



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM : WAKI, MUSINGA & OUKO, J.J.A.)

CIVIL APPEAL NO. 205 OF 2017

BETWEEN

CLIFFORD ODHIAMBO MWALO.....APPELLANT

VERSUS

ROY OCHIENG SAMO.....1ST RESPONDENT

ORANGE DEMOCRATIC PARTY.....2ND RESPONDENT

ODM NATIONAL ELECTIONS BOARD.....3RD RESPONDENT

INDEPENDENT ELECTROAL AND

BOUNDARIES COMMISSION.....4TH RESPONDENT

(Being an appeal from the Ruling and Order of the High Court

of Kenyaat Nairobi (Mwongo, J.) given on 18th June, 2017

in

ELECTION PETITION APPEAL NO. 29 OF 2017)

JUDGMENT OF THE COURT

1. This appeal arises from the decision of Mwongo, P.J. made on 22nd June, 2017 which simply reads: **“The matter is marked as settled.”** It is necessary to set out the background that gave rise to that short impugned decision or finding.
2. The appellant and the 1st respondent, among others, participated in the 1st respondent’s nominations on 25th April, 2017 for the Kajulu Ward Member of County Assembly seat, Kisumu County.
3. The 1st respondent was declared the winner and issued with an interim certificate of nomination on 29th April, 2017. However, the 2nd and 3rd respondents issued the appellant with a final nomination certificate.

As a result, the 1st respondent filed a complaint at the Political Parties Disputes Tribunal (**PPDT**) challenging the 2nd respondent's action of issuing the final nomination certificate to the appellant.

4. The PPDT allowed the 1st respondent's complaint and restrained the 2nd respondent from issuing a nomination certificate to any person other than the 1st respondent.

5. The appellant, being aggrieved by that decision, preferred an appeal to the High Court, essentially complaining that the PPDT failed to consider important documents that had been presented to it which revealed that he was the bona fide winner of the nomination contest. He urged the court to allow the appeal, set aside the judgment of the PPDT; and declare him the validly nominated ODM candidate for the said position.

6. The High Court (Mwongo, P.J.), having heard all the parties' representations, in his judgment delivered on 19th May, 2017, allowed the appeal and set aside the judgment of the PPDT. The learned judge further ordered ODM (the 2nd respondent) **“to use its internal dispute resolution mechanism to resolve the dispute between the parties within 24 hours from the date hereof, failing which the ODM party shall hold and complete fresh nominations for MCA for Kajulu Ward no later than Monday, 22nd May, 2017.”**

7. In compliance with the High Court judgment, the 2nd respondent's Internal Disputes Resolution Mechanism (IDRM) chaired by Assa Nyakundi, sat and heard the disputants in the presence of their respective advocates.

8. On 16th June, 2017 the 2nd respondent's tribunal rendered its decision and held, *inter alia*:

“5. In the matter at hand the Returning Officer declared Roy Ochieng Samo the winner. However, Lameck Onyango did not forward the results from the ward as required to the Constituency Returning Officer. However, the Returning Officer Mr. Riaga was able to declare results for this ward using results presented by other presiding officers from Kajulu Ward. Lameck Onyango surfaced later declaring Clifford Odhiambo Mwallo winner. We find that Lameck Onyango had no authority to do so. Besides Lameck Onyango had to be arrested by police following his inexplicable disappearance.

This in itself makes it impossible to rely on results presented by Lameck Onyango.

We are satisfied that the proper person to be issued with the nomination certificate was Roy Ochieng Samo and not Clifford Odhiambo Mwallo. The certificate issued to Clifford Odhiambo Mwallo dated 29th April 2017 was issued in error and through misrepresentation. The party considers it null and void and of no effect.”

9. By a letter dated 19th June, 2017 the 2nd respondent forwarded to the High Court's Deputy Registrar its aforesaid decision. On 22nd June, 2017 the matter was mentioned before Mwongo, P.J. The advocates for the 1st and 2nd respondent urged the Court to mark the matter as settled in terms of the decision reached by the 2nd respondent's tribunal. The appellant's advocate reserved his comments, having told the court that he had not seen the decision.

10. The learned judge marked the matter as settled as earlier stated. The appellant, being dissatisfied with the order marking the matter as settled, preferred a second appeal to this Court. In his memorandum of appeal, he faulted the learned judge for upholding the decision of the 2nd and 3rd respondents in spite of glaring misapprehension of law and facts apparent in the process.

11. When the appeal came up for hearing before this Court on 19th July, 2017, **Mr. Awele** appeared for the appellant and made oral submissions in support of the appeal. The 1st respondent was represented by

Mr. Wasuna and **Miss Opar**, with **Mr. Nyakundi** appeared for the 2nd and 3rd respondents, while **Mr. Juma** represented the 4th respondent.

12. The 1st and 2nd respondents filed submissions and their counsel orally highlighted the same. Mr. Juma made brief submissions in opposition to the appeal.

13. We have carefully considered the record of appeal as well as the submissions of counsel. We are of the considered view that this appeal is without merit and hereby dismiss it. The effect of that finding is that the decision of the 2nd respondent's internal dispute resolution tribunal dated 16th June, 2017 shall stand. The costs of the appeal are awarded to the 1st respondent.

14. The reasons on the findings and orders herein shall be given on 29th September, 2017.

Dated and delivered at Nairobi this 21st day of July, 2017.

P.N. WAKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR