



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 43 OF 2017

ABEL OSUMBA ATITO.....APPELLANT/APPLICANT

-V E R S U S -

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT NATIONAL

ELECTIONS BOARD.....2ND RESPONDENT

WILSON ONGELE OCHOLA.....3RD RESPONDENT

(Being an Appeal from the judgement and decree of the Political Parties Dispute Tribunal of Kenya at Nairobi delivered on 13th May, 2017 by Hon. Kyalo Mbobu, James Atema and Hassan Abdi vide Complaint No. 145 of 2017))

JUDGEMENT

1. Abel Osumba Atito and Wilson Ongele Ochola, the appellant and the 3rd respondent respectively participated in the Orange Democratic Movement, the 1st respondent, party nominations primaries on 30.4.2017 for the position of County Assembly, Nairobi County, Utalii Ward, Ruaraka Constituency. The appellant was declared the winner at the end of the elections. Being aggrieved, the 3rd respondent lodged a complaint with the 1st respondent's special County Appeals Tribunal (CAT). On 6th May 2017, the nomination certificate issued to the appellant was revoked and withdrawn. However pending the decision of the ODM special County Appeals Tribunal's decision, the 1st respondent proceeded to award the 3rd respondent with a nomination certificate.

2. Being further aggrieved by the decision of CAT, the 3rd respondent approached the Political Parties Disputes Tribunal to impugn the decision. The Political Parties Dispute Tribunal heard and determined the same in favour of the 3rd respondent. The tribunal issued an order of mandatory injunction directing that the 1st respondent to issue the nomination certificate to the 3rd respondent and to proceed to present his name to IEBC as the ODM member of the County Assembly nominee for Utalii Ward. Being also aggrieved, the appellant preferred this appeal.

3. On appeal, the appellant put forward the following grounds.

1. The honourable tribunal erred in law and in fact in finding that the appellant had not complied with the disciplinary decision requiring him to pay a sum of 200,000/= within 7 days

when both the appellant and the 3rd respondent both failed to so comply with the disciplinary sanction.

2. The honourable tribunal erred in fact and in law in finding that the appellant was indeed the declared nominee of the 1st respondent.

3. The honourable tribunal erred in law and in fact in finding that the 3rd respondents claim was meritorious.

4. The honourable tribunal erred in fact and in law in directing the 1st respondent to issue a nomination certificate to the 3rd respondent without appreciating the overwhelming evidence tendered by the appellant.

5. The honourable tribunal erred in fact and in law in arriving at a decision that amounted to declaring the 3rd respondent as the nominee of the 1st respondent without appreciating the overwhelming evidence on record.

6. The honourable tribunal erred in fact and in law in relying on documents and submissions by an unqualified person allegedly acting for the 1st respondent.

4. When the appeal came up for hearing, this court directed the parties to file and exchange written submissions. Learned counsels were also invited to make oral highlights of their submissions.

5. I have re-evaluated the case that was before the Political Parties Tribunal. I have also considered the rival oral and written submissions. Though the appellant put forward a total of six (6) grounds of appeal, two grounds commend themselves for the decision of this court. First, whether the tribunal properly considered and assessed the evidence presented before it to justify its decision.

Secondly, whether the tribunal arrived at the correct decision in the circumstances.

6. I prefer to deal with the two grounds together. It is the submission of the appellant that the tribunal erred in declaring the 3rd respondent the winner, without appreciating the fact that there was overwhelming evidence on record in the D.V.D which was annexed to the replying affidavit of the appellant. It was pointed out that the tribunal did not refer to any portion of the aforesaid evidence despite having the same on record. The appellant further argued that, had the tribunal considered that piece of evidence it could have come to a different conclusion. The tribunal was also accused of arrogating itself powers of the returning officer by declaring the 3rd respondent the winner of the primaries. It was further pointed out that in its judgment the tribunal referred to the affidavit of the returning officer dated 12th May 2017 but failed to appreciate that by law, it was this returning officer who was mandated to tally final results and announce the winner which was what the returning officer did but the tribunal failed to appreciate. The tribunal was also accused of failing to evaluate the evidence tendered before the 1st respondent's special County Appeals Tribunal (CAT). This court was beseeched to admit additional evidence in form of the affidavit of Abraham Oyugi Dollah, the returning officer, Ruaraka Constituency sworn on 12th May 2017 pursuant to the provisions of Section 78 (1) (d) of the Civil Procedure Act. Mr. Wanyanga, learned advocate for the appellant urged this court to allow the appeal by setting aside the decision of the tribunal and uphold the victory of the appellant and direct the 1st respondent to issue him with a final nomination certificate and to further present the appellant's name to IEBC as the 1st respondent's Member of County Assembly nominee for Utalii Ward.

7. Mr. Makori, learned advocate for the 1st and 2nd respondents urged this court to allow the appeal. It was pointed out that the replying affidavit of one Anthony Moturi sworn on 10th may 2017 was not executed by the said deponent hence it was filed without the authority of the 1st respondent's party. It was further pointed out that the judgment of the tribunal largely turned on the basis of the aforesaid

affidavit which the 1st respondent termed it as fraudulent. The aforesaid affidavit is said to contain material misstatements and therefore the decision was arrived at devoid of material facts. The tribunal was accused of failing to consider the crucial evidence in the affidavit of the returning officer who is the party official authorised under the 1st respondent's party constitution to tabulate and collate results as presented by the presiding officer to him and issue a nomination certificate.

8. Mr. Muga, learned advocate for the 3rd respondent urged this court to dismiss the appeal. It is the submission of the learned advocate that there was credible evidence that the appellant had failed to pay the fine of ksh.200,000/= imposed upon him by the 1st respondent and as such the appellant was disqualified to contest in the said primaries. It was pointed out that the issue was deponed in the replying affidavit of Anthony Moturi which was filed before the tribunal on 10th May 2017. This assertion was controverted by the appellant who presented a receipt showing that he actually paid the fine on 16.4.2017. The 3rd respondent has tersely admitted in his submissions that he was too fined ksh.200,000/= by the 1st respondent for a similar offence like that committed by the appellant. On the question as to whether or not the tribunal considered all the relevant evidence and pleadings on record, the 3rd respondent argued that the evidence of the 1st and 2nd respondents were considered. It was pointed out that the decision of the 1st respondent's special County Appeals Tribunal (CAT) delivered on 10th May 2017 was quashed and the nomination certificate issued to the appellant was withdrawn on the basis that the same was issued based on a flawed process and illegal results. The 3rd respondent's learned advocate argued that the appellant did not challenge nor apply to set aside the decision of the 1st respondent's special County Appeals Tribunal. It is further submitted by the 3rd respondent that the tribunal was right to find that the issuance to the appellant with a nomination certificate was illegal, irregular and a nullity *ab initio*. The 3rd respondent attacked the decision of the 1st and 2nd respondents to disown the replying affidavit of Anthony Moturi sworn on 10th May 2017. He argued that the allegation that the replying affidavit was not authorised to be filed is dishonest on the part of the 1st and 2nd respondent. It is said that the two respondents were represented by competent counsels who drew and filed the aforesaid replying affidavits which affidavit were also duly commissioned by a competent commissioner for oaths. In short, it is the 3rd respondent's submission that the replying affidavit of Anthony Motuti was lawfully in the tribunal's record since there was no evidence of forgery from a document examiner. This court was beseeched to find that the 1st and 2nd respondents allowed themselves to approbate and reprobate at the same time therefore they should not be allowed to introduce new evidence at this stage.

9. The 3rd respondent further pointed out that the appellant's appeal before the tribunal could not be sustained by the evidence and pleadings. It was submitted that the tribunal's proceedings of 10.5.2017 shows that the appellant's documents were expunged from record by consent of all parties when it was discovered that they had been forged hence not properly on record and therefore there was no evidence upon which the tribunal could find the case in favour of the appellant. The 3rd respondent argued that he presented cogent and credible evidence to support his claim that he won the nomination vis-a-vis those of the appellant which were inconsistent. It is argued that the appellant approached the tribunal with unclean hands in a desperate attempt to mislead and embarrass the tribunal.

10. Having considered the arguments from both sides, I form the following view of this matter. There is no dispute that when the complainant came up for hearing before the Political Parties Dispute Tribunal on 11th May 2017, learned counsels appearing before the tribunal recorded a consent order to have the affidavits sworn by Vincent Ochieng Owuor and Abraham Oyugi Dollah on behalf of the ODM National Elections Board, the 2nd Appellant herein to be expunged from record. The 2nd Appellant was then granted leave to file fresh affidavits to replace those expunged from record. It would appear that pursuant to the consent order expunging the aforesaid affidavits from record, the appellant herein filed the affidavit of Abraham Oyugi Dollah sworn on 12th may 2017. It is also on record that the appellant herein filed a replying affidavit, the appellant swore. Annexed to the aforesaid replying affidavit, is the DVD evidence which was accompanied by certificates of Kelvin Roy Omondi pursuant to the provisions of Section

106B(4) of the Evidence Act (Cap. 80 Laws of Kenya.)

11. It is also apparent that the evidence of one, Vincent Ochieng Owuor, the presiding officer at Mathare 4A primary school polling centre was heavily relied upon. There was a question as to whether he was the proper person to announce the results. It would appear, that issue was not determined by the tribunal. There is no doubt that under **Rule 4:3:5(d)** as read together with **Rule18:6** of the **Elections and Nomination Rules** of the 1st respondent that the presiding officer's role is to tally the votes cast at each polling station and then forward the results to the constituency returning officer who shall make the final tally before announcing the results of the elections in respect of the member of County Assembly representatives and member of National Assembly. With respect, I agree with the appellant's submissions that the D.V.D evidence never received the attention of the tribunal. In my view, that piece of evidence was very crucial and important in determining this dispute either way.

12. The tribunal also noted that the returning officer did not get hold of the presiding officer of **Drive Inn** Polling Station to report prompting him to appoint one Reagan Ochieng to replace the missing presiding officer. After a thorough assessment of the entire proceedings conducted before the tribunal, I am convinced that alot of evidence was left out by the tribunal to extent that its decision cannot be justified. A fair decision in the circumstances is to order, which I hereby do, is to allow the appeal and set aside the decision of the tribunal and to remit it back to the Political Parties Disputes Tribunal for a fresh rehearing before a fresh panel other than Kyalo Mbobu, James Atema and Hassan Abdi. The re-hearing be given priority. In the circumstances of this dispute, I order that each party bears its own costs.

Dated, Signed and Delivered in open court this 24th day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent