**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, OUKO & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 141 OF 2017**

**BETWEEN**

**EMMANUEL A. ACHAYO.....APPELLANT**

**AND**

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

**COUNTY APPEALS TRIBUNAL (ODM). ……..…… 2ND RESPONDENT**

**ABIGAEL PERPETUA AWINO …….……. 3RD RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION ……..…….. 4TH RESPONDENT**

**REGISTRAR OF POLITICAL PARTIES …....…… 5TH RESPONDENT**

***(Being an appeal from the decision of the High Court of Kenya at Nairobi (Riechi, J.) delivered on 21st May, 2017 in Election Petition No. 46 of 2017)***

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**REASONS FOR THE JUDGMENT OF THE COURT**

**(Rules 32(5) of the Court of Appeal Rules)**

On 6th day of June, 2017 we rendered an unanimous judgment in which we declared that the nomination exercise conducted by the Orange Democratic Movement Party for Member of County Assembly for Gem Central Ward, Siaya County conducted on 25th April, 2017 in which the 3rd respondent was declared the party nominee was so chaotic and so incredible as to leave no doubt that the outcome of that exercise and the decisions of Siaya County Appeals Tribunal, the Political Parties Dispute Tribunal and the High Court confirming it could not stand. Accordingly, in our judgment, we allowed the appeal with costs, set aside the judgment of the High Court rendered on 21st May, 2017 and ordered the 1st respondent to conduct fresh nominations for Gem Central Ward Member of County Assembly, within forty eight (48) hours from 4 pm on the 6th June, 2017.

Briefly, both the appellant and the 3rd respondent participated as contestants in the party nomination exercise for Gem Central Ward Member of County Assembly as explained above. The appellant was aggrieved by declaration of the 3rd respondent as the nominee. Pursuant to the party constitution, he challenged the nomination before the Siaya County Appeals Tribunal, complaining of a myriad of irregularities and malpractices in the nomination process. For instance he contended that voting materials arrived late, some ballot boxes had no lids, double voting, voting by non party members, use of ordinary papers as ballots and ballot stuffing. The appellant also alleged that the votes were not tallied. The Siaya Appeals Tribunal, in a terse judgment of one and a half pages, dismissed the complaint for the single reason that the appellant did not prove the alleged irregularities and malpractices. In accordance with **section 41** of the Political Parties Act**,** the appellant took his grievance to the Political Parties Disputes Tribunal, again raising the same complaints regarding the manner the party nominations were conducted and faulting the decision of the first tribunal. In an equally laconic approach, the Political Parties Disputes Tribunal also dismissed the appeal, being in agreement with the findings of the first tribunal and directed that the 3rd respondent be issued with the final nomination certificate within two days of the decision. The appellant promptly took out an application before that Tribunal for it to review its decision on the ground that the 3rd respondent was not a member of the 1st respondent but belonged to the Democratic Congress Party. That application was similarly dismissed. The appellant, aggrieved by the two dismissals, moved to challenge them in the High Court. In the High Court, the two appeals were consolidated.

In its judgment, the High Court (Riechi, J.) found that the appellant had failed to present evidence to demonstrate that indeed the nominations were marred by irregularities and malpractices. The learned Judge, for instance, did not find any evidence in proof of the claims that there was voter bribery, ballot stuffing, double voting or lack of votes tallying. He also dismissed the appeal challenging the rejection of the appellant's application for review holding that there was no proof that the 3rd respondent was a member of a different party. With that, the learned Judge dismissed the consolidated appeals and upheld the decision of the Political Parties Disputes Tribunal.

Undeterred, the appellant now brings this appeal in terms of **section 41** of the Political Parties Act on seven grounds which were controverted by the 1st, 2nd and 3rd respondents. The 4th and 5th respondents, though served with the hearing notice, did not attend the hearing. They also did not file submissions. From the seven grounds, the appellant framed four questions; whether the learned Judge misdirected himself in failing to appreciate the fact that evidence presented to prove malpractice and irregularities at the nomination was not controverted; whether he failed to appreciate that the appellant had discharged the burden of proof to the required standard; whether it was proper for the learned Judge to reject the letter from the 5th respondent to the effect that the 3rd respondent was a member of Democratic Congress (DC) Party and not the 1st respondent on the basis only of lack of certification; and whether the appellant presented evidence to demonstrate that the nomination did not meet the threshold of free, fair and credible elections under **Articles 38** and **81** of the Constitution.

The appellant contended before us that his averments and those of his chief agent, Jacob Mathew Oludhe Ondik, contained in their respective affidavits gave an account of how the nominations did not accord with the party's Constitution, election and nominations rules; that they demonstrated that the returning officers did not tabulate and collate the results as a consequence of which the winner was not declared; that no nomination certificate was issued to any of the candidates that took part in the nomination exercise. The appellant urged us to agree with him that in the absence of evidence to controvert these averments, they constituted proof to the required standard, of the malpractices and that it was, therefore, in error for the learned Judge to disregard that evidence. Regarding the letter from the 5th respondent, the appellant submitted that no certification was required being communication from a public office; and that in any case its authenticity was never challenged. Finally, the appellant argued that without the announcement of the results, the 3rd respondent should never have been issued with the nomination certificate; and that for the malpractices he had identified, especially the failure by the returning officer to announce the results, the learned Judge ought to have found that the nominations were not conducted in accordance with **Articles 38** and **81** aforesaid; that they were not free, fair and transparent.

The 3rd respondent denied the allegations that she was not a member of the 1st respondent. She also denied the allegations of malpractices and agreed with the learned Judge that there was no evidence to support those claims. She urged us to maintain the decision of the High Court as she had been cleared by the party and her name submitted to the 4th respondent

With the 2010 Constitution came the new dawn to political parties as it marked a major departure in the parties' organization and introduced funding of political parties. The objective was to institutionalize political parties as vehicles of a democratic process because free and fair primaries are a precursor to free and fair elections. The general elections and nominations ought to be mirror of each.

If the numerous disputes witnessed in the last parties primaries and the complaints determined by internal parties disputes resolution mechanisms, Political Parties Disputes Tribunal, IEBC Tribunal, is any guide, it is apparent that, despite the new paradigm introduced by the new Constitution and the Political Parties Act, there is very little change in the manner parties primaries are still conducted. Primaries are still characterized by divisive politics, violence, allegations of bribery and such similar efforts to influence the outcome. It is generally accepted that once nominated in a party's stronghold, the candidate is as good as elected and that, in our view, is the only reason why primaries are, in some instances, usually high octane brand of competition.

The Supreme Court in **Peter Gatirau Munya V Dickson Mwenda Kithinji & 2 others** Petition No. 2B of 2014 expressed these sentiments;

> **"[245] Democracy is predicated upon notions of free choice, and fair competition. The freedom to choose, is cardinal to democratic processes, to such an extent that it constitutes the heart and soul of any democracy. It is only when ideas are allowed, in pacific conditions, to contend in the political market place, that citizens will be able to make the right political purchases.**
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> **[246] Kenya's political history has been characterized by large-scale electoral injustice. Through acts of political zoning, privatization of political parties, manipulation of electoral returns, perpetration of political violence, commercialization of electoral processes, gerrymandering of electoral zones, highly compromised and incompetent electoral officials, and a host of other retrogressive scenarios, the country's electoral experience has subjected our democracy to unbearable pain, and has scarred our body politic. As a result, free choice and fair competition, the holy grail of electoral politics, have been abrogated, and our democratic evolution, so long desired, has staggered and stumbled, indelibly stained by this unhygienic environment in which our politics is played. This is the history that our Constitution seeks to correct, through elaborate provisions, and the adoption of exemplary standards in our electoral system".**

For us, the question that we are called upon to determine in this appeal is whether the nominations were conducted in accordance with the Constitution, Political Parties Act, the party's constitution, election and nomination rules, that is; whether they were free, fair, accurate, transparent, accountable and credible. As we do so, we bear in mind the fact that before the High Court were two appeals, one on the dismissal by the Political Parties Dispute Tribunal of the complaint on the conduct of the party primary and the other challenging the dismissal of the application for review.

The appellant, as we have said complained of a myriad of malpractices and irregularities but the main one, in our view, was that the results were not declared after the nomination exercise came to a close and therefore there was no basis for declaring the 3rd respondent the party nominee.

In terms of **Rule 18.8** of the 1st respondent's Election and Nomination Rules, each returning officer was required to tabulate and collate certified results received from presiding officers at the polling stations level and promptly announce those results in the presence of all the candidates or their agents and thereafter issue a certificate of return showing the total number of votes received by each candidate in every polling station. Those results may be signed by either the candidates or their agents and a certified

copy forwarded to the County Elections Board. The County Elections Board would in turn certify the results and transmit them to the National Elections Board.

Isaac Poka, who described himself in an affidavit filed before the Political Parties Dispute Tribunal, both as the presiding and returning officer deposed, among other things, that as far as he was concerned, the results of the nomination exercise were not declared. This position was corroborated by the appellant's chief agent, Jacob Mathew Oludhe Ondik and the appellant's sister, Pauline Akinyi Achayo, who supervised the appellant's agents in all the 12 polling stations in the ward. The combined effect of their evidence was that the voting went on smoothly despite a few challenges with regard to things like the delay in commencing the voting; some ballot boxes had no lids; lack of ballot papers and use of exercise books. The main problem, they said, came about during the tallying of votes. A rowdy group of youth stormed the tallying centre causing confusion that enabled the 3rd respondent's agent who is also her son, to load several ballot boxes in a vehicle and drive away.

It was conceded that the results were declared after this confusion and pandemonium. That is why it is as interesting as it is confounding that in those circumstances the 3rd respondent was declared the nominee. It is no wonder the returning officer was unable to indicate the number of votes the 3rd respondent got, *vis a vis,* her opponents. The only reference to the outcome was the unofficial figures presented at the Political Parties Dispute Tribunal by the appellant himself, which as expected favoured him. They were however rejected even by the High Court. The 3rd respondent, apart from boldly declaring in her affidavit that the exercise was "*substantially*" free, fair and transparent; that she was declared the winner "*in a manner prescribed by the party rule";* and that the results were a true reflection of the will of the people, failed to state by how many votes she was nominated.

Although the provisions of **rule 18.8** aforesaid were cited before the learned Judge, he did not address his mind to the core question, whether the results were declared. We reiterate that under that rule, the returning officer was required to tabulate and collate the results from presiding officers at the polling stations and promptly announce those results in the presence of all the candidates or their agents and thereafter issue a certificate showing the total number of votes garnered by each candidate in every polling station. The results, as we have said, would be signed by either the candidate or their agents and a certified copy forwarded to the County Elections Board. The County Elections Board would in turn certify the results and transmit them to the National Elections Board. For the learned Judge to agree with the 3rd respondent that she was duly nominated, there ought to have been some evidence of that nomination supported by a trail from the polling centre to the National Elections Board culminating in the issuance of a nomination certificate. Nomination certificates are issued through a process and, unlike *manna* from heaven, do not just drop from above. Regarding the ground faulting the learned Judge for rejecting the application for review, our simple answer is that the learned properly found that the provisions of Order 45 Rule 1 of the Civil Procedure Rules were not met. In particular we agree that the alleged new evidence was always available.

We found considerable merit in this appeal. It is for the reasons we have given above that we allowed it on 6th day of June, 2017 and directed the 1st respondent to conduct fresh nominations for Gem Central Ward Member of County Assembly, within forty eight (48) hours from the date of the judgment, the 6th June, 2017.

**Reasons dated and delivered at Nairobi this 6th day of October, 2017.**

**R.N. NAMBUYE**

**…….....**

**JUDGE OF APPEAL**

**W. OUKO**

**…….....**

**JUDGE OF APPEAL**

**P.O. KIAGE**

**…….....**

**JUDGE OF APPEAL**

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

***DEPUTY REGISTRAR***