



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 170 OF 2017

BETWEEN

MAXWELL OCHIENG' APPELLANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT 1ST RESPONDENT

GEORGE OMONDI 2ND RESPONDENT

*(Being an appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Lesiit, J.)
delivered on 2nd June, 2017*

in

ELECTION PETITION APPEAL NO. 79 OF 2017)

JUDGMENT OF THE COURT

1. This is a second appeal from the original judgment of the Political Parties Disputes Tribunal (**PPDT**), in relation to the 1st respondent's party primaries conducted on 30th April, 2017 for the position of Member of County Assembly, Korogocho Ward, Ruaraka Constituency, Nairobi County.
2. The appellant alleged that he garnered 635 votes against the 2nd respondent's 568 votes but the Returning Officer unlawfully declared the 2nd respondent as the winner, saying that he obtained 619 votes while the appellant managed 600 votes.
3. The appellant contested the results and filed a complaint before the 1st respondent's County Appeals Tribunal, which ruled in his favour; revoked the 2nd respondent's nomination certificate; and ordered that the appellant be issued with the nomination certificate.
4. That notwithstanding, the 1st respondent issued the 2nd respondent with the final nomination certificate, prompting the appellant to file a complaint before the PPDT.
5. The PPDT allowed the appellant's complaint; annulled the nomination certificate that had been issued

to the 2nd respondent; and ordered the 1st respondent to conduct fresh nomination exercise for the aforesaid position.

6. The appellant was dissatisfied with the PPDT's decision and preferred an appeal to the High Court; arguing, *inter alia*, that the PPDT erred in law in finding that the entire nomination process was opaque, unaccountable and inaccurate; and for ordering a repeat of the nomination exercise. He urged the Court to compel the 1st respondent to issue him with the final nomination certificate.

7. The High Court (Lesiit, J.) overturned the PPDT's decision; dismissed the appeal; and confirmed the nomination of the 2nd respondent. That is the decision that gave rise to this appeal.

8. In his memorandum of appeal, the appellant argued, *inter alia*, that the learned judge erred in law by holding that the results as announced by the Returning Officer, Korogocho Ward, were accurate and reflected the voters' will in the said ward; and by confirming the 2nd respondent as the lawful nominee of the 1st respondent for the position of Member of County Assembly, Korogocho Ward. He urged the Court to set aside the impugned judgment; affirm him as the 1st respondent's lawful nominee for the aforesaid position; compel the 1st respondent to issue him with the final nomination certificate and forward his name to the IEBC as the duly nominated party's candidate for the said position.

9. The appeal came up for hearing on 21st June, 2017. **Miss Awuor** held brief for **Prof. Ojienda, S.C.** for the appellant, while **Mr. Muango** appeared for the 2nd respondent. The 1st respondent was unrepresented.

10. Upon hearing counsel and upon a careful consideration of the entire record of appeal, the written submissions, including the cited authorities, and for reasons that the Court shall give on **28th July, 2017**, we hereby make the following orders:

(a) The appeal is partially allowed,

(b) The High Court judgment dated 2nd June, 2017 is set aside,

(c) The 1st respondent is ordered to conduct fresh nomination exercise for the position of Member of County Assembly, Korogocho Ward, Ruaraka Constituency within Nairobi County, in accordance with its Constitution and current Election and Nomination Rules, within 48 hours from 4.00 p.m. today.

(d) Each party shall bear its own costs.

Dated and delivered at Nairobi this 23rd day of June, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR