



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 42 OF 2017

CAROLI OMONDI.....COMPLAINANT

-VERSUS -

HON. JOHN MBADI..... 1ST RESPONDENT

DUNCAN NYABILO.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Complaint together with the 1st Respondent participated in the Orange Democratic Movement (ODM) nomination process for Member of National Assembly Suba South Constituency held on the 17th April 2017. At the conclusion of the exercise, the 1st Respondent was declared the winner and issued with a provisional nomination certificate having garnered 12,365 votes against the Complainant 11, 547 votes.
2. This declaration aggrieved the Complainant who moved the ODM National Appeals Tribunal (NAT) challenging the decision of the Returning Officer to issue the provisional nomination certificate to the 1st Respondent. The NAT considered the issues raised and delivered its decision on 28th April 2017 wherein it held that the electoral process in Suba South Constituency could not be said to have met the

threshold of free and fair elections as envisaged in the Party Constitution and the Nomination Rules and hence it proceeded to cancelled the results and ordered that a fresh nomination exercise should be conducted.

3. Further aggrieved by the decision of the NAT in ordering a fresh nomination exercise, the Complainant moved this Tribunal by way of a complaint dated 1st May 2017 seeking the following orders:

- a) A declaration that the results announced for God Oloo Primary School, are a nullity for having exceeded the number of registered voters as per the most recent IEBC Register for 2013 (which was not used) which puts them at 569 Registered Voters and is contrary to Elections Act.
 - b) A declaration that the results announced for Mikuyu Primary School are a nullity for (the combined votes of three candidates) having exceeded the number of registered voters as per the most recent IEBC register which puts them at 252 registered voters and is contrary to Elections Act.
 - c) that the Honourable Tribunal Orders/ and or direct that any purported issuance of a certificate of a nomination on or/after the 29th of April 2017 to the 1st respondent to contest as a candidate representing the 3rd respondent for Suba South constituency is null and void and of no effect.
 - d) that the Honourable Tribunal Orders that the ODM issue a certificate of nomination for candidate of Member of National Assembly Suba South Constituency to the Claimant herewith forthwith
 - e) costs of this complaint be awarded to the Complainant as against the 2nd and 3rd Respondent.
4. Also filed with the complaint was a notice of motion application dated 1st May 2017 under Certificate of urgency seeking *inter alia* that; the 3rd Respondent be restrained from conducting a repeat nomination of Suba South Constituency pending hearing and determination of the Complaint dated 1st May 2017. Upon hearing Mr. Momanyi

holding brief for Mr. Omwaza, Counsel for the Complainant, the Tribunal, in the interest of justice certified the matter as urgent, and granted an interim order restraining the 3rd Respondent from conducting a repeat nomination of Suba South Constituency. The Tribunal further ordered that service be effected upon all the Respondents to facilitate *inter parties* hearing on the 3rd of May 2017.

5. On the 3rd May 2017 this complaint came up for hearing whereby the parties agreed to adjourn the matter for hearing on the 4th May 2017 in order to enable all parties to file and serve their responses. The interim orders granted on the 1st May 2017 were extended.
6. We note that on the 4th May 2017 this matter came up for hearing and the Complainant proceeded to file an amended memorandum of complaint. Further by consent of the parties the 2nd Respondent was expunged from the proceedings of this claim with no orders as to costs, the parties having agreed that he was erroneously included in the proceedings.

PARTIES SUBMISSIONS

The Complainant's case

7. The complainant relies upon the complaint, a further affidavit dated 2nd May 2017 together with the submissions dated 2nd May 2017.
8. The Complainant submits that this complaint arises from the decision of the National Appeals Tribunal rendered on the 28th April 2017 which ordered for a fresh nomination. He alleges that the NAT in dealing with the issue of ballot stuffing erred in law by relying upon the claims advanced by the 1st Respondent to the extent that the Complainant had conducted ballot stuffing. The Complainant urge the Tribunal to adopt the definition of ballot stuffing as articulated by the Court of

Appeal in Uganda case of **Toolit Simon Akecha V Oulanyah Jacob & Electoral Commission**, Election Petition Appeal No. 19/11 which defined ballot stuffing as fraud whereby a person who is permitted only one vote submits multiple votes.

9. It is the Complainants submission that the Tribunal should give life to the interpretation given under Regulation 83 of the Elections (General) Regulations, 2012 and order a re-tally by disregarding the results of the seven (7) polling stations and thereafter declare him the *bonafide* winner for ODM candidate in Suba South Parliamentary seat. The Complainant relied upon his analysis to show and demonstrate that the valid vote casts exceeded the registered voters as per the IEBC list. To buttress this argument the Complainant urges the Tribunal to rely upon the case of **Joseph Amisi Omukanda V Independent Electoral and Boundaries & 2 Others** [2013] eKLR. Further the Complainant emphasized that by disregarding the count as directed by Regulation 83 of the Elections (General) Regulations, 2012 the Tribunal will be upholding the law and the will of the people of Suba South Constituency.
10. It is the Complainant further submission, that the Elections were conducted using the IEBC Register of 2013 and as a result the people who voted exceeded those in the register to a range of 105% to 147%. He urges the Tribunal to nullify the results of Oma Primary School, God Oloo Primary School, Koga Primary School, Mikuyu Primary School, Miriya Primary School, Kiembe Primary School, Nyakiya Primary School where incidences of over voting occurred. The Complainant argues that if this was done the 1st Respondent would have garnered 10,457 votes and the Complainant would have garnered 10,882 votes thus making him a winner.
11. The Complainant contends that for persons to be eligible to vote in the nomination process they ought to have been registered as party members and be registered as voters with the IEBC.

12. Also challenged was the 3rd Respondent's action of disregarding the order by the NAT nullifying the nomination process and proceeding to the Special Central Committee of the Party where the Hon. John Mbadi (the 1st Respondent) was present at the meeting to grant direct nomination to himself (the 1st Respondent).
13. It was the Complainant submission that the 3rd Respondent actions contravened the provision of Article 31 of the Constitution in that it failed to respect the right of all persons to participate in a political process. Further that this act contradicted the 1st Schedule of the Political Parties Act which provides for the Code of Conduct for Political Parties. The Complainant points out that the 1st Respondent had never disclosed his conflict of interest to the Special Central Committee.
14. The Complainant submitted that according to the ODM Election Rules, number 19.2.10, the decision of NAT is final. Therefore any party aggrieved by the Committee's decision ought to file an appeal to the Tribunal. He stated that the Party rules do not recognize another organ within the party that reviews the decision of the NAT.
15. The Complainant urges the Tribunal to uphold the provisions of Article 91 of the Constitution and grant the prayers sought.

1st Respondent submission

16. The 1st Respondent Case is as contained in his Replying Affidavit dated 3rd May 2017.
17. The 1st Respondent avers that there exists an elaborate and substantive process established by law for the conduct of the party primaries and dispute settlement. As a result of this, he submits that on the 29th April 2017, the ODM National Executive Council received, deliberated and adopted the decision of the ODM NAT requiring ODM party to proceeds to conduct a fresh nomination exercise.

18. Consequently ODM proceeded under the law to nominate him as the candidate for Suba South Constituency. To support this argument the 1st Respondent relied upon the minutes of the Special Meeting of the Central Committee held on 29th April 2017 at Park Place Hotel and a copy of the nomination certificate issued to him.
19. It is the 1st Respondent submission that the only issue that calls for determination in this Complaint is, how did the ODM get to nominate its candidate. He submits that, the Tribunal should focus more on the propriety of the decision of ODM to directly nominate the 1st Respondent as his candidate for Member of Parliament Suba South Constituency.
20. The 1st Respondent submits that the ODM complied with the decision of the NAT by carrying out nominations in accordance with the Party Rules and Constitution. He urges the Tribunal to take into account and appreciate the Party's Election and Nomination Rule 3.3 and 18 which allows for direct nomination. It was his further submission that the Party complied with the decision of the NAT, its Constitution and Rules.
21. The 1st Respondent submits that this application has been brought in bad faith aimed at frustrating and curtailing the Party from presenting a candidate for Member of Parliament for Suba South Constituency. He urged this Tribunal to dismiss this complaint as being frivolous and misconceived.

The 3rd Respondent Submission

22. The 3rd Respondent case is as contained in the in the Replying affidavit sworn by Odiwuor Ong'wen dated 3rd May 2017.
23. The 3rd Respondent submitted that both the Complainant and the 1st Respondent were important members of the Party.
24. Subsequently, he submits that the Tribunal has no jurisdiction to deal with this matter for the reason that, the subject matter of this Complaint was the ODM

primaries contest for Suba Constituency conducted on the 24th April 2017 and not the direct nomination of the 1st Respondent as a candidate for Suba South Constituency. He urges the Tribunal not to take any step in relation to this matter. Further the 3rd Respondent accused the Complainant for concealing and failing to disclose to this Tribunal the fore going facts in seeking to obtain the *ex parte* orders. He urged the Tribunal to find that the Complainant guilty of non- disclosure of material facts

25. The 3rd respondent contends that upon taking into account the internal dispute mechanism resolution decision and that the deadline set by the IEBC for parties primaries was fast coming to an end, the Party pursuant to the Constitution, and Rules nominated the 1st Respondent as its candidate for Suba South Constituency.

26. It was the 3rd respondent submission that under Article 38 of the Constitution a Party is entitled to fill candidates at any elections and which right ought to be preserved at all times. As a consequence the 3rd respondent submit that it acted within its powers by relying upon the Political Parties Act that the term party primaries to mean either “election” or “selection”. The 3rd respondent urged the Tribunal to dismiss this claim with costs.

Analysis

27. In their submissions, the parties addressed the issues for determination as set out below;

- a) Whether the Tribunal has jurisdiction to hear and determine this Complaint.
- b) Whether the decision of the NAT was implemented by the 3rd Respondent.

Whether the Tribunal has jurisdiction to hear and determine this Complaint.

28. It is the Respondents submission that this Tribunal has no jurisdiction to hear this complaint for the reason that the process leading to the nomination of the 1st

Respondent as the ODM Member of Parliament for Suba South was a totally new process that ought to be subjected to the internal Dispute resolution mechanism of the party. In response the Complainant stated that this Tribunal has jurisdiction to hear and determine this complaint for the reason that the ODM Nomination rules provide that the NAT decision is final thus leaving recourse to the Tribunal. Further the Complainant submitted that this whole complaint is as a result of the nomination process held on the 24th August 2017 and the dispute has since been determined by the NAT an internal dispute resolution mechanism.

29. It is the Respondents submission that this Tribunal has no jurisdiction to hear and determine this complaint for the reason that the Complainant has not exhausted the Party's internal dispute resolution mechanism. They allege that this is a subsequent nomination following the decision of the NAT ordering that a fresh nomination be conducted.
30. In responding to this argument the Complainant stated that this Tribunal has jurisdiction to hear appeals from the Party's Internal Dispute Mechanism. Further that the Constitution of the Party and its Rules do not provide for an appeal mechanism making this Tribunal the only option available to the Complainant.
31. Jurisdictional issues go to the core of the complaint as it is that which legitimizes the arbiter to adjudicate on the complaint. Bearing this in mind it is important for this Tribunal to proceed and determine this issue for if we are to find that we do not have jurisdiction to hear and determine this matter, we will have no option but to down our tools.
32. In the classic decision in the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, (Nyarangi, JA at p.14): had this to say;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

33. This position was further fortified by the Supreme Court in *In the Matter of the Interim Independent Electoral Commission*, Supreme Court Constitutional Application Number 2 of 2011 and other subsequent cases of the Supreme Court.

34. The jurisdiction of this Tribunal is stipulated under Section 40 of the Political parties Act which provides that;

40. (1) The Tribunal shall determine —

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and a political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners; and

(f) appeals from decisions of the Registrar under this Act.

(fA) a disputes arising from parties primaries

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) (f a) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

35. Guided by the provisions of Section 40(2) of the Political Parties Act, it is prudent for parties to first have their disputes resolved within the Party's IDRDM in order to be

able to invoke the jurisdiction of the Tribunal. This Tribunal should not act as a first call of point in resolving intra parties' disputes.

36. Having said this we proceed to analyse whether indeed this dispute is one that has been adjudicated by the Internal Dispute Resolution Mechanism (IDRM) of the party. This calls us to reexamine the steps leading to this complaint being filed before us. As stated earlier, the Complainant was aggrieved by the declared results of the Suba South nomination process held on the 24th of April 2017 and filed a dispute before the NAT. Upon both parties presenting their case NAT proceeded to issue a verdict dated 28th April 2017.

37. Following this decision, the 3rd Respondent proceeded to implement the decision by undertaking procedures, leading to the 1st Respondent being granted direct nomination whereas the Complainant proceeded to file this complaint challenging the decision of the NAT.

38. Thus the 3rd respondent argument that this is a new nomination process which ought to be subjected to IDRM of the party cannot stand. Further by putting this argument into perspective we find that, this argument is aimed at trying to circumvent this litigation process. The raising of this argument at this point is a red herring introduced by the Respondents in this matter to circumvent and divert the Tribunal from the real issue at hand. As it is they seem to be ousting the jurisdiction of this Tribunal in the pretext that IDRM has not been undertaken. As a Tribunal we need not lose sight of the fact that this complaint emanates from the nomination of 24th April 2017 and not the process leading to the direct nomination of the 1st Respondent. We also take note that according to Rule 19 -2-10, of the Nomination rules, the decisions of the National Appeals Tribunal is final. Where then would an aggrieved Complainant go to?

39. Having said this, we find that this process of awarding the 1st respondent with a nomination certificate was as a result of the decision of the NAT which is an internal

dispute resolution mechanism. Consequently we find that this Tribunal has Jurisdiction to hear and determine this complaint having complied with the requirement of section 40(2) of the Political Parties Act.

Whether the decision of the NAT was implemented by the 3rd Respondent

40. It is the Respondents submission that the only issue for determination is whether the ODM Party implemented the decision of the NAT. They argue that by granting the 1st Respondent with the direct nomination they complied with the NAT order requiring them to conduct fresh nominations.
41. It is their argument that the Party Constitution recognizes direct nomination as one of the ways of nominating a candidate. Therefore, they acted in accordance with their Constitution and the rules. This argument was refuted by the Complainant who urged the Tribunal to disregard it and find that the 3rd Respondent did not implement the decision of the NAT in accordance with the stipulated law.
42. It is the Complainant further submission, that the Elections were conducted using the IEBC Register of 2013 and as a result the people who voted exceeded those in the register to a range of 105% to 147%. He urges the Tribunal to nullify the results of Oma Primary School, God Oloo Primary School, Koga Primary School, Mikuyu Primary School, Miriya Primary School, Kiembe Primary School, Nyakiya Primary School where incidences of over voting occurred.
43. The decision of the NAT was in the following terms;
- a) that the provision certificate issued to Hon. John Mbadi as the ODM, nominee for Suba Constituency be and is hereby revoked**
 - b) that the National Election Board of the ODM party proceeds to conduct a fresh nomination exercise, for a party nominee in respect of Suba Constituency Parliamentary seat.**

44. In essence this order directed the National Election Board (NEB) to proceed and conduct '*a fresh nomination exercise*'. Who then is NEB? Article 7.11 of the ODM Constitution establishes a NEB whose mandate includes, *inter alia* to plan, organize, direct, conduct, supervise and or coordinate all parties election and nomination of candidates. This mandate has also been provided for in the Election and Nomination Rules as amended by the National Governing Council held on 31st October, 2016 at the Bomas of Kenya. Rule 3.1 provides for the core function of the NEB as to plan, organize, direct, conduct, supervise and or coordinate all parties election and nomination of candidates. Rule 3.2 provides for its duties. Of interest to this case is Rule 3.3 which provides that the NEB may with written approval of the National Executive Committee (NEC) grant a candidate an automatic nomination.

45. Having read this we find that the NEB has the powers to grant a candidate an automatic nomination upon a written approval by the NEC. In this instant case, the Respondent have alleged that a special meeting of the Central Committee was held and recommended that Hon. John Mbadi be directly nominated as its candidate for Suba South National Assembly seat. As part of the annexures the 3rd Respondent have annexed a copy of the said minutes which, in part, read at page 8:

The committee adopted the position taken with regard to the recommