



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 73 OF 2017**

**ORANGE DEMOCRATIC MOVEMENT PARTY.....1<sup>ST</sup> APPEALANT**

**LUMUMBA PATRICK OWADE.....2<sup>ND</sup> APPEALANT**

**VERSUS**

**PAUL OTIENO OBIA.....RESPONDENT**

*(Appeal from the judgment of the Political Parties Tribunal (Hon. M. O. Lwanga, Paul Ngotho, Dr. Adelaide Mbithi & Desma Nungo delivered on 10<sup>th</sup> day of May, 2017 in PPDR Case No. 214 of 2017)*

**J U D G M E N T**

1. This appeal arises out of the decision made on 19<sup>th</sup> May 2017 by the Political Parties Dispute Tribunal (hereinafter PPDT) in which the PPDT dismissed the 1<sup>st</sup> Appellant's application for review. The 1<sup>st</sup> Appellant prays that the said orders be set aside and/or reviewed and the nomination certificate for the position of Member of County Assembly of Woodley Ward, Kibra Constituency Nairobi County issued to the 2<sup>nd</sup> Appellant be confirmed.
2. The grounds of the appeal are that the orders made on 19<sup>th</sup> May 2017 by the PPDT were in breach of **Article 50(1)** of the **Constitution** on fair trial; that the 1<sup>st</sup> Appellant was not accorded sufficient time to explain its case and the PPDT did not consider its oral evidence; that the PPDT failed to appreciate the 1<sup>st</sup> Appellant's Internal Dispute Resolution Mechanism (hereinafter IDRM) which it had employed to discipline the Respondent and disqualify him from vying on their ticket after he was found guilty of instigating and participating in violence.
3. The 1<sup>st</sup> Appellant also states that the PPDT failed to consider matters relevant to the case and instead considered irrelevant matters and failed to appreciate new and important matters that warranted a review of their earlier decision. That it failed to properly exercise its discretion under **Order 45** of the **Civil Procedure Rules** in regard to this matter.
4. In opposing the appeal the Respondent filed a replying affidavit sworn on 26<sup>th</sup> May, 2017. He avers that he participated in the 1<sup>st</sup> Appellant's primaries held on 30<sup>th</sup> April 2017 for the position of member of County Assembly, Woodley Ward and emerged victorious having garnered 1156 votes against the 2<sup>nd</sup> Appellant's 217 votes in a free, fair and credible process. He was duly declared the winner by the Returning Officer in accordance with **Rule 18.6** of the **ODM Election and Nomination Rules** and was awarded the Provisional Nomination Certificate.

5. The Respondent charges that the 2<sup>nd</sup> Appellant lodged a complaint with the Special County Appeals Tribunal (SCAT) of the 1<sup>st</sup> Appellant challenging the Respondent's nomination to which the Respondent was not accorded an opportunity to respond. In its decision of 6<sup>th</sup> May 2017 the SCAT revoked his nomination and recommended that a certificate be issued to the 2<sup>nd</sup> Appellant. The Respondent moved the SCAT for review of its decision and on 8<sup>th</sup> May 2017 he was cleared of any wrong doing and his nomination upheld.

6. The Respondent asserts that if at all there was a meeting of the National Elections Board held on 2<sup>nd</sup> May 2017 to deliberate on allegations raised against him, then he was condemned unheard as he only learnt of the meeting and its decision on 16<sup>th</sup> May 2017. He urges that the NEB acted in contravention of **Article 50(1)** of the **Constitution** on the right to fair trial and the provisions **Fair Administrative Action Act 2015**. That in any case, both the SCAT and the PPDT cleared him of any wrong doing in subsequent decisions and the 1<sup>st</sup> Appellant's application to the PPDT to review its decision was heard and dismissed.

7. On 29<sup>th</sup> May, 2017 the parties made brief submissions before me. Mr. Yogo learned Counsel for the 1<sup>st</sup> Appellant argued that the Review before the PPDT was necessary on two grounds. First, that there had been lack of service in the proceedings that led to the decision sought to be reviewed and second, that there were material facts not brought before the PPDT, which if placed before it the PPDT would have reached a different decision.

8. Counsel also states that from the SCAT the Respondent went directly to the PPDT bypassing the National Appeals Board of ODM in contravention with the ODM Constitution which makes it mandatory for parties to exhaust its IDRMs before going to the PPDT.

9. Miss Opar learned Counsel for the 2<sup>nd</sup> Appellant aligns herself with the submissions of Mr. Yogo and in addition states that the life of the SCAT expired on 6<sup>th</sup> May 2017 after it first pronounced itself in this matter. That there can therefore be no other review which was carried out by the SCAT on its decision after the 6<sup>th</sup> May 2017 and any decision allegedly made on 8<sup>th</sup> May 2017 cannot stand.

10. Miss Opar further argues that there was no evidence that the Respondent paid the requisite Kshs.30,000/= to entitle him to participate in the proceedings before the SCAT. Any purported participation in the said proceedings by the Respondent was therefore through the back door.

11. Mr. Ayieko learned Counsel for the Respondent submits that when the Respondent learnt on 6<sup>th</sup> May 2017 that a decision had been made which nullified his nomination, he wrote to the SCAT to contend that he had been condemned unheard. In that letter he also submitted his evidence, which led the SCAT to review its earlier decision on 8<sup>th</sup> May 2017. Counsel asserts that although the SCAT had stopped hearing fresh matters it was still in operation. They recommended that the NEB do revoke the Nomination Certificate issued to the 2<sup>nd</sup> Appellant.

12. Counsel contends that at the time of the meeting by the NEB on the 2<sup>nd</sup> May 2017 the Respondent had not been heard. Upon hearing both parties the SCAT exonerated the Respondent. When the 1<sup>st</sup> Appellant showed reluctance to comply with the orders of the SCAT the Respondent moved the PPDT to enforce the decision. The PPDT upheld the decision of the SCAT directing the 1<sup>st</sup> Appellant to issue the Respondent with the Nomination Certificate. The PPDT subsequently dismissed the 1<sup>st</sup> Appellant's application for review of its decision upon hearing both sides. He urges the court to dismiss the appeal with costs.

13. I have considered the grounds of the appeal, the affidavit in reply and the rival arguments advanced

in submission. The issue that does commend itself for determination is whether the PPDT failed to properly exercise its discretion in regard to the provisions of order **45** of the **Civil Procedure Rules** with regard to this matter.

14. The evidence in the matter is that following the nomination process the Respondent emerged as the winner having garnered 1156 votes as evinced by the polling results both tabulated and announced by the Returning Officer. The Returning Officer issued the Respondent with a provisional nomination certificate as the winner.

15. The 2<sup>nd</sup> Appellant filed a complaint with the SCAT and without hearing the Respondent the SCAT nullified the results and recommended that the NEB do revoke the Respondent's nomination certificate and issue one to the 2<sup>nd</sup> Appellant. Upon the Respondent lodging his response urging that he had been condemned unheard and providing his evidence, the SCAT did review its earlier decision and uphold his nomination. The SCAT had stopped hearing fresh matters but there was nothing to stop it from reviewing what was already before it.

16. The decision of the SCAT was subsequently upheld by the PPDT which considered the Tally Sheets adduced in evidence, which indicated that the Respondent had won. It also considered the judgment of SCAT including the review issued on 8<sup>th</sup> August, 2017 in favour of the Claimant. The 2<sup>nd</sup> Appellant filed a replying affidavit in support of the 1<sup>st</sup> Appellant. The PPDT considered all the information presented in the review application and found that there was no new and important evidence tendered by the 1<sup>st</sup> Appellant herein. The application was dismissed.

17. What the 1<sup>st</sup> Appellant calls material facts were that the Presiding Officer had declared that it was not possible to tell who the winner was in the nomination process and had left the decision to the NEB. This declaration led to the meeting of 2<sup>nd</sup> May 2017 by the NEB in which the Respondent was disqualified unheard for gross misconduct at the recommendation of the Presiding Officer.

18. I note however that not only did the Presiding Officer tabulate, but he also announced the results which from annexure "POB 2" indicate that the Respondent won. He also issued him with a provisional nomination certificate which has been upheld by both the SCAT and the PPDT. The Appellants cannot approbate the decision of the SCAT only when it suits them and reprobate it upon review. The earlier decision of the SCAT was arrived at without benefit of evidence from both sides as was the decision of the NEB following its meeting of 2<sup>nd</sup> May 2017.

19. Having considered the material before me I find that the two Tribunals did consider the evidence placed before them and properly directed themselves to arrive at the decisions that they did. I also find that on the evidence before it the PPDT properly directed itself with regard to the provisions of **Order 45** of the **Civil Procedure Rules**. The appeal is therefore found to be lacking in merit and is accordingly struck out.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> DAY OF May, 2017.**

.....

**L. A. ACHODE**

**JUDGE**

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

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

In the presence of .....for the Respondent



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