



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 41 OF 2017

JECONIA OKUNGU OGUTU1ST APPELLANT

JULIUS OOKO OKAYO 2ND APPELLANT

- V E R S U S -

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

SIAYA COUNTY RETURNING OFFICER 2ND RESPONDENT

CORNEL RASANGA AMOTH 3RD RESPONDENT

ENG. NICOLAS ODERO GUMBO 4TH RESPONDENT

CAREY OREGI5TH RESPONDENT

WILLIAM ODUOL 6TH RESPONDENT

(Being an Appeal from the judgement and order delivered on 11th May, 2017 by the Political Parties Dispute Tribunal of Kenya at Nairobi by Hon. M. O. Lwanga, Desma Nungo and Dr. Adelaide Mbithi, vide Complaint No. 200 of 2017))

JUDGEMENT

1. Jeconia Okungu Ogutu and Julius Ooko Okayo, the 1st and 2nd Appellants respectively, participated in the Orange Democratic Movement (ODM) party primaries for the gubernatorial seat in Siaya County conducted on 25.4.2017 together with Cornel Rasanga Amoth, Eng. Nicholas Odero Gumbo, Carey Orege and William Oduol being the 3rd, 4th, 5th and 6th Respondents respectively. At the end of the nomination exercise ODM, the 1st Respondent, through the Siaya County Returning Officer, the 2nd Respondent, declared Cornel Rasanga Amoth, the 3rd Respondent, the winner of the nominations and eventually issued him with a nomination certificate on 29th April 2017. Being dissatisfied with the decision to declare the 3rd Respondent as the winner, Nicholas Gumbo, the 4th Respondent, filed a complaint before the 1st Respondent's National Appeals Tribunal (NAT), citing irregularities and claiming he was the lawful winner of the primaries. NAT heard the complaint and disallowed the same and further went ahead to direct the 1st Respondent to issue a nomination certificate to Cornel Rasanga Amoth. Being dissatisfied with the decision, the Appellants filed a petition before the Political Parties Disputes Tribunal vide the petition dated 5th May 2017 claiming that their constitutional rights under Article 38 of the Constitution of Kenya, 2010, were breached. By an application dated 12th May 2017,

the 3rd Respondent raised and argued a preliminary objection and sought to have the petition struck because the political Parties Disputes Tribunal lacked jurisdiction to entertain petitions in respect of constitutional rights violations. The Political Parties Dispute Tribunal heard the preliminary objection and eventually came to the conclusion that it had no jurisdiction to hear and determine the complaint because the jurisdiction to determine such disputes was specifically reserved for this court under Article 165 (3) of the Constitution of Kenya, 2010. The Tribunal then proceeded to dismiss the petition for want of jurisdiction. Being dissatisfied, the Appellants preferred this appeal.

2. On appeal, the Appellants put forward the following grounds in their amended memorandum.

1. The learned members erred in fact and law by misconstruing Section 31 2(D) of the Elections Act, 2016.

2. The learned members erred in fact and law in finding that this Tribunal could not determine whether the allegations of irregularities of the primaries were a violation of the constitution rights under Article 38 and 91 of the constitution even when they arise out of the complaint filed in the Tribunal as validly filed before it.

3. The learned members erred in fact and law by misconstruing Section 40 (1) (a) of the Political Parties Act on the issue of whether the Appellants constitutional rights were affected, as these was corollary to the core issue of determining whether the elections were conducted in accordance with the law, the party constitution and nominations rules.

4. The learned members erred in fact and law by ex tempore that its mandate to hear and determine disputes arising out of Section 40(1) (a) of the Political Parties Act was limited until the 15th of May 2017 and therefore restricting its mandate to a timeline not contained in its constituting statute and therefore denying the Appellant a right to be heard on the issues placed before it.

5. The learned members erred in fact and law when they disregarded the application under certificate of urgency and notice of motion dated 9th of May 2017 that was made by the Appellants demonstrating their efforts would require the assistance of the court, which neither heard nor determined by the Tribunal in accordance with Section 40(1) (a) of the Political Parties act and Article 50(1) of the constitution therefore placing the Appellants in a situation where they did not have any recourse in law or remedy.

3. When the appeal came up for hearing learned counsel for the Appellants and that of the 4th Respondent were allowed to proceed to argue the appeal in the absence of the 1st, 2nd, 3rd, 5th and 6th Respondents when it became evident that the aforesaid Respondents had been served but they failed to avail themselves in court. In the affidavit of service filed by Catherine Macharia and Nicholas Kisilu this court was convinced that the aforementioned Respondents were properly served via Whats App a mode of service this court approved as proper vide its judgement delivered on 22nd May 2017 vide Complaint no. 44 of 2017.

4. Mr. Omwanza, learned advocate for the Appellants and Mr. Awiti learned advocate for the 4th Respondent argued two main grounds. First, it is argued that the Political Parties Disputes Tribunal erred when it held that it could not determine whether the allegations of irregularities of the primaries were a violations of the Appellants' constitutional rights under Articles 38 and 91 of the Constitution of Kenya, 2010. Mr. Omwanza pointed out that the Appellants had initially applied through the motion dated 9th May 2017 for an order directing ODM to avail to the Tribunal the return results signed by various agents and the presiding officers for every polling station in Siaya, but the Tribunal disregarded the application yet the Appellants were seeking for the assistance of the Tribunal to secure an important document evidence in possession of the 1st Respondent. It is argued that the Tribunal's decision to disregard the motion, meant that the Appellants were placed in a situation where they did not have any recourse on remedy in law. I have already stated that the Tribunal dismissed the Appellants' petition on the basis that

it did not have jurisdiction to hear and determine the same. With respect, I agree with the submissions of Mssrs Omwanza and Awiti, learned advocates, that the Political Parties Disputes Tribunal misconstrued the provision of Section 40 1(a) of the Political Parties Act on the question as to whether the Appellants' constitutional rights were affected since the issue was corollary to the core issue of determining the question as to whether the elections/nominations were conducted in accordance with the law, the party constitution and nomination rules. The Tribunal therefore wrongly denied itself jurisdiction to determine a matter strictly within its mandate to hear and determine under Section 40 (1) of the Political Parties Act.

5. The **second** ground ably argued by learned counsels is that the Tribunal misconstrued the provisions of Section 31(2D) of the Elections Act, 2016. It was submitted that the Appellants were denied access to the members list used by the Orange Democratic Movement. With respect, I agree with the learned advocates that the Appellants' political rights stated and protected under Article 38 of the Constitution of Kenya, 2010 is an issue which the Tribunal should have seized the opportunity and determine under Section 40(1) of the Political Parties Act.

6. In the end, I am satisfied that the appeal has merit.

Consequently it is allowed but with no order as to costs. For the avoidance of doubt and arising from the appeal, the following orders are given:

i. The judgment of the Political Parties Tribunal delivered on 11.5.2017 dismissing the appellants' petition is set aside. The same is remitted back to the Political Parties Tribunal to be heard afresh before a different panel other than M. O. Lwanga, Desma Nungo and Dr. Adelaide Mbithi.

ii. The Tribunal is further directed to hear and determine the motion dated 9th May 2017.

Dated, Signed and Delivered in open court this 23rd day of May, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent