



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 36 OF 2017

KENNEDY ODURU NYARUMBA APPELLANT/APPLICANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT

CAROLYNE OMEDO.....2ND RESPONDENT

FREDERICK OMONDI OTIENO.....3RD RESPONDENT

**(Being an appeal from the entire judgment & decree delivered by the Political Parties
Dispute Tribunal on 5th May, 2017 at Nairobi**

in

Complaint No. 199 of 2017)

JUDGMENT

The appellant herein has approached this court by way of a memorandum of appeal dated 15th May, 2017 wherein he has listed seven [7] grounds of appeal.

The appeal arises from the decision of the Political Parties Dispute Tribunal [PPDT] rendered on 11th May, 2017.

It was filed under certificate of urgency accompanied by a notice of motion of even date but when the application came up on 6th May, 2017, the court directed that the application be dispensed with and the appeal be heard at the earliest.

The appeal came up for hearing on 18th May, 2017 and on the said date, there was no representation on the part of the respondents despite having been served and an affidavit of service filed to that effect. It therefore proceeded *ex parte*.

In his submissions, counsel for the appellant told the court that on 30th April, 2017, he together with the 2nd and 3rd respondents participated in the 1st respondent's party nomination exercise in respect of Lucky Summer Ward. That the exercise started at 10:45am and ended at around 6pm but just after the closing of the polling stations, violence erupted during which, the ballot boxes were destroyed and the votes that

were cast were scattered all over.

That the votes were not tallied by the presiding officer and there was no official announcement of the results. That to the appellant's surprise, the 3rd respondent had purportedly been issued with a nomination certificate, as a result of which, the appellant lodged a complaint with the County Appeals Tribunal [CAT] which after considering the issues raised before it, made a finding that there was sufficient evidence produced before it showing that there was no tallying and there was no announcement of official results. That finding, notwithstanding, the CAT proceeded to revoke the initial certificate that had been issued to the 2nd respondent.

The appellant being aggrieved by the decision of County Appeals Tribunal [CAT] filed a complaint dated 9th May, 2017, with the PPDT, which upon hearing the complaint, dismissed the same after having made a finding that there was no valid nomination. He averred that by dismissing the complaint, the PPDT violated the Constitution and the rights of the people of Lucky Summer Ward and cited **Article 38 (3) (b) of the Constitution** which provides that every adult has a right to vote in an election, and that, by the returning officer issuing a certificate in the circumstances that he did, the will of the people of Lucky Summer to nominate a person of their choice was not expressed.

The court was invited to find that the decision of PPDT was irregular as it failed to appreciate the basic requirement of a political party as enshrined under **Article 91 (1) (d) and (e) of the Constitution** which binds the parties when carrying out their nomination.

The court was told that the direction that the 2nd respondent be issued with the provisional certificate for being most peaceful was absurd and that the same was not informed by reason or law.

The court was referred to the ODM party elections and nomination rules and in particular, rules 18.1, 18.2, 18.4, 18.5 and 18.6 but emphasis was laid on rule 19.1.10. It was submitted that the Tribunal had no powers to give the judgment that it did.

The counsel for the appellant averred that in so doing, the PPDT was only avoiding a bad decision that had been given by the County Appeals Tribunal. The appellant sought for the orders as prayed for in the memorandum of appeal and in addition, sought for orders that in the unlikely/unfortunate event that the ODM party has forwarded its list of nominees to the Independent Electoral and Boundaries Commission [IEBC], orders be issued to expunge the names and more specifically the 2nd and 3rd respondents from the list submitted by the 1st respondent to IEBC.

The court has considered the grounds of appeal and the submissions by the counsel for the appellant.

The appeal herein arises from a dispute from party primaries for Lucky Summer Ward, Ruaraka, for the position of member of county assembly for which the appellant and the 2nd respondent were contesting for.

The court has perused the proceedings before the Special County Appeals Tribunal and those before the PPDT. Before the Special County Appeals Tribunal, the appellant and the 2nd respondent had the following complaints:

- 1. That the elections were marred with violence and were never completed.*
- 2. There was no tallying of votes and no announcement of the official results.*
- 3. A certificate was issued to one of the aspirants for being the most peaceful.*

The Tribunal made a finding that there was sufficient evidence produced showing that there was no tallying and announcement of official results. It allowed the appeal by the 2nd respondent, withdrew and revoked the certificate which had been issued to one of the aspirants and ordered that a nomination

certificate be awarded and issued to the 2nd respondent in this appeal.

That finding, by the County Appeals Tribunal provoked the appellant to file a complaint before the PPDT, which dismissed his claim dated 9th May, 2017 with no orders as to costs. The court has perused the proceedings before the PPDT which are the subject of this appeal. The PPDT identified one issue for determination which was:

“Whether or not, the nomination certificate was rightfully issued to the 2nd respondent.

In their analysis they made the following observations:

- 1. There were irregularities during the nomination process and that the process was terminated without the returning officer being able to identify a winner.***
- 2. That all the aspirants were accorded a hearing before the IDRМ and after listening to it, deemed it fit and fair to award the nomination certificate to the 2nd respondent.***
- 3. That the complaint as presented did not show why PPDT need reverse the IDRМ findings.”***

This court faults the decision of PPDT for the following reasons:

- 1. Having found that there were irregularities during nomination process and that they terminated without the returning officer being able to identify a winner, it ought not to have upheld the decision of the county appeals board. It ought to have interrogated the evidence further and ask itself on what basis IDRМ decided to award the nomination certificate to the 2nd respondent. And even looking at the proceedings before IDRМ, it made a clear finding that there was sufficient evidence produced showing that there was no tallying and announcement of official results.*
- 2. That finding alone, was sufficient for the PPDT to reach a different conclusion. It is general knowledge that a winner in a nomination process is determined by garnering the most votes after the final tallying is done. If this was not done, it then follows that there was no winner and that explains why the returning officer was unable to identify one.*

In the end, I find and hold that the decision of PPDT was not well founded in law and in facts. The appeal is hereby allowed and the following orders are made:

- 1. That the order of PPDT dismissing the appellant’s complaint is set aside.***
- 2. The nomination certificate if any, issued to either the 2nd or 3rd respondent is declared null and void.***
- 3. The 1st respondent is hereby restrained from submitting the names of either the 2nd or 3rd respondents to IEBC as its nominee for the member of the county assembly for Lucky Summer Ward and in the unlikely event that the 1st respondent has so submitted, the names of 2nd and 3rd respondents be expunged from that list.***
- 4. That fresh, fair and credible nomination be carried out by the 1st respondent, for member of county assembly Lucky Summer Ward in Ruaraka Constituency within 72 hours from the date of this judgment.***
- 5. No orders are made on costs.***

Dated, signed and delivered at Nairobi this 19th day of May, 2017.

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L. NJUGUNA

JUDGE