



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OKWENGU & MUSINGA, JJA.)**

**CIVIL APPEAL NO. 194 OF 2017**

**ALEX OUDA OTIENO.....APPELLANT**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT KENYA.....1<sup>ST</sup> RESPONDENT**

**OSCAR OMOKE OCHOLLA.....2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya, Nairobi (Onguto J)*

*dated 13th June 2017*

**in**

**Election Petition Appeal No. 96 of 2017)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

[1] This appeal has its origin in the nomination exercise for Orange Democratic Movement for Member of National Assembly for Lang'ata constituency that was held on 30th April 2017. Alex Ouda Otieno, who is now the appellant before us, was one of the contestants for the nomination. Following the nominations, he lodged a complaint before the Political Parties Dispute Resolution Tribunal (PPDT) complaining that Oscar Omoke Ocholla who is now the 2nd respondent had been irregularly issued with the nomination certificate when he (appellant) was the one who had been nominated as the ODM candidate for the Member of National Assembly for Lang'ata constituency. The complaint was heard by PPDT who on 11th May 2017 dismissed the complaint and affirmed the nomination certificate issued to the 2nd respondent. Shortly thereafter, the appellant moved the PPDT by way of an application under Order 45 Rule 1 of the Civil Procedure Rules seeking review of the PPDT's judgment on the ground that Jeremiah Aganda Ochiel (Jeremiah), the Returning Officer who declared the 2nd respondent validly nominated had been replaced and had no authority by the time he declared the 2nd respondent the winner; and that in fact the Returning Officer was James Okoth (Okoth) who had been appointed to replace Jeremiah.

[2] Having heard the application for review, the PPDT allowed the application for review and ordered the appellant to be declared the winner of ODM nomination for the position of Member of National Assembly for Lang'ata Constituency. The 2nd respondent who was dissatisfied with the outcome of the review lodged an appeal in the High Court against the decision of PPDT contending, *inter alia*, that PPDT erred in reviewing its judgment without taking into account Order 45 rule 1 and 2 of the Civil Procedure Rules; in reviewing the judgment when the same had already been executed; and in failing to take into account the High Court decisions that had pronouncements on the determination of ODM's Returning Officer for Lang'ata Constituency.

[3] The appeal was opposed by the appellant who maintained that PPDT had no jurisdiction to review its decision; that in any case the jurisdiction of PPDT was properly exercised; and that the issue as to who was properly mandated and appointed Returning Officer for Lang'ata Constituency was not *res judicata*.

[4] In his judgment the learned judge of the High Court ruled that the evidence relied upon by the appellant to move PPDT for review did not constitute newly discovered evidence, as it was always available and due diligence would have unearthed it before the determination of the appellant's complaint by PPDT. He therefore concluded that PPDT erred in reviewing its decision, set aside the orders made by PPDT on 8th June 2017, and affirmed the 2nd respondent as the duly nominated candidate on Orange Democratic Movement ticket for the seat of Member of National Assembly, for Langata Constituency.

[5] The appellant has now lodged an appeal before us under Section 41(2) of the Political Parties Act against the judgment of the High Court. The appellant has raised six grounds of appeal maintaining *inter alia* that the learned judge erred in law and fact; by failing to consider and appreciate the evidence that was presented to PPDT in the review application; failing to appreciate that the evidence was new evidence that arose after PPDT had made its decision of 11th May, 2017; and failing to properly exercise his discretion in not appreciating that PPDT canvassed all the issues.

[6] Following directions given during the case management parties duly filed and exchanged written submissions. For the appellant, it was submitted that the application for review before the PPDT was properly lodged as it was based on discovery of new and important matter or evidence which after the exercise of due diligence was not within the appellant's knowledge and could not be produced by him at the time when PPDT made its ruling of 11th May, 2017. It was argued that the new affidavit evidence that was availed confirmed that the appellant was the winner and was so declared by Okoth, who conducted the ODM nominations exercise for member of National Assembly for Lang'ata Constituency, Jeremiah having been barred from conducting the elections.

[7] The appellant explained that it was not possible for him to produce the affidavit evidence from the witnesses at the time he filed his complaint as the witnesses were not reachable. He faulted the learned judge for rejecting the affidavit evidence without making a finding whether they were truthful or not and

resolving the issue of what the result of the poll was. He also faulted PPDT for falling into error in accepting the results announced by Jeremiah despite the overwhelming evidence of him having been retired from office.

[8] The appellant further submitted that the learned judge failed in his duty to re-evaluate the evidence that was placed before the PPDT such as the meeting held on 14th May 2017; that PPDT which enjoyed a wide discretion than an ordinary court, applied its discretion in a purposeful way by allowing an application for review to ensure a just resolution of the dispute; and that the acceptance of the new evidence even though coming late, was within the powers of PPDT.

[9] The ODM party also filed written submissions in opposition to the appeal identifying the following issues for the court's consideration: whether the review application before the PPDT met the threshold for the grant of the orders sought; whether Jeremiah was the official returning officer for Lang'ata Constituency; and whether the appellant is entitled to the prayers sought.

[10] It was pointed out that under section 41(4) of the Political Parties Act, PPDT is obligated to apply the provisions of the Evidence Act Cap 80 and the Civil Procedure Act Cap 21 with necessary modification. It was argued that the three affidavits that were relied upon by the appellant to constitute the discovery of new evidence did not in fact constitute new evidence which after due diligence was not in the knowledge of the appellant; that the assertion of facts made in the affidavits were never backed with any evidence; that the appellant did not adduce any new evidence before PPDT to justify the review, nor did the appellant exhibit the due diligence undertaken on his part to obtain the alleged new evidence; and therefore the evidence did not meet the threshold for review.

[11] On the issue of the Returning Officer, the Court was urged to note that there was no deposition on record in the form of an affidavit indicating that there was a revocation of the appointment of Jeremiah. The party aligned itself with the affidavit of 2nd respondent who deponed that the Returning Officer for Lang'ata Constituency was Jeremiah and not James E. Okoth. In this regard ***Election Petition Appeal No. 47 of 2017 Osman Khalif Abdi v ODM & 22 others***, wherein the issue of the Returning Officer for Lang'ata arose was relied upon. The court was urged to find the appeal not merited and overtaken by events.

[12] For the 2nd respondent, it was submitted that the review application before PPDT did not meet the relevant requirement of Order 45 rule 1 and 3(2) of the Civil Procedure Rules. This was because the appellant did not avail any evidence and/or sufficient explanation to prove the unavailability of the deponents of the affidavits, nor did the deponents indicate in their affidavits that they were unavailable before the decree was passed. It was maintained that the alleged new evidence was all along within the knowledge of the appellant; that the appellant being aware that the major ground for dismissing his claim was the issue of the Returning Officer strategically brought in the alleged new evidence to seal the weaknesses of his original case.

[13] In addition, the court was urged that the appellant was raising issues of facts that were not admissible in an appeal under section 41(2) of the Political Parties Act; that the appellant having opted for review, his review was not an appeal but a review restricted to consideration of only the new issues. Reference was made to ***John Rex Omole v Orange Democratic Movement & another, Election Petition No.59 of 2017***, where the issue of the Returning Officer was raised and a finding made that the Returning Officer for Lang'ata Constituency was Jeremiah. The court was therefore urged to dismiss the appeal, as frivolous and an abuse of the court process, and confirm the 2nd respondent as the *bona fide* and legitimate winner of ODM Party's nomination exercise for Member of National Assembly for Lang'ata Constituency.

[14] We have considered this appeal and the submissions that were filed and highlighted by counsel as well as the authorities filed. It is critical to note in this appeal that the decision of the PPDT that was subject of the appeal in the High Court was in regard to a review application under **Order 45 Rule 1** of the Civil Procedure Rules 2010. In regard to discovery of new evidence as a ground for review, we reiterate what this Court stated in ***Civil Appeal No.275 of 2010 Pancras T. Swai vs. Kenya Breweries Limited*** that:

***“30. The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in Rule 1 of Order 44 (Now 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in Rule 1 refers to discovery of facts that does not relate to ascertainment of existing law which the Court is deemed to be alive to.”***

[15] This means that PPDT was restricted in dealing with the matter before it. It was not a question of the appellant in the review application having a second bite of the cherry in re-arguing his initial application. This is because in the application for review, PPDT's mandate was restricted to considering the matters posited as new evidence, with a view to determining whether the same “was new and important matter or evidence which after exercise of due diligence was not within the knowledge” of the appellant or could not be produced by him at the time when the decree or order was passed on account of some error on the face of the record or any other sufficient reason. Similarly, in considering the appeal, the learned judge could not be faulted for failing to re-evaluate all the evidence that was adduced before the PPDT. The mandate of the learned judge only extended to evaluating the new evidence introduced in the review application with the view to determining whether it met the threshold of Order 45 Rule 1 of the Civil Procedure Rules and whether PPDT properly exercised its discretion.

[16] As the alleged new evidence was the identity of the person validly appointed as the Returning Officer for Lang'ata constituency, and the declaration of the winner in the nomination process, the question before PPDT in the application for review, was whether that was new and important evidence, which with the exercise of due diligence was not available to the appellant. It is clear that evidence was adduced before PPDT during the initial hearing in which the appellant's contention was that Jeremiah had been removed from conducting the elections and his place taken by James E. Okoth. This contention was rejected by PPDT and was the basis of PPDT's conclusion in its decision of 11th May, 2017 that Jeremiah was the validly appointed Returning Officer, and had the mandate to issue the

provisional nomination certificate to the winner.

[17] In the application for review under Order 45 of the Civil Procedure Rules 2010, PPDT's reasoning was contained in the following paragraph:

***“6. We are persuaded that this is a fit and proper case for review on the grounds that the identity of the legitimate Returning Officer, James Okoth, amounts to new and important matter or evidence which, after the exercise of due diligence, could not be produced by the applicant at the time the (sic) when the judgment was passed. Since the judgment of 11th May, 2017 turned on the ground that James Okoth, the Returning Officer who had declared the Claimant winner had not been validly appointed, there is now sufficient reason to review that decision. We are therefore persuaded that there are proper grounds of review in this application.”***

[18] In his judgment, the learned judge having considered the three affidavits introduced as new evidence, stated thus:

***“29. Before the PPDT there was already documentary evidence that the duly appointed returning officer was Jeremiah. Then there was contested affidavit evidence by Alex that the appointment had been revoked. An affidavit was also sworn by the (sic) Oscar contesting this position held by Alex. The PPDT upon evaluation was not satisfied with Alex's contentions and held that in the face of the appointment letter the contention of the appointment having been revoked stood unsubstantiated. The three new affidavits simply reiterated the position of Alex. There was no substantiation of the alleged action by ODM of revoking the returning officer's appointment. There was simply similar evidence which did not substantiate the earlier allegations. I am also satisfied that the new evidence added no weight to Alex's case as had been held by the PPDT. There was in short, no new evidence that Jeremiah had been defrocked.”***

[19] The learned judge concluded that:

***“The PPDT erred when it held a rather blank view that the alleged new evidence had an impact on PPDT's earlier determination. The essence of PPDT's earlier determination had been that in the absence of any written or documentary evidence to the contrary it could not hold the returning officer as appointed by ODM on 29th April, 2017 had been replaced. The same position still stood and should not have changed simply because three additional affidavits had been filed to repeat and reiterate what Alex had sworn to earlier.”***

[20] We cannot but concur with the learned judge that PPDT did not properly exercise its discretion in dealing with the application for review. PPDT did not subject the new evidence to scrutiny so as to determine whether the evidence was really new evidence that had just been discovered". Nor does the ruling of PPDT reveal the due diligence that the appellant had undertaken such as to lead to the conclusion that the alleged new evidence was not within the appellant's knowledge or that the appellant had good grounds for inability to produce it.

[21] For the above reasons, we uphold the judgment of the High Court and find that this appeal has

no merit. It is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of July 2017.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**H. M. OKWENGU**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**



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