



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI  
COMPLAINT NO. 299B OF 2017

HYPOLITUS OWITI OBUNGA.....COMPLAINANT  
VERSUS  
ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup> RESPONDENT  
INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT  
CAROLINE OJENGE OGOT.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

*Summary of the Case*

1. The Claimant and the 3<sup>rd</sup> Respondent were contestants in the 1<sup>st</sup> Respondent's party primaries of the Interested Party held on 26<sup>th</sup> April 2017 for the position of the Member of County Assembly, Central Nyakach Ward, Nyakach Constituency, Kisumu County. The Claimant claimed to have garnered 1,161 votes against the 3<sup>rd</sup> Respondent who got 327 votes. However, as opposed to declaring the Claimant the winner, the Returning Officer one Mr. Vitalis Onditi instead declared the 3<sup>rd</sup> Respondent the victor of the said nomination.
2. Aggrieved by the Returning Officer's decision, the Claimant lodged his appeal with the 1<sup>st</sup> Respondent County Appeals Tribunal, which however, did not determine the dispute but proceeded and issued the Claimant with the final nomination certificate. As a result, the Claimant approached this Tribunal for the following reliefs:
  - (a) An order nullifying any nomination certificate issued to the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Respondent in respect of Central Nyakach Ward;

(b) An order to direct the 1<sup>st</sup> Respondent to forward the Claimant's name to the 2<sup>nd</sup> Respondent as the duly nomination candidate for the position of the Member of County Assembly, Central Nyakach Ward.

3. In reply, the 3<sup>rd</sup> Respondent claimed that she won the nomination having garnered 2,235 votes against the Claimant's 1,116 votes and was issued a provisional as well as the final nomination certificate as a consequence.

*Issues for Determination*

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

*Analysis*

5. 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, Central Nyakach Ward. Credibility of an election process is one crucial condition 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.
6. 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.

7. In this regard, *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.
8. Indeed, it is not in doubt that 1<sup>st</sup> Respondent conducted party primaries on 26<sup>th</sup> April 2017 with the goal to determine the nominee for the County Assembly Member, Central Nyakach Ward, Kisumu County. 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.
9. Upon the perusal of the evidence before us, we noted that both the Claimant and the 3<sup>rd</sup> Respondent were issued with the final nomination certificates. Although the 3<sup>rd</sup> Respondent averred that she was the only one issued with the provisional nomination certificate, she did not adduce evidence to that effect.
10. Additionally, both the Claimant and the 3<sup>rd</sup> Respondent produced different tally sheets purporting to show the votes garnered by each of them. However, what we are unable to discern is whichever of the two was authentic. The Claimant's tally sheet lacked the 1<sup>st</sup> Respondent's letterhead and did not bear the maker's signature. The 3<sup>rd</sup> Respondent's tally sheet, on the other hand, was handwritten. In this regard, the Tribunal finds it difficult vouching for veracity of either of the tally sheets. Put different, neither of the tally sheets looks authentic and verifiable.
11. What is more, in spite of the 1<sup>st</sup> Respondent's Special County Appeals Tribunal failing to make a determination of the Claimant's appeal, the 1<sup>st</sup> Respondent nevertheless went ahead and issued the Claimant with final nomination certificate.

This raises the question how was it possible for the 1<sup>st</sup> Respondent to again issue the 3<sup>rd</sup> Respondent with both provisional and final nomination certificates?

12. In a nutshell, we were unable to find any credible evidence to support the contention that the 1<sup>st</sup> Respondent's party primaries for the position of County Assembly Member, Central Nyakach Ward, Kisumu County were credible and fair. As such, it is impossible to verify the results alleged by both the Claimant and 3<sup>rd</sup> Respondent herein.

***Orders***

13. In the premises, this Tribunal allows the Claimant's case as follows:

- a) That the Claimant's case be and is hereby allowed.*
- 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 Member, Central Nyakach Ward, 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, Central Nyakach Ward, 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, Central Nyakach Ward, Kisumu County within 36 hours of this judgment forthwith.*
- e) No orders as to cost in order to foster party unity, growth and democracy.*  
*Orders accordingly.*

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2017**

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

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

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