of the Elections Act. He submitted that the applicability of Article 38 of the Constitution ought not to negate sections 13 and 25 of the Elections Act.

[14] Having heard and considered the appeal, the written submissions and the oral submissions that were made before us, we gave our decisions on 18th July 2017 dismissing the appeal and reserved our reasons. We now give the reasons for our decisions

[15] This being an appeal arising from an election dispute, the mandate of this Court is as provided under Article 164(3) of the Constitution as read with section 41(2) of the Political Parties Act. These provisions provide as follows:

Article 164(3) :

The Court of Appeal has jurisdiction to hear appeals from

--

(a) the High Court; and ?

(b) any other court or tribunal as prescribed by an Act of Parliament. ?

Section 41(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

[16] An examination of these provisions make it clear that in the context of election party dispute resolution, the appellate jurisdiction of this Court is not the general appellate power of the Court to hear appeals from the High Court as provided under Article 164(3)(a) of the Constitution, but the specific appellate power under Article 164(3)(b) as set out under section 41(2) of the Political Party Act. In this case, the origin of the dispute was the party primaries carried out by the ODM. Therefore this Court's appellate jurisdiction must be in compliance with section 41 and 42 of the Political Parties Act, which means that the appeal must originate from the PPDT to the High Court and then to this Court as a second appeal on issues of law only.

[17] It is evident from the memorandum of appeal even with the last minute amendment that was made by the appellant, that the appeal is against the judgment of the High Court delivered on 31st May 2017 in High Court Petition No. 237 of 2017. Therefore the judgment appealed against is not a judgment arising from the exercise of the High Court's appellate powers but is a judgment in a constitutional petition in which the respondent sought to enforce the order of the PPDT made in his favour on 7th May 2017.

[18] In constitutional petition No.237 of 2017, the learned judge was not inquiring into the nomination dispute or determining who was the properly nominated candidate of ODM for the position of member of County Assembly for West Kamagak. Those were issues that had already been addressed by the PPDT in the complaint that was before it in Complaint no 92 of 2017. The High Court could only address the propriety of the nomination exercise if there was an appeal before it against the decision of the PPDT. In the absence of such an appeal, the focus of the learned Judge in the petition was to satisfy himself whether there was an order in existence made by the PPDT in the respondent favour and if so, whether the order has been complied with, and if not, determine whether to issue an enforcement order.

[19] In his submissions, the appellant appeared to challenge the decision of the PPDT and the decision of the IEBC to nullify the appellant's nomination. Nevertheless, without the appellant lodging an appropriate appeal against the decision of PPDT, or challenging the orders made by PPDT by way of judicial review, it was not open to the High Court nor this Court to subject the decision of the PPDT to review as the same remained in force. Similarly, the decision of the IEBC to nullify the appellant's nomination cannot be assailed, as IEBC was merely acting pursuant to lawful orders made by PPDT and CPDT.

[20] With regard to the complaint that the appellant was denied a right to fair hearing and that the learned Judge interfered with the constitutional powers of IEBC. We find no substance in these allegations. The appellant participated in the proceedings before the PPDT where he filed a lengthy affidavit. The appellant had the opportunity to challenge the decision of PPDT on appeal, or seek review before the PPDT. He exercised none of these options.

[21] While we concur with the appellant that IEBC has constitutional and statutory powers relating to resolution of election dispute, such powers are subject to the review jurisdiction of the High Court. With due respect, the issues raised concerning sections 13 and 25 of the Elections Act were substantive issues for consideration before the PPDT in complaint No. 92 of 2017 and not in the enforcement suit.

[22] It is for the above reasons that we were satisfied that the learned Judge did not err, but properly addressed the issues before him, and issued appropriate orders directed to the IEBC to comply with a lawful judicial order.

These are our reasons for the judgment delivered on 18th July, 2017.

Dated and delivered at Nairobi this 22nd day of September, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

