REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 240 OF 2017

CHARLES OTIENO OPIYO

WILLIS OMONDI OROWE

JOSEPH OWINO OGENDO

SALA JARED OWINO……..…....…….APPLICANTS/PETITIONERS

-VERSUS-

ORANGE DEMOCRATIC MOVEMENT PARTY.....…RESPONDENT

JARED OKELLO..……...……..INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petitioners herein describe themselves as adults of sound mind.

2. The Respondent is a registered political party established in accordance with the ***Political Parties Act*** and in accordance with the principles laid down in Article 91 of the Constitution responsible for inter alia nomination of candidates for election in various offices of political leadership.

3. According to the Petitioners, they appealed to the Respondent's National Appeals Tribunal (hereinafter referred to as "the Tribunal" or "NAT") which is the Respondent's Internal Dispute Resolution Mechanism (IDRM) against the declaration of the Interested Party as its candidate for Nyando Constituency (the Constituency) in the forthcoming General Elections scheduled for 8th August, 2017. They averred that the said Tribunal nullified the nomination of the Interested Party and ordered a fresh process of determining the Respondent's nominee for the said seat.

4. According to the Petitioners, the only procedure of determining the candidate according to the Respondent's Election and Nomination Rules is by way of nominations. However, the Respondent has failed to comply with its NAT's directive and hence the need to file this Petition.

5. The Petitioners averred that the Respondent refused to give the Petitioners a copy of judgment until Friday, 19th May, 2017 by which time the Political Parties Disputes Tribunal (PPDT) had stopped receiving new complaints from disputes handled by Political Parties Internal Disputes Resolution

Mechanisms (IDRM).

6. The Petitioners therefore contended that it is therefore imperative that this Court issues an order directing the Respondent to comply with its NAT's directives by carrying out fresh nominations for the said constituency within timelines set by the court in order to ensure democracy in the Respondent's primaries for the forthcoming General Elections scheduled for 8th May, 2017.

7. The Petitioners emphasised that the Interested Party did not challenge the NAT's Judgment in PPDT.

8. In his submissions on behalf of the Petition, **Mr Ogutu**, learned consel for the Petitioner averred that in its decision delivered on 5th May, 2017, the NAT nullified the nominations of the Respondent and withdrew the provisional certificate and the Party was directed to initiate the process of determining its nominee for Nyando Constituency. Despite that there was no compliance with the NAT's directive despite the fact that the interested party herein never appealed the decision to the Political Party Disputes Tribunal "the PPDT).

9. It was submitted that since the judgement was only issued to the petitioners o 19th May, 2017 by which time the PPDT had stopped receiving new complaints, the Petitioners could not approach the PPDT for relief.

10. With respect to section 74 of the ***Elections Act***, it was submitted that since none of the parties was challenging the decision of the NAT, there was no nomination dispute hence the matter could not be the subject of the proceedings before the Independent Electoral and Boundaries Commission (the IEBC). In the Petitioner's view, since the dispute had been determined there was nolonger a nomination dispute in existence hence it is only this Court that can direct the Respondent to carry out the nomination.

11. It was submitted that according to rule 18(1)(a) of the Respondent's Election and Nomination Rules, it is clear that the Respondent can only nominate its candidates in respect of Zone B through a nomination process since Nyando Constituency is within Kisumu County and under Schedule 2 of the said Nomination Rules, the Respondent can only select its candidate for the constituency through a nomination process. It was therefore submitted that direct nomination is not available in respect of the said Constituency.

12. Responding to the interested party's position that the appeal before the NAT was lodged out of time it was submitted that the authorities relied upon were in reference to the provisions of the ***Elections Act*** and were not applicable to party primaries. In addition, it was submitted that the interested parties raised the issues before the NAT but the same was disallowed and no appeal was lodged against the said decision.

13. It was the Petitioners' case that though it was contended that the Petitioners did not disclose any violation of their constitutional rights, it was clear that Article 38(3)(c) of the Constitution protects the right to be a candidate for a political party. In this case the Petitioners were members of the ODM Party and they took part in the Party's nomination process. It was submitted that in the event that they are shut out their rights would be violated.

14. The Petitioners therefore urged the Court to grant the following orders:

> **a. The Respondent be and is hereby ordered to carry out fresh nominations for Nyando Constituency within timelines set by the court.**
>
> **b. Costs be provided for.**

<u>Respondent's Case</u>

15. The Petition was however opposed by the 1st Respondent the ODM Party.

16. The Party's case was presented by its learned Counsel **Mr Owuor** who submitted that, the Party was not joined to the proceedings before the NAT and that the dispute before the NAT was between the Petitioners and the interested party.

17. It was however contended that in the NAT's decision, some logistical challenges were noted which affected all the candidates. The Party however contested this Court's jurisdiction of this Court and contended that the proper way of approaching the Court is by way of an appeal pursuant to section 40 of the ***Political Parties Act***. It was submitted that this petition amounts to leapfrogging an appellate process under the said Ac and that on that basis alone the Court should exercise restraint in terms of exercising jurisdiction under the ***Elections Act***.

18. It was submitted that the decision of the NAT was that the Party initiates fresh process in manner appropriate to the Party's rules. While appreciating the correctness of the aforesaid rule 18, it was contended that the Party has elaborate structure to ensure that the rights of its members under Articles, 10, 38, 81 and 91 of the Constitution are assured. Once the process of free party primary has been considered by a Tribunal to have been subject to logistical challenges, it was submitted that steps were taken in accordance with rule 18. It was contended that if it was not possible to conduct nomination as contemplated under rule 8 as a result of the said logistical challenges, the Party was entitled to take alternative methods consistent with its constitution and this discretion cannot be fettered by the band where the Constituency falls.

19. It was submitted that direct nomination is one of the alternatives available to the Party hence the Court ought to defer to inernal party structures established to make a decision.

20. According to the Party apart from the NAT's decision no evidence was adduced to support the petition yet this petition is a feesh cause and not an appeal.

The Interested Party's Case

21. On the part of the interested party, the following grounds of opposition were filed:

> **(1) THAT the Application and the Petition both dated 22nd May, 2017 as drawn and instituted herein are in substance incompetent and fatally defective as they are contrary to section 40 of the Political Parties Act.**
>
> **(2) THAT the Petition dated 22nd May 2017 and filed herein is in substance fatally defective for non-compliance with the provisions of the Constitution as it neither states nor demonstrates how the provision of the Constitution have been violated.**
>
> **(3) THAT there are other legal mechanisms that were and still are available for the Petitioners such as the Political Parties Dispute Tribunal and the Independent Electoral and Boundaries Commission under Article 88 (4)(e) of the Constitution of Kenya 2010 which provides for alternative modes of dispute resolution specific to the nomination process that were never followed by the Petitioners.**
>
> **(4) THAT the Petition herein has been filed with inordinate delay and after the time provided by the Independent Electoral and Boundaries Commission for nomination dispute to be considered has lapsed.**
>
> **(5) THAT based on the aforesaid reason, the Jurisdiction of this Honourable Court has wrongly been invoked.**
>
> **(6) THAT in the premises, the Application and the Petition dated 22nd May, 2017 and filed in Court on 23rd May, 2017 respectively and as filed and supported by the said of one Willis Omondi Orowe is an abuse of the process of the Court and the same should be dismissed with**

costs to the Interested Party.

22. Apart from the said grounds, it was averred by the interested party that it is not in dispute that the ODM Party Primaries for Nyando Constituency were held on 25th April, 2017 and the results announced on 26th April, 2017. In his view, the nomination exercise was free, fair and transparent considering that Ballot boxes and papers arrived on time, voting done smoothly with properly arranged queues, votes counted after the exercise and transmission of the result to the tallying centre was effective with no hitches and tallying was then done in the presence of all the parties concerned. After the tallying of the results, he was duly announced by the returning officer one **Oscar Omondi** as the winner of Nyando Constituency nominee of the Orange Democratic Movement having garnered 14,435 votes, against other competitors scored as follows:

I. Willis Omondi Orowe-**7,560**

II. Joseph Owino Ogendo-**4,208**

III. Sala Jared Owino-**2,208**

IV. Charles Otieno Opiyo-**1294**

V. Caleb Omoro-**157**

23. It was averred that after the announcement of the results on 26th April, 2017, the Petitioners moved to the National Appeals Tribunal of the Respondent herein on 30th April, 2017 to challenge the nomination. It was however contended that the said Petition was fatally defective having been filed out of time contrary to Rule 19.2.5 of the ***Orange Democratic Movement Election and Nomination Rules, 2014***, which provides that the appeals to the National Appeals Tribunal should be made **within 48 hours** of the announcement of results appealed from and in this case the appeal was instituted on 30th April, 2017 while the announcement of the results was on 26th April, 2017. It was therefore averred that the judgment of the National Appeals Tribunal was a nullity as the said Tribunal lacked jurisdiction to entertain the Petition as it was filed out of time.

24. According to the interested party, the averment that the Appeals Tribunal failed to supply the Petitioners with its judgment dated 5th May, 2017, is a mere allegation that has not been substantiated. In addition, the allegations that the Petitioners did not know about the announced results is falsehood as they were made aware immediately after the said announcement of the results.

25. It was contended that this Petition has been filed in a wrong forum contrary to section 40 of the ***Political Parties Act, 2011***. The interested party asserted that he was the duly nominated candidate for the Nyando Constituency in the forthcoming General Elections scheduled for 8th August, 2017 running on an ODM ticket having garnered 14, 435 votes and issued with the Nomination by the Orange Democratic Movement. To him, after being furnished with the Nomination Certificate by the Respondent, his name was accordingly forwarded to the Independent Electoral and Boundaries Commission and the same is available at the Independent Electoral and Boundaries Commission website.

26. Relying on the principle of the Law of Evidence that "***he who alleges must prove"*** it was contended that in the present case the Applicants/Petitioners herein made a claim of various irregularities taking place during the party primaries; which claim they have neglected, failed and/or refused to prove. Consequently the allegations levelled by the Applicants/Petitioners cannot be substantiated for reasons that they have been unable to explain where such irregularities took place, by whom and in which polling station or stations.

27. The interested party reiterated that under sections 40 and 41 of the ***Political Parties Act No. 11 of 2011*** the first forum to which the Applicants/Petitioners ought to have tabled their dispute was the Political Parties Dispute Tribunal (PPDT); which avenue they neglected, failed and/or refused to exploit.

Additionally, the Applicants/Petitioners have neglected, failed and/or refused to demonstrate that they made a request for a copy of the Judgment of the Respondent's NAT and as such that allegation is baseless.

28. The interested party therefore insisted that his nomination was valid and as such the will of the people of Nyando Constituency to choose him as their representative in the forthcoming General Elections should be respected hence it is in the interest of justice that this Honourable Court declines to grant the Orders sought by the Applicants/Petitioners as the same would greatly prejudice him.

Determination

29. I have considered the issues raised before me in this petition.

30. It was contended that there was lack of precision in the pleadings hence the orders sought could not be granted. On the issue whether this Court can determine the Constitutional issues raised without compliance with the requirements stipulated in **Anarita Karimi Njeru vs. Republic (No. 1) 1979 KLR 159** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of the Constitution under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant or petitioner ought to set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

> **"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."**

See **Deepak ChamanlalKamani& Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

31. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

32. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former. Mine is not a lone voice shouting in the wilderness. The Court of Appeal in **Peter M. Kariuki vs. Attorney General [2014] eKLR,** declined to adopt the

Anarita Karimi (supra) position, line, hook and sinker when it expressed itself *inter alia* as follows:

> **"Although *section 84(1)* was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like *ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154,* the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal…The narrow approach in *ANARITA KARIMI NJERU* was ultimately abandoned in Kenya, in favour of purposive interpretation of *Section 84(1)*."**

33. I associate myself with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

> **"A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing… Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution."**

34. I must however underscore the need for pleadings to be as precise as possible and this requirement applies both to civil proceedings as in any other proceedings including constitutional petitions. The system of pleadings, it is important to note, operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. (See ***Bullen & Leake and Jacob: Precedents of Pleadings,*** 2th edn. page 3). The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (See **Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218 at 238.)** However where the proceedings can be salvaged by way of further and better particulars or amendment, that option ought to be resorted to first. In this case, there was no allegation that the Respondent and the interested party were disabled from adequately answering the allegations made by the Petitioners. Accordingly, I am not inclined to disallow the application on the ground of lack of precision.

35. The next issue for determination is whether this Court has jurisdiction to entertain this petition in light of the provisions of the ***Political Parties Act*** as read with the ***Elections Act***. The issue of jurisdiction has been dealt with extensively by various courts of this Country. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** **Nyarangi, JA** expressed himself as follows:

> **"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no**

jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

36. Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** expressed itself as follows:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

37. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

38. It may be argued that the existence of alternative remedies does not oust the jurisdiction of the Court under Article 165(3)(a) and that that jurisdiction cannot be restricted or limited. On that issue, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However, sovereign power under the Constitution is delegated to *inter alia* the Judiciary and independent tribunals. The Constitution therefore clearly recognizes the role of independent tribunals in dispute resolution scheme. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement.

39. As was stated in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728**, ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognised that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts. The learned Judge however cautioned the blanket application of the ouster clauses when he expressed himself as hereunder:

> **"The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal…It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court."**

40. In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,**where it was held that

> **"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."**

41. Accordingly I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to. Nevertheless any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act. However where there is an alternative remedy which is effective restraint ought to be exercised. This was the position adopted by the Supreme Court in **Peter Oduor Ngoge vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012**, [para. 29-30] where it was held:

> "**The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted. In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework".**

42. I therefore associate myself with the position adopted by **Emukule, J** in **Revital Healthcare (Epz) Limited & Another vs. Ministry of Health & 5 others [2015] eKLR** at paragraph 10 where he cited with approval the case of **Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004** in which it was held that:-

> **"…where there is a parallel remedy, Constitutional relief should not be sought *unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate.*."**

43. It is therefore clear that where there appears in the complaint a feature which makes the available means of redress inappropriate or inadequate, the Court would be entitled to step in in order to ensure justice is done. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved.

44. In this case the petitioners contend that by the time they were furnished with the Judgement the Political Parties Tribunal had stopped entertaining fresh disputes. This contention has not been controverted. With respect to section 74 of the ***Elections Act***, the said section provides as hereunder:

> ***Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.***

45. It is therefore clear that any dispute relating to or arising from party nominations ought to be lodged with the Independent Electoral and Boundaries Commission unless those disputes are in the nature of elections petitions or are disputes subsequent to declaration of results. In this case however, the petitioners aver that the dispute that existed had been resolved and that what has not been undertaken is the implementation thereof. What then amounts to a dispute? In **Niazons (K) Limited vs. China Road & Bridge Corporation (Kenya) Civil Appeal No. 157 of 2000 [2001] KLR 12; [2001] 2 EA 502** the Court expressed itself with respect to arbitral proceedings as follows:

> **"If a debtor agrees that money is due, but simply fails to pay it, there is no dispute and the creditor can and must proceed by action, rather than by arbitration; equally silence in the face of a screaming claim does not constitute nor raise a dispute."**

46. In this case, the Respondent has submitted that in pursuance of its mandate, it established a credible internal framework to ensure free and fair nomination that gives effect to all contestants and effective participation of its membership which includes the ODM Constitution and the ODM Election and Nomination Rules. It is not in doubt that the Respondent herein, as required by the law, also established its internal dispute resolution mechanism by the name of National Appeals Tribunal. The said Tribunal heard the dispute and returned a verdict. The said mechanism was an organ of the party and whereas there was submission that the dispute ought to have been lodged with the County Appeals Tribunal, it is clear from rule 19.1.4 of the ***Orange Democratic Movement Election and Nomination Rules*** (the Rules) that the said Tribunal only deals with disputes relating County Ward Representatives. In this case since the dispute was in respect of the National Assembly Representative, the matter fell squarely within the jurisdiction of the National Appeals Tribunal pursuant to rule 19.2.3 of the said Rules. According to rule 19.2.10, the decision of the National Appeals Tribunal is expressed to be final. In other words the Respondent is bound by the decision of the NAT.

47. In those circumstances I agree with the Petitioners that as far as the Respondent was concerned there was no dispute capable of being dealt with under section 74 of the ***Elections Act***. Similarly, since it is not contended that any party challenged the said decision before the Political Parties Disputes Tribunal pursuant to section 40 of the ***Political Parties Act,*** it is my view and I find that both section 40 of the

Political Parties Act and section 74 of the ***Elections Act*** did not offer the petitioners herein effective remedy to resolve the impasse caused by the Respondent in these circumstances since none of the parties to the dispute had expressed any grievance with the decision arrived at by the Respondent's own internal dispute resolution mechanism.

48. In those circumstances I agree with the petitioners that in order to protect and uphold their rights enshrined under Article 38 of the Constitution their only recourse was to move this Court as they did.

49. It was alleged that this Court ought to defer to the party structures in such disputes. In other words the Respondent and the interested party were contending that this being an internal party dispute the party ought to be given the latitude in resolving the same. That argument may have carried weight if the party had shown an intention to resolve the same lawfully. In this case there is no attempt made at all by the Party to resolve the matter in accordance with its own internal dispute resolution mechanism which it recognises as being final. In other words the Respondent has ignored its own structures hence is violating its own constitution. In **Tanui & 4 Others vs. Birech & 11 Others [1991] KLR 510** the Court of Appeal held that:

> **"While it is not the business of the High Court or the Court of Appeal to involve itself in the day to day running of institutions such as the Church, colleges, clubs and so on, yet where it is shown that such an organisation is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and the Court of Appeal would not only be entitled to but is under a duty to compel it, either, by injunction or otherwise, to obey its constitution."**

50. Similarly in **Okiring & 2 Others vs. Namango & Another [1990] KLR 132, Pall, J** (as he then was) held that:

> **"Although normally the Court would not interfere with the internal matters of the church, in a case where the rules of natural justice have been flouted, the court must. The last thing the court wishes to do is to arrogate to itself powers to decide on matters, which are not ordinarily justiciable by the courts. But there is a world of difference between intermeddling in domestic decisions and stepping in to correct clear breaches of natural justice."**

51. Therefore it is clear that where a political party is violating not only its constitution but also the Constitution of the land by contravening the fundamental freedoms and rights of its members as is the case in the instant case, this Court must intervene.

52. In this case there is no evidence at all that the Respondent ever reached a decision on the issue either way apart from remitting the interested party's name to the IEBC. In other words there is no evidence that issue of the nomination of the Respondent's Nyando Constituency Parliamentary candidate was ever deliberated upon by the Respondent before the decision to submit the interested party's name was made. In other words there is no material on the basis of which this Court can arrive at a decision that the Respondent did, pursuant to its constitution make a decision along those lines. This is more so as it is admitted that Nyando Constituency is within Kisumu County and under Schedule 2 of the said Nomination Rules, the Respondent can only select its candidate for the constituency through a nomination process.

53. The Respondent, rather nonchalantly, contends that the decision of its own National Appeals Tribunal was a nullity. What the Respondent is contending is contradictory to its position that it has credible internal framework to ensure free and fair nomination. In my view there is no plausible reason why the Respondent should ignore its own dispute resolution mechanism with impunity. To say that the NAT only nullified the provisional certificate and not the final certificate is immaterial since the NAT was clear in its decision that the parties were to initiate a fresh process of determining the party nominee for Nyando Constituency Parliamentary elections in a manner that is compatible with the Party constitution, nomination and election rules.

54. With respect to the other issues raised herein the same were raised before the National Appeals Tribunal which dealt with the same and made a determination thereon. None of the parties herein have challenged the said findings. To vary the same would in fact result into what the Respondent and the interested party herein have urged the Court not to do – interfere with decisions made by the Respondent's organs.

55. It follows that the decision of the Respondent's National Appeals Tribunal must be complied with by the Respondent in order to uphold the Petitioners' constitutional rights enshrined in Article 38(2)and (3) of the Constitution which provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the Constitution or any office of any political party of which the citizen is a member and the right, without unreasonable restrictions to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

56. In the premises this petition succeeds and I hereby in the exercise of the Court's jurisdiction under Article 165(6) of the Constitution direct the Respondent, **Orange Democratic Movement Party,** to within 72 hours from the time of service of this decision, initiate a fresh process of determining the party nominee for Nyando Constituency Parliamentary elections in a manner that is compatible with the Party constitution, nomination and election rules.

57. As this is a dispute between a political party and its members, there will be no order as to costs.

58. It is so ordered.

Dated at Nairobi this 29th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Moses Owuor for the 1st Respondent

Mr Kanjama for the interested party

CA Mwangi