



**REPUBLIC OF KENYA**

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

(Coram: Maraga, CJ & P, Mwilu, DCJ & VP, Ojwang, Wanjala, & Njoki, SCJJ)

**PETITION NO. 12 OF 2017**

**- BETWEEN-**

**PROF. AYIECHO OLWENY.....APPELLANT/PETITIONER**

**- AND -**

**1. JAMES ONYANGO K'OYOO .....1<sup>ST</sup> RESPONDENT**

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

**3. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

(Being an Appeal against, the Judgment of the Court of Appeal (**Githinji, Ouko & Mohammed, JJ.A**) in Civil Appeal No. 180 of 2017, delivered on 10<sup>th</sup> July, 2017)

**AS CONSOLIDATED WITH PETITION NO. 13 OF 2017**

**PROF. AYIECHO OLWENY .....APPELLANT/PETITIONER**

**- AND -**

**1. ONYANGO K'OYOO .....1<sup>ST</sup> RESPONDENT**

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

**3. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

(Being an Appeal against the Judgment of the Court of Appeal (**Githinji, Ouko & Mohammed, JJ.A**) in Civil Appeal No. 181 of 2017 as consolidated with No. 182 of 2017, delivered on 10<sup>th</sup> July, 2017)

## **RULING**

### **A. INTRODUCTION**

[1] The petitioner filed two appeals before this Court. Petition No. 12 of 2017 and Petition No. 13 of 2017. Both petitions are dated 20<sup>th</sup> July, 2017 and filed pursuant to Articles 50 (4), 159(2)(a) (d) & (e), 163 (4) (a) and (b) of the Constitution of Kenya 2010, and Sections 3, 19(a) and 21 of the Supreme Court Act 2011; Section 41(2) of the Political Parties Act and Rules 9, 26 & 33 of the Supreme Court Rules, 2012.

[2] Petition No. 12 of 2017 is an appeal from the Judgment and Orders of the Court of Appeal at Nairobi, (*Githinji E.M, Ouko W, & Mohammed J. JJA*) delivered on 10<sup>th</sup> July, 2017 in Civil Appeal No. 180 of 2017.

[3] Petition No. 13 of 2017 seeks to set aside the Court of Appeal Judgment (*Githinji E.M, Ouko W, & Mohammed J., JJA*) delivered on 10<sup>th</sup> July, 2017 in *Civil Appeal Nos. 181 and 182 of 2017 (as Consolidated)* ( *an appeal challenging the findings of the application for contempt of court*).

### **B. PRELIMINARY ISSUES**

[4] By consent of the parties, the Court made an Order consolidating Petition No. 12 of 2017 and Petition No. 13 of 2017 with directions that Petition No. 12 of 2017 be the lead file. The Court further directed the parties to proceed and address the Court, on the Preliminary Objection dated 5<sup>th</sup> August, 2017 filed by the 1<sup>st</sup> respondent challenging the jurisdiction of this Court.

[5] Thereafter, Mr. Nyamodi, counsel for IEBC (the 3<sup>rd</sup> respondent) made an application that IEBC be exempted from these proceedings as it has no interest or role in the proceedings. None of the parties objected to this application and by a further consent of all the parties IEBC was exempted from the proceedings with no orders as to costs.

### **C. BACKGROUND**

[6] The petitioner and the 1<sup>st</sup> respondent participated in the ODM party nomination exercise for Muhoroni Constituency conducted on 25<sup>th</sup> April, 2017. The 1<sup>st</sup> respondent, James Onyango K'Oyoo, was declared winner and issued with a nomination certificate. Aggrieved by this decision, the appellant filed a complaint with the ODM National Appeals Tribunal (NAT) seeking, *inter alia*, the recall, and cancellation of the nomination certificate issued to the 1<sup>st</sup> respondent.

[7] On 6<sup>th</sup> May, 2017, apprehensive that a final nomination certificate would be issued before the delivery of a decision by NAT, the appellant moved to the Political Parties Disputes Tribunal, (PPDT) with a complaint that the nomination results had been declared before results from 5 Wards had been submitted. On 9<sup>th</sup> May, 2017, the PPDT dismissed the complaint holding that the allegations had not been substantiated and that it would not interfere with the Party's internal Dispute Resolution Mechanism (IDRM).

[8] This decision aggrieved the appellant and on 19<sup>th</sup> May, 2017 he filed an appeal before the High Court on the grounds *inter alia* that; *PPDT failed to evaluate the entire evidence; Tribunal's error in wrongly relying on a 'dubious' Judgment; Tribunal failure to interrogate the author of the alleged Judgment, failure of Tribunal to annul the nomination results, erring in discarding the affidavit evidence tendered by the 5 presiding officers; and failure of Tribunal to appreciate that the respondents did not adduce evidence to counter the complainant's evidence.*

[9] In a Judgment rendered on 26<sup>th</sup> May, 2017, the High Court set aside the PPDT Judgment and ordered the 2<sup>nd</sup> respondent to within 72 hours,

a. to receive the results of the nomination from the 5 wards comprising Muhoroni Constituency;

b. tabulate the results; and

c. declare the winner who will then represent the party.

[10] Upon failure by the 2<sup>nd</sup> respondent to abide by the High Court's Orders, the appellant/petitioner filed a Notice of Motion application under Sections 4, 5, 28 and 30 of the *Contempt of Court Act, No. 46 of 2016 seeking orders inter alia: that the 1<sup>st</sup> respondent, Judith Pareno, the ODM's National Elections Board Chairperson, be cited for contempt of the High Court order dated 29<sup>th</sup> May, 2017; that the Court adopt the results presented by the 5 POs of the 5 wards which had been presented in Court via the affidavit of Peter Oyuko, where after the tabulation tallying and declaration of the winner of the nomination exercise conducted on 25<sup>th</sup> April, 2017 for Muhoroni be done under the supervision of the Honourable Court (High Court).*

[11] In a Ruling delivered on 14<sup>th</sup> June, 2017 the High Court, (*Lesiit, J*) convicted the 1<sup>st</sup> and 2<sup>nd</sup> respondents of contempt of court. The learned Judge also made the following Orders which we have set out *verbatim*:

i. The nomination of the 4<sup>th</sup> respondent (James Onyango K'oyoo) by the 2<sup>nd</sup> respondent as the nominee for the Muhoroni constituency seat and his name as forwarded to the IEBC if at all, in the purported compliance of this court's order be and is hereby set aside.

ii. The applicant/appellant be and is hereby declared the nominee of the 2<sup>nd</sup> respondent for the Muhoroni constituency Parliamentary seat.

iii. The 2<sup>nd</sup> respondent should issue the Applicant/Appellant with the Nomination certificate as its nominee for the Muhoroni Constituency Parliamentary seat.

iv. Failure of (iii) above this order be extracted and served upon the 3<sup>rd</sup> Respondent to serve as a Nomination certificate for the Applicant/Appellant as order in (ii) above.

v. The 1<sup>st</sup> Respondent to show cause why the court should not commit her to civil jail for contempt.

vi. The 2<sup>nd</sup> respondent to meet the cost of the applicant/appellant to this application.”

[12] Aggrieved by the High Court Ruling, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' appealed to the Court of Appeal vide Civil Appeal Nos. 181 and 182 of 2017 respectively. The two appeals were consolidated for purposes of hearing and determination. They were premised on the following summarized grounds:

(i) That the application giving rise to the impugned decision was incompetent and irregular;

(ii) That the learned judge lacked jurisdiction to declare the nominee of the 1<sup>st</sup> appellant for the Muhoroni Constituency parliamentary seat; that by doing so she sat on appeal over her own decision or amended it;

(iii) That the learned Judge erred in finding that the 1<sup>st</sup> appellant failed to comply with the order directing compliance within a period of 72 hours which period had not lapsed at the point of filing the application dated 30<sup>th</sup> May 2017 and even after finding that the 1<sup>st</sup> appellant had not been served with the order of 29<sup>th</sup> May, 2017;

(iv) That the learned Judge also erred in finding that the 2<sup>nd</sup> appellant was guilty of contempt of court before directing her to show cause and in admitting fresh and additional evidence at the hearing of the application of 30<sup>th</sup> May, 2017; and

(v) That the learned judge usurped the role of the 1<sup>st</sup> appellant by receiving, tallying and declaring results for the party's nomination and by relying on impugned results to declare the nominee.

[13] In a Judgment delivered on 10<sup>th</sup> July, 2017, the Court of Appeal allowed the appeal and set aside the High Court's decision.

[14] It is this Court of Appeal decision of 10<sup>th</sup> July, 2017, that has aggrieved the appellant and necessitated the filing of Petition

No. 13 of 2017 to the Supreme Court.

[15] The 1<sup>st</sup> respondent also filed a further appeal against the High Court decision in Civil Appeal No. 180 of 2017. This appeal was premised upon numerous grounds *inter alia*: *the erroneous reliance on fresh evidence; upsetting election results without any material evidence; relying on evidence which had been found not to be credible; relying on the evidence of Peter Oyuko when he had no capacity to swear an affidavit on election results from the POs and reliance on extraneous evidence and substantiated and forged results.*

[16] This appeal was also allowed by the Court of Appeal in its decision of 10<sup>th</sup> July, 2017.

[17] The Appellate Court held that the High Court had misdirected itself and reached an erroneous decision by allowing the 1<sup>st</sup> respondent (Appellant herein) to change the nature of his complaint.

[18] Aggrieved by that decision, the appellant moved to the Supreme Court on 26<sup>th</sup> July, 2017 and filed Petition No. 12 of 2017 seeking to set it aside. The petition is premised on several grounds, *inter alia*, that the learned Judges of the Court of Appeal erred in: *allowing into evidence a purported 'Judgment' without questioning its authenticity, authorship, legality and the manner in which it was obtained by the 1<sup>st</sup> respondent, hence affecting appellant's rights under Article 50(4) of the Constitution; misinterpretation and misapplication of section 41(2) of the Political Parties Act, limiting the jurisdiction of the Court of Appeal to points of law; delving into issues not substantively before them, such as the constitutionality of section 41(2) of the Act; disregarding the corpus of evidence presented before them; overturning the decision of the High Court without laying a firm basis for upsetting the said Judgment: these judgment raise weighty issue of constitutional issues.*

[19] In summary, Petition No. 12 of 2017 seeks to set aside the Court of Appeal Judgment and decree delivered on 10<sup>th</sup> July, 2017 in Civil Appeal No. 180 of 2017. The appellant also seeks the costs of the appeal and in all other proceedings before the Court of Appeal, High Court and the PPDT.

#### D. PARTIES SUBMISSIONS

##### (i) 1<sup>st</sup> Respondent's Submissions

[20] The 1<sup>st</sup> respondent filed a preliminary objection dated 5<sup>th</sup> August 2017 to the effect that *the Court has no jurisdiction to hear and determine this appeal since there is no certification and leave to appeal that has been granted; and neither is there any matter involving the interpretation and application of the Constitution.* This preliminary objection has also been raised in petition No 13 of 2017.

[21] In addition Mr. Sagana Counsel for the 1<sup>st</sup> respondent, faulted the petitioner's reliance on section 41(2) of the Political Parties Act. He submitted that section 41(2) of the Political Parties Act does not confer jurisdiction on this Court as Parliament cannot confer jurisdiction upon a court of law beyond the scope permitted by the Constitution.

[22] Counsel urged the Court to assess the grounds of appeal in both the Court of Appeal and High Court, which he submitted, had nothing to do with the interpretation or application of the Constitution. In support of his submissions, Counsel cited this Court's decision in *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another* (2012) eKLR and *Erad Supplies & General Contractors Limited v. National Cereals & Produce Board* SC Petition No. 5 of 2012.

[23] It was Counsel's submission that this dispute revolves around the provisions of the Orange Democratic Movement Election and Nomination Rules and the Political Parties Act and which disputes were resolved by the Tribunals and the Superior Court under the said provisions. That the Tribunals and Superior Courts did not in any way apply or interpret the provisions of Article 38, or 50 of the Constitution.

[24] To further support his arguments, Mr. Sagana referred to the cases of *The Owners of the Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Ltd* (1989) eKLR 1; *Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others*; Application No. 2 of 2011 [2012] eKLR; *Mukisa Biscuits Manufacturing Co. Ltd. v. West End Distributors* (1969)EA 696.

[25] Counsel urged the Court to down its tools for lack of jurisdiction and strike out both the petitions with costs.

(ii) *The 2<sup>nd</sup> Respondent's Submissions*

[26] The 2<sup>nd</sup> respondent supported Mr. Sagana's contention that this Court lacked jurisdiction to entertain the two petitions of appeal under either Article 163(3), (4) (a) or (b) of the Constitution.

[27] It was the 2<sup>nd</sup> respondents submission that the petition of appeal was incompetent, frivolous, and an abuse of this Court's process having been filed without leave contrary to Article 163 (4) (b) of the Constitution. Secondly the 2<sup>nd</sup> respondent contended that, the appeal did not raise any issues involving the interpretation and application of the Constitution. Counsel made reference to the cases of *Hassan Nyanje Charo v. Khatib Mwashetani* Supreme Court Application No. 14 of 2014; *Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others* [2014] eKLR; *Lawrence Nduttu & 6000 Others (Supra)*.

[28] Counsel agreed with the 1<sup>st</sup> respondent's submission that Section 41 of the Political Parties Act does not confer or grant the Supreme Court jurisdiction. He urged the Court to strike out the appeal with costs.

(iii) *The Petitioners Submissions*

[29] Mr. Mwamu, Counsel for the appellant, opposed the preliminary objection on grounds that the same did not meet the required threshold for preliminary objections as set out in the case of *Mukisa Biscuits (Supra)*.

[30] Counsel submitted that the appeal raises issues involving the interpretation and application of the Constitution under Article 163(4) (a) of the Constitution. He stated that the core of the appellant's case is Article 50(4) and 38 of the Constitution. He contended that, the Court of Appeal had violated the rights of the appellant under Articles 50(4) and 38 of the Constitution, by relying on an impugned judgment to arrive at the decision that it did.

[31] It was Counsel's submission that a perusal of the Complaint filed before the PPDT and the Memorandum of Appeal filed before the High Court would reveal that the issue of fair hearing had all along formed the gist of the appellant's case.

[32] Counsel submitted that this Court was properly clothed with jurisdiction to entertain the appeal. In support of his argument, Counsel made reference to this Court's decisions in *Yusuf Gitau Abdallah v. Building Centre (K) Ltd & 4 Others* (2014) eKLR; *Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others* Application No. 2 of 2011 [2012].

[33] Counsel further submitted that, at the core of the appellant's case, are the provisions of Article 38; 50(4) and 91 of the Constitution.

[34] Counsel urged the Court to dismiss the preliminary objection and proceed to determine the appeal.

**E. ANALYSIS**

[35] The main question arising for determination is whether this Court has jurisdiction to here and determine this appeal.

[36] The appellate jurisdiction of this Court under Article 163 (4) (a) and (b) of the Constitution has been comprehensively addressed in various decisions of the Court; to wit:

(*Lawrence Nduttu Case supra, Hermanus Phillipus Steyn v. Giovanni Gnechchi-Ruscione* [2013] eKLR, *Sum Model Industries Ltd v. Industrial Commercial Development Corporation* Supreme Court Civil Application No.1 of 2011, and *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others* (2012) eKLR.

[37] Regarding the argument as to whether the preliminary objection meets the threshold established in the *Mukisa Biscuit case*, it is clear to us, as observed by this Court, in *Aviation & Allied Workers Union Kenya v. Kenya Airways & Others* Sup. Ct. Applic

No. 50 of 2014 [2015] eKLR; that where a court's jurisdiction, is objected to by any party to the proceedings before that court, such an objection must be dealt with as a preliminary issue. Indeed, a jurisdictional issue is a question of law, to be answered before the meritorious determination of any cause. Towards this end, the respondents herein have clearly contended, that this Court lacks jurisdiction to entertain the appeals herein. The preliminary objection in this case, falls squarely within the four corners of *Mukisa* and is therefore properly before us.

[38] The appellant relies upon section 41(2) of the Political Parties Act and Article 163(3) (b) (ii) of the Constitution. Section 41(2) provides that:

**“An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.”**

[39] While Article 163(3) (b) (ii) of the Constitution provides that:

**“The Supreme Court shall have:**

**(b) subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from—**

**(i) the Court of Appeal; and**

**(ii) any other court or tribunal as prescribed by national legislation.**

[40] An appeal to this Court from any other court or tribunal is still subject to Article 163 (4) (a) and (b) of the Constitution. The said Article provides that:

**“Appeals shall lie from the Court of Appeal to the Supreme Court—**

**(a) as of right in any case involving the interpretation or application of this Constitution; and**

**(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).**

**(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.”**

[41] Therefore, Section 41(2) of the Political Parties Act cannot support an appeal to the Supreme Court outside the strictures of Article 163(4) (a) and (b) of the Constitution. The appellant must satisfy the Court that the appeal in question involves the interpretation or application of the Constitution; or that the said appeal has been certified as involving a matter of general public importance.

[42] As the appeal before us has not been certified as involving a matter of general public importance, we can only consider its competence under Article 163 (4) (a) of the Constitution.

[43] In *Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd.* this Court was categorical that Article 163 (4) (a) must be seen ...

**“to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. ... it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application. The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the constitution...Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under**

the provisions of Article 163(4) (a).”

[44] This position was affirmed in *Charles Michael Angus Walker-Munro v. Pamela Ann Walker-Munro* Supreme Court Petition No. 7 of 2015; wherein the Court stated thus:

“This Court has long settled the question of when and whether an appeal lies from the Court of Appeal under Article 163 (4) (a) of the Constitution. A perusal of any of the decisions wherein the Court has pronounced itself on the applicability of the said Article, would immediately reveal that for an appeal to lie to this Court, the impugned decision must have turned on the appellate court’s interpretation or application of the Constitution.”

[45] We have extensively examined the record of appeal before us to determine whether, in arriving at its decisions, the Court of Appeal interpreted or applied any provisions of the Constitution. We have also perused the submissions of the parties to determine whether any arguments revolving around the interpretation or application of the Constitution, were canvassed at the High Court and Court of Appeal. What is disclosed from the record does not demonstrate that the judgments of the two superior courts turned on any question involving the interpretation or application of the Constitution.

[46] The main argument advanced by the appellant is that the Court of Appeal relied on an impugned judgment and in so doing infringed upon his rights to a fair hearing. Such an argument in our view, without more, cannot bring the appeal within the rubric of what is envisaged under Article 163(4) (a) of the Constitution. The cause of action did not involve the application and interpretation of Articles 50(4) and 38 of the Constitution; nor was this issue before any of the two superior courts.

[47] Consequently, we find that this appeal cannot be admitted pursuant to the provisions of Article 163 (4) (a) of the Constitution.

**F. ORDERS**

- i. *The Preliminary Objection is hereby allowed.*
- ii. *The Petitions of Appeal herein (as consolidated) are hereby struck out.*
- iii. *The Appellant shall bear the costs of the Appeal.*

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of October 2018.**

.....

**D. K. MARAGA**

**CHIEF JUSTICE & PRESIDENT**

**OF THE SUPREME COURT**

.....

**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

.....

**N. S. NDUNGU**

.....

**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE**

**PRESIDENT OF THE SUPREME COURT**

.....

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

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