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| Case Number:                 | Election Petition Appeal 64 of 2017                                       |
| Date Delivered:              | 26 May 2017   |
| Case Class:                  | Civil   |
| Court:                       | High Court at Nairobi (Milimani Law Courts)                               |
| Case Action:                 | Judgment  |
| Judge:                       | Hedwig Imbosa Ong'udi   |
| Citation:                    | Gabriel Bukachi Chapia v Orange Democratic Movement & another [2017] eKLR |
| Advocates:                   | -   |
| Case Summary:                | -   |
| Court Division:              | Civil   |
| History Magistrates:         | (Kyalo Mbobu, James Atema & Hassan Abdi, Tribunal Members)                |
| County:                      | Nairobi   |
| Docket Number:               | -   |
| History Docket Number:       | Complaint No. 237 of 2017   |
| Case Outcome:                | Appeal dismissed  |
| History County:              | Nairobi   |
| Representation By Advocates: | -   |
| Advocates For:               | -   |
| Advocates Against:           | -   |
| Sum Awarded:                 | -   |

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION APPEAL NO. 64 OF 2017

GABRIEL BUKACHI CHAPIA.....APPELLANT

VERSUS

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

EDWIN SIFUNA.....2<sup>ND</sup> RESPONDENT

*(Being an Appeal against the Judgment of the Political Parties Dispute*

*Tribunal, (Kyalo Mbobu, James Atema & Hassan Abdi, Tribunal Members)*

*dated 16<sup>th</sup> May, 2017 in Complaint No. 237 of 2017)*

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**JUDGMENT**

1. The Judgment being challenged by the Appellant was delivered on 16<sup>th</sup> May, 2017 by the Political Parties Dispute Tribunal (PPDT). The Tribunal in the said Judgment directed that the dispute between the Appellant and the 2<sup>nd</sup> Respondent be referred back to the 1<sup>st</sup> Respondent's Nationals Elections Board (2<sup>nd</sup> Respondent) to nominate its senator candidate for Nairobi County.

2. The Appellant and 2<sup>nd</sup> Respondent are members of the Orange Democratic Movement (ODM) Party. The Appellant applied for a senatorial post in Nairobi and he came out unopposed. On 3<sup>rd</sup> April, 2017 at Bomas of Kenya, he was issued with a Nomination Certificate and cleared to start work. On 13<sup>th</sup> April, vide a Gazette Notice No. 3797, the Independent Electoral Boundaries Commission (IEBC) published a list of names of those contesting and the Appellant remained unopposed.

3. On separate dates, in April 2017 there were two meetings held between the Appellant and Mr. Kidero of ODM. The purpose of the meetings was to persuade the Appellant to step down for the party's preferred candidate. The meetings were not successful. He later at another meeting met the preferred candidate **Mr. Sifuna** (2<sup>nd</sup> Respondent) but he still refused to concede.

4. On 5<sup>th</sup> May, 2017 afternoon, the party introduced the 2<sup>nd</sup> Respondent as the senatorial candidate for Nairobi. On 9<sup>th</sup> May, 2017 the Appellant learnt that the 1<sup>st</sup> Respondent had issued Mr. Sifuna (2<sup>nd</sup> Respondent) with a Nomination Certificate.

5. The Appellant then moved to the Political Parties Disputes Tribunal (PPDT) to complain vide case no. 237 of 2017.

6. **Mr. Kibe** addressed the Court on several issues and I wish to start with the first two issues;

It was his submission that the PPDT lacked jurisdiction to issue the order it did. To support this position, he cited the case of **Faith Wairimu Gitau –vs- Hon. Wanjiku Muhia & Another EPA No. 25 of 2017** which sets out the jurisdiction of the PPDT. He went on to state that in contest was the Certificate of Nomination and the PPDT presupposed that the Appellant had no certificate

7. The 2<sup>nd</sup> issue he raised was that the PPDT failed to address the issues that were presented before it. He submitted that the Court cannot go outside the pleadings filed when making its decision. He cited the case of **Global Vehicles (K) Ltd. –vs- Lenana Road Motors [2015] eKLR**.

Mr. Kibe also referred to Section 13 (2) Elections Act saying the Appellant's certificate is irrevocable.

8. **Mr. Anzala** for the 2<sup>nd</sup> Respondent and holding brief for Mr. Oluoch for 1<sup>st</sup> Respondent in response to these two issues submitted that the decision being contested was hinged on the PPDT's jurisdiction. He stated that the Appellant ought to have first lodged his complaint at the Party Tribunal (NEB). That he was simply referred to the right place by the PPDT. He referred to **Peter M. Wambua –vs- PPDT & Others Misc. Application No. 232 of 2017. (Odunga J.)**

9. He also submitted that the Appellant had initially filed Petition NO. 192 of 2017 which **Mativo J.** dismissed for being prematurely filed. Also referred to were;

1. **EPA No. 7 of 2017 Hezron Opiyo Asudi & Another –vs- Peter Anyang Nyong'o.**

2. **Narok County Council –vs- Transmara County Council Civil Appeal No. 25 of 2000.**

His position was that the 1<sup>st</sup> Respondent was correct in declining to assume jurisdiction.

10. He informed the Court that IEBC placed a Notice on how parties were to conduct their primaries, and the 1<sup>st</sup> Respondent held a meeting on 28<sup>th</sup> April, 2017 to discuss party primaries (Minutes page 144 – 148).

The certificates issued were recalled as a result of this meeting.

He submitted that the Appellant cannot claim to be validly nominated when he holds a certificate issued prior to gazette of the Notice on party primaries.

On Section 13 (2) Elections Act he submitted that it only applies when the Political Party has submitted the name of its nominated person to IEBC. The Appellant's name has not been forwarded to IEBC.

In a rejoinder, Mr. Kibe submitted that the authorities cited were not applicable in this matter as the facts therein were different from the present case. He further stated that the NEB had closed shop and the Appellant had nothing else to do.

11. I have read the Appellant's supporting affidavit sworn on 11<sup>th</sup> May, 2017; the 2<sup>nd</sup> Respondent's replying affidavit sworn on 12<sup>th</sup> May, 2017; affidavit by Bernard Shilatukha Khatechi sworn on 12<sup>th</sup> May, 2017; affidavit by Agnes Zani (Secretary General ODM) sworn on 15<sup>th</sup> May, 2017 plus the Appellant's further affidavit and the submissions filed.

12. There is no dispute that the Appellant applied for nomination to vie for the senatorial post on the 1<sup>st</sup> Respondent's ticket.

It is also not in dispute that as at 3<sup>rd</sup> April, 2017 there was no one opposing the Appellant for the nomination. He was issued with a nomination certificate on the said 3<sup>rd</sup> April, 2017.

13. It is a fact that on 5<sup>th</sup> April, the IEBC issued a directive to the effect that no party primaries were to take place until the names of the aspirants were gazetted by the Commission. Following this directive by IEBC, the Central Committee of the 1<sup>st</sup> Respondent held a meeting and it was decided among others that all nomination certificates issued prior to the directive be recalled (Minutes – 002) and reissued. The aspirants were to be notified.

14. Agnes Zani has in her long replying affidavit explained all the steps taken by the 1<sup>st</sup> Respondent in this matter to resolve the stalemate. That finally, the Central Committee unanimously passed a resolution to nominate the 2<sup>nd</sup> Respondent as its candidate for the position of Senator, Nairobi County since the Appellant had not responded to their invitations nor returned the certificate.

15. It is the Appellant's submission that he remains the nominee for the senatorial post for Nairobi County for the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent counters this by stating that the nomination certificate the Appellant holds was issued prior to the gazettment of the aspirants.

16. It has clearly come out of what has been set before this Court, that in fact, there were no real primaries that were held for the Nairobi Senator's post on the ODM party ticket. The reason being that the Appellant was the only one who had applied then and there was no process of electing or selecting but going by the choice of the unopposed candidate.

It has been shown that after the issuance of the nomination certificate to the Appellant on 3<sup>rd</sup> April, 2017 and after the gazettment on 13<sup>th</sup> April, 2017 of the Appellant as the one running for that seat on the ODM ticket, the 1<sup>st</sup> Respondent issued the 2<sup>nd</sup> Respondent with a certificate of nomination.

17. The Appellant went to the PPDT to contest this. The PPDT referred them back to the party. The Appellant submits that the PPDT had no jurisdiction to do that.

The PPDT draws its jurisdiction from Section 40 of the Political Parties Act (PPA) which provides;

***(1) The Tribunal shall determine—***

***(a) disputes between the members of a political party;***

***(b) disputes between a member of a political party and a political party;***

***(c) disputes between political parties;***

***(d) disputes between an independent candidate and a political party;***

***(e) disputes between coalition partners; and***

***(f) appeals from decisions of the Registrar under this Act;***

***(fa) disputes arising out of party primaries.***

***(2) 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.***

18. Under Section 40 (2) there are specific disputes which the PPDT has no jurisdiction to handle without proof that they have been conclusively dealt with by the party internal resolution mechanism. This is a form of Alternative Dispute Resolution (ADR) which is anchored in the Kenyan Constitution. Article 159 (1) provides;

***“(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).”***

19. One of the provisions of the Constitution or Rules of a political party is the provision of an internal party dispute resolution mechanism in accordance with Article 47 and 50 of the Constitution (Rule 23 of second Schedule of the PPA). Section 11 (1) of the Fair Administrative Action Act provides;

***(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-***

***(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;***

***(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;***

***(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;***

***(d) prohibiting the administrator from acting in particular manner;***

***(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;***

***(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;***

***(g) prohibiting the administrator from acting in a particular manner;***

***(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;***

All these provisions read together show that internal dispute resolution is one very important way of resolving disputes.

20. 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).

21. The law requires that these disputes be first handled at the party level. There is evidence that the 1<sup>st</sup> Respondent was trying to deal with this matter internally but the Appellant backed out after making certain demands which were not met.

After the directive by the IEBC on party primaries, the 1<sup>st</sup> Respondent held a meeting of its Central Committee to review the party primaries. It was then decided that all certificates of nomination issued prior to this directive were to be recalled for fresh ones to be reissued in conformity with the directive. All the aspirants including the Appellant were notified of the decision.

22. In his wisdom the Appellant has to date not returned the nomination certificate issued to him on 3<sup>rd</sup> April, 2017. By all standards, this is not a valid nomination certificate. It is not in conformity with the directive of the IEBC. Had the Appellant surrendered the certificate and the 1<sup>st</sup> Respondent does not reissue him with a proper certificate, he could have had a good reason to complain against the 1<sup>st</sup> Respondent of not being neutral.

23. A political party has the duty to elect or select a candidate to carry its flag during the general elections. The PPA defines “party primaries” to mean;

***“the process through which a political party elects or selects its candidates for a forthcoming general election or for a forthcoming by-election.”***

In this case, there are two candidates who claim to have valid nomination certificates. The PPDT directed them back to the NEB because that is the party that issued them with the said certificates. The Appellant elected not to go to the NEB as per the Orders of the PPDT. Mr. Kibe submitted that the Appellant could not get any justice before the 1<sup>st</sup> Respondent hence the filing of this matter here.

24. There is no evidence that the Appellant went to the 1<sup>st</sup> Respondent’s NEB, as per the Orders of the PPDT and he was not attended to or heard. The issue of bias or partiality could only be pleaded after complying with the Orders of the Tribunal.

25. Section 13 (1) and (2) of the Elections Act referred to by the Appellant is only available to a candidate whose name has been forwarded to the IEBC. The 1<sup>st</sup> Respondent has denied forwarding the Appellant’s name to the IEBC and there is no evidence to confirm that his name has indeed been forwarded.

26. My finding on the two first issues is that;

- i. The matter between the parties herein falls under Section 40 (1) (a), (b) and (fa) of the Political Parties Act and ought to have been first filed, heard and determined by the 1<sup>st</sup> Respondent’s NEB.
- ii. The Tribunal acted within its jurisdiction when it referred the matter to the 1<sup>st</sup> Respondent to nominate its senator candidate for Nairobi.

27. These two issues have actually determined this appeal and I do not find it necessary to consider the

other issues.

28. I therefore find that the appeal lacks merit. It is dismissed with no order as to costs.

Orders accordingly.

**Delivered, signed and dated this 26<sup>th</sup> day of May 2017 at NAIROBI**

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**HEDWIG I. ONG'UDI**

**HIGH COURT JUDGE**



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