



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, M'INOTI, & ODEK, J.J.A.)**

**CIVIL APPEAL 271 OF 2017**

**WILSON ONG'ELE OCHOLA.....APPELLANT**

**AND**

**ORANGE DEMOCRATIC MOVEMENT..... 1ST RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT NATIONAL ELECTIONS BOARD.....2ND  
RESPONDENT**

**ABEL OSUMBA ATITO..... 3RD RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION..... 4TH  
RESPONDENT**

***(Appeal from the judgment and decree of the High Court of Kenya (Lesiit, J.) dated 1st August 2017 in  
Election Petition No. 131 of 2017)***

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**JUDGMENT OF THE COURT**

The central issue in this appeal is whether the name of the appellant, Wilson Ong'ele Ochola is validly on the ballot paper as the Orange Democratic Party (ODM) candidate for election to the office of Member of County Assembly (MCA), Utalii Ward, Nairobi County. The elections are due to be held tomorrow, 8th August 2017. Due to the extreme urgency of the appeal and its peculiar circumstances, we are constrained to render our judgment now and reserve the reasons therefor to a date which we shall specify shortly.

The main protagonists in this appeal are the appellant and the 3rd respondent, Abel Osumba Atito. Both offered themselves to be nominated by ODM as its candidate for the office of MCA, Utalii Ward in Nairobi County during the party primaries held on 30th April 2017. The 3rd respondent was declared the winner. After that it was one application after another, one appeal after another. In all, the parties have litigated before ODM's Disputes Tribunal, three times before the Political Parties Disputes Tribunal (PPDT), before the Independent Electoral and Boundaries Commission's (IEBC) Dispute Resolution Committee and three times before the High Court, prior to coming to this Court.

In the last judgment in the High Court dated 1st August 2017, which is impugned in this appeal, Lesiit J. found, among others, that Onguto J. had on 24th June 2017 directed ODM to select its candidate for the office of MCA, Utalii Ward by universal suffrage. The learned judge further held that in view of that order, the PPDT had no jurisdiction to accept direct nomination of the appellant by ODM party because it

amounted to the PPDT sitting on appeal from the judgment of the High Court. Accordingly she directed the IEBC to de-gazette the appellant as the ODM candidate.

Principally that is what the appellant is challenging in this appeal. We have heard Mr. Akusala for the appellant, Mr Oregio for ODM and its National Elections Board, Mr Obondi for IEBC and Mr Wanyanga for the 3rd respondent. Save for the 3rd respondent, the appeal was supported by all the other parties.

Having duly considered the record of appeal, the impugned judgment, the oral and written submissions, as well as the authorities cited by the parties, we have come to the following determination. Lesiit, J. misapprehended the final order by Onguto J. and erred by holding that the PPDT had sat on appeal from a decision of the High Court. We are satisfied that Onguto, J. appreciated that the ODM constitution and rules provided for universal suffrage as the mode of nomination in specific areas. Secondly, Onguto, J. held that the decision of the PPDT dated 31st May 2017 still stood as a valid decision. The pertinent part of that judgment provided as follows:

***“23. b. The 1st respondent (ODM) will forthwith proceed, in accordance with its constitution, election and nomination rules, to nominate its candidate for Member of County Assembly for the Utalii Ward, Ruaraka Constituency.”***

Lastly, in his said judgment Onguto, J. prohibited IEBC from gazetting any ODM nominee for the said office ***“until such time as the 1st respondent (ODM) would have fully and freely complied with the orders of the Political Parties Disputes Tribunal (PPDT) of 31st May 2017 and the PPDT has certified as much”***. By its decision dated 18th May 2017 the PPDT certified that ODM had duly complied with its order of 31st May 2017.

We accordingly allow this appeal, set aside the judgment of decree of Lesiit, J. dated 1st August 2017. We shall give the full reasons for our judgment on Friday, 22nd September 2017. It is so ordered.

**Dated and delivered at Nairobi this 7th day of August, 2017.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**