

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 14 OF 2017

GEORGE ONYANGO OLOO.....APPELLANT

-VERSUS-

ORANGE DEMOCRATIC MOVEMENT1ST RESPONDENT

KEN OBURA.....2ND RESPONDENT

FREDRICK ODHIAMBO OUDA3RD RESPONDENT

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....INTERESTED PARTY

JUDGEMENT

1.The Members of the Orange Democratic Movement in Kisumu Central Constituency would have been shocked when three Certificates of Nomination were issued to three different individuals after the Party Primary held on 25th April, 2017.

2. George Onyango Oloo (the Appellant) was one of the Candidates in the said Primary and a holder of a Nomination Certificate issued to him by the Chairman of Kisumu Central Constituency Elections Panel. Invoking the provisions of Rule 18 of the Party's Election and Nomination Rules, the Appellant had moved the National Appeals Tribunal of the Party to uphold his Nomination. However, in a Judgement delivered on 6th May, 2017, the Tribunal ordered for the withdrawal of Nomination Certificate held by Appellant and one Ken Obura (the 2nd Respondent). At the same time the Tribunal affirmed the Certificate issued to Fred Ouda (the 3rd Respondent). Aggrieved with that outcome the Appellant moved the Political Parties Dispute Tribunal (PPDT) under the Provisions of section 40(1)(fa).

3. At the Tribunal the Appellant prayed for the setting aside of the National Appeals Tribunal Decision and for the following prayers:

(c) That this Honourable Tribunal upholds the Decision by the Chairman of the Interested Party declaring the Appellant herein as duly nominated as the ODM candidate for Kisumu Central Constituency.

(d) In the alternative to (c) above, this honourable Tribunal directs the Returning Officer to conduct a final tally of the votes for Member of Parliament for Kisumu Central Constituency conducted on the 25.4.2017 in the presence of all the candidates as tallied by the presiding officers.

(e) In the alternative to (d) above, this honourable Tribunal conducts a final tally of the votes for Members of Parliament for Kisumu Central Constituency conducted on the 25.4.2017 as tallied by the Presiding Officers.

4. The Decision of the Appeals Tribunal was somewhat of a shock to the Appellant as, although the Tribunal nullified the Decision of the Party Tribunal, it directed the Party to issue the 2nd Respondent

herein with the final Nomination Certificate.

5. Some facts surrounding the impugned Elections are not contested. The Elections were held on 25th April, 2017 and the casting of the Votes was peaceful. In the night, Mr. Laban Bosire (the Returning Officer for the Constituency) disappeared only to reappear on the following day. And when he did so, he issued two Certificates to two different people namely, the 2nd and 3rd Respondents.

6. It has been the case for the Appellant that upon the disappearance of the Returning Officer and his Deputy, the Chairman of the Constituency Election Panel summoned the Panel and received the results from the various Presiding Officers. The Appellant asserts that there was uncontroverted evidence before the Party Tribunal and the PPDT that the results announced by the Chairman of the Panel a Mr. BernandOnyango was supported by the results presented to him by the Presiding Officers of the various wards. Those results were as follows:-

	Name of Candidate	Figures
1.	FRED OUDA ODHIAMBO	12549
2.	GEORGE ONYANGO OLOO	21551
3.	RICHARD DICK OGENDO	3446
4.	SAMWELONYANGO OKELO	2751
5.	KENNED ODHIAMBO NYAGUDI	628
6.	ELIPHAS OYUGI	418
7.	HEZBON OBWAYO ODIERO	740
8.	KEN OBURA MIRANGA	2463

7. Both at the Party Tribunal and the PPDT were Affidavits of the Presiding Officers of 6 Wards namely:

- a) Francis Okidi (Nyalenda (B) Ward)
- b) Fredrick Yamo (Milimani Market Ward)
- c) Eliakim Okello (Railways Ward)
- d) William Oswago (Migosi Ward)
- e) Judity Akinyi Weya (Kaloleni/Shauri Moyo Ward)
- f) Romanus Odhoch (Kondele Ward)

8. The contents of the Affidavits were similar. That each was responsible for the counting and tallying of Votes cast in their respective Wards for the Nomination of Member of Parliament. In the evening of 25th April, 2017 at around 5pm they were unable to reach Mr. Bosire the Returning Officer for the Constituency. After the completion of the counting of Votes, they were still unable to reach him so as to forward the results to him. On 26th April, 2017 the Chairman of the Constituency Election Panel requested the Presiding Officers to forward the results to the panel.

9. Mr. Bernard Onyango had deponed that following the disappearance of the Returning Officer and his Deputy, he summoned the Constituency Election Panel on 26th April 2017 and resolved to start receiving results from various Presiding Officers and tally them. It was his evidence that the results were obtained from Primary documents presented by the Presiding Officer of the Polling stations and verified through the Agents of Candidates. That he later learnt from a Presiding Officer, one Judith Akinyi Wera, that the Returning Officer had been kidnapped by the 2nd Respondent herein and forced to declare him as the winner. Before both Tribunals was the Affidavit of Judith Akinyi Wera to that effect.

10. On his part the 2nd Respondent denied having any role in the disappearance of the Returning Officer. In an Affidavit sworn on 5th May 2017, the Candidate vouched for his nomination pointing out that the Nomination Certificate of the 3rd Respondent was dated 25th April, 2017 by which date the Counting of the Votes was not complete.

11. The 3rd Respondent deponed that the Returning Officer disappeared on 25th April, 2017 at around 10pm after he had received results from 38 out of 45 Polling Stations. That even after his disappearance tallying continued. He maintains that the disappearance of the Returning Officer did not impact on the Voting Exercise since the votes were counted and tallied without any irregularities. The Candidate assails the Nomination Certificate of the Appellant as it was issued by a person not authorized under the Party Constitution to do so. On his Nomination, Mr. Ouda asserts that he was issued with proper and lawful Certificate at Goan Institute which was the Constituency tallying Centre. And that all Candidates were present when the results were announced and each was issued with copies of the results by the Returning Officer dully signed by him.

12. This Appeal raises the following grounds as set in the Memorandum of Appeal dated 10th May, 2017:-

1. The Tribunal erred in law and in fact by framing its own issues for determination which issues, had not been pleaded, were substantially undisputed and remain as such in total disregard of the issues placed by the parties before it and making a determination based on those issues.

2. That the Tribunal erred in fact and law, by finding, that the Chairperson to the Constituency Election Panel duly authorized by the 1st Respondent to undertake logistical planning, coordination and supervision of the nomination exercise, had “assumed the sensitive office of Returning Officer without the authority of NEB and proceed to declare a candidate, following the disappearance of the Returning Officer and his Deputy, after Ward Presiding Officers had completed their tallies.

3. That the Tribunal by making a finding in (2) above was in total violation of the legitimate expectation of the appellant and in total violating of article 45 of the Constitution as read together with section 4 of the Fair Administrative Actions Act.

4. That the Tribunal, having found on page 4, that tallying was not completed, and at paragraph 15 that Rule 29 of the 1st Respondent’s Election and Nomination Rules requires the preservation of all election material for up to six months at the part headquarters, erred in law and fact in failing to order for a re-tally of the Ward Presiding Officers Polling Stations Forms.

5. That the Tribunal having found at paragraph 14 that it had the power to grant the most appropriate remedy in the circumstances, erred in law in failing to tally the Ward Presiding Officers Polling Station Forms placed on record.

6. That the Tribunal erred in law and in fact by ordering that the 2nd Respondent be given the Nomination Certificate without any evidence on record.

7. That the Tribunal erred in fact by making determinations of fact contrary to the material evidence placed before it, which material was not controverted, before the National Appeals Tribunal and the

Political Parties Dispute Tribunal.

8. The Tribunal erred in law and in fact by failing to find and hold that the Appellant was the validly nominated candidate of the 1st Respondent in respect Member of Parliament of Kisumu Central Constituency despite the overwhelming evidence placed before it in support of this.

13. As I turn to consider the Appeal, I make two preliminary observations.

14. Under the Provisions of Section 41 (2) of the Political Parties Act an Appeal shall lie from the Decision of the PPDT to the High Court on points of Law and Facts. As a first Appellate Court, this Court is obliged to re-evaluate the evidence before the Tribunal and to make its own findings. Since the evidence before the Tribunal is Affidavit evidence, that is the evidence this Court re-evaluates. For purposes of an Appeal the record of the Tribunal is the Record of the Court.

15. It had been argued by Mr. Opiyo for the 3rd Respondent that under the Provisions of Section 40 of the Political Parties Act PPDT sits on Appeal over the Decisions of the Internal Political Party Dispute resolution mechanism (and in this instance it would be the Party National Appeals Tribunal). In making that argument, Mr. Opiyo was laying a basis for the argument that the issues the Appellant could raise before the PPDT are those that he had raised at the Party Tribunal.

16. These are the Provisions of Section 40 of the Tribunal:-

(a) Disputes between the members of a political party

(b) Disputes between a member of a political and a political party.

(c) Disputes between an independent candidate and a political party.

(d) Disputes between an independent candidate and a political party.

(e) Disputes between coalition partners and

(f) Appeals from decisions of the Registrar under this Act.

(fa) Disputes arising out of party primaries

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the Internal Political dispute Resolution mechanisms.

Jurisdiction is all important because it is the power of the Tribunal or Court to hear and determine a matter. Jurisdiction cannot be inferred. It is conferred by Statute. From the Provisions of Section 40, it is clear that in subsection 1(fa) one of the mandates of the PPDT is to hear disputes arising out of Party Primaries. There is no ambiguity in those provisions and the PPDT does not sit on Appeal in respect to those disputes. Under the Provisions of subsection 2 a Party to a Party Primary dispute need not first submit his dispute to the Internal Party Disputes Resolution mechanism before moving the PPDT (subsection 2 as read with subsection 1(fa)). However where a Party chooses the Internal Party Dispute Resolution mechanism as a first port of call, then it cannot bring a dispute to the PPDT other than the Dispute it had placed before the Internal Party Dispute Resolution mechanism.

17. Although it had been argued by Mr. Opiyo that the only issue that was before the Tribunal was the question of the three Certificates, this Court agrees with the Appellant that it was more than that. In the Appeal before the Party Tribunal the Appellant had asked to be declared the winner of the Party Nominations and that his Certificate be endorsed because he had scored the highest number of votes. Clearly the issue of tallying of votes and the outcome thereof was an integral party of the dispute in respect to the Certificates because only the true winner ought to have been issued with the Certificate.

18. Having considered the arguments made before this Court and the evidence before the PPDT, this Court forms the view that there are two primary issues for determination:-

1) Which, if any, of the three Certificates reflects the ultimate Will of the Party Members who participated in the Party primary.

2) What were the appropriate Orders that PPDT should have made?

19. The Election carried out on 25th April, 2017 must be examined in the light of the propositions made by Lord Denning in Morgan Vs. Simpson [1974] 3ALL ER 722. He stated:-

“Collating all these cases together, I suggest that the law can be stated in these propositions (1) if the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election is vitiated, irrespective of whether the result is affected, or no ... (2) if the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election. (3) But, even though the Election was conducted substantially in accordance with the law as to Election, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the Election is vitiated.”

20. There is undisputed evidence that the Returning Officer to the impugned Elections was Mr. Laban Bosire. It is also common ground that the tallying Centre for the said Election was Goan Institute Kisumu. There was sufficient evidence that the Returning Officer disappeared before the counting and tallying of Votes had completed. This Court need not to comment on the circumstances surrounding his disappearance.

21. The position of the 3rd Respondent is that upon returning, the Returning Officer announced the outcome of the Elections in his favour. There is however evidence adduced by the Appellant that in the confusion and quagmire that the disappearance of the Returning Officer had caused, the Constituency Election Panel stepped in and duly received results from Presiding officers and Polling clerks. Eventually, the Chairman of the Panel announced the winner. The Appellant's argument was that the Panel and its Chairman had stepped in as Agents of necessity.

22. Rules 18.8 of the Party Election and Nomination Rule is on the announcement of results and issuance of Nomination Certificate and sub Rules i and ii are as follows:-

i. Each Returning Officer shall tabulate and collate certified results received from Presiding Officers at the Polling Station level and promptly announce the results in the presence of all the candidates or their agents.

ii. The Returning Officers shall thereafter issue a Certificate of return showing the total number of votes garnered by each candidate in every Polling Station and which shall be signed by either the candidates or their Agents and a certified copy of which shall be immediately forwarded to the County Elections Board which shall in turn certify the same and transmit it to the NEB.

23. It is true therefore as submitted by the Respondents that the mandate of announcing the results of an Elections of a Constituency primary falls on the Constituency Returning Officer. It is also that Officer who issues a Certificate of Return which is forwarded to the County Elections Board which in turn transmits it to the National Elections Board. It is also true that neither the Elections and Nominations Rule nor the Letters of Appointment gave Members of the Constituency Election Panel the Powers conferred on the Returning Officer. While it had been argued by Mr. Magina for the Appellant that the Constituency Election Panel became an Agent of necessity after the National Election Board had failed to give direction, the same is not borne by evidence. This Court has carefully read the Affidavit of Mr. Bernard Onyango sworn on 28th April, 2017 before the Party Tribunal and does not find any disposition that the Constituency Panel had sought the guidance of the National Election Board before taking up the

role of verifying the tallies and announcing the winner. Under the Elections and Nominations Rules(Rule 3(2) the power to appoint Constituency Returning Officers is reserved for the National Elections Board. While there is no express provision as to the appointment of a Returning officer to replace one who for some reasons is unavailable in the course of an Election, it can be inferred that it is only the National Elections Board (the appointing authority for a Returning officer) which can lawfully appoint another person in his place.

24. Just like the Party Tribunal and the PPDT, this Court finds that there was no basis for the Constituency Elections Panel to assume the sensitive Office of a Returning Officer without the authority and sanction of the National Elections Board. Further, that the Nomination Certificate held by the Appellant was generated and issued in contravention with Rule 18 of the Party Elections and Nominations Rules.

25. Having said that, it is the view of this Court that in the nature of the Dispute the PPDT was under a duty to ascertain, if possible, where the Will of the people lay. In the claim before it the Appellant had sought some alternative reliefs. The Appellant had asked the PPDT to direct that the Returning Officer do conduct a final tallying of the Votes in the presence of all candidates as tallied by the Presiding officer. As an alternative, the Tribunal could conduct the final tally. This argument is underpinned by the Appellants' proposition that the result presented by the Presiding Officers is the true outcome of the Election.

26. On the other hand the 3rd Respondent had before the Tribunal produced his own set of results which were said to be the results from the Polling Station as tallied by the Returning officer.

27. This Court has anxiously considered these rival positions because in a dispute of this nature the Will of the electorate is all important and where it can be ascertained then the role of the Tribunal or the Court is to give it effect.

28. It is not disputed that there were 45 Polling stations in the Election and from the Provisions of Rule 18 the votes were to be counted at each Polling Station and results announced. The results would then be sent to the Returning Officer who would tabulate and collate the results received from the various Polling Stations. The witnesses for the Appellant had stated that the results in his favour were authentic as they were in the basis of primary document presented by Presiding officers of Polling Stations and verified by Party Agents. This Court has looked at those documents and has only found Polling results from 7 Polling stations in which the Agents of the various candidates have signed to the outcome. This would be Aghakan, Migosi, Car Wash tent, Ofafa Memorial, St. Teresa Girls and Kaloleni Station. In many of the Polling stations forms there is no signature of the Presiding Officer. On the other hand, the 3rd Respondent produced the collation of the results by the Returning Officer without any proof of the primary documents. That is the Certificate was not supported from results on the ground.

29. The case by the Appellant was that a re-tallying be done on the basis of the documents he had produced. That however would produce challenges because as pointed out, unlike what the Appellant says, many of the Documents from the Polling Stations are themselves incomplete. And these results also differ from the results held by the Returning Officer. As to the 2nd Respondent his Certificate was not backed by any result at all. Invariably his position was weak. On the evidence that was before the Tribunal, it would not have been possible for this Court and the Tribunal to ascertain the true winner.

30. As a way out, the Party had suggested that as there were apparent irregularities in the conduct of the Nominations, the Party be allowed to investigate the conduct of the Election and issue a Certificate to the deserving candidate. The trouble with this route is that although required to preserve all Election materials of up to 6 months at the Party Headquarter (Rule 29 of the Elections and Nominations Rules), the Party did not bother to produce any results or evidence that could assist the Tribunal or this Court make a determination as to whether a fair re-tally that would reflect the wishes of the people was possible.

31. As stated earlier what is of paramount importance is that the will of members of the Party who participated in the Election be given effect. On the material before Court, it is difficult to ascertain that will and the prayers sought by the Appellant would not help resolve that vital issue. This is because the

authenticity and integrity of either of the rival results presented was in doubt. Further the Party itself did not help matters as it did not present evidence of the Primary results. Although the Appellant did not, either at the Tribunal or Appeal, seek for an Order of repeat of the Nomination it was incumbent upon the Tribunal, given the nature of the dispute, to make such Orders that, would ensure that the will of the electorate is protected.

32. It is for this reason that, on 12th May, 2017, I made the following Orders:-

1. THAT the Judgment and/or Order of The Political Parties Disputes Tribunal dated 9th May 2017, in Complaint Number 111 of 2017 (George Onyango Oloo vs. Orange Democratic Movement, Laban Bosire, Fred Odhiambo Ouda, Ken Obura and Kisumu Central Constituency Elections Panel (Interested Party), be and is hereby set aside.

2. THAT the 1st Respondent (Orange Democratic Movement) be and is hereby ordered to undertake a Repeat Elections for the Nomination of its Candidate for Member of Parliament for Kisumu Central Constituency.

3. THAT In view of the strict timeline for the Nomination of Political Party Candidates that is set out in The Elections Act, the Repeat Elections referred to in Order 4 above, shall be conducted within 72(Seventy two) hours which time shall be with effect from 13th May 2017 at 8.30am and for purpose of computing time Saturday (13th May 2017) and Sunday (14th May, 2017) shall be included.

4. THAT This Court shall give its Order on costs and reasons for this Decision on 15th May 2017 at 12.00noon.

33. As to costs, the Appeal has not produced a winner or loser and it is for this reason that each Party shall bear its own costs on this Appeal.

Dated, Signed and Delivered in Court at Nairobi this 15th day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Magina for Appellant

Magina h/b Osiemo for 2nd Respondent

Kabene h/b for Opiyo for 3rd Respondent

Alex – Court clerk