



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO 51 OF 2017

CONSOLIDATED WITH ELECTION PETITION APPEAL NO 53 OF 2017

ELPHAS ODIWOUR OMONDI.....APPELLANT

VERSUS

JOAN MINSARI OGADA.....1ST RESPONDENT

BENARD OGODO.....2ND RESPONDENT

AND

ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST INTERESTED PARTY

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND INTERESTED PARTY

(An appeal from the whole of the ruling and orders made by The Political Parties Dispute Tribunal at Nairobi on the 13th day of May 2017 in complaint no 73 of 2017)

IN THE POLITICAL PARTIES DISPUTE TRIBUNAL AT NAIROBI CASE NO 73 OF 2017

BETWEEN

ELPHAS ODIWOUR OMONDI.....CLAIMANT/RESPONDENT

VERSUS

JOAN MINSARI OGADA.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY..... 2ND RESPONDENT

BENARD OGODO.....3RD RESPONDENT

CONSOLIDATED WITH ELECTION PETITION APPEAL NO 53 OF 2017

BENARD OGADOAPPLICANT/APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST RESPONDENT

ELPHAS ODIWOUR.....2ND RESPONDENT

JOAN OGADA.....3RD RESPONDENT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....INTERESTED PARTY

REASONS

1. These consolidated appeals were heard and allowed on 22nd May 2017. The court ordered the 2nd respondent, the **Orange Democratic Movement Party**, to conduct fresh nomination for MCA candidate for **Kojwach ward**, Kabondo-Kasipul Constituency, Homa bay County, and reserved reasons for that decision, which the court now gives.
2. **Elphas Odiwour Omondi**, (Elphas), **Joan Minsari Ogada**, (Joan), **Benard Ogado** (Benard) and other candidates, participated in the nomination for Member of County Assembly for **Kojwach Ward** in **Kabondo-Kasipul** constituency within **Homa bay County**, held on 24th April 2017. Nomination exercise proceeded well and at close of the polls, counting commenced followed by tallying.
3. According to **Joan**, although she emerged the winner, **Benard** was declared to have won and issued with a provisional certificate. She lodged an appeal which was allowed by the Homabay County, Appeals Tribunal (**IDRM**).
4. Meanwhile **Elphas** had also filed his own appeal before the Special Counties Appeals Tribunal (**SCAT**) of the party sitting in Nairobi, which also found in his favor. He then filed an application before the **PPDT** seeking to be given the final certificate which was allowed on 11th May 2017, in terms of the decision by **SCAT**.
5. **Joan** must have got wind of this decision by **PPDT** and filed an application dated 12th May 2017 seeking to review and set aside the order by **PPDT** on grounds that it was made in error for non-disclosure that **SCAT** was of concurrent jurisdiction with Homabay County Appeals Tribunal and that this particular **IDRM** had made a decision on the same matter. The application was allowed and the orders of 11th May 2017 set aside. That meant **Joan** was to be issued with the final certificate.
6. **Elphas** filed an appeal to this court being elections Appeal no 51 of 2017, challenging the **PPDT's** decision to review its order of 11th May 2017. **Benard** who had initially been declared the winner also filed his own appeal being Election Appeal No. 53 of 2017. The two appeals were consolidated and heard as together, with Appeal No. 51 of 2017 being the lead file.
7. At the hearing of these appeals, **Mr. Makori** appeared for **Elphas**, **Miss Chege** for **Benard**, **Mr. Onyango** for **Joan** and **Mr. Ombwayo** for ODM . Counsel addressed the court on their respective client's appeals which submissions the court took into account in its decision.
8. What was clear from the submissions and the record, and also conceded by all counsels was that there were two tallying sheets for the same ward displayed by two different candidates but with different results. The tallying sheet by **Joan** is printed and has five polling centres. It shows that she garnered a total of **935 votes**, **Elphas 301 votes**, **Dan Ochieng 300 votes** and **Benard, 129 votes**. These results are said to have been confirmed by **Benard Juma Otieno**, **Peter Odhiambo Molah**, **Gered Jayiro Musa** and **Phoebe Opiyo**, It was not clear though who these people were. The decision by Homabay **IDRM** upheld **Joan's** complaint based on these results.
9. **Elphas**, on the other hand, produced a different tallying sheet for the same ward. His appeal to **SCAT** was upheld and a certificate was to be issued to him. **SCAT** found that according to **Elphas**, there were irregularities such as delay in distribution of election materials or less ballot papers.
10. **SCAT** was in particular told that there was violence at **Ringa Polling centre** leading to closure of that polling centre. The tallying sheet produced by **Elphas** is handwritten and has nine polling centres. Eight centres have results but one centre, **Ringa**, has no results. The tallying sheet was signed by one **Jotham Oludi** as the returning officer. There are remarks attributed to him to the effect that results from **Ringa** polling station were not tallied because **Joan** was alleged to have physically blocked counting of ballot papers forcing the ballot papers to be transported to another centre without being accompanied by agents, indicating why results from that polling centre were not included.
11. According to this tallying sheet, **Benard** garnered **1550 votes**, **Joan 681 votes**, **Dan Ochieng Okoth 607 votes**, **Elphas 157 votes**, and **George Otieno Juma 180 votes** as the leading candidates. Three people were then issued with certificates at different stages namely; **Joan**, **Elphas** and **Benard**.
12. Political parties are required by **Article 91(1)** of the constitution to, among others, *abide by democratic principles of good governance, promote and practice democracy through regular fair and free elections within themselves; and promote the objects and principles of the constitution and the rule of law*. One of the principles of our constitution is that citizens must exercise their free will to elect their representatives through an open fair and democratic process. A political party choosing to subject its members to a nomination process, has a duty to ensure that its members exercise their political democratic right to nominate their representative in an open, fair, credible and democratic process where their will prevails.
13. The results as shown in the two tallying sheets are inconclusive. In one tallying sheet, four polling centers are missing, while in the other, one polling centre is missing. It is not clear which of the two is the official tallying sheet. Those results cannot be said to be a true reflection of the will of the people of **Kojwach ward**. Even if any of the tallying sheets was to be taken to be the correct tallying sheet, still results from some polling centre(s) are missing, and members of the party in the missing centre(s) cannot be disenfranchised. They have an inalienable right to determine the person they want to represent them in their ward.
14. It is also evident that the party's internal dispute resolution mechanism(**IDRM**) acted at cross purposes. Whereas the party had a County Appeals Tribunal at Homabay, which heard appeals from that county and in particular the appeal by **Joan** from **Kojwach ward**, there was

another Special Counties Appeals Tribunal (**SCAT**) which also heard another appeal from the same county and ward, with the result that the two tribunals gave two different decisions yet they were of concurrent jurisdiction. None was superior to the other and none could hear appeals from the other.

15. Where the court is faced with an appeal arising from nominations, it should as a primary duty, try to ascertain whether the people spoke in a clear and demonstrable manner on who their chosen representative was, and whether in making that decision the party followed democratic principles of open, transparent, fair and credible nomination in accordance with its constitution and rules whose ultimate purpose is to enable members express their free will. As **Kimani J**, held in **Kennedy Omondi Obuya v Orange Democratic Movement Party & 2 Others Election Petition Appeal No 35 of 2017, in a nomination exercise, the purpose is to determine who garnered the highest number of votes to entitle him to be issued with a nomination certificate and being a game of numbers, unless electoral malpractices are established, the will of the people expressed through the votes should be respected.**

16. Where the court is unable to discern from the record the will of the people as in this case, the only option is for the court to ensure that the people have an opportunity to express their will.

17. In this appeal, counsel for all parties, including Mr Ombwayo who represented ODM Party, appreciated the fact that it was not possible to tell who won the nomination, since tallying was in complete and the results could not be said to have indicated the overall will of the people of **Kojwach ward**. It was therefore imperative that the members of the party in **Kojwach ward** are given an opportunity to exercise their democratic right in determining the person they wanted to represent them in the fourth coming general election.

18. It was on the above basis that the court found it necessary to order that fresh nomination be conducted in **Kojwach ward** in a democratic manner.

Dated, Signed and Delivered at Nairobi this 25th Day of May, 2017

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JUDGE