



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI

COMPLAINT NO. 185 OF 2017

ALHAD ADAM.....COMPLAINANT

-VERSUS-

ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup> RESPONDENT

GORE MOHAMED.....2<sup>ND</sup> RESPONDENT

AND

SOLOMON ODANGA MAGEMBE.....INTENDED INTERESTED PARTY

RULING

Background

1. By a Complaint dated and filed before this Tribunal on 9th May 2017, the Applicant, an aspirant for the position of Member of County Assembly, Makina Ward sought to implement the decision of the County Appeals Tribunal (CAT) dated 6th May 2017 that upheld the Applicant's nomination. The 2nd Respondent had challenged the Applicant's nomination at the 1st Respondent's CAT.
2. The 1st Respondent through its Legal Officer, Anthony Muturi, swore a replying affidavit on 10th May 2017 in which the 1st Respondent conceded that it would indeed implement the decision of CAT.
3. On the same day, a consent was recorded in the following terms:  
  
" i) The final nomination certificate for MCA, Makina Ward, Kibra Constituency, Nairobi County be and is hereby awarded to the Complainant forthwith.

- ii) The 1st Respondent shall accordingly enter the name of the Complainant on the party list to IEBC.
- iii) The Complaint against the 2nd Respondent be and is hereby withdrawn.”

**The Application**

- 4. On 16th May 2017, the intended interested party filed an application seeking to be enjoined as such. The intended interested party also seeks to set aside the consent order dated on 10th May 2017 and the subsequent orders in enforcement thereof whilst seeking conservatory orders restraining the 1st Respondent from presenting the Complainant’s name to IEBC.
- 5. The grounds for this application are that the interested party won the nomination exercise and that the Complainant and 2nd Respondent colluded and concealed material facts thereby misleading the Tribunal. further, the Complainant relied on a forged document. The application is supported by the intended interested party’s affidavit. He avers that he learnt of the consent order on 15th May 2017 from one of his agents. He alleges that he was the winner of the nomination and was issued with a provisional nomination certificate as well as the final nomination certificate, copies of which he has annexed to the affidavit.
- 6. the applicant filed an amended application on 26th May 2017 in which he further seeks that his name be returned to the IEBC, the same having been initially put and then substituted with that of the Complainant. He accuses the Complainant of using all means to get the nomination.

**The Response**

- 7. The Complainant filed a replying affidavit dated 17th May 2017 in which he reiterates that he won. He also avers that the intended interested party has not exhausted internal dispute resolution mechanism and asserts that his complaint

before the Tribunal was to enforce the decision of CAT and not contest over who won. He also takes issue with the appearance and authenticity of the provisional certificate adduced by the intended interested party and urges us to dismiss the application. The Complainant swore and filed a further affidavit on 25th May 2017. He avers that the intended interested party cannot be enjoined upon entry of judgment and the matter is now *res judicata*. He also attaches an extract of the IEBC list as at 20th May 2017 in which his name was already included as the 1st Respondent's nominee.

**Issues for determination**

8. We note that by consent, the intended interested party was enjoined in the proceedings on 26th May 2017 when the matter came for hearing. What remains to be determined therefore is *whether the consent orders of 10th May 2017 should be set aside*.

**Analysis**

9. The principles of setting aside a consent order are well settled. In *Brooke Bond Liebig (T) Ltd vs Mallya (1975) E.A.L.R 266* it was held that a consent judgment may only be set aside for fraud, collusion or any reason which would enable the court to set aside an agreement. The Interested Party argues that he was not a party to the proceedings as he was never served. Our perusal of the record indicates that appearance was entered on his behalf by the firm of Wesonga Wamalwa & Kariuki Advocates who later withdrew the application to be enjoined as interested party. The Interested Party disputes having been instructed the said firm of advocates. Unfortunately, we are not in a position to address ourselves on the issue of instructions as we have not been specifically called upon to make this finding and evidence adduced in this regard.

10. The Complainant and the Interested Party each challenge the provisional certificate adduced by the other accusing the other one of being a forgery. Again, we are not able to determine the question of forgery in the absence of more evidence. We say the same of the two contradicting affidavits on record allegedly sworn by the 1st Respondent's Anthony Moturi. Where a party alleges fraud, the onus is on the person to discharge the requisite burden of proof to support the allegation to the satisfaction of the Tribunal.
11. Presently, we can only at best note that there may be inconsistencies of fact and material before us without any further overriding evidence to make us find in favour of the interested party's allegations. This in itself is not sufficient to enable us make a finding of fraud to warrant our reconsideration of the consent orders issued on 11<sup>th</sup> May 2017. Moreover, the consent was made in open court and put on record as part of the court record. We do not see how that amounts to collusion on the part of the parties. The Interested Party has not persuaded us in this respect.

**Order**

12. Consequently, the Interested Party has not proved to the satisfaction of the Tribunal that he deserves the prayers sought in the Amended Notice of Motion application dated 24<sup>th</sup> May 2017. The application fails and is hereby dismissed with no order as to costs.

**Dated at NAIROBI this 25<sup>th</sup> DAY of MAY 2017**

**1. Kyalo Mbobu .....(Chairperson)**

**2. James Atema .....(Member)**

**3. Hassan Abdi .....(Member)**