



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 19 OF 2017

JOSEPH OBIERO NDIEGE..... APPELLANT

VERSUS

ORANGE DEMOCRATIC PARTY ..... 1<sup>ST</sup> RESPONDENT

PHILIP O. MWABE ..... 2<sup>ND</sup> RESPONDENT

JUDGMENT

1. This is an appeal arising from the decision of the Political Parties Disputes Tribunal (herein referred to as PPDT) delivered On the 10<sup>th</sup> May, 2017 in which the appellant's complaint dated 7<sup>th</sup> May, 2017 was dismissed.

2. On 24<sup>th</sup> April, 2017, the 1<sup>st</sup> respondent Orange Democratic Movement Party (herein referred to as ODM), call for party primary nomination exercise for the seat of National Assembly Suna West Constituency. Among the aspirants who participated in the said exercise were, Joseph Obiero Ndiege (appellant), Peter Masara, Philip Mwabe (2<sup>nd</sup> respondent), Valentine Ogongo and Benedict Migore.

3. Upon completion of the exercise, the appellant was declared the winner by one returning officer by the name of Geoffrey Magak who issued him with provisional certificate dated 24<sup>th</sup> April, 2017 and the 2<sup>nd</sup> respondent also got his after being declared the winner by another returning officer by the name of Mathew Obell Ochino. Subsequently, the appellant was issued with a final nomination certificate dated 29<sup>th</sup> April, 2017 hence became the validly nominated ODM candidate for Suna West constituency.

4. Aggrieved by this development, the 2<sup>nd</sup> respondent lodged an appeal on 2<sup>nd</sup> May, 2017 to the 1<sup>st</sup> respondent's National Appeals Tribunal (herein referred to as NAT) seeking the following orders:

**i. That the tribunal be pleased to revoke/vacate the fake/forged nomination certificate issued by nonexistent returning officer (RO) to the interested party.**

**ii. That the tribunal be pleased to recall the provisional nomination certificate that was conferred to the interested party by the agent purporting to be acting for 1<sup>st</sup> and 2<sup>nd</sup> respondents.**

**iii. That the tribunal be pleased to confer the nomination certificate for Suna West Constituency to the appellant.**

5. Upon deliberating on the said appeal, NAT allowed the same on 5/5/2017 and made the following

directions:

- i. The appeal by Philip Mwabe is hereby allowed.**
- ii. The provisional certificates held by both the appellant and the 1<sup>st</sup> interested party (Mr. Ndiege) be and are hereby withdrawn.**
- iii. The party to proceed and carry out a fresh process of determining the party nomination for Suna West Constituency National Assembly elections in a manner compatible with the party constitution, election and nomination rules and**
- iv. The party to investigate election irregularities and the violence meted on the people of Suna West Constituency and the returning officer and appropriate action taken against those responsible in accordance with the party constitution, election and nomination rules.**

6. Following the said directives, the appellant herein was provoked hence moved to PPDT vide complaint No.126/2017 seeking to have the orders of NAT dated 5/5/2017 set aside and have him declared as the winner and duly nominated contestant for the seat of Member of National Assembly Suna West Constituency on ODM ticket.

7. In the said complaint, ODM was named as the respondent and later the 2<sup>nd</sup> respondent herein joined as an interested party. After hearing the complaint, PPDT disallowed the same with orders as follows:

- a. The complaint dated 7<sup>th</sup> May, 2017 is disallowed.**
- b. The decision of the Orange Democratic Movement (ODM) National Appeals Tribunal of 5<sup>th</sup> May, 2017 is affirmed.**
- c. As a consequence, party national election board is directed to determine the party nominee for Suna West Constituency National Assembly Seat in a manner compatible with the party constitution, election and nomination rules.**
- d. In the interest of party unity, either party to bear its own costs.**

8. Dissatisfied with that decision, the appellant moved to the high court vide a memorandum of appeal dated 11<sup>th</sup> May, 2017 pursuant to Section 41 (2) of political parties Act. In his memorandum of appeal, the appellant raised 11 grounds particularised as hereunder:

- 1. The honourable tribunal erred in law and fact by failing to put into consideration all material facts laid before it.**
- 2. The honourable tribunal erred in law and in fact by failing to consider that the 2<sup>nd</sup> respondent herein had filed his papers filed out of time, considering the constitution of the 1<sup>st</sup> respondent clearly marking 48 hours as the true time for lodging such an appeal essentially delegitimizing the whole appeals tribunal process.**
- 3. The honourable tribunal erred in law and in fact by affirming the said process and decisions of the appeals tribunal considering the said appeal had been filed out of time.**
- 4. The honourable tribunal erred in law and in fact by failing to consider the affidavit of the returning officer one Geoffrey Magak in affirming his declaration that the appellant was the winner.**
- 5. The honourable tribunal erred in law and in fact by failing to consider the affidavit of the county returning officer one Samson Olala affirming the declaration of his subordinate in**

**declaring the appellant the winner of the party primaries for Suna West Constituency.**

**6. The honourable tribunal erred in law and in fact by failing to consider the affidavit of the 1<sup>st</sup> respondent who decidedly declared that the appellant herewith is the duly nominated candidate to represent the will of the people of Suna West Constituency.**

**7. The appellant has no faith in the National Elections Board of the 1<sup>st</sup> respondent to make a fair and just decision in this matter.**

**8. The appellant contends that elements within the 1<sup>st</sup> respondent's tribunal and its chairmanship are working in concert to upend the appellants' rights.**

**9. The will of the people of Suna West has been expressed and the decision granted by the Political Parties Dispute Tribunal is likely to disfranchise that will.**

**10. The appellant herein is the rightfully declared winner of the Suna West Parliamentary Primary under the 1<sup>st</sup> respondent's nomination ticket and unless urgently heard is unlikely to be allowed to participate in the nomination process in the upcoming August 8<sup>th</sup> polls.**

**11. That the appeal will be rendered nugatory unless execution of the said ruling of 10<sup>th</sup> May 2017 by the Political Parties Disputes Tribunal is stayed in this honourable court.**

9. Consequently the appellant prayed for the following orders:

**1. That service be dispensed with and that this application be heard ex parte at the first instance.**

**2. That this matter be certified urgent.**

**3. That execution of and all proceedings to enforce the ruling/judgment in this matter delivered on 10<sup>th</sup> May, 2017 be stayed and or arrested pending the hearing and determination of this appeal.**

**4. That the honourable court does take the facts and issues that arose in the tribunal and make its own decision based on all facts, affidavits, annexures and statements on their merits.**

**5. That the honourable court does see it fit to declare the appellant herein the winner and duly elected nominee of the respondent's Suna West parliamentary nomination primaries.**

**6. That in the alternative, court does order fresh primaries be conducted and overseen by the IEBC within 48 hours of a ruling by the honourable court.**

10. Contemporaneously filed with the petition of appeal is a Notice of Motion dated 11<sup>th</sup> May, 2017 and filed the same day under certificate of urgency seeking to stay execution of the orders of PPDT pending hearing and determination of the application interpartes.

11. On the 12<sup>th</sup> May, 2017, Mr. Omari and Mogaka appearing for the appellant argued the said application ex parte and the court granted the stay orders as prayed pending hearing and determination of the substantive application. Counsel was ordered to serve and hearing fixed for 13<sup>th</sup> May, 2017 which never took off as service was not done. The court gave further hearing date On 15/5/2017 when Mr. Omari for the appellant, Professor Ojienda appearing for the 2<sup>nd</sup> respondent and Mr. Owuor counsel for 1<sup>st</sup> respondent agreed to dispense with hearing of the application and instead proceeded with the main appeal.

12. During the hearing, Mr. Omari for the appellant orally submitted that the appellant herein did submit himself as a candidate for nomination for the seat of National Assembly Suna West on 24<sup>th</sup> April, 2017 and on completion of the exercise, the returning officer one Geoffrey Magak issued him with a provisional nomination certificate dated 24<sup>th</sup> April, 2017 which was later ratified by the ODM National Executive Committee by issuing a final nomination certificate dated 29<sup>th</sup> April, 2017, thereby declaring him as the validly nominated candidate on ODM ticket

13. Counsel further submitted that even if the court were to find that both NAT and PPDT did nullify the appellant's and second respondent's provisional nomination certificates, the original nomination certificate issued to the appellant on 29<sup>th</sup> April, 2017 was not affected by the decision of NAT nor PPDT. On that ground alone, Mr. Omari contended that the appellant is and still is the validly nominated candidate for Suna West on ODM ticket.

14. Mr. Omari urged the court to find that NAT and PPDT erred in relying on the results announced by Mathew Obell Ochino a returning officer who declared the 2<sup>nd</sup> respondent a winner despite having resigned from his role as a returning officer before the nomination exercise was over. Counsel contended that, Mr. Mathew Obell had sent SMS message to Mr. Samson Olala County Returning officer claiming that his life was in danger. That based on that message, Mr. Olala appointed Magak same day to carry on with the nomination exercise till completion and that it was Magak's announcement of results declaring the appellant a winner that was authentic and not Ochino's who gave a verdict before the process was complete.

15. Mr. Omari relied on a letter dated 24<sup>th</sup> April, 2017 authored by Samson Olala appointing Geoffrey Magak as returning officer after Ochino resigned and an affidavit sworn on 28/4/2017 by the said Geoffrey Magak confirming that he successfully oversaw the exercise until the end when he declared the appellant as the winner having garnered 8,258 votes against Peter Masara with 5,701, Philip Mwabe 3,303, Valentine Ogongo 1986 and Benedict Migore 1379.

16. Learned counsel averred that the nomination exercise was free and fair and that the people of Suna West had spoken and expressed their will through universal suffrage by electing a leader of their choice and that the leader is the appellant who should be declared a winner as there was no basis for nullifying the exercise.

17. Counsel went further and challenged the blatant abuse of the appeal process, as the 2<sup>nd</sup> respondent filed his appeal 5 days after the exercise instead of 48 hours hence the appeal ought to have been rejected.

18. Mr. Omari also challenged the finding by NAT which was subsequently upheld by PPDT that the party (NEC) reserved the right to apply any other method (process) in determining the next party nominee. Counsel averred that, the power to nominate a party candidate other than through universal suffrage will amount to violation of the rights of the Suna West Constituency ODM members and that the same was subject to manipulation by party officials. Learned counsel opined that, the right to nominate a candidate directly only applies where no attempt has been made in calling for elections.

19. In the alternative Mr. Omari submitted that, the 1<sup>st</sup> respondent should call for a repeat exercise rather than leave the parliamentary party aspirants in a limbo.

20. Counsel argued that under Article 3 and 18.8 of ODM elections and nomination rules, parliamentary nomination primaries must be conducted and determined through universal suffrage only and direct nomination can only apply if the affected constituency falls under zone C. In this case Suna West falls under zone B which requires party nomination primaries conducted and a nominee elected through universal suffrage.

21. In response, Professor Ojienda counsel for the 2<sup>nd</sup> respondent submitted that the appeal herein is unfounded as it is based on a dispute that has not matured. Counsel submitted that the appellant cannot

be declared the winner as his provisional certificate giving rise to the original final certificate was based on results announced by an imposter one Geoffrey Magak who was not officially appointed by the National Executive Committee. Counsel further submitted that one Mathew Obell Ochino who was the officially appointed and recognized returning officer had procedurally declared the 2<sup>nd</sup> respondent the winner.

22. Counsel urged the court to uphold the decision of NAT and PPDT given that the election exercise was marred with chaos hence no valid results would emerge out of it. He referred the court to a report compiled by Mathew Obell Ochino (RO) dated 26<sup>th</sup> April, 2017 in which the officer gave a graphic account of what happened and the amount of violence and chaos that marred the exercise all of which he attributed to the appellant and his supporters. Professor Ojienda contended that, to declare the appellant as the winner out of a tainted exercise would amount to upholding an illegality.

23. Learned counsel supported the finding of the tribunal and further added that courts cannot police party activities by ordering a repeat of the exercise yet the party has not indicated how it intends to nominate the party nominee a fresh whether by direct appointment or through elections being options provided for in the party constitution and nomination rules. Professor Ojienda maintained that, under article 3 of ODM elections and nomination rules, the party reserves the right to nominate directly its party nominee. That until the party acts, there will be no action or wrong committed capable of being challenged before a court of law.

24. Lastly, counsel urged the court to give the party time to comply with the orders of NAT and PPDT and after that, any member aggrieved would challenge the decision by following the party internal disputes resolution mechanism before approaching the court. He urged the courts to keep off party disputes before the parties exhausts their internal dispute resolution mechanism which in this case is ODM Constitution Article 7.5.3 and elections and nomination rules Article 3.3. Counsel referred the court to several authorities supporting that jurisprudence inter alia. **Moses Mwigigi & 14 others vs Independent Electoral and Boundaries Commission and 5 others (2016)eKLR, Petition No. 147/2013 National Gender and Equality Commission vs Independent Election and Boundaries Commission and another (2016) eKLR and MISC Civil Application No. 48/2014 Republic vs Cabinet Secretary of Information and Communication & 8 others Exparte Andrian Kamotho Njenga & 2 others (2014) eKLR.**

25. Mr. Owuor for the 1<sup>st</sup> respondent, basically supported Professor Ojienda's submissions. He confirmed to the court that the party had not yet nominated the parliamentary nominee for Suna West on ODM ticket and that the appellant should wait for the process to be completed and thereafter follow the normal party dispute resolution mechanism if aggrieved by that decision.

26. After close of their submissions, Mr. Omari requested to file his written submissions the following day before delivery of judgment scheduled for 18<sup>th</sup> May, 2017.

27. However on 17<sup>th</sup> May, 2017, the firm of MMA Advocates (Owuor) appearing for the 1<sup>st</sup> respondent filed an affidavit sworn by Anthony Muturi legal officer ODM confirming that the 1<sup>st</sup> respondent had on 8<sup>th</sup> May, 2017 decided to nominate the appellant as the party candidate for Suna West Constituency. Interestingly, on the same day (17/5/2017) the 2<sup>nd</sup> respondent did file what he referred to as a replying affidavit confirming that he had been issued with a nomination certificate dated 6<sup>th</sup> May, 2017 and attached the same as annexure "POM1".

28. After considering the two contradicting affidavits, this court finds that they were filed without leave of the court after hearing of the appeal had closed. Introduction of such affidavits at this stage without leave of the court would amount to evidence from the bar however relevant they are hence of no evidential value. Accordingly, the two affidavits are expunged from the court record.

29. Authority and jurisdiction to preside over matters of this nature is donated by Article 165(5) in so far as its supervisory role on subordinate courts (tribunal) is concerned and Section 41 (2) of the Political

Parties Act which provides that appeals on points of law and facts shall lie to the high court. After hearing the appeal, and after considering materials placed before the court by both counsels, and case law referred thereto, the following issues arise for determination:

- 1. Whether there was a valid appeal before NAT the same having been filed after 48 hours contrary to ODM party nomination and regulations rules.**
- 2. Whether the final nomination certificate is still in force and valid the same having not been mentioned and withdrawn specifically in NAT and PPDT's decisions.**
- 3. Whether this court has the power to declare the appellant the winner of party primary nominations exercise for member of parliament Suna West.**
- 4. Whether the court can order for a repeat of the nomination exercise.**
- 5. Whether there is a cause of action.**

30. Regarding issue No. one concerning the filing of the appeal five days after declaration of results instead of 48 hours was dealt with adequately both by NAT and PPDT who said that that was a procedural technicality curable under Article 159 of the Constitution. I do agree with both tribunals that Article 159 of the constitution took care of that and that no prejudice was suffered by the appellant herein.

31. Regarding issue No. two, Mr. Omari argued that NAT and PPDT only nullified and withdrew provisional certificates issued to both parties and that by omitting to mention specifically that the final nomination certificate had been nullified implies that the same is valid. This argument by Mr. Omari is merely academic and cannot stand as the order to nullify the entire nomination exercise affected all certificates by whatever name or description arising out of the said exercise hence the final nomination certificate is invalid.

32. Regarding issue No. three, the appellant claimed victory based on the provisional nomination certificate issued by a returning officer by the name of Geoffrey Magak, who was allegedly appointed by Mr. Odhiambo Olala the Migori County returning officer vide his letter dated 24/4/17. According to the evidence laid before the NAT, Mr. Mathew admitted that due to the violence that took place in several polling stations, he had to resign. There is prima facie evidence from Ochino's report of 26<sup>th</sup> April, 2017 that it took police intervention and effort to contain the situation after shooting and dispersing voters. That is how Geoffrey Magak came in as Deputy returning officer. In a case of this nature, proof is on a balance of probability and not beyond reasonable doubt.

33. It cannot be true that Geoffrey Magak was not regarded as a returning officer in the circumstances yet his returns were recognized by the national office who initially confirmed the provisional certificate. If they did not recognize him they could not have accepted his returns and then issue final nomination certificate to the appellant. It is obvious that as a deputy, Magak had to take over after Ochino stepped down as admitted in his own report and testimony before NAT and affidavit of Migori County returning officer Mr. Samson Olala.

34. However, one thing that is clear from the evidence laid before NAT, through Mathew Ochino's report, affidavit of Geoffrey Magak and County returning officer Mr. Samson Olala, there were several incidences of violence during the exercise hence the results could not have been free and fair and cannot be a true reflection and expression of the will of the people of Suna West and this court cannot declare the appellant the winner out of a flawed exercise contrary to Articles 91 and 38 of the constitution. Article 38(2) provides:

**“Every citizen has the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electors.**

35. Under the international covenant on civil and political rights (ICCPR) Article 25 which is a replica of

our Article 38 of 2010 Constitution provides as follows:

**“Every citizen is entitled to and to be elected at a genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, granting the free expression of the will of the voters”.**

Having held that the exercise was tainted with electoral malpractices none of the candidates can claim victory.

36. Can the court order for a repeat exercise. Before I answer this question, I will first address the issue raised by Prof. Ojienda whether there is a justiciable cause of action before me. If the court finds that the appeal before court is seeking for orders on a wrong that has not accrued, then the court will have to leave it for the party to deal with it first or tribunal whichever is applicable in accordance with Section 40 (1) (b) and 40 (1) (fa).

37. Professor Ojienda contended that, by the NAT and PPDT directing that the party nominates afresh the nominee, it is incumbent upon the party to act first and thereafter any aggrieved party can commence the internal dispute resolution mechanism before approaching the court. Mr. Omari argued that the party has refused to act and it is taking too long hence apprehensive that time lines to submit the name of the party nominee to the IEBC is up hence the party might impose their favourable candidate through direct nomination thus denying Suna West people an opportunity to elect a leader of their choice.

38. I do agree with Professor Ojienda that until the party acts upon the directive of processing a fresh nominee by whatever method including holding an election, we cannot speculate. The party might call for elections any time to which the appellant and 2<sup>nd</sup> respondent are ready to participate in. That therefore means, action can only be taken by challenging the decision of the party if the decision so taken offends the party constitution and election and nomination rules. This cause of action has not crystallized. Mere apprehension giving rise to contemplated cause of action does not amount to justiciable cause of action.

39. What will happen if the party decides to do direct nomination? Article 3.3 of ODM elections and a nomination rules provides:

**“the NEB may with the written approval of the national executive committee (NEC) grant a candidate an automatic nomination”.**

However, Article 18 gives a rider and qualifies Article 3 by saying:

**“party primaries for the nomination of member of the county assembly, governor, member of the senate, member of national assembly and county woman representative shall be by way of universal suffrage of all registered party members at the polling stations or by sub-branch or by electoral college”.**

Article 18.1 (A) goes further and provides:

**“the party nominations set out above may be held at least six months before the date of election in respect of Zone A and at least 3 months before the date of election in respect of Zone B. The national elections board may with the approval of NEC directly nominate candidates using any other criteria in regard to Zone C as set out in the second schedule”.**

40. Apparently, Zone C refers to regions where ODM is not popular i.e. Kiambu County, Murang’a, Kirinyaga, Tharaka Nithi, Laikipia, Nyandarua, Nyeri, Meru, Nandi, Markwet, Garissa and West Pokot.

41. According to Article 3 as read together with Article 18, the party can hold elections for parliamentary seat through universal suffrage or Electoral College. Since the party has not moved to take any of the available choices, the appellant cannot go ahead of it by crafting a cause of action. Even if the decisions

were to be made and the aggrieved party decides to challenge it, it will only be through the party internal disputes resolution mechanism as provided for under Section 40 of the Political parties act which provides as follows:

1. The tribunal shall determine

- a. **Disputes between the members of a political party.**
- b. **Disputes between a member of political party and a political party.**
- c. **Disputes between political parties.**
- d. **Disputes between independent candidates and a political party.**
- e. **Disputes between coalition partners and**
- f. **Appeals from decisions of the registrar under this act and**
- g. **Disputes arising out of party primaries.**

42. Based on that provision, the appellant would have to exhaust the internal party mechanism either under Section 40 (1) (b) and 40 (2) or 40 (1) (fa) in which case under 40 (1) (b) they must start with the party dispute resolution mechanism organ (NAT) as required by Section 40 (2).

In a similar scenario like this in a case, affecting Homabay County for the seat of governor between **Samuel Owino Wakiaga vs Orange Democratic Party, Cyprian Otieno Owiti and Independent Electoral Boundaries Commission election petition No. 16/2017** the party nullified the election exercise and later on gave direct nomination to 2<sup>nd</sup> respondent under Article 7.5 of ODM constitution and Article 3.3 of the election and nomination rules which the PPDT upheld. In this case Judge Achode upheld the decision of PPDT by saying that the appellant ought to have exhausted party internal dispute resolution mechanism because the dispute was between a party and a member under Section 40 (1) (b).

43. Indeed it is now settled law that where the constitution or statute or party organisation have provided for structured method of dispute resolution mechanism, the same must be exhausted first (**see the case of Stephen Asura Ochieng and 2 others vs Orange Democratic Movement and others Petition No. 294/2011 Nairobi HC**) where the court held that:

**“To my mind, the provisions of Section 40 (2) of Political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties tribunal where the political party has neglected or refused to activate the internal party disputes resolution mechanism. The section must be read as contemplating assumption of the jurisdiction by the tribunal where internal party dispute resolution mechanism has failed to hear and determine a dispute”. Indeed, I do not believe that this court has jurisdiction to entertain this petition at all in view of the nature of petitioner’s grievance and the parties involved.**

44. Having held as such, the cause of action before me is premature and has not crystallised and on that ground the appeal herein fails and same is dismissed. Can the court offer any remedy by directing a repeat exercise. It is worth noting here that the decision giving the party powers to nominate a fresh nominee was given on 5<sup>th</sup> May, 2017 by NAT and upheld on 10<sup>th</sup> May, 2017 by PDDT. The party has decided to keep quiet as time fast approaches towards the last day of submitting list of nominees to IEBC 60 days to elections i.e. 8<sup>th</sup> June, 2017 in accordance with Section 13 (1) of the elections Act.

45. Assuming the party keeps quiet up to 7<sup>th</sup> of June or 8<sup>th</sup> at 6.00pm and then decides to nominate afresh a Suna West Constituency nominee, what recourse will the aggrieved party have? There are situations

where “party officials get drunk with power and authority and decide to defy their own constitution and rules thereby subjecting innocent people to grave injustice. Equally, there are instances where the same party organ may deliberately and for malicious reasons decide not to act. If it is a dispute involving party primaries, a party will have an option for recourse under Section 40(1) (fa) by proceeding directly to the tribunal and later thereafter to the high court which has wide and inherent jurisdiction for the ends of justice to meet. In this case, the parties are uncertain as to what will happen and when. Considering the urgency of these matter and exigency of time, the 1<sup>st</sup> respondent is duty bound to act within reasonable time by making a decision in choosing a party nominee. The delay here is wanting and in contravention of fair administrative actions Act Section 2 and 4.

-Section 2 of the said Act defines fair administrative action as including

**“any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.**

Section 4 (1) also provides as follows:

**“every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair”.**

46. In this case constitutionally under Article 47 and statutorily under fair Administrative actions act, the 1<sup>st</sup> respondent is duty bound to swiftly act and in the absence of that, this court will step in in exercise of its wide powers of inherent jurisdiction to make necessary orders (see **Board of trustees of African Independent Pentecostal Church of Africa church vs Peter Muigai Kimani & 12 others (2014) eKRL**) in which J. Aburili held:

**“whereas it is the view of this court that church leadership disputes are better handled in the church through mediation and conciliation, the high court has unlimited original jurisdiction in civil matters under Article 165 of the Constitution of Kenya 2010 except those matters that are in the exclusive jurisdiction of courts contemplated in Article 162**

**2. (a) (b) of the Constitution”.**

47. In the instant case, the 1<sup>st</sup> respondent has failed to provide leadership and direction. ODM members Suna West having participated in a party primary nomination exercise and the same having been nullified, have legitimate expectation and constitutional right to exercise their sovereign power through their elected leaders (Article 1 (2), participate in political activities (Article 38 (1) (b) and free and fair election through universal suffrage. The party having failed to act, this court cannot condone or perpetuate a conduct or behaviour that is calculated at violating or likely to violate the constitutional right of its members for the sake of vested interest or undisclosed reasons. For those reasons and in exercise of this courts inherent powers, the court do hereby direct as follows:

a. That the 1<sup>st</sup> respondent through its national elections board officials and national executive committee ODM are hereby directed to initiate or undertake a process of nominating afresh nominee as directed by NAT on 5<sup>TH</sup> May, 2017 and PPDT on 10/5/2017 within 48 hours from today in default the National Elections Board (NEB ODM) to initiate, call for and or conduct nomination election exercise for member of national assembly Suna West on ODM ticket within 48 hours from the time the 48 hours granted to NEC and NEB to address the fresh nomination lapses.

b. For avoidance of doubt, the national executive committee in conjunction with NEB to initiate the process of nominating a party nominee on ODM ticket for Suna West Constituency not later than 6.00pm of the 20<sup>th</sup> May, 2017 and in default initiate, call for and conduct fresh nomination elections exercise latest by 6.00pm of 22<sup>nd</sup> May, 2017 being 48 hours calculated from 6.00pm of 20<sup>th</sup> May, 2017.

c. That considering the nature and circumstances of this case I will order that each party shall bear its own costs.

**DATED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY, 2017 AT 6.00PM.**

**J. N. ONYIEGO (JUDGE)**

In the presence of

..... Counsel for the appellant

.....Counsel for 1<sup>st</sup> respondent

.....Counsel for the 2<sup>nd</sup> respondent