



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION APPEAL NO 92 OF 2017**

**CORNEL RASANGA AMOTH.....APPELLANT**

**VERSUS**

**JECKONIA OKUNGU OGUTU.....1<sup>ST</sup> RESPONDENT**

**JULIUS OOKO OKAYO.....2<sup>ND</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY.....3<sup>RD</sup> RESPONDENT**

**SIAYA COUNTY RETURNING OFFICER .....4<sup>TH</sup> RESPONDENT**

**NICHOLAS ODERO GUMBO.....5<sup>TH</sup> RESPONDENT**

**CAREY OREGE.....6<sup>TH</sup> RESPONDENT**

**WILLIAM ODUOL.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Judgment and Decree of PPDT dated 2<sup>nd</sup> June 2017 in petition No 200 of 2017. In that judgment, PPDT cancelled the appellant's nomination certificate and directed the 3<sup>rd</sup> respondent (ODM) to conduct fresh nomination for the position of Governor for Siaya County.

2. The appellant being aggrieved, filed a memorandum of appeal dated 5<sup>th</sup> June 2017 and raised 9 grounds of appeal, Grounds 1 and 2 were concerned with jurisdiction where the appellant complained that the PPDT had no jurisdiction to deal with a petition and should have instead dismissed that petition.

3. Other grounds raised were that PPDT shifted the burden of proof to the appellant contrary to law, and holding that the 3<sup>rd</sup> respondent's contention that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not its members was a mere denial; that PPDT erred in failing to consider the appellant's contention that the petition was instigated by a person who was not a member of the party; that PPDT erred in holding that the appellant was declared winner before tallying, had been concluded; that it erred by holding that the 3<sup>rd</sup> respondent did not use the party list submitted to IEBC without evidence to support that allegation; and that PPDT erred in deciding the petition on the basis of failure by the 3<sup>rd</sup> respondent (ODM) to produce evidence yet it was the duty of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's duty to prove their case, thereof shifting the burden to the appellant and the 3<sup>rd</sup> respondent.

4. Finally the appellant complained that PPDT erred in holding that the 3<sup>rd</sup> respondent did not conduct free and fair nomination for the gubernatorial position without evidence before it,

5. Although this is an appeal, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition and a replying affidavit affirming the decision of PPDT. In the grounds of opposition, the two respondents contended that the PPDT had jurisdiction and that it was right in deciding the case as it did.

6. The facts of this appeal briefly are that nomination was held for the Governor's position in Siaya County on 25<sup>th</sup> April 2017, where the appellant was declared the winner. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a petition before PPDT on 9<sup>th</sup> May 2017 which was however dismissed on 11<sup>th</sup> May 2017 on grounds of lack of jurisdiction. They filed an appeal for this court being EPA No 41 of 2017, which was heard by Sergon J, who set aside PPDT's judgment and remitted the matter back to PPDT for re-hearing. The complaint was heard and judgment delivered on 2<sup>nd</sup> June 2017 allowing the complaint and ordered that fresh nomination be carried out. According to the respondents, the PPDT was right in its decision to order repeat of nomination hence this appeal.

7. At the hearing of this appeal, Mr Amuga, Mr Wakla and Mr Lawrence Madialo appeared for the appellant, Mr Omwanza for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Mr Makori for 3<sup>rd</sup> and 4<sup>th</sup> respondents and Mr Bush for 5<sup>th</sup> respondent.

8. Mr Amuga submitted that the PPDT was wrong in hearing and making a determination on the matter when it did not have jurisdictions. To elaborate on this point, Mr Amuga pointed out that what was before the PPDT was a petition as opposed to a complaint hence PPDT could not hear a petition. Learned Counsel submitted that under the law, PPDT is supposed to hear complaints which are not the same as petitions. Counsel then argued grounds 3, and 5 to 9 together. Counsel submitted that PPDT erred in shifting the burden of proof to the 3<sup>rd</sup> respondent yet the law requires that a complainant proves his case. Counsel referred to section 107 of the Evidence Act to fortify his argument. According to counsel the 1<sup>st</sup> and 2<sup>nd</sup> respondents never proved their complaint before the PPDT given that they were not members of the 3<sup>rd</sup> respondent and therefore the petition should have been dismissed.

9. Mr Omwanza on his part submitted that the PPDT had jurisdiction, an issue that had already been decided upon by this court (Sergon J) hence the contention is no longer arguable and was therefore *res judicata*. Counsel submitted that the same issue was raised before PPDT but was declined when PPDT held that it had jurisdiction to hear the matter before it.

10. On grounds 3, 5 to 9 Counsel submitted that there was sufficient evidence before PPDT through affidavits filed by the 1<sup>st</sup> respondent including that sworn on 2<sup>nd</sup> June 2017 which presented evidence in support of the complaint before PPDT. Part of the evidence, counsel submitted, was the CDs containing the 2013 IEBC register and 3<sup>rd</sup> respondent's members list submitted to IEBC under section 28 of the Elections Act, 2011. Mr. Omwanza therefore contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents proved their case and asked that the appeal be dismissed.

11. Mr Bush, Learned counsel for the 5<sup>th</sup> respondent submitted that PPDT had jurisdiction. Counsel admitted that indeed the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a petition and not a complaint but contended that the rules do not give the format the complaint should take. On proof, counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents adduced sufficient evidence and proved their case. Counsel argued that PPDT did not shift the burden to the 3<sup>rd</sup> respondent and the appellant. According to counsel, the 3<sup>rd</sup> respondent did not produce the documents it was required to produce, but despite this, the 1<sup>st</sup> respondent took steps and produced that evidence(CDs) containing party list of members and IEBC 2013 register.

12. I have considered this appeal and submissions by counsel. This appeal arises from the decision of PPDT dated 2<sup>nd</sup> June 2017 which declared the nomination certificate given to the appellant null and void and ordered fresh nomination for the position of Governor for Siaya County. From the pleadings and submissions, two main issues arise for determination namely, whether PPDT had jurisdiction to determine the matter before it; and whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents proved their case as required.

### **Whether PPDT had Jurisdiction**

13. It has been submitted on behalf of the appellant that the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a petition instead of a complaint against the PPDT Regulations and therefore PPDT had no jurisdiction to hear it. The respondent, of course, have submitted that PPDT had jurisdiction.

14. Jurisdiction is the power or authority given to a court to administer justice by determining disputes presented before it. **Black's Law Dictionary 9<sup>th</sup> Edition** defines jurisdiction as a ***Court's power to decide a case or issue a decree***. There are enough authorities on this subject but suffice it to say that in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012]eKLR**, the Supreme Court stated as follows-

**“ A Court’s jurisdiction flows from either the constitution, or legislation or both. Thus a court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where the constitution exhaustively provides for the jurisdiction of a court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”**

(See – Re The matter of **Interim Independent Electoral Commission Application No 2 of 2011**)

15. It is without a doubt that jurisdiction is granted by the constitution or statute or both, Article 169 of the constitution provides that Subordinate Courts are the Magistrate Courts; the Kadhi Courts; the Court Martial; and any other Court or local tribunals as may be established by an act of parliament, other than the courts established under Clause (1). Sub- Article 2 provides that parliament shall enact legislation confirming jurisdiction, functions and powers on the courts established under clause (1).

16. The constitution therefore recognizes tribunals as part of the subordinate courts, which are established and gives jurisdiction and power by their parent Acts. In that regard, PPDT is a tribunal established under the political parties Act under Section 39. Section 40 of the Act provides for jurisdiction of the PPDT, stating that it shall determine disputes between members of a political party, (member **qua** member), disputes between a member and a party, disputes between political parties, coalition of parties, independent candidates and political parties and hear appeals from decisions of the Registrar of political parties. Regulations 7 of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017, provides that a dispute to the tribunal should be commenced by filling a complaint which should be filed in Form A in the First schedule.

17. Form A in the First schedule to the Regulations is simple and is clearly headed **“Complaint Form”** .It has space for prayers. All a party needs to do is fill that form and file it before PPDT. Regulation 9 provides what should accompany the complaint at the time of filing the complaint. It is clear that the form is not in the nature of a petition. However, what was before PPDT was clearly headed “Petition”. After description of parties, the petition has a sub title *constitutional violations* and it goes on to enumerate the Articles of the constitution said to have been violated, and finally seeks declarations on those violations.

18. When the matter went back to PPDT, it held that the jurisdictional question was a ploy to dislodge the claimant from the tribunal's seat of justice and that it had jurisdiction and therefore proceeded to determine the dispute. What then is the difference between a complaint and petition and did PPDT have jurisdiction to determine that petition and grant the declarations sought"

19. **Black's Law Dictionary (supra)** defines the word "**Complaint**" as *the initial pleading that states a civil action and states the basis of the court's jurisdiction, the basis of the plaintiff's claim, and the demand for relief*. It goes ahead to add that in **some states, this pleading is called a petition**. It defined "**Petition**" as *a formal written request presented to a court or other official body*.

20. **Concise Oxford English Dictionary Twelfth Edition** defines "Complaint" as *an act or the action of complaining reasons for dissatisfaction; the plaintiff's reasons for proceeding in a civil action*. And it defines "**Petition**" as *a formal written request typically signed by many people, appealing to authority in respect of a cause; an appeal or request, an application to a court for a writ, judicial action in a suit*. It can therefore be generally said that a petition is a form of pleading presented to a court seeking a specific relief(s).

21. In the matter before PPDT the pleading filed was headed "Petition" as opposed to complaint. However, from the definitions above, they appear to have the same meaning being that is a pleading presented to a court for some reliefs. The petition was not headed a **constitutional petition** which would have implied the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a constitutional interpretation and, therefore, some constitutional redress..

22. The dispute before PPDT was on party primaries and the question was on the application of some Articles of the constitution. PPDT as a tribunal has mandate to apply the constitution in so far as the disputes before it are concerned. What it cannot do is inteprete and gives meaning to words used in the Articles of the constitution or determine conflict between the constitution and statutes. It can however determine whether the party followed the law in doing what it did without encroaching jurisdiction of the superior courts.

23. Article 23 is clear that the High Court has power to hear and grant reliefs on violations of constitutional rights and fundamental freedoms and generally enforce the Bill of Rights. Articles 91 and 138 are some of the Articles on fundamental rights that fall outside the Bill of rights. Under Sub Article 2 Parliament is to pass legislation to give jurisdiction to subordinate courts (including tribunals) to enforce the Bill of rights. This has been done in the Magistrates courts through the 2016 Act, but the same thing has not been dome to PPDT. The jurisdiction it has is to determine whether political parties like in the case of nominations, followed the law. It has not been given jurisdiction as contemplated by sub Article 2 to redress violations of the Bill of Rights and it cannot do so.

24. However, looking at the prayers in the petition and the reliefs claimed and eventually granted, these are reliefs that could ordinarily be granted in a normal complaint without necessarily using the word Declaration. It is important though that parties and their counsel stick to regulations and filed complaints before PPDT to avoid the disputes taking a different trajectory.

#### **Whether 1<sup>st</sup> and 2<sup>nd</sup> respondents discharged of proof in this case.**

25. The appellant has argued that the 1<sup>st</sup> and 2<sup>nd</sup> respondents never proved their case and that PPDT shifted burden of proof to the 3<sup>rd</sup> respondent instead.. PPDT stated in its judgment at paragraph 66.

**“ Whereas electoral results must be accurate, verifiable, secure, accountable and transparent, until this moment, no official tallies or returns from the 1<sup>st</sup> respondent’s nominations have been availed to this Tribunal. The directions given by this tribunal on 25<sup>th</sup> May 2017 directing the 1<sup>st</sup> respondent to file those before this tribunal did not yield much.**

**[67] this omission in our view, fortifies the petitioner’s claim that results were declared prematurely and by a stranger to the electoral process, not even the 3<sup>rd</sup> respondent, could state the name of the returning officer who allegedly declared him as having been elected.”**

26. The PPDT then concluded that the appellant was declared the winner before tallying had been completed. In the petition the 1<sup>st</sup> respondent states at paragraph 29-30 that he presented himself as a party member and having registered with IEBC as a voter after 2013 to a polling station to vote but was turned away because he was not in the 2017 IEBC register. The 2<sup>nd</sup> respondent states the same thing at paragraph 31 that he was also unable to vote because he was not in the 2013 IEBC register although he visited a polling station for that purpose.

27. I have perused the affidavit in support of the petition. Paragraph 10 states generally that at the polling station, members were shocked that officials were using 2013 IEBC register and this was replicated across all ODM polling stations, and according to him, (at paragraph 12) party members registered after 2013 were unable to vote.

28. First and for most, the 1<sup>st</sup> and 2<sup>nd</sup> respondents do not identify when they registered as party members nor did they adduce evidence to show that they were indeed party members. They do not also identify the polling stations they visited to vote, but speak generally without specifics. When one claims to be a member of a particular party, it is his duty to show to the satisfaction of the court that he is indeed a party member.

29. There are no annexures to affidavit(s) as evidence or proof that indeed the two are party members of the 3<sup>rd</sup> respondent, when they joined the party or their membership numbers which is important in establishing a claim against a party based on membership and rights accruing to party members.

30. This was not national general election but a party nomination affair limited to party members. Where one claims that his party did not use its party register, like it was claimed in the complaint before the PPDT, that person is under duty to show that he has a right as a member of the party to question that failure. Just like a general election where a voter has the right to challenge an election, the voter must be a citizen because only citizens can vote and therefore have a right to question irregularities. In the same vein, only party members can challenge party nominations and proof of membership is the first test if one is to be entitled to challenge the party process. I say so because party matters may be full of intrigues where non members may engage a party in endless litigation even when they have no locus.

31. Only genuine party members, proof of which is on them can successfully lodge a complaint over party activities such as nomination irregularities. Even on this alone, I am not satisfied that the PPDT interrogated this issue sufficiently before determining the questions raised in the complaint before it. It must not be taken that everyone who has sympathetic views about a given political party is a member. Membership is a fact which must be proved to the satisfaction of the court.

32. Section 107 of the Evidence Act is clear on this and there are enough authorities on the subject. The 1<sup>st</sup> and 2<sup>nd</sup> respondents stated a fact of membership and wanted the PPDT to find in their favour yet failed to establish the fact of membership. It is a principle of law that **he who asserts must prove** and not otherwise. That is why Section 107(1) of the Evidence Act provides that;

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.**

33. Similarly section 109 of the same Act provides that;

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”**

34. The Court of Appeal emphasized on the above provisions in the case of Jenifer Nyambura Kamau v Humprey Mbaka Nandi[2012]eKLR and also stated that Section 108 of the evidence provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In the case of Kirugi & Another v Kibaya & 3 Others [1987]KLR 347 the Court of Appeal again stated that the burden was always on the balance of probabilities.

35. I note from the record and the judgment of PPDT, that the 3<sup>rd</sup> respondent was to submit certain documents which it did not and PPDT made an observation that failure to produce those documents reinforced the 1<sup>st</sup> and 2<sup>nd</sup> respondents' complaint. PPDT also referred to the fair Administrative Action Act and further concluded that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were entitled to that information.

36. First without repeating myself, I have stated that this being a political party nomination affair, only party members could seek information from their party on how it conducted its nominations. Either one is a member or not and information in this case could only be sought by a member. Secondly, the information sought should be information only held by the party required to produce it. That is the import of Article 35 of the constitution and the Access to Information Act. The information was from a political party to a person claiming to be a member. Under section 4 of the Act, the information should be produced where it is required for exercising or protecting a right. That provision is in general terms. But where the person like in this case, seeks information as a party member, proof of membership is, in my view, a first step.

37. I am fortified by the words in Article 35 that the information is available to **Citizens** and in the case of political parties, that information like the one that was being sought in the complaint before PPDT, could only be availed to party member and not everybody. The word “Citizen” in Article 35 of the constitution and section 4 of the Act should be read to mean “ every party member” in the case political parties.

38. The 1<sup>st</sup> and 2<sup>nd</sup> respondents wanted the party 3<sup>rd</sup> respondent to provide the party list and when it failed, they produced CD's which they say contained the 2013 IEBC register and ODM 2013 party register respectively , and that is what is marked on the two CDs. However, the 1<sup>st</sup> and 2<sup>nd</sup> respondents say they registered as voters after 2013; they do not say when they joined ODM. The “CD J002” is marked as the 2013 ODM party register. The question then is; were the 1<sup>st</sup> and 2<sup>nd</sup> respondents party members in 2013 but not registered voters with IEBC”.

39. I have perused the PPDT judgment of 2<sup>nd</sup> June 2017. It is silent on the two CDs and the affidavit sworn on 2<sup>nd</sup> June 2017 which contains the two CDs. There is no mention of whether the PPDT viewed the CDs and whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents names are in the party list. During the hearing of the appeal, the court sought to know from Mr. Omwanza whether the CDs had been viewed by PPDT, and he answered in the negative. He also conceded that this court could not tell what was in those CDs, a clear testimony that the evidential value of the two CDs was in doubt.

40. According to the record of PPDT, parties had entered into a consent and the 3<sup>rd</sup> respondent was to

produce the list of party members submitted to IEBC pursuant to section 28 of the Election Act. It did not and for that reason the 1<sup>st</sup> and 2<sup>nd</sup> respondent supplied the CDs whose contents are unknown. Failure to produce the list was taken against the 3<sup>rd</sup> respondent and an unfavourable comment was made against the 3<sup>rd</sup> respondent.

41. It is however clear that the information on the party membership list was not only available at the party (ODM) but also IEBC where it was eventually obtained from. That information is also available at the Registrar of political parties who is the custodian of party membership records in this country. It is therefore not true that only the 3<sup>rd</sup> respondent could provide that information. In any case the 1<sup>st</sup> and 2<sup>nd</sup> respondents eventually obtained the information. They could have obtained it earlier.

42. The 3<sup>rd</sup> respondent was also to produce tallying sheets for the gubernatorial nomination results, which again it would appear was not produced. As I have said earlier in this judgment, the 1<sup>st</sup> and 2<sup>nd</sup> respondents who were the complainants before PPDT were not contestants for the position of governor but “voters”. They say the problem of voting using the IEBC 2013 voter register was replicated across the country. They do not say the source of this information and yet they had no agent in other polling stations. In my view, these are general statements that are of little probative value to their case. They are categorical that they visited unidentified polling stations where 2013 IEBC register was used. They did not say they visited other stations. The source of their information that the IEBC 2013 register was used across the county was not provided.

43. I have also examined affidavits by Edwin Otieno Oبرا, Esther Atieno, Justus Odimo, and Justus Onyango. None of them mentions use of the 2013 IEBC register. Festus Onyango says he was an agent of a candidate but does not say anything about the register either. We have an adversarial system where it was the complainants versus the respondents. It was the duty of the complainants before PPDT to prove their case and PPDT could not shift the burden to the 3<sup>rd</sup> respondent to prove that the complainants before it were not its members. That is not the position in our civil jurisdiction. The stance taken by PPDT was akin to allowing a party to file a case and ask the defendant to prove it for him.

44. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further alleged Malpractices including over voting which again they did not elaborate on. They say they did not vote. They do not say how they knew that there was over voting yet they did not have the IEBC voter register, ODM Party list or tallying sheets. They did not say they were at any tallying centre and had concrete figures to show that indeed there was over voting. They merely alleged and that was all.

45. I have also examined the supporting affidavit sworn on 5<sup>th</sup> May 2017 and filed with the petition on allegations of malpractices. Paragraphs 23 to 33, contain generalities. For instance, he says ballot papers arrived late at many polling stations eg Kama lumbe Primary School, but he does not say he was in those polling stations, and that there was violence at Kara Pul and Bar Kosongo Primary Schools without again disclosing the source of information (para 30, 31).

46. In my respectful view, PPDT abdicated its responsibility examining and determining the complaint based on evidence before it but proceeded as though it was the duty of the 3<sup>rd</sup> respondent to disprove the complaint. The PPDT also dismissed the 3<sup>rd</sup> respondent saying that there was no affidavit to deny that the petitioners were its members. I have seen submissions on record by the 3<sup>rd</sup> respondent and this was one of the issues raised in the submissions but no decision was made on it.

47. I have considered the record, the judgment of PPDT and re evaluated the evidence myself. I am satisfied that the appellant has genuine complaint. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did not prove their case before PPDT on the balance of probability and PPDT erroneously shifted the burden of proof to the 3<sup>rd</sup>

respondent which is not the case in our jurisdiction.

48. For the above reasons, I allow the appeal and set aside judgment and decree of PPDT dated 2<sup>nd</sup> June 2017 and all consequential orders. Each party will bear own costs.

Dated, Signed and Delivered at Nairobi this 9<sup>th</sup> Day of June 2017

**E C MWITA**

**JUDGE**



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