



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
ELECTION PETITION APPEAL NO.89 OF 2017

TOM ODEGE.....APPELLANT

VERSUS

HON EDICK PETER OMONDI ANYANGA.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT (ODM).....2ND RESPONDENT

FREDRICK OGENGA.....3RD RESPONDENT

JUDGMENT

The Appellant, Tom Odege and the 1st Respondent, Hon. Edick Peter Omondi Anyanga, among others, participated in the primaries organized by the 2nd Respondent to determine who was to be nominated the flag bearer of the party for the Nyatike Constituency parliamentary seat. It was common ground that the nomination exercise was not properly concluded. The 1st Respondent stated that at the time the nomination exercise was stopped, he was leading with 6,970 votes as against 1,970 votes that was garnered by the Appellant. The dispute was referred to the 2nd Respondent's National Appeals Tribunal for determination by one of the aggrieved parties by the name Fredrick Ogenga (3rd Respondent). The 2nd Respondent's National Appeals Tribunal nullified the nominations after it found that there were irregularities that vitiated the results. It ordered the 2nd Respondent to hold fresh nominations for the position of Nyatike Constituency's Member of Parliament. It also issued an order cancelling the provisional nomination certificate that had been issued to the 3rd Respondent. However, from the affidavits filed, it was apparent that the 2nd Respondent disobeyed the order issued by the said Tribunal. The 2nd Respondent did not hold repeat nominations as ordered by the said Tribunal.

The 1st Respondent herein was concerned that the 2nd Respondent would not conduct repeat nominations and would instead use other means to nominate a candidate for the said parliamentary seat other than through universal suffrage. The 1st Respondent lodged a claim against the 2nd Respondent at the Political Parties Disputes Tribunal (PPDT). The 2nd Respondent was served and participated in the hearing before the PPDT. In its judgment rendered on 9th May 2017, particularly paragraph 10 thereof, the Tribunal held thus:

“For this reason, this Tribunal has noted from the unchallenged evidence of the claimant that the claimant garnered 6,970 votes against 3,120 votes for the interested party (3rd Respondent) and 1,970 votes for one Tom Odege (the Appellant) by the time the Returning Officer stopped

tallying the votes. In this regard, it is apparent that the claimant got most votes and as such ought to be recognized as the winner for the position of Member of National Assembly Nyatike Constituency. In any case, the claimant has demonstrated vide his supplementary affidavit that the interested party herein has since been issued with a clearance letter by the Registrar of Political Parties to vie as an independent candidate for the said Nyatike Constituency.”

The PPDT then proceeded to order the 2nd Respondent to issue the 1st Respondent with a nomination certificate in respect of the said constituency. The 1st Respondent annexed a copy of the said nomination certificate which was issued to him by the 2nd Respondent in compliance with the order issued by the PPDT. The final nomination certificate was issued to him on 12th May 2017.

One would have thought that that would be the end of the matter. It was not to be. The Appellant herein on 14th May 2017 made an application before the PPDT seeking to have the said judgment issued in favour of the 1st Respondent reviewed and set aside. The Appellant complained that he was in fact issued with a direct nomination to be the nominee for the said constituency by the 2nd Respondent after the failure of the nomination exercise that was earlier organized by the 2nd Respondent. He was of the view that the PPDT had issued the order in his absence. It was his assertion that he was a necessary party to the said proceedings. The Tribunal considered his application and proceeded to dismiss it because it formed the opinion that the said application lacked merit. It was the refusal by the Tribunal to grant the said orders of review sought by the Appellant that provoked this appeal.

In his memorandum of appeal, the Appellant raised several grounds of appeal challenging the decision of the PPDT in dismissing his application for review. In summary, the Appellant contends that the decision was rendered in contravention of his right to be given a fair hearing in that a decision that affected him was rendered without him being made a party to the proceedings. The Appellant faulted the Tribunal for failing to consider that the 1st Respondent had obtained the orders in question after concealing material facts from the court. The Appellant argued that having been issued with a nomination certificate by the 2nd Respondent his right to offer his candidature for the 2nd Respondent party for Nyatike parliamentary seat had crystallized and the same could not be withdrawn without his participation. He took issue with the fact that the Tribunal had purported to nominate the 2nd Respondent and thus usurped the role of the 2nd Respondent in nominating a candidate of its choice for the said parliamentary seat.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Ligunya for the Appellant, Mr. Amuga for the 1st Respondent and Mr. Mwamu for the 2nd Respondent. This court has carefully considered the said submission. It has also read the pleadings filed before the PPDT and the decisions rendered by the said Tribunal. The issue for determination by this court is, essentially, who as between the Appellant and the 1st Respondent is entitled to present the nomination certificate to the IEBC as the 2nd Respondent's nominee for the Nyatike parliamentary seat. According to the Appellant, he was issued with direct nomination by the 2nd Respondent after the failure of the nomination exercise which had earlier been organized by the 2nd Respondent. The Appellant submitted that the 2nd Respondent was justified in issuing the direct nomination because its nomination rules gave it the leeway to do so under certain circumstances. The position of the Appellant was supported by the 2nd Respondent which insisted that the Appellant was its nominee for the said parliamentary seat. On his part, the 1st Respondent insisted that he was the legitimate nominee for the said parliamentary seat having proved that he was the most popular candidate in the nomination exercise that was subsequently nullified. The Appellant further argued that since the PPDT had upheld his nomination, and further, since the 2nd Respondent in compliance with the order of the Tribunal had issued him with a nomination certificate, the nomination certificate issued to the Appellant had no legal effect.

The Appellant and the 1st Respondent both presented to the court nomination certificates which were allegedly issued by the 2nd Respondent. Although the 2nd Respondent claims it did not issue the nomination certificate that is in the 1st Respondent's possession, this court having perused the original is

satisfied that the said nomination certificate was infact genuine and was validly issued by the 2nd Respondent to the 1st Respondent in compliance with the order which was issued by the PPDT. The question that this court asks itself in determining this appeal is on what basis was the Appellant issued with direct nomination by the 2nd Respondent. This was after it had established that he performed poorly in the nomination exercise that was subsequently vitiated by the 2nd Respondent's own National Appeals Tribunal. On re-evaluation of the facts of this case, this court holds that the 2nd Respondent had purported to issue the said direct nomination to the Appellant in defiance of the decision of its own National Appeals Tribunal. The 1st Respondent had legitimate expectation that the 2nd Respondent would comply with the orders issued by the National Appeals Tribunal to conduct fresh nomination exercise to determine its nominee for the said Nyatike constituency parliamentary seat. For the 2nd Respondent to turn around and refuse to conduct fresh nominations, and use the excuse of the said refusal as a basis to issue a direct nomination to the Appellant, is not only dishonest but breach of the rules of natural justice. The 1st Respondent was justified to complain before the PPDT when it became apparent to him that if he did not take action he would be denied the right to offer his candidature for nomination for the said parliamentary seat.

What distressed this court during the hearing of this appeal is the inconsistent and erratic positions taken by the 2nd Respondent during the entire period that the dispute was under resolution. It is the 2nd Respondent own National Appeals Tribunal that ordered fresh nominations to be held. For avoidance of doubt, the said Tribunal directed that the nominee for the Nyatike parliamentary seat for the party would be nominated through universal suffrage and not by any other means. The 2nd Respondent had no choice but to comply with this order by its own National Appeals Tribunal. At the Political Parties Dispute Tribunal, the 2nd Respondent was represented by counsel but failed to present the position that it is now advancing before this court. After the PPDT had rendered its decision, in compliance with the order of the Tribunal, it issued a nomination certificate to the 1st Respondent. When the Appellant filed an application seeking to set aside the decision of the Tribunal, the Appellant's position, as contained in the affidavit sworn by its legal officer, was neutral and did not support the position taken by the Appellant that he was a beneficiary of direct nomination by the 2nd Respondent party. During the hearing of this appeal, the 2nd Respondent asserted that indeed it was within its right to nominate anyone it thought fit, and in a manner that it chose, to be its candidate for the said parliamentary seat. This court was disturbed that a political party which espouses the principles of democracy would assume a position that negates its core principles of nominating its candidates on the basis of their popularity.

On re-evaluation of the facts of this appeal, it was clear to this court that the 2nd Respondent acted in contempt of the orders of its own National Appeals Tribunal when it purported to issue to the Appellant a direct nomination for the said Nyatike constituency parliamentary seat. In this regard, the only credible basis upon which a nomination certificate can be issued for the said parliamentary seat, noting that nominations will be presented to the IEBC tomorrow 1st June 2017 and on Friday 2nd June 2017, is for this court to consider who as between the Appellant and the 1st Respondent presented evidence as to his popularity among the voters of Nyatike Constituency to be nominated as the candidate to represent the 2nd Respondent party in the forthcoming general elections. This court takes judicial notice of the fact that the 2nd Respondent, being the dominant party in Nyatike Constituency, a nominee of the party, for all intents and purpose, is as good as elected as a Member of Parliament. It would therefore constitute a travesty for the 2nd Respondent to impose a candidate on the people of Nyatike Constituency who is obviously not their choice.

Due to the fact that the 2nd Respondent disobeyed the order of its own National Appeals Tribunal to conduct fresh nominations for the said parliamentary seat, the only gauge of who is popular as between the Appellant and the 1st Respondent is the nomination exercise that was held on 24th April 2017. Although the nomination exercise was not concluded, it was clear that the 1st Respondent had most votes by the time the tallying exercise was inexplicably stopped. The 1st Respondent had three times more votes than the Appellant. The Tribunal did not therefore err when it directed the 2nd Respondent to issue a

nomination certificate to the 1st Respondent. There was no basis whatsoever upon which the 2nd Respondent purported to issue a direct nomination to the Appellant especially when such decision went contrary to its own nomination rules and the orders issued by its own National Appeals Tribunal and the Political Parties Disputes Tribunal. Whereas this court is reluctant to interfere with political parties internal processes, where it becomes apparent, as in the present appeal, that a political party does not respect its own rules and also legitimate orders issued by competent tribunals, this court will have no option but intervene to remedy an obvious injustice, unfair conduct and breach of rules of natural justice.

The upshot of the above reasons is that the appeal lodged by the Appellant cannot be allowed. It is for dismissal. It is hereby dismissed. For the avoidance of doubt, the nominee for Orange Democratic Movement Party for Nyatike Constituency is the 1st Respondent, Edick Peter Omondi Anyanga. The nomination certificate issued to him by the Orange Democratic Movement Party is the only valid nomination certificate which shall be received by Independent Elections and Boundaries Commission (IEBC). The nomination certificate that was issued to the Appellant contrary to the orders of Orange Democratic Movement Party's National Appeals Tribunal and the Political Parties Disputes Tribunal is hereby cancelled and is declared null and void. It shall have no legal effect whatsoever. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF MAY 2017

L. KIMARU

JUDGE