



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJA)

CIVIL APPEAL NO.166 OF 2017

BETWEEN

TOM ODEGE.....APPELLANT

AND

HON. EDICK PETER OMONDI ANYANGA.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY.....2ND RESPONDENT

FREDRICK OGENGA.....3RD RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....4TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL NO. 167 OF 2017

BETWEEN

ORANGE DEMOCRATIC MOVEMENT PARTY.....APPELLANT

VERSUS

HON. EDICK PETER OMONDI ANYANGA.....1ST RESPONDENT

TOM MBOYA ODEGE.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....3RD RESPONDENT

(Appeals from the Judgment and Decree of the High Court of Kenya at Nairobi (Kimaru, J) Dated 31st May, 2017

in

Election Petition No. 89 of 2017)

REASONS FOR THE JUDGMENT OF THE COURT

Rule 32 (5) of the Court of Appeal Rules

The consolidated appeals namely, Appeal numbers 166/2017 and 167/2017 were exhaustively argued before us on the 19th day of June, 2017 by learned counsel, **Mr. Jaoko A.** instructed by the firm of Nchoe, Jaoko & Company Advocates for the appellant in 166/2017, and the 2nd respondent in 167/2017, **Tom Mboya Odege (Odege)**; learned counsel **Mr. P.N. Amuga** leading **Mr. L.O. Madialo** instructed by the firm of Amuga & Company advocates for the 1st respondent in both appeals, **Hon. Edick Peter Omondi Anyanga (Hon. Anyanga)**; learned counsel **Kennedy Okong'o** instructed by the firm of Okong'o, Wandago & Company advocates for the 2nd respondent in 166/2017, and the appellant in 167/2017, the **Orange Democratic Movement Party (ODM)**; learned counsel **Miss S. Okimaru**, for the 4th respondent in both appeals; the **Independent Electoral and Boundaries Commission (IEBC)**. There was no representation for the 3rd respondent in both appeals, **Mr. Fredrick Ogenga (Ogenga)** who, we were informed had lost interest in the litigation. In a judgment dated the 21st day of June, 2017, we allowed both appeals on the following terms:

(1) The consolidated Appeals numbers CA 166/2017 and 167/2017 be and are hereby allowed.

(2) The judgment of the Hon. Mr. Justice Luka Kimaru, J delivered on the 31st day of May, 2017 be and is hereby set aside.

(3) The nomination of Edick Peter Omondi Anyanga, the first respondent in both appeals as the Orange Democratic Movement Party's candidate for the position of member of the National Assembly, Nyatike Constituency, pursuant to the orders of Kimaru, J. of 31st May, 2017 be and is hereby set aside.

(4) The Orange Democratic Movement Party, the 2nd respondent in appeal No. 166/2017 and the appellant in appeal number 167/2017, is hereby directed to conduct fresh nomination exercise for Member of the National Assembly for Nyatike Constituency by way of universal suffrage within 48 hours from 4.00pm today.

(5) Each party to bear their own costs.

We reserved reasons which we now proceed to give as hereunder. We profusely apologize for the inordinate delay in rendering the reserved reasons. The delay was not deliberate, it was occasioned but caused by logistical work constraints but more particularly inadvertence occasioned by inadvertence which is highly regretted.

The background to the consolidated appeals is that **Odege, Hon. Anyanga, and Ogenga** among others participated in ODM primary nomination exercise for Nyatike Constituency parliamentary elections on 24th April, 2017. The nomination exercise was marred with violence but the violence notwithstanding, the Returning Officer declared **Ogenga** the winner and issued him with a nomination certificate. **Hon. Anyanga** was aggrieved and challenged the Returning officer's action before ODM National Appeals Tribunal (NAT), which after due deliberations found the entire nomination exercise carried out by ODM for the seat flawed, annulled the same and directed the withdrawal of the Provisional Nomination certificate issued to **Ogenga** and directed ODM National Elections Board (NEB) to undertake a new nomination exercise by universal suffrage.

