



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI  
COMPLAINT NO. 203 OF 2017

ROBERT ORUKO OTUGE.....COMPLAINANT

VERSUS

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

ODM NATIONAL ELECTION BOARD.....2<sup>ND</sup> RESPONDENT

IEBC.....3<sup>RD</sup> RESPONDENT

STEPHEN OUMA OWITI.....1<sup>ST</sup> INTERESTED PARTY

JUDGMENT

*Summary of the Case*

1. The Claimant, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were contestants in the 1<sup>st</sup> Respondent's party primaries held on 25<sup>th</sup> April 2017 for the position of the Member of County Assembly, Kolwa East Ward, Kisumu County. The Claimant was declared the winner of the said nominations having garnered 1,972 votes against the Interested Party who got 1,964. This was according to the unsigned tally sheet from unnamed Constituency Returning Officer.
2. The Claimant was issued with a provisional nomination certificate as a consequence by one Thomas M. Riaga purportedly as the Returning Officer and a final nomination certificate. In another tally sheet lacking the 1<sup>st</sup> Respondent's letterhead and bearing the name and signature of one John Agie Ombwayo, the

Claimant is shown as having garnered 968 votes while the Interested Party got 1,964. The Interested Party was issued with both the provisional and final nomination certificate; former certificate being issued by one John Kagie also purporting to the Constituency Returning Officer.

3. On learning this, the Claimant, vide a letter dated 7<sup>th</sup> May 2017 complained to the 1<sup>st</sup> Respondent's National Elections Board, which letter was never acted upon.

The Claimant has now approached this Tribunal for the following reliefs:

- a) A declaration that the Claimant is the bone fide 1<sup>st</sup> Respondent's nominee for the position of the Member of County Assembly, Kolwa East Ward, Kisumu County.
  - b) A permanent injunction to restrain the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent from presenting the name of the Interested Party to the 3<sup>rd</sup> Respondent as the nominee for Kolwa East Ward.
  - c) A mandatory injunction directing the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent to submit the Claimant's name to 3<sup>rd</sup> Respondent bone fide 1<sup>st</sup> Respondent's nominee for the position of the Member of County Assembly, Kolwa East Ward, Kisumu County.
4. In reply, the Interested Party has also alleged being winner for the position of the Member of County Assembly, Kolwa East Ward, Kisumu County.

### *Issues for Determination*

5. The primary issue is whether the 1<sup>st</sup> Respondent's party primaries for the position of the Member of County Assembly, Kolwa Central Ward, Kisumu County were credible.

### **Analysis**

6. This issue calls into the question the credibility of the 1<sup>st</sup> Respondent's nomination process to determine the nominee for the position of the Member of County Assembly, Kolwa East Ward. Credibility of an election process is one crucial conditions that must be satisfied in order for an election exercise to be said to have been free and fair. Other requirements include the electors being allowed to vote through secret balloting, free from violence, intimidation and improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.
7. These requirements also underlie the citizens' rights and freedoms contained in *Article 38* of the *Constitution of Kenya, 2010*, and as such, are binding on a political party's nomination exercise. *Article 38* guarantees the right of every citizen to make political choices, which includes the rights to form and participate in the activities of a political party. In this regard, one has the right to take part in a free, fair and regular elections based on universal suffrage and the free expression of will to vie for any office of any political party to which such a person is a member.
8. To this end, *Article 91 (1) (d)* of the Constitution specifically obligates political parties in Kenya to abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party. To fulfil these constitutional requirements, *section 9* of the *Political Parties Act, 2011* read together with the *Second Schedule* of the same sets out the key issues that must be contained in the constitutions of all duly registered political parties in Kenya.
9. The relevant point for our purposes in the matter is the rule that a political party constitution must establish guidelines for, among other things, the nomination of candidates for elections. The 1<sup>st</sup> Respondent's nomination rules also guarantee

the rights and freedoms of their members to a free, fair and credible elections. Indeed, it is not in doubt that 1<sup>st</sup> Respondent conducted party primaries on 25<sup>th</sup> April 2017 with the goal to determine the nominee for the County Assembly Member, Kolwa East Ward, Kisumu County.

10. As a political party that is duly registered in Kenya, the 1<sup>st</sup> Respondent owed to its members the obligation to conduct a free, fair and credible nomination process. This meant, among other things, that the exercise ought to have been credible and accurate results of the same recorded by the Returning Officer.
11. Upon the perusal of the evidence before us, it is not known who the Returning Officer for Kisumu East Constituency was. It is also difficult telling which of the two tally sheets, between the unsigned one bearing the 1<sup>st</sup> Respondent's letterhead and the other one lacking the letterhead but signed by one signature of one John Agie Ombwayo, was indeed true. In a nutshell, we were unable to find any credible evidence to support the contention that Returning Officer accurately recorded the results of the nomination for the position of County Assembly Member, Kolwa East Ward, Kisumu County.
12. For these reasons, it is difficult verifying the results alleged by both the Claimant and Interested Party herein. In other words, it is not clear to this Tribunal as to who, between the Claimant and Interested Party won the 1<sup>st</sup> Respondent's nomination exercise for the position of the County Assembly Member, Member, Kolwa East Ward, Kisumu County.

### **Orders**

13. In the premises, this Tribunal orders as follows:

- a) That the Claimant's case be and is hereby allowed with respect to prayer (b).*
- b) That the 1<sup>st</sup> Respondent be and is hereby restrained from issuing the final nomination certificate to any person for the position of the Member of*

*County Assembly, Kolwa East Ward, Kisumu East Constituency, Kisumu County.*

- c) That, in the event that the 1<sup>st</sup> Respondent has issued the final nomination certificate to any individual for the position of the Member of County Assembly, Kolwa East Ward, Kisumu East Constituency, Kisumu County, the same is hereby declared null and void.*
- d) That the 1<sup>st</sup> Respondent be and is hereby ordered to conduct fresh nominations for the position of the Member of County Assembly, Kolwa East Ward, Kisumu East Constituency, Kisumu County, within 48 hours of this judgment.*
- e) No orders as to cost in order to foster party unity, growth and democracy. Orders accordingly.*

**DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY 2017**

**Kyalo Mbobu (Chairman) .....**

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

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