



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI  
COMPLAINT NO 155 OF 2017

ASHA ABDI SOSSO.....COMPLAINANT  
VERSUS  
ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup> RESPONDENT  
JAIRUS OMA YA.....2<sup>ND</sup> RESPONDENT  
ODM ELECTIONS BOARD.....3<sup>RD</sup> RESPONDENT

JUDGMENT

**Introduction**

1. Following the 2013 general elections, the petitioner served as a nominated member of the County Assembly of Nairobi. She intends to seek a competitive seat as member for Lindi Ward, Nairobi County Assembly, Nairobi County, in the forthcoming 8<sup>th</sup> August, 2017 general elections. She therefore participated in the 1<sup>st</sup> Respondent’s nomination exercise held on 30<sup>th</sup> April, 2017. The outcome of that nomination exercise is that the 2<sup>nd</sup> Respondent was declared winner with 400 votes, while the petitioner came 3<sup>rd</sup> with 210 votes.

**Claimant’s Case**

2. The petitioner appealed to the County Appeals Tribunal claiming that the nomination exercise had been marred with irregularities and were not free or

fair. The County Appeals Tribunal confirmed that there were election malpractices, voting process was not free or fair and the declared results were not credible. The tribunal also revoked the 2<sup>nd</sup> Respondent's nomination and withdrew his provisional nomination certificate.

3. She therefore moves this Tribunal seeking to enforce the decision of the County Appeal's Tribunal.
4. A supplementary issue the petitioner raises is that the 1<sup>st</sup> Respondent did not cater for special groups of people such as expectant mothers, breast feeding mother, persons with disabilities, the illiterate and semi-illiterate, as well as the elderly. She avers that voters with special needs were all clamped together with the rest and agents were prohibited from assisting them.

#### **1<sup>st</sup> Respondent's Case**

5. The 1<sup>st</sup> Respondent did not file any papers in this complaint. There is, however, a return of service sworn on 10<sup>th</sup> May, 2017, by Peter Sena Mutunga detailing service of process on the 1<sup>st</sup> Respondent. We are therefore satisfied that the 1<sup>st</sup> Respondent was aware of these proceedings, but inadvertently or deliberately opted not to participate in the matter. We will proceed to determine the matter without the 1<sup>st</sup> Respondent's input.

#### **2<sup>nd</sup> Respondent's Case**

6. The 2<sup>nd</sup> Respondent confirms that he participated in the nominations held on 30<sup>th</sup> April, 2017. He avers in his affidavit sworn on 10<sup>th</sup> May, 2017 that the nominations were peaceful and without any major mishap that affected the voting process.

7. He avers that the decision to award the petitioner herein the nomination certificate was taken without giving him a chance to be heard. He asserts that this application was also filed without his knowledge, though he was subsequently served with the proceedings herein.
8. Secondly, he contends that this Tribunal cannot convert a decision of the 1<sup>st</sup> Respondent into a decree, since the Tribunal lacks appellate jurisdiction over the 1<sup>st</sup> Respondent.

### **Analysis**

9. The 1<sup>st</sup> Respondent averred that this Tribunal cannot convert a decision of the 1<sup>st</sup> Respondent into a decree because it lacks appellate jurisdiction over the 1<sup>st</sup> Respondent. To the contrary, in *Complaint No 48 of 2017 John Mruttu v Thomas Mwadeghu & 2 Others at para 16* we recently held as follows:

**15. Our determination is that we have both original and appellate jurisdiction over the decisions of the NAT and are not bound by any lack of jurisdiction on the part of the NAT due to non-compliance with Rule 19.2.5 of the party's Rules. In this regard, a finding that the NAT lacks jurisdiction may in fact mean that the party has no internal dispute resolution mechanism left for him to exhaust thus triggering the jurisdiction of this Tribunal.**

10. For emphasis, section 40(2) of the Political Parties Act, 2011 expressly forbids us from considering certain classes of political party disputes prior to attempts at

internal dispute resolution mechanisms. Our understanding of that section, is that we only have second instance jurisdiction over the categories of political party disputes listed in section 40(a)(b)(c) and (e). Attempts must first be made at resolving a dispute within the party before it accrues into a justiciable cause before us. We therefore reject the submission by the 2<sup>nd</sup> Respondent that we lack appellate jurisdiction over the decisions of the 1<sup>st</sup> Respondent. We hold that section 40 confers both original and appellate jurisdiction on the Tribunal in all matters relating to political party disputes, including party primaries.

11. The 1<sup>st</sup> Respondent asserts that the decision to award the petitioner herein the nomination certificate was taken without giving him a chance to be heard. He asserts that as a result of that decision his right not to be condemned unheard was violated. We hold that in so far as the 1<sup>st</sup> Respondent revoked the 2<sup>nd</sup> Respondent's provisional nomination certificate without hearing him, the same was a violation of his right to be heard and we so declare.
12. We are also satisfied that having cancelled the provisional nomination certificate nominations dated 1<sup>st</sup> May, 2017 the nomination certificate dated 7<sup>th</sup> May, 2017 stood cancelled too. We rely on the Court of Appeal decision in *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited [1998] eKLR* for the proposition that nothing turns on a nullity.
13. Having cancelled the initial primaries, the 1<sup>st</sup> Respondent took a fresh decision to award the nomination certificate to the petitioner herein. The 1<sup>st</sup> Respondent's failure to participate in these proceedings has deprived us of reasons for the decision to award the nomination certificate to the petitioner. In the foregoing circumstances, we are unable to interfere with the 2<sup>nd</sup> Respondent's decision in this regard. We are not satisfied that the decision was unreasonable or unjustifiable in the circumstances of this case.

**Reliefs**

14. In *Complaint No 48 John Mruttu v Thomas Ludindi Mwadeghu & 2 others* we held that in every matter over which we have jurisdiction, this Tribunal can grant any order that is just and equitable in accordance with section 11(1) of the Fair Administrative Action Act, 2015. The proper discharge of this Tribunal's mandate requires it to grant effective remedies, which means the most appropriate remedy in the circumstances of the case. We have found that the initial nominations were terminated in a manner that violated the 2<sup>nd</sup> Respondent's right to be heard.

15. Accordingly, the justice of this case requires us to make the following orders:

- a. **An order be and is hereby issued directing the 1<sup>st</sup> Respondent to issue a nomination certificate to the petitioner herein within 12 hours of pronouncement of this judgment.**
- b. **The 1<sup>st</sup> Respondent shall bear the Claimant's costs of this complaint.**

**DATED AND DELIVERED at Nairobi this 12<sup>th</sup> day of May 2017**

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

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

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