Instead of ODM carrying out the repeat exercise by way of universal suffrage, as directed by its own NAT, handed **Odege** a direct nomination certificate dated 29th April, 2017. **Hon. Anyanga** on the other hand challenged NAT's decision before the political parties Disputes Tribunal (PPDT), citing ODM as the only respondent and after due deliberations, the PPDT in its decision dated 9th May, 2017 directed ODM NEB to nominate **Hon. Anyanga** for the position of Member of the National Assembly for Nyatike Constituency, Migori County within 48 hours of the said decision. Although ODM has persistently denied complying with the above directive, **Hon. Anyanga** accessed a nomination certificate he has all along asserted was validly issued to him by ODM. Upon learning of the existence of a rival certificate in possession of **Hon. Anyanga**, on 11th May, 2017 **Odege** unsuccessfully applied to the PPDT to set aside its orders of 9th May, 2017 and reopen the matter for him to be heard. The PPDT dismissed **Odege's** application saying that it was *functus officio*.

Undeterred, **Odege** successfully filed Election Petition Appeal No. 27 of 2017, vide which **Richard Mwangi**, Principal Judge, High Court of Kenya (as he was then), in a Judgment dated 18th May, 2017, allowed **Odege's** appeal and directed the PPDT to reopen the proceedings and hear **Odege** on his application for review and setting aside of the orders issued by the PPDT on 9th May, 2017. The PPDT reopened the matter, heard **Odege** but affirmed its decision of 9th May, 2017.

Odege was aggrieved and filed Election Petition Appeal number 89 of 2017 whose impugned judgment delivered by Kimaru, J gave rise to Appeal numbers 166/2017 and 167/2017 as consolidated, raising a total of ten (10) grounds of appeal, while ODM raised seventeen grounds of appeal condensed as follows:-

That the learned Judge erred in law when:

(i) He failed to properly appreciate that it was ODM's legal mandate and duty under section 13(1) of the Elections Act to nominate a candidate for Nyatike Constituency National Assembly seat.

(ii) He failed to properly appreciate that ODM had already exercised its mandate and legal duty under section 31(1) of the Elections Act and nominated Odege as its nominee candidate for member of the National Assembly seat, Nyatike Constituency.

(iii) He usurped the powers of ODM, nullified the nomination of Odege and purported to nominate Hon Anyanga as ODM's candidate for Nyatike Constituency National Assembly seat.

(iv) He made a conclusion not supported by material evidence on the record which was perverse thereby rendering the entire decision bad in law.

The appeals were canvassed by way of written submissions fully adopted and orally highlighted by learned counsel for the respective parties as already indicated above.

In support of the appeal in 166/2017, learned counsel **Mr. Jaoko** faulted the Judge for taking away the power of ODM to nominate a candidate for Nyatike Constituency National Assembly seat. Counsel submits that it was the legal mandate and duty of ODM to nominate a candidate under section 13(1) of the Elections Act as read with Regulation 14 of the General Elections Regulations; that ODM nominated **Odege**, issued him with a nomination certificate and forwarded his name to IEBC as the only lawful and legitimate ODM candidate for the Nyatike Constituency National Assembly seat as confirmed by affidavits deposed on the 30th day of May, 2017 by ODM National Election Board chairperson, **Judy Pareno** the Executive Director, **Oduor Ongwen**, and a member of the Board, **Dr. Robert Arunga**; that ODM demonstrated sufficiently before the Court that the purported nomination certificate presented by **Hon. Anyanga** before the High Court was a forgery and therefore illegal, a position ignored by the Court which proceeded to give judgment in favour of **Hon. Anyanga**, and in the process perpetuating an illegality.

To buttress the above submissions, **Mr. Jaoko** cited various cases; eg, **Mistry Amar Singh versus Serwano Wafu Mira Kulubya [1963] EA 409; Standard Chartered Bank Kenya Limited versus Intercom services Ltd and 4 Others [2004] eKLR and Birkett versus Acorn Business Machines Ltd [1979] 2 ALLER 429**, all for the proposition that whenever an illegality is brought to the attention of a court of law, the Court should not allow any party to benefit from such an illegality. Also cited was the case of **Macharia M. Sandi versus Kenya Co-Operative Creameries Limited, Mombasa CA No. 154 of 1992 (UR)** and **Nairobi City Council versus Thabiti Enterprises Limited [1995-1998] 2EA 231**, both for the principle that a court of law has no mandate to decide an issue not raised before it by the parties through their pleadings.

Rising to support appeal No. 167 of 2017, learned counsel **Mr. Kennedy Okongo** faulted the Judge first for the failure to appreciate that ODM acted within its mandate and legal duty under Article 99(1) of the Constitution of Kenya 2010, section 13(1) of the Elections Act, its own constitution and Election Rules when it nominated and certified **Odege** to IEBC as its nominee for Nyatike Constituency National Assembly seat; that the Judge lacked jurisdiction to compel ODM to act in a particular manner; that the Judge therefore usurped the powers of ODM when he nominated **Hon. Anyanga** as the ODM nominee candidate for member of the National Assembly for Nyatike constituency and erroneously held that ODM was in contempt of the orders of its own NAT when it issued a nomination certificate to **Odege**, an issue not raised before the Judge; that the Judge failed to properly appreciate that ODM nominated **Odege** as its nominee for member of the National Assembly seat for Nyatike Constituency on 29th April, 2017, long before the orders of the PPDT were made on 9th May, 2017 and could not therefore have been in contempt of orders made subsequently to its action; that it is not open to a court of law to rely on extraneous material not properly tendered in evidence; that the Judge relied on extraneous matters when he held that he had perused the original nomination certificate issued to **Hon. Anyanga** and found it genuine and validly issued by the PPDT, in the absence of a court order calling for the said original certificate for the Judge's perusal. There was therefore nothing in the circumstances to oust ODM's assertion that the purported certificate held by **Hon. Anyanga** was in fact a forgery, especially when the Judge without any justification ignored the uncontroverted depositions in the affidavits of **Dr. Robert Arunga, Judy Pareno** and **Oduor Ongwen**, that they never signed any such certificate.

To buttress the above submission, counsel relied on a litany of case law, among them being **Steven Kariuki versus Geerge Mike Wanjohi and 2 others [2014] and West Kenya Sugar Company Limited versus Kenya Sugar Board & 4 others [2014] eKLR**; for propositions that where it is difficult to determine who had won an election, ordering a repeat of election serves the ends of justice in the matter; that by sanctioning orders issued by the PPDT in favour of **Hon. Anyanga**, the Court took away the power of ODM to nominate a candidate; that documents which had not been properly introduced into the proceedings should not have been acted upon by the Judge as the basis for dismissing **Odege's** appeal; that the proceedings that gave rise to the decision of the PPDT to which Odege was never a party should not have been sustained as the same were reached in breach of the rules of natural justice as he was never heard before adverse orders were made against him; that ODM as a political party had the duty to elect or select a candidate to carry its flag during a general election; that in law the PPDT has no mandate authorizing it to direct ODM to nominate a particular candidate to carry its flag during an election; that since ODM had certified **Odege** to IEBC as its nominee for member of National Assembly seat Nyatike Constituency, **Odege** acquired rights which could not be taken away without due process.

Opposing the appeal in 166 of 2017, **Mr. P.N. Amuga** relied on the case of **Mawji versus Arusha General Store [1970] EA 137** and submitted that the orders given by the Judge simply went to affirm the decision of the PPDT. Counsel also relied on section 31(1) of the Elections Act, rule 18.1(A) of ODMs nomination Rules, sections 13(1) (2A) of the Elections Act, sections 6 and 40 of the Political parties Act and submitted that a correct interpretation of those provisions is that ODM was required to conduct its Party primaries nomination exercise by way of universal suffrage. ODM was therefore in flagrant disobedience to the said provisions when it purported to hand **Odege** a direct nomination and therefore committed an illegality, which should not be countenanced by a court of law.

Counsel also relied on **Njogu & Company Advocates versus National Bank of Kenya Ltd [2016] eKLR**, for the submission that **Odege's** appeal should not be sustained as in doing so this Court would be sanctioning an illegality; on the case of **Odd Jobs versus Mubia [1970] EA 476**, for the submission that the Judge's action of calling for and viewing **Hon. Anyanga's** certificate had been prompted by the respective parties' invitation for the Judge to do so; and lastly on the case of **National Bank of Kenya Ltd versus Ndungu Njau**, Civil Appeal Number 211 of 1996 and **Board of Trustees, National Social Security Fund versus Michael Mwalo [2015] eKLR**, and section 41(4) of the Political Parties Act, for the submission that, this being a second appeal, only issues of law fall for our consideration. We should therefore resist **Odege's** invitation to interrogate the factual basis of the appeal.

In opposition to appeal number 167 of 2017, counsel relied on the case of **Nyaboke Machani versus Mogere Amosi Ombui & 2 others**

[2014] eKLR, for the submission that ODM's appeal as laid did not lie as ODM did not appeal the PPDTs' decision of 9th May, 2017 which the Judge simply affirmed in appeal number 89 of 2017. ODM was therefore bound by that decision. Counsel also relied on **Articles 38 and 81** of the Kenya constitution, for the submission that it was mandatory for ODM to honour the political rights of its members especially the right to a free and fair election based on universal suffrage; the case of **Tanui & 4 others versus Birechi & 11 others [1991] KLR 50**, and sections 12,28,31 (2A) and 35 of the Elections Act, all for the submission that ODM was in flagrant disobedience of the above provisions when it handed **Odege** a direct nomination.

Counsel lastly relied on the case of **Board of Trustees National Social Security Fund versus Michael Mwalo [2015] eKLR**, **National Bank of Kenya versus Ndungu Njau** Civil Appeal No. 211 of 1996 and **Dubai Bank Kenya Limited versus Kwanza Estates Limited [2015] eKLR**, for the submission that ODM participated in the proceedings before the PPDT through counsel and should not be heard to complain of breach of rules natural justice against it.

Learned counsel **Miss S. Okimaru** on the other hand, submitted that, IEBC's mandate as donated under Article 88 of the Constitution is to, *inter alia*, conduct and supervise elections of any elective body or office established by the Constitution and any other election as prescribed by an Act of Parliament; that the dispute resulting in these appeals arose from Party Primary nomination exercise conducted by ODM and its members among them **Odege** and **Anyanga**; that the dispute herein had been resolved by the PPDT pursuant to the provisions of section 39 of the Political Parties Act and in the manner set out in **section 40** of the said Act and the political parties Disputes Tribunal Procedures Regulations 2017; that IEBCs' role in the Party Primaries nomination exercise was limited to the publication of the Election (Party Primary and Party lists Regulations 2017 and the Elections (General) Regulations 2017 to guide political parties in the conduct of Party Primaries nomination exercise for their candidates to vie for various elective posts in the then impending 2017 General Election. Secondly, receiving the names of nominees of the various Parties at the conclusion of the Party Primary nomination exercise under **section 13** of the Elections Act 2011 and declaring a nominee for the relevant seat for which such a nominee was nominated under the rules set out under **section 22 to 26** of the Elections Act 2011. That the dispute giving rise to these consolidated appeals being an internal dispute between ODM and its members, IEBC's role was limited to what has been stated above and secondly, to respect the court's verdict.

To buttress the above submission, counsel relied on the case of **Republic versus Kenya School of law & 2 others Exparte Juliet Wanjiru Njoroge & 5 others [2015] eKLR** to emphasize an age old principle which is now trite that Court orders are not issued in vain, they demand obedience. They also attract penal sanctions where not obeyed.

In reply to the respondents' submissions, **Mr. Jaoko** maintained that the record is silent with regard to the Judge calling for **Hon. Anyanga's** original nomination certificate for perusal. The Judge's impugned action was therefore *suo motu*. **Mr. Okong'o** on the other hand, also maintained that there was no justification for the Judge interfering with **Odege's** nomination as the judgment of the PPDT of 9th May, 2017 set aside by the Judgment of **Mwongo, J** was no longer an issue in the determination of the appeal and that by the time the PPDTs' decision of 9th May, 2017 was made the nomination window had closed.

Mr. Wakwaya on his part submitted that the results relied upon by **Hon. Anyanga** were nullified by ODM's NAT; and that by the time the PPDT intervened on his behalf ODM had already complied with its NAT's directions handing **Odege** a direct nomination.

We have carefully considered the consolidated appeals records, the rival submissions and the authorities cited by counsel in support of their opposing positions. Our mandate in an appeal of this nature is limited as provided for under **section 41(2)** of the Political Parties Act, to points of law only. It provides as follows:

“(2) An appeal shall lie from the decision of the Tribunal to the High Court on point of law and facts and on points of law to both the Court of Appeal and the Supreme Court.”

Although the appellant in the separate appeals filed a litany of grounds of appeals which were also extensively and exhaustively submitted on at length in favour of their opposing positions, in our view, only the issues condensed above arise for our determination.

Issue numbers 1, 2, & 3 which relate to complaint that the Judge usurped ODM's mandate and are therefore interrelated will be addressed as one. It is evident from the record that the Judge after assessing and evaluating the record before him, made findings, *inter alia*, and correctly so in our view, that, **Odege** and **Hon. Anyanga** participated in the Party Primaries nomination exercise organized by ODM to determine who was to be nominated as the flag bearer for the ODM Party for the Nyatike Constituency Parliamentary seat; that disputes arose as a result of that nomination exercise which were variously addressed in various designated forums before finally landing on appeal before the Judge.

Turning to the core issue for determination before him, the Judge considered the grounds of appeal raised by **Odege** in light of the rival submissions before him and drew out the following conclusion:

“Although the 2nd respondent claims it did not issue the nomination certificate that is in the 1st respondent's possession, this Court having perused the original, is satisfied that the said nomination certificate was in fact genuine and was validly issued by the 2nd respondent to the 1st respondent in compliance with the order which was issued by the PPDT.”

As asserted by **Odege** and ODM in their submissions, nowhere in the said judgment does the Judge mention how he came to be in possession of **Hon. Anyanga's** original certificate, perused it and found it genuine as there is no mention by the Judge that it had been annexed to any pleading on record before him. Neither was there any reason given as to why the Judge found that nomination certificate to be the genuine one as opposed to that relied upon by **Odege**. We also do not find any analysis of any evidence on the record as forming basis for the Judge's rejection of ODM's denial that it was not the originator of the nomination certificate that **Hon. Anyanga** had asserted was issued to him by ODM. Instead of addressing the above issues, the Judge embarked on the interrogation of the basis upon which ODM had issued **Odege** with a direct nomination. The findings of the Judge on that exercise were, *inter alia*, that ODM had issued **Odege** with direct nomination after establishing that **Odege** had performed poorly in the nomination exercise that was subsequently annulled by ODM's own NAT; that ODM

issued the said direct nomination to **Odege** in defiance of the decision of its own NAT and contrary to **Hon. Anyanga's** legitimate expectation that ODM would comply with the orders issued by NAT.

In light of the above observations, the Judge drew out the following conclusion:

“For the 2nd respondent to turn round and refuse to conduct fresh nominations and use the exercise of the said refusal as a basis to give a direct nomination to the appellant is not only dishonest but breach of the rules of natural justice. The 1st respondent was justified to complain before the PPDT when it became apparent to him that, if he did not take action, he would be denied the right to offer his candidature for nomination for the said parliamentary seat.”

The Judge also took issue with apparent inconsistent and erratic positions taken by ODM during the pendency of the dispute and upon revisiting the facts on the record, made observation that an officer of ODM had sworn an affidavit filed before the PPDT portraying ODM as a neutral party in the dispute between **Odege** and **Hon. Anyanga** and was therefore surprised at the change in ODM's conduct. To register that disapproval, the Judge expressed himself as follows:

“This Court was disturbed that a particular party which espouses the principles of democracy would assume a position that negates its core principles of nominating its candidates on the basis of their popularity.”

On further re-evaluation of the record, the Judge made findings that, ODM was in contempt of the orders issued by its own NAT; that in light of the above observation, it was incumbent upon the Court to decide who between **Odege** and **Hon. Anyanga** presented evidence as to his popularity among voters of Nyatike Constituency to be nominated as the candidate to represent ODM in the then forthcoming 2017 General election.

After due consideration of the above and without assigning reasons, the Judge drew out the following conclusions:

“This Court takes judicial notice of the fact that the 2nd respondent being the dominant party in Nyatike Constituency, a nominee of the party for all intents and purposes, is as good as elected as a member of parliament. It would therefore be a travesty for the 2nd respondent to impose a candidate on the people of Nyatike Constituency who is obviously not their choice.”

Before drawing out final conclusions on the matter, the Judge made observation that, although the nomination exercise carried out by ODM on 24th April, 2017 was not concluded, it was clear that **Hon. Anyanga** had most votes by the time the tallying exercise was inexplicably stopped; that **Hon. Anyanga** had three times votes than **Odege**, that the PPDT did not therefore err when it directed ODM to issue a nomination certificate to **Hon. Anyanga**; that there was no basis whatsoever upon which ODM could have purported to act to issue a direct nomination to **Odege**, especially when such decision went contrary to its own nomination rules, and the orders of its own NAT; that whereas the Court was reluctant to interfere with political internal process, where it became apparent as in the appeal before the Judge that a political party does not respect its own rules and also legitimate orders issued by a competent tribunal the court would have no option but to intervene to remedy an obvious injustice arising from an unfair conduct and breach of the rules of natural justice.

In light of the above assessment and reasoning, the Judge concluded as follows:-

“The upshot of the above reasoning is that the appeal lodged by the appellant cannot be allowed. It is for dismissal. It is hereby dismissed. For the avoidance of doubt, the nominee for Orange Democratic Movement Party for Nyatike Constituency is the first respondent, Edick Peter Omondi Anyanga. The nomination certificate issued to him by the Orange Democratic Movement Party is the only valid nomination certificate which shall be received by Independent Elections and Boundaries Commission (IEBC). The nomination certificate that was issued to the Appellant contrary to the orders of Orange Democratic Movement Party's National Appeals Tribunal and the Political Parties Disputes Tribunal is hereby cancelled and is declared null and void. It shall have no legal effect whatsoever. There shall be no orders as to costs. It is so ordered.”

Those are the orders that provoked the appeals under consideration and in respect of which the appellants have invited us to overturn, while the 1st respondent has invited us to affirm. Our observations on the reevaluation and reanalysis of the impugned judgment is that, nowhere in the said Judgment do we find mention of the Judge construing the relevant applicable provisions of law and applying them to the rival submissions before drawing out the conclusions highlighted above. These are the provisions of law that parties have not only addressed us on but also invited us to construe and apply them to the rival submissions and decide either way, which we now proceed to do.

Article 99 of the Constitution makes provision for the criteria for qualification and disqualification for election as a member of parliament. Popularity of such a candidate in a Constituency is not one such criteria for eligibility for nomination for election as a member of parliament. **Article 81** makes provision for principles that guide an electoral system in the exercise of its electoral mandate. Under the said provision the entity charged with the said exercise is enjoined to guarantee the citizen the freedom to exercise their political rights; ensure observance of the rule on gender balance, universal suffrage, based on aspiration for fair representation and equality and also guarantee free and fair election as provided for thereunder. **Article 38(2)** guarantees to every citizen the right to a free fair and regular election based on universal suffrage and the free expression of the will of the electorate, while **subsection 3 (c)** guarantees the right to be a candidate for public office, or office within a political party of which the citizen is a member and if elected to hold office. Issue of popularity or lack of it of such a candidate is not also a prerequisite under this Article.

Article 47(1) guarantees the right to fair administrative action which includes right to be given reason in writing for impugned action, while **Article 50(1)** guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court of law or in any of the appropriate independent and impartial tribunal or body.

Turning to the electoral law, the Elections Act No. 24 of 2011; **Section 13(1)** donates power to a political party to nominate candidates for an election under the Act; **section 13 (2A)** donates jurisdiction to a political party to determine all intra party disputes arising from political party primary nominations within specified period of time, **section 22** provides for qualification for nomination of candidates, **section 24** for qualification and disqualification for nomination as a member of parliament, **section 27** donates power for the promulgation of party nomination rules for submission of names of nominated candidates to IEBC for publication; **section 31 (2A)** makes provision for timelines within which to submit names to IEBC, while **section 35** provides for the timeline within which to submit the party list before the date of the elections.

Sections 6, 39, 40 and 41 of the Political Parties Act No. 11 of 2011, also featured in the submissions. **Section 6** makes provision for application for registration of a political party, **section 39** for the establishment of the PPDT, **section 40** provides for the nature of disputes to be determined by the PPDT and **section 41** is on the mode of determination of disputes. Nowhere in the above provisions do we find the PPDTs mandate to direct a political party to act in a particular manner with regard to any outcome of a dispute submitted to the PPDT for determination.

Turning to the regulatory provisions, **Regulation 10(1)** makes provision for the establishment of an Election Board with a mandate to conduct or supervise party primaries and party nomination lists and any other related activities for purposes of selection of candidates to participate in an election. **Regulation 13** provides for tenure of the party Election Board; **regulation 14** for the publication of fees to be levied against every aspiring candidate of any party and the mode of payment of such fees; **regulation 16 (3) (4) & 5** provides for the certification of the party nominees by the party, certification of party lists by authorized officials of the party to the commission which has no mandate to make any alteration to the said party list; **regulation 18** for the filing of a declaration at the time of submission of the party lists to the commission by a designated authorized officer; **regulation 21** for the submission of a declaration by the authorized officer that the party list submitted to the commission complies with the constitution.

Regulation 27 obligates every political party to put in place intraparty dispute resolution mechanism for resolution of disputes arising from the party primaries and party lists. Lastly, regulation **28** provides for sanctioning of electoral malpractices.

ODM's own nomination rules also featured in the rival arguments especially rules **18, 19 and 20** setting out the nomination procedures, qualifications and disqualification for nomination. Also provided for is an internal mechanism for resolution of disputes arising from Party Primaries nomination exercise, a position the rival parties subjected themselves to as already highlighted above in the background to the appeal.

We have construed and applied the above provisions to the rival submissions highlighted above, and proceeded to draw out the following as the reasons for allowing the appeal:

(1) The constitutional provisions assessed above guaranteed fair play not only to **Odege** and **Hon. Anyanga**, but to all other persons participating in party primary nomination exercise giving rise to litigation resulting in the consolidation appeals.

(2) Both **Odege** and **Hon. Anyanga** met the threshold for nomination for the position of Member of Parliament for Nyatike Constituency. That is why they were cleared by ODM to participate in the said exercise.

(3) From all the provisions assessed above, the entity charged with the conduct of the said exercise was ODM, executed by its own machinery tasked for that purpose put in place in accordance with ODM's own Constitution, Regulations and Rules governing the conduct of such an exercise.

(4) It is not in dispute that the said exercise was carried out on 24th April, 2017 but the same was discredited by ODM's own NAT and annulled and ODM directed to carry out a repeat exercise by way of universal suffrage. Instead of ODM carrying out a repeat nomination exercise in the manner directed for by its own NAT, it handed **Odege** a direct nomination on 29th April, 2017. It was therefore correctly contended by the 1st respondent that the direct nomination handed out to **Odege** was contrary to the directions given by NAT when it nullified ODM's first nomination exercise and directed a repeat of the nomination exercise through universal suffrage. However, ODM while riding on that platform handed **Odege** a direct nomination instead.

(5) It is also evident from the record that by the time the PPDT directed ODM on 9th May, 2017 to issue **Hon. Anyanga** with a nomination certificate, **Odege** already had a nomination certificate. **Odege's** name had also been processed, certified and forwarded to IEBC. The above position in favour of **Odege** notwithstanding, **Hon. Anyanga** acquired a nomination certificate which he has asserted throughout the proceedings was issued to him by ODM in obedience to the PPDT's directive, a position disputed vehemently by ODM terming it a forgery. Such contestation called for expert evidence to determine whether the certificate held by **Hon. Anyanga** was indeed a forgery or not, an exercise not undertaken by the Judge before rendering the impugned judgment. There was therefore no basis as asserted by the appellants upon which the Judge could have drawn the conclusions reached that the certificate relied upon by **Hon. Anyanga** to assert his rights was original and genuine.

(6) In light of our reasoning in items 1,2,3,4 &5 above, it is our opinion that the Judge's failure to construe and apply the above provisions of law to the rival positions before him is what led to the failure to appreciate properly that the Constitution guaranteed both disputants fair play; that both qualified to be nominated for the position of member of National Assembly for Nyatike Constituency. That is why they participated in the said nomination exercise. That the role of ODM in the whole exercise was that of a main actor, and any error committed either by ODM itself or those others tasked by it to play any part in the nomination exercise had to be rectified by ODM itself in accordance with the constitutional, legal and regulatory provisions highlighted above. Secondly, the Judge would also have appreciated that the directive given to ODM by its NAT was in line with the constitutional requirement and the Judge would therefore have used ODM's own disobedience to its own NAT's directive as a basis for faulting ODM for flouting its own NAT's directions; and, secondly for directing ODM to repeat the nomination exercise with strict adherence to the above highlighted constitutional, legal and regulatory provisions.

(7) It is also our opinion that taking the above approach would have also assisted the Judge to realize that policing powers donated to the PPDT by the political parties Act assessed above did not include supervisory powers over ODM in the discharge of its mandate to the extent that the PPDT could direct ODM to issue the contested nomination certificate to **Hon. Anyanga**. Secondly, that the policing power of the court was limited to examining the process to determine whether there were any flaws demonstrated to exist in that process and if satisfied that any flaws were established or demonstrated to exist to the extent that these operated to vitiated the entire process, to direct ODM to repeat the nomination exercise as we did in the judgment whose reasons we have now rendered and which in our view is based on our above finding that there was no constitutional, legal or r regulatory mandate vested in the Judge authorizing him to nominate a candidate for ODM in the manner done in the impugned Judgment.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE, 2019

R.N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

.....

JUDGE OF APPEAL

**I certify that this is a
true copy of the original.**

DEPUTY REGISTRAR.