



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 3 OF 2017

CAROLI OMONDIAPPELLANT/APPLICANT

VERSUS

HON. JOHN MBADI1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

(Being an appeal from the entire judgment & decree delivered by the Political Parties Dispute Tribunal on 5th May, 2017 at Nairobi

in

Complaint No. 42 of 2017)

JUDGMENT

This is an appeal arising from the decision of the Political Parties Dispute Tribunal delivered on 5th May, 2017. The appellant and the respondent had been candidates for the electoral seat of Suba South Constituency as members of parliament, in the nomination exercise that was held by their party, Orange Democratic Movement [*herein referred to as the ODM*], on 24th April, 2017. They both participated fully in the nomination exercise and at the end of the process, the 1st respondent was declared the winner of the party primaries.

The appellant herein lodged a complaint with the ODM National Appeals Tribunal at Nairobi, on 1st May, 2017 and the Tribunal made the following orders:

- a) *That the provisional certificate issued to Hon John Mbadi [the 1st respondent herein], as the ODM nominee for Suba Constituency be and is hereby revoked;*
- b) *That the National Elections Board of the ODM party proceeds to conduct a fresh nomination exercise, for a party nominee in respect of Suba Constituency parliamentary seat.*

The appellant was not satisfied with the said orders by the ODM National Appeals Tribunal and he lodged an appeal against the same to the Political Parties Dispute Tribunal vide his complaint dated 1st May, 2017 which he later amended on 4th May, 2017 in which he sought various orders as set out therein. Parties made submissions before the Political Parties Dispute Tribunal [*herein referred to as PPDT*] which rendered its judgment on 5th May, 2017, wherein the following orders were made:

a) *The decision of the central committee issued on 29th April, 2017 to award a certificate of nomination to the 1st respondent to contest as candidate representing the 3rd respondent for the Suba South Constituency is declared null and void;*

b) *The 3rd respondent is hereby ordered to conduct fresh nominations for Suba South Constituency Member of the National Assembly in the following polling stations Oma Primary School, God Oloo Primary School, Koga Primary School, Miriya Primary School, Mikuyu Primary School, Kiembe Primary School and Nyakiya Primary School within 72 hours of this order; and*

c) *That each party bear its own costs.*

The appellant still dissatisfied with the decision by PPDT has appealed to this court vide a memorandum of appeal dated 6th May, 2017 wherein he has listed four [4] grounds of appeal as hereunder:

1. *The honourable tribunal erred in law and fact in failing to declare the appellant the winner of the 2nd respondent's nomination elections held on 24th April, 2017 for the nomination of a candidate for Member of the National Assembly for Suba South Constituency for the General Elections to be held on 8th August, 2017 on an Orange Democratic Movement ticket even after finding that the results from 7 polling stations [namely God Oloo Primary School, Oma Primary School, Koga Primary School, Miriya Primary School, Mikuyu Primary School, Kiembe Primary School and Nyakiya Primary School] in the said constituency were irregular, null and void.*

2. *The honourable tribunal erred in law and fact in ordering that repeat nomination elections be conducted by the 2nd respondent in only seven polling stations [namely God Oloo Primary School, Oma Primary School, Koga Primary School, Miriya Primary School, Mikuyu Primary School, Kiembe Primary School and Nyakiya Primary School] out of 96 polling stations in Suba South Constituency.*

3. *The honourable tribunal erred in law and fact in ordering that repeat nomination elections be conducted by the 2nd respondent in only seven polling stations [namely God Oloo Primary School, Oma Primary School, Koga Primary School, Miriya Primary School, Mikuyu Primary School, Kiembe Primary School and Nyakiya Primary School] without taking into consideration that the appellant stand to suffer prejudice if partial repeat nomination elections are held in the said seven polling stations to the exclusion of the other 89 polling stations in Suba South Constituency.*

4. *That the honourable tribunal erred in law in disregarding the submissions by the appellant specifically on disregarding the results of the 7 polling stations in which it found the valid votes cast exceeded the number of registered voters and failed to order a tallying of the remainder or the unaffected polling stations [89 in number].*

Together with the memorandum of appeal, the appellant filed a Notice of Motion dated 6th May, 2017 accompanied by a certificate of urgency and when the application came up for hearing, counsels for the respective parties agreed to dispense with the hearing of the Notice of Motion and argue the main appeal.

Mr Omwanza appeared together with Mr Ochwa for the appellant.

Mr Omwanza submitted that, though the PPDT found that there were irregularities that had been established in seven polling stations, it did not deal with the question of how that ought to have been addressed. He took issue with how the PPDT dealt with the issue of irregularity by proceeding to cancel the nominations in those polling stations and ordering a repeat. In his view, the PPDT ought to have disregarded the votes from those stations and tally the votes for the remaining stations.

He further argued that in those seven polling stations, people who are not registered as voters voted during the exercise, which was also an irregularity in that, it is only registered voters who are entitled to vote. Such registered voters are reflected in the ODM register which should be a true reflection of the register held by Independent Elections and Boundaries Commission [*herein referred to as the IEBC register*]. It was his further submission that for purposes of this appeal, the 2013 register was used. He relied on the case of **HOGAN V CAREEN & ANOTHER, Decision Docket 1993 Lt J No. 2242** to support his contention on the importance of relying on the register.

The court was told that the entitlement of a voter in Suba South Constituency to vote, arises out of being registered to vote by IEBC and hence the claim that some polling stations had people who voted who are not registered voters is important.

He contended that by PPDT ordering that the nominations be repeated in only seven [7] polling stations, the appellant would be prejudiced as those stations are strongholds for the 1st respondent. He relied on regulation 19.2.8 of the ODM Nomination and Regulation rules, which gives the PPDT the powers to order a recount of votes, re-tally of votes or order a repeat of elections among other powers. He argued that if a recount of votes was to be done excluding the seven polling stations, the appellant would emerge the winner and it is on that basis that he has sought prayer [d] in his memorandum of appeal.

Mr. Ochwa on his part, submitted that there were irregularities in the seven polling stations, a fact that has not been disputed by the respondents. That even the two tribunals which heard the dispute between the appellant and the respondent herein acknowledged that there were irregularities in those stations but according to him, the law was not applied by the said tribunals. He submitted that the tribunals ought to have applied the Election Act and the Election (General) Regulations, 2012 which were revised in 2016 and in 2017, and in particular **rule 83** of the said regulations which has remained unaltered. He argued that the said rule ought to have been invoked by the PPDT and disregard the results of the 7 polling stations in tallying the total votes cast in Suba South Constituency in determining the nominee for the parliamentary seat.

He further submitted that in carrying out the nomination exercise, the 2nd respondent was supposed to apply **Article 91 of the Constitution** which sets out the basic requirements for political parties and more particularly **sub article [g]** which provides that political parties should promote the objects and principles of this Constitution and the rule of law. He argued that if there was an irregularity, the 2nd respondent ought to have applied the applicable law. He relied on the case of **JOSEPH AMISI OMUKUBA V IEBC & 20 OTHERS, ELECTION PET. NO. 4/2013** to support that contention.

On the general principles for the electoral system, he cited **Article 81 of the Constitution** with particular reference to **sub clause [e]** which provides for free and fair elections and contended that the elections carried out by the 2nd respondent relating to the appeal herein were not free and fair. **Article 38 of the Constitution** was also relied on.

He further averred that the PPDT in resolving any disputes should do so in accordance with the provisions of the Constitution and any other written law. He urged the court to apply the law in considering the issues raised in the appeal herein.

On his part, Hon. Kajwang, the learned counsel for the 1st respondent submitted on five issues including the jurisdiction of the High Court under **Article 165 of the Constitution**. He argued that the jurisdiction of the High Court donated by the Elections Act makes it an election court and it is different from that conferred by Political Parties Act [PPA] which confers jurisdiction to the High Court under **section 41** of the same act. He submitted that the two jurisdictions are not interchangeable, they are exclusive and the remedies that the court can issue under the two jurisdictions are different. In his submissions when the High Court is hearing an appeal under **section 41 of PPA**, it ought to be guided by the proceedings and determination arrived at by the PPDT.

While submitting on **Article 38 of the Constitution**, *vis-à-vis* **Article 24 (1) (d) of the Constitution**, he told the court that though **Article 38** guarantees political rights, such rights can be limited and their enjoyment must not limit the rights of others. In furtherance of that argument, the court was told that the nominations herein, affect thousands of registered voters who are equally entitled to enjoy equal rights. That the contest herein is not just between the appellant and the respondent but it also involves other people too and that it is the enjoyment of this right that the Tribunal weighed and struck a balance between the parties and ordered a repeat in the areas under dispute.

He argued that the process of nomination is provided for in the PPA and the same Act provides how a political party should proceed to deal with selection of candidates in a by-election or nomination. According to him, the Elections Act provide the powers of IEBC to make regulations and part 3 of the same deals with nomination by the political parties. He averred that **regulation 83 of the Elections (General) Regulations, 2012**, relied on by the appellant does not apply to party nominations but only applies to General Elections, and that there is a difference between nominations and elections. He averred that that regulation is not contained in the regulations relating to nominations.

On the issue of excess voters and irregularities in the seven polling stations, he submitted that the only way to scheme off the excess was by ensuring that only the registered voters are allowed to vote but the court should not deny the genuine voters a right to vote. The returning officer having been removed from the proceedings by consent of the parties; it is difficult to know the excess people

who voted in those polling stations and that is what may have informed the PPDT in ordering a repeat of nomination in the areas that were affected.

In his conclusion, he contended that the orders sought in the appeal cannot issue as the court sitting as the appellate court does not have jurisdiction to issue the orders sought.

Hon Kaluma, learned counsel for the 2nd respondent supported the contention by the 1st respondent's counsel that the orders sought in the appeal cannot issue and that the applicable law in the appeal herein is the PPA and not the Elections Act. He submitted that the original complaint lodged by the appellant before the National Election Board related to only one polling station and the blame for excess voters was not laid on any of the candidates who were involved in the nomination and it was for that reason that the National Appeals Board revoked the nomination. He averred that in addition to the parties herein, the registered voters of Suba South Constituency have rights and the same should be protected. He told the court that in compliance with the orders issued by the PPDT, the 2nd respondent has already made preparations for the repeat of nominations and in view of the set timelines, the 2nd respondent is constrained on time to submit candidates for the General Elections. According to him, the appeal is an abuse of the court process and he urged the court to uphold the rights of all the parties involved and affected by these proceedings.

In his response, Mr. Ochwa, learned counsel argued that the PPDT in hearing the disputes is at liberty to apply not only the Constitution but any other relevant law and therefore the Elections Act is applicable. He asked the court to apply the law and discount the votes in the seven polling stations, order for a scrutiny in those stations and declare a winner.

He contended that under *Article 165 (6) (7) of the Constitution*, the High Court has supervisory jurisdiction over the lower court and the tribunals under it and by virtue of that jurisdiction, the court can consider any matter arising from the tribunals. He urged that in so doing, the court would not be usurping the powers of political parties but will be enforcing actions that the returning officer ought to have taken.

In a quick rejoinder and with the leave of the court, Hon Kaluma responding on behalf of both respondents argued that *Article 165 (3) (e) of the Constitution* specifies the jurisdiction of the High Court and urged the court to find that the Election Act is not applicable in this appeal and that the applicable law is the PPA and the rules relating to nomination of candidates.

This court has considered the appeal and the submissions made by the learned counsels for the parties.

As noted earlier on in the judgment, the appellant has raised four grounds of appeal which this court shall proceed to consider together as they are all related and in doing so let me first consider whether the honourable Tribunal erred in law and in fact in ordering a repeat nomination elections by the 2nd respondent in the seven polling stations and whether by ordering the repeat, it took into consideration the fact that the appellant stood to be prejudiced by the partial repeat.

The argument advanced by the counsels for the appellant is that the PPDT ought not to have ordered for a repeat nomination after it found that there were irregularities in the nomination exercise. It is on record in the proceedings before the National Election Tribunal that there were irregularities and it was for that reason that the National Election Tribunal had ordered for repeat nominations in all the polling stations.

It has also emerged from the proceedings that the nature of those irregularities were as a result of staffing of votes but both the NET and the PPDT did not attribute the irregularities to either the appellant or the 1st respondent herein. What is, however, clear is that the irregularities affected seven polling stations and that the total number of votes in those stations were more than those of the registered voters. This is however notwithstanding the fact that in carrying out party nominations, a political party and in this case ODM was supposed to use the party register and that of the IEBC to determine the total number of registered voters and to ensure that only the registered voters were allowed to cast their votes but that was not the case.

Having found that there was this irregularity, the PPDT ordered for a repeat nomination in those seven stations affected by the same. This court has perused the Elections and Nomination Rules for ODM which were amended and adopted by the National Governing Council held on 5th December, 2014 at the Bomas of Kenya, Nairobi and under regulation 19.2.8, the powers of the National Appeals Tribunal are set out therein.

The gist of this appeal lies in **rule 83 of the Elections (General) Regulations, 2012**. Counsel for the appellant contends that under that regulation, the returning officer was supposed to disregard the votes from those seven [7] stations and tally the remaining ones. On the other hand, counsels for the respondents maintain that the regulation is not applicable and that the law applicable is the PPA. The said regulation **83 (1) (a)** provides:

“(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present -

(a) tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect.”

The said regulation has been made under the Elections Act. It deals with tallying and announcement of **election results**. At this point it is important for this court to consider what constitutes election results under this regulation. The Election Act under which the regulation is made defines an election to mean a presidential, parliamentary or county election and includes a by election. The definition does not include “*nomination*” but rather, nomination is separately defined as the submission to the commission of the name of a candidate in accordance with the Constitution and this Act (Election Act).

Under **section 13 of the Act**, nomination of candidates by a political party for an election shall be done at least 60 days before the general election under this Act in accordance with its constitution and the nomination rules. My understanding of the above section is that nomination of candidates by a political party should be done in accordance with its constitution and nomination rules. Under the same Act, “*election results*” is defined to mean the declared outcome of the casting of votes by voters at an election.

After having considered the definitions of the above terminologies which this court found necessary so to do, my humble and considered opinion is that regulation 83 aforesaid is not applicable in this case and the same cannot afford a remedy to the appellant herein as there is no similar provision in the Election and Nomination Rules of the ODM Party. Ground one of the memorandum of appeal therefore fails.

With regard to grounds 2, 3, and 4 of the Appeal, it has emerged from the evidence on record that the irregularities that were established did not affect the whole Suba South Constituency but only the seven stations in which the PPDT ordered a repeat of nomination. The appellant, however, seems to have an issue with the repeat in only those stations and has argued that it will give the 1st respondent unfair advantage as those are his strongholds. Though counsels for the appellant submitted on this issue during the hearing of the appeal, the court has keenly perused through the record of proceedings before the two Tribunals and the same was not raised in the complaints and/or in the submissions. It is no wonder that counsels for the respondents objected when it was raised by the counsels for the appellants during the hearing of the appeal. This court finds that, not a being point of law, the appellant cannot raise it in appeal, as it is a new issue altogether which was not the subject of proceedings before the Tribunals.

Am alive to the provisions of Article 24 of the Constitution on limitations of rights and fundamental freedoms and in particular clause (d) thereof, on the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others.

All parties herein have, and are entitled to enjoy their Constitutional rights to vote by secret ballot in any election or referendum as provided for under Article 38 (3) (b) of the Constitution and the elections must be free and fair, transparent, free from violence, intimidation, improper influence or corruption see Article 81 (e) of the Constitution.

However, the evidence on record reveals that the elections were free and fair in the 89 polling stations save for the seven disputed ones. It would not be fair to nullify the elections in these seven stations as it would amount to denying the voters in those stations their Constitutional right to vote. On the other hand, it would not be reasonable to subject the voters in the other 89 stations to a repeat nomination and especially when the parties herein have not alleged any malpractices in those stations. The court has to balance the interest of all the parties herein, and those of the voters of Suba South Constituency.

Lastly, the issue of the jurisdiction of this court was raised and it’s only fair that I address the same. The same was raised with

regard to whether the High Court sitting as an appellate court has powers to grant prayer (d) in the memorandum of appeal. The jurisdiction to hear appeals from the PPDT is donated by *section 41 of the Political Parties Act*. Under the said section, an appeal from the decision of the Tribunal shall lie to the High Court on points of law and facts. In my view, the jurisdiction conferred above is an appellate jurisdiction. See *Article 165 (e) of the Constitution*.

This jurisdiction is different from that the High Court exercises when hearing petitions under the Election Act. Under that Act, an election court with respect to the High Court means the High Court in the exercise of the jurisdiction conferred upon it by *Article 165 (3) (a) of the Constitution* which gives the court unlimited original jurisdiction in criminal and civil matters. The powers of an election court are set out in *section 80 of the Election Act* which includes summoning and swearing in witnesses, compelling the attendance of any person as a witness and examining witnesses.

This court is persuaded by the submissions by the counsels for the respondents that the two jurisdiction are different and when the High Court is sitting as an election court, its jurisdiction is wider than when it sits as an appeal court to hear appeals from PPDT in which case its powers are limited and it cannot issue certain orders.

Having said that, and in view of the foregoing analysis, the order that commends itself to this court is that the appeal herein has no merits and the same is dismissed. The court finds that the decision of the PPDT was well founded and the same is upheld. Each party shall bear its own costs of the Appeal.

Dated, signed and delivered at Nairobi this 9th day of May, 2017.

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L. NJUGUNA

JUDGE



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