



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 67 OF 2017

GABRIEL UMINDA OLENJE.....1ST APPELLANT
DANIEL OJJI AWUONDA 2ND APPELLANT
LYDIAH ADHIAMBO SADIA 3RD APPELLANT
MARESA ATIENO NYAKINYE 4TH APPELLANT
MUNYIKO MAURICE KIHINGU 5TH APPELLANT

- V E R S U S -

ORANGE DEMOCRATIC MOVEMENT..... 1ST RESPONDENT
HON. ZACHARY OKOTH OBADO 2ND RESPONDENT

(Being an Appeal from the judgement and decree of the Political Parties Dispute Tribunal of Kenya at Nairobi delivered on 8th May, 2017 by Hon. Kyalo Mbobu, James Atema and Hassan Abdi vide Complaint No. 85 of 2017))

JUDGEMENT

1) The Orange Democratic Movement Party nominations in Migori County Gubernatorial seat were held on 24th April 2017. Zachary Okoth Obado, the 2nd respondent herein, was declared the winner of the primaries and was issued with a provisional certificate by the County Returning Officer. Ochillo Mbogo Ayacko, an aspirant who participated in the primaries, filed a complaint to O.D.M (1st respondent herein) National Elections Appeals Tribunal (NAT) alleging that the nomination exercise was marred by various irregularities which included but not limited to violence interference and chaos. The 1st respondent's National Appeals Tribunal (NAT) considered the complaint and eventually made a decision to withdraw the nomination certificate issued to Zachary Okoth Obado, the 2nd respondent and further directed the 1st respondent to carry out a fresh process to determine its nominee for Migori County Gubernatorial seat elections in accordance with its constitution, nomination and election rules. The 1st respondent's Central Committee held a special meeting on 27.4.2017 and exercised the functions of its National Executive Committee (NEC) and gave an approval in writing to its National Elections Board(NEB) to issue the 2nd respondent a direct nomination for Migori Gubernatorial seat under Article 7.5A.2(x) of the ODM Party Constitution and Rule 3.3 of the ODM party Election and Nomination Rules. Gabriel Uminda Olenje, Daniel Ojji Awuonda, Lydiah Adhiambo Sadia, Maresa Otieno Yakinye and Munyuiko Maurice Kihingu the 1st, 2nd, 3rd, 4th and 5th appellants respectively, being aggrieved by the decision of the 1st respondent's

NEB, filed a complaint before the Political Parties Disputes Tribunal (PPDT) to impugn the same. On 8th May 2017, the Political Parties Disputes Tribunal dismissed the appellants' complaint on the basis that it had no jurisdiction to entertain the complaint since the appellants had not first exhausted the 1st respondent's Internal Party Dispute Resolution Mechanisms (IDRM) under Section 40(2) of the Political Parties Act. The appellants were further dissatisfied by PPDT's decision hence this appeal.

2) On appeal, the appellants put forward the following grounds:

1. The honourable tribunal erred in law and in fact by holding that it lacked the jurisdiction to substantively consider and rule on the questions as to nomination of gubernatorial candidate on the Orange Democratic Party for Migori County in breach of Articles 38 and 159 of the Constitution of Kenya to the detriment of the applicants.

2. The honourable tribunal erred in fact by failing to consider that the nomination of the 2nd respondent by the 1st respondent ODM is a grave violation of Article 81 of the Constitution which provides that "the electoral system shall comply with the following principles – free and fair elections which are: (i) by secret ballot; (ii) free from violence, intimidation, improper influence or corruption...."

3. The purported nomination of the 2nd respondent by the 1st respondent was not in accordance with Articles 38 and 81 of the Constitution for the following reasons:

a. The ODM gubernatorial Elections in Migori County was marred by chaos, violence and intimidation at the behest of the 2nd respondent and was subsequently nullified by the party's Election Appeals Tribunal.

b. The 1st respondent's National Election Appeals Tribunal ordered the party to nominate a Gubernatorial candidate for Migori County in accordance with the Party's Constitution. Article 19.1 of the Party's Constitution provides in very clear terms that the decision of the Party National Appeals Tribunal shall be final

c. The 1st respondent ignored the order of its own Appeals Tribunal and proceeded to issue a direct nomination to the 2nd respondent in blatant breach of its own constitution and ODM Party Nominations Rules 2016.

d. In addition no nomination results were ever tallied and announced in two constituencies in Migori County namely Awendo and Uriri constituencies with a combined number of registered voters of over 100,000 voters which was large enough to interfere with the final tally. The returning officers in the two constituencies were arrested for electoral malpractices and booked into police stations and did not therefore tally or announce any results.

e. The nomination in two constituencies namely Kuria East and West started late afternoon and continued well past 11.00pm in violation of the party nomination rules.

f. The 2nd respondent was found guilty of the chaos and violence before the nomination and was fined by the party a sum of Kenya shillings two million a sum he paid without appeal.

g. The 2nd respondent was subsequently found to have introduced chaos in the nomination exercise, intimidated and instigated violence that led to the chaotic and ultimately unsuccessful nomination.

4. The purported nomination of the 2nd respondent by the 1st respondent was in breach of the

party's own constitution and nomination rules in the following manner

a. The 2nd respondent was purportedly given a direct nomination by the Special Meeting of the Central Committee on 30th April, 2017

b. The party nomination rules 2016 at Article 18.1 provides that the party may only issue direct nominations for nominations in Zone C regions. Migori county is in Zone B for which party nominations must be held.

c. The party nomination rules 2016 at Article 3.3 provide that the National Elections Board may with the approval of the National Executive Committee issue a direct nomination to a candidate. In this case, the NEB did not obtain any approval of the NEC and in fact the purported decision was taken by the Central Committee which is not mandated to do so.

5. The honourable tribunal erred in law and fact and in breach of Article 159 of the constitution by refusing to consider that in fact the National Elections Appeals Tribunal which is an internal ODM dispute resolution organ, was approached on the matter and gave orders which the 1st respondent eventually unlawfully ignored.

6. The honourable tribunal erred in law and in fact by not determining that the 1st respondent ignored its own National Elections Appeals Tribunal which found that the nominations for the gubernatorial position in Migori County was marred by violence, intimidation, chaos and

7. The honourable tribunal erred in law and fact by failing to consider that the gubernatorial nominations of the 2nd respondent in Migori County was marred by such heavy irregularities and that they did not meet the requirements of a free and fair elections under Articles 38 and 81 of the constitution, Sections 6 and 21(1)(b) of the Political Parties Act and Rule 5 of the Electoral Code of Conduct.

8. The honourable Tribunal erred in law and in fact in neglecting the fact that the 2nd respondent was in any event not qualified to participate in the nomination process of the 1st respondent as he had not complied with the requirements of nomination of the party.

9. In view of the circumstances set out hereinabove, the honourable tribunal totally misdirected itself by failing to consider and appreciate the applicable law and facts as pleaded by the appellants.

3) However when the appeal came up for hearing, one issue commends itself for determination. It is the question as to whether or not the Political Parties Disputes Tribunal had jurisdiction to hear and determine the complaint it dismissed. The learned advocates appearing for the appellant were of the firm view that PPDT misconstrued the provisions of Section 40(2) of the Political Parties Act and in the end, it erroneously stripped themselves of jurisdiction of the dispute which was properly before it. It is argued that the purported nomination of the 2nd respondent by the 1st respondent was not in accordance with Articles 38 and 81 of the Constitution of Kenya, 2010. The learned advocates pointed out that the 1st respondent ignored the decision of its own National Appeals Tribunal and proceeded to issue direct nomination to the 2nd respondent in blatant breach of its own constitution and its Election and Nomination Rules.

4) The respondent vehemently opposed the appeal arguing that the 1st respondent strictly complied with the provisions of its constitution and the Election and Nomination Rules when issuing the 2nd respondent with direct nomination. It was pointed out that Article 19 of the 1st respondent's constitution did not bar the 1st respondent from issuing direct nomination certificates in the circumstances of this case. The respondents further submitted that the appellants herein never filed any complaint before the Internal

Party Dispute Resolution Mechanism hence they were not entitled to be heard by PPDT.

5) I have carefully re-evaluated the complaint that was before the Political Parties Disputes Tribunal. I have also considered the rival oral submissions together with the case law, the constitution, the statutes and regulations cited by the parties. The respondents' advocates have raised an issue touching on the appellants participation in the proceedings before the 1st Respondent's Internal Party Dispute Resolution Mechanism. It is not in dispute that after the 1st respondent's Party nomination exercise held on 24th April 2017, the 2nd respondent was declared the winner. The only aspirant who filed a complaint against the outcome of the 1st respondents primaries was one Ochillo Mbogo Ayacko. None of the appellants herein filed a complaint before the 1st respondent.

6) It is also not in dispute that the 1st respondent's National Appeals Tribunal heard the complaint filed by Ochillo Ayacko and consequently decided to withdraw the certificate issued to the 2nd respondent. The 1st respondent was further directed by NAT to carry out a fresh process to determine its nominee for Migori County Gubernatorial seat in accordance with its constitution, its Election and Nomination rules. The 1st respondent went ahead to grant the 2nd respondent direct nomination. Ochillo Ayacko did not challenge the decision of the 1st respondent's National Election Board (NEB) to award the 2nd respondent a direct nomination ticket. The question to be determined here, is whether the appellants exhausted the Party Internal Dispute Resolution Mechanism before approaching the Political Parties Dispute Tribunal? It is clear to me that the appellants did not do so. The appellants instead directly approached PPDT. I presume that the appellants were riding on the decision of the 1st respondent's NAT which arose pursuant to the complaint filed by Ochillo Mbogo Ayacko.

7) In its decision, PPDT expressly stated in part as follows:

“None of the disputes cited and evidenced by the 1st respondent that would otherwise amount to I.D.R.M. have been shown to have been initiated by any of the complainants herein.”

8) Pursuant to the provisions of Section 40(2) of the Political Parties Act, the Political Parties Disputes Tribunal dismissed the complaint. In my humble estimation, I think PPDT came to the correct decision therefore it cannot be faulted.

9) The other ground which is related to preliminary objection, is whether the 1st respondent was entitled to issue a direct nomination certificate after a highly disputed party primaries like in this case. According to the appellants, the law did not permit the 1st respondent to issue direct nomination to the 2nd respondent. It was pointed out by the appellants that Migori County fell under zone B where the party constitution did not permit the party to give direct nomination certificates. The respondents opposed the appellants argument arguing that the 1st respondent fully complied with the decision of the National Appeals Tribunal when it initiated the process of picking a fresh its nominee for Migori County.

10) It was also pointed out that the party (1st respondent) addressed the complaints arising from the primaries and acted upon the recommendations of N.A.T by withdrawing the certificate issued to the 2nd respondent. I have carefully looked at the decision of the 1st respondent's National Appeals Tribunal. The decision appears to have been carefully drafted. Apart from withdrawing the certificate issued to the 2nd respondent, it also directed the party to proceed and carry out a fresh process to determine its nominee in accordance with its constitution and nomination and election rules. It is important to note that the 1st respondent's N.A.T did not direct the 1st respondent to carry out a repeat of the party primaries. It is apparent from the material placed before this court that the 1st respondent's N.E.C gave a written approval to the 1st respondent's N.E.B to issue direct nomination to the 2nd respondent. I have carefully considered the provisions of Article 7.5A 2(x) of the 1st respondent's constitution as read with Rule 3.3 of the ODM party Elections and Nomination Rules and I am convinced that the 1st respondent acted within its constitution. I also agree with the submissions of the 1st respondent that the gubernatorial

primaries held on 24.4.2017 were cancelled by the 1st respondent 's N.A.T, therefore the 1st respondent was not barred by its constitution from issuing a direct nomination certificate. It is also not in dispute that Migori County falls in zone B where direct nominations may not be allowed. A purposive interpretation of the applicable provision will reveal that the subsequent introduction of zoning were meant as guidelines and not a limit to the party issuing direct tickets.

11) In the end, I find the appeal to be without merit. It is dismissed in its entirety. A fair order on costs is to direct which I hereby do, that each party bears its own costs.

Dated, Signed and Delivered in open court this 27th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent