



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 363 OF 2017**

**DAVID OCHIENG BABU .....APPELLANT**

**VERSUS**

**LORNA ACHIENG OCHIENG .....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY.....2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTIONS**

**AND BOUNDARIES COMMISSION.....INTERESTED PARTY**

*(Appeal from the ruling of the Political Parties Dispute Resolution Tribunal in Nairobi by Milly Lwanga Odongo, Mr. Paul Ngotho, and Dr. (Mrs.) Adelaide Mbithi on 9<sup>th</sup> May, 2017 in PPDT Case No. 76 of 2017)*

**JUDGMENT**

1. The Orange Democratic Movement Party (ODM) held its nominations for the Member of County Assembly for North Sakwa Ward, Bondo Constituency, in Siaya County on 25<sup>th</sup> April, 2017. Lorna Achieng Ochieng, the 1<sup>st</sup> Respondent herein, was declared the winner of the primaries. The Appellant being disgruntled filed a complaint No. 76 of 2017 with the Political Party Dispute Tribunal (hereinafter PPDT) challenging the nominations on 5<sup>th</sup> May, 2017.

2. The PPDT after hearing the Appellant's complaint dismissed it under **section 40(2)** of the **Political Parties Act** for reasons that the Appellant had not exhausted the 2<sup>nd</sup> Respondent's Internal Dispute Resolution Mechanisms (IDRM).

3. M/s. Ochieng learned counsel represented the Appellant and submitted that the PPDT did not take into account the entire Appellant's evidence and had erred in dismissing his complaint. Counsel complained that the entire nomination process was marred with irregularities, and alterations of the results as evinced by the results of Bakowino Polling Station where the incumbent was shown to have garnered 170 votes, in the ODM's list but the Returning Officer's book shows that he garnered 70 votes. Counsel stated that the Appellant tried to file a complaint in the Nairobi, ODM's office but was referred back to Bondo in Siaya to serve one Mr. Rubiik who failed to act on his complaint.

4. M/s. Ochieng argued that the Appellant was unfairly locked out of the process and is likely to suffer irreparable loss as he is not a member of any other party. She prayed that the court do set aside the PPDT's decision of 9<sup>th</sup> May, 2017 and revoke the nomination certificate issued to the 1<sup>st</sup> Respondent. Further that the IEBC be restrained from clearing the 1<sup>st</sup> Respondent and publishing his name on the ballot papers for North Sakwa Ward in Bondo Constituency until this dispute is resolved.

5. Mr. Adoli learned Counsel appeared for the 1<sup>st</sup> Respondent and submitted that the Appellant failed to exhaust the IDRM.

Counsel argued that the letter presented by the Appellant as evidence of having filed a complaint with the IDRM had no stamp of acknowledgment or receipt and could therefore have been written by anyone. He contended that the decision by the PPDT was sound since it was guided by **Section 40(2)** of the **Political Parties Act** which states that the IDRM must be exhausted before the court is approached.

6. Mr. Adoli referred the court to the decision in **Gabriel Uminda Olenje & 4 others v Orange Democratic Movement & Another [2017] eKLR**, where Serгон J stated that:

**“The question to be determined here, is whether the appellants exhausted the Party Internal Dispute Resolution Mechanism before approaching the Political Dispute Tribunal”**

He also referred to **Gabriel Bukachi Chapia v Orange Democratic Movement & Another [2017] eKLR**, Ong’udi J which held thus:

**“In this case, the Appellant filed his claim before the PPDT under Section 40(1) (fa) which refers to disputes arising from party primaries. In as much as this is separated from the other disputes and one may come to the PPDT direct, it still incorporates elements of disputes between members of a political party (Appellant -vs- 2<sup>nd</sup> Respondent); disputes between a member of a political party and a political party (Appellant vs 1<sup>st</sup> Respondent).”**

7. Counsel argued that delay in filing the appeal was inordinate and the appeal itself is an afterthought since it was filed 43 days after the PPDT’s decision and only after the Appellant had been shut out of the chance to run as an independent candidate. Further that the appeal is not properly before the court as the Appellant has not annexed the judgment of the PPDT, and the Tally sheets that he is relying on as annexures “DOB 1” and “DOB 2” are private tallies which cannot be admitted in evidence.

8. M/s. Ochieng’ in a brief rejoinder submitted that the reason they relied on a complaint that was not stamped, was because the ODM was ‘weird’ and was not stamping documents. That the fact that there was no acknowledgment by the ODM was not the Appellant’s fault. She also stated that although the email sent by the Appellant was personal the Appellant had filed an affidavit stating why he sent it. Further that the reason they had come to court late was because the PPDT was overwhelmed. It had been sitting up to late hours and was not supplying proceedings on request.

9. M/s. Njagi appearing for the Interested Party, IEBC associated herself with the submissions of Mr. Adoli and also placed reliance on the replying affidavit of the 1<sup>st</sup> Respondent.

10. Section 40(2) of the Political Parties Act provides as follows:

**“Notwithstanding subsection (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 mechanisms.”**

It is noted that under **Section 40(1)(fa)** disputes arising from party primaries may come to the court directly. I am however in agreement with the sentiments of Mumbi Ngugi J in the decision of **Francis Mutuku vs Wiper Democratic Movement - Kenya & Others [2015] eKLR**, which held thus:

**“The law is clear with regard to circumstances such as are now before me, and courts have expressed themselves quite succinctly on this point; where there are specialised procedures provided by law or the Constitution for the resolution of disputes they should be followed. See in this regard the case of *Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Other (2008)3 KLR (EP)*; *Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP)*; *Speaker of the National Assembly vs Njenga Karume (2008) IKLR (EP) 425* and *Alphonse Mwangemi Munga & 10 Others vs African Safari Club Ltd Petition No. 564 of 2004. ....”***

11. The circumstances of this case dictate that this Court, despite its wide jurisdiction under the Constitution, does not assume such jurisdiction. The dispute is clearly a dispute that falls within the mandate of the institutions in which the Political Parties Act vests jurisdiction. It involves a member of a political party and his political party. That party has an internal dispute resolution mechanism. The law requires that the said mechanism be exhausted; that a party dissatisfied with the outcome of the internal party

dispute resolution process takes his grievance to the Political Parties Tribunal, and if unhappy with the outcome, has a right to appeal to the High Court. It would be to undermine and defeat the mechanism and institutions provided by law, which are underpinned by the Constitution, to hold otherwise. See Francis Mutuku (supra)

12. The Appellant’s averments that there was no Tribunal to hear him in Siaya and he had to travel all the way to the ODM headquarters in Nairobi only to be directed to return to Siaya and serve a man with the single name of Ribik who took no action, is wondrous to say the least and difficult to accept. It is not disputed that the letter lodging the alleged complaint with the IDRM does not bear any evidence of acknowledgment while the email purporting to refer to the complaint lodged with the said Mr. Ribik merely reads **“Hello, find herewith attached.”** Whatever may have been attached is anyone’s guess.

13. In any case there is no record of the Tribunal before this court for me to analyse and re-evaluate the evidence that was before the PPDT and draw my own conclusions, as is the mandate of the court of first appeal. Mrs. Ochieng’s submission that the Appellant had difficulty securing the record of the proceedings from the PPDT because the PPDT was overwhelmed and was working late and not supplying records on request is without basis. There is no evidence that the Deputy Registrar was requested for the record, nor was this court requested to aid in securing the said record.

14. Having carefully considered the rival arguments I have no difficulty in agreeing with the 1<sup>st</sup> Respondent that this appeal is an afterthought perhaps to salvage the Appellant’s position. I find no merit in it and hereby strike it out.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> DAY OF June, 2017.**

.....

**L. A. ACHODE**

**JUDGE**

In the presence of .....for the Appellant

In the presence of .....for the 1<sup>st</sup> Respondent

In the presence of .....for the 2<sup>nd</sup> Respondent

In the presence of .....for the Interested Party



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