



THE REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI
COMPLAINT 200 OF 2017

JECONIA OKUNGU OGUTU.....1ST PETITIONER
JULIUS OOKO OKAYO.....2ND PETITIONER

VERSUS

ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST RESPONDENT
SIAYA COUNTY RETURNING OFFICER.....2ND RESPONDENT
CORNEL RASANGA AMOTH.....3RD RESPONDENT
ENG. NICOLAS ODERO GUMBO.....4TH RESPONDENT
CAREY OREGE.....5TH RESPONDENT
WILLIAM ODUOL.....6TH RESPONDENT

JUDGMENT

Background

1. The 1st and 2nd Petitioners are members of the 1st Respondent. The 3rd to 6th Respondents participated in the nomination exercise for the gubernatorial seat in Siaya County conducted on 25 April 2017. The 3rd Respondent was declared the 1st Respondent's nominee for the said seat and issued with a nomination certificate on 29 April 2017.
2. Aggrieved by the declaration of the 3rd Respondent as the winner, the 4th Respondent filed National Appeals Tribunal (NAT) Appeal 31 of 2017 on 27

April 2017, citing irregularities and that he was the rightful winner. He therefore asked to be declared the rightful winner and to be awarded the nomination certificate. By a decision dated 3 May 2017, the NAT disallowed the appeal and directed that the nomination certificate be issued to the 3rd Respondent.

3. The Complainants, aggrieved by the manner in which the nomination exercise was carried out approached this Tribunal seeking a declaration that the 1st Respondent acted in contravention of Article 38 of the Constitution in failing to use the party register; a declaration that the 1st Respondent in failing to use the party register and failing to allow the Petitioners to vote, contravened the Constitution and its own rules; and a declaration that the nomination fails to meet the constitutional threshold of free, fair and regular elections based on universal suffrage and free expression of the will of voters. They also sought a declaration that there was no validly nominated gubernatorial aspirant for the 1st Respondent in Siaya County and an order nullifying the purported nomination exercise for the position of governor, Siaya County.
4. The 1st and 2nd Respondent did not appear or file a reply. The 3rd Respondent filed a Preliminary Objection challenging this Tribunal's jurisdiction.

Issues for Determination

5. From a review of the material on record, we have identified the following:
 - a. **Does this Tribunal have jurisdiction to determine the matter?**
 - b. **Were the party primaries in Siaya conducted inside the rules and regulations of the party?**

**c. Can the Tribunal issue orders in respect of alleged violations of the
Constitution?**

Analysis

a. Does this Tribunal have jurisdiction to determine the matter?

6. By an application dated 11 May 2017, the 3rd Respondent lodged a Notice of Preliminary Objection seeking to strike out the petition on the grounds that the Petitioner, having alleged constitutional violations, ought to have directed his complaint to the High Court. It was also contended on behalf of the 3rd Respondent that this Tribunal lacked the requisite jurisdiction to address this Complaint because IDRMs had not been exhausted. It was their contention that there had been no IDRMs because Appeal 31 of 2017 had been filed by the 4th Respondent against the 3rd Respondent.
7. The jurisdiction of this Tribunal is well established by section 40 of the Political Parties Act. Insofar as the present dispute involves party members and their party, it falls within the jurisdiction of this Tribunal. If a dispute meets the criteria in section 40 (1), the next requirement to be met is reference to the party's internal dispute resolution mechanism (IDRM). Section 40(2) requires that a Complainant first refer to the IDRMs of the party before approaching the Tribunal. We have previously held where there has been an attempt to refer to the IDRMs, this Tribunal becomes well seized of the matter. This issue in dispute was the subject matter within the IDRMs in the NAT Appeal 31 of 2017. We note that the grounds cited to invalidate the nomination exercise before NAT are largely the same as those brought to the Tribunal, i.e. failure to use the party register, ballot stuffing

and over-voting within Siaya County. This infers IDRM. Therefore, in so far as this dispute pits a party member against their party, it is properly before us.

b. Were the party primaries in Siaya County conducted inside the rules and regulations of the party?

8. The Petitioners contended that the 1st Respondent violated its own constitution and election and nomination rules by failing to avail party registers to be used for the nomination exercise. Consequently, party members were disenfranchised and non-members allowed to vote. They also asserted that 200,000 people voted who were more than the 60,000 registered members of the 1st Respondent in Siaya County.

9. The material presented before us in support of this determination does not support this averment. The party register would, in such circumstances need be produced. The IEBC register, to show the list of such party members who are registered in that county, would be useful in buttressing the case. The information on who actually voted on that date of primaries also need have been adduced. It was not. If this had been done, the Tribunal would have been able to, within its mandate, determine if the process had contravened the party laws or not. In light of this lapse, we are unable to do so.

c. Was the conduct of the nomination exercise by the 1st Respondent in violation of the Constitution?

10. The Petitioner contended that the manner in which the nomination exercise was carried out was a violation of the party rules and the Constitution. He cited

violations of Article 38, 91, 92 of the Constitution in alleging that because party registers were not used, party members were disenfranchised and non-members were allowed to vote.

11. In this regard as well, the Petitioners have not presented evidence or information before the Tribunal that would help to determine that the particular rights of its member was violated in so far as the expectation to adherence to party rules are concerned. The broader question however, remains whether the action is a violation of the Constitution of Kenya. While the issues relating to violation of constitutional rights are valid, the PPDT lacks the mandate to address the same. Alleged constitutional violations can only be determined by a constitutional court. Under the 2010 Constitution this jurisdiction is reserved for the High Court, which under Article 165 (3) (b) has 'jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'. The Petitioners' allegations of constitutional violations ought to have been directed to the High Court. This Tribunal can only address alleged violations of the 1st Respondent's constitution and election and nomination rules. We therefore find, as contended by the 3rd Respondent, that we do not have the mandate to address these allegations.

Orders

12. In light of the foregoing, we find that the Complaint dated 5th May 2017 fails and is dismissed.
13. We direct that each party to bear its own costs.

Dated at NAIROBI this 11th DAY of MAY 2017

M. O. Lwanga (Presiding Member)

Desma Nungo(Member)

Dr. Adelaide Mbithi(Member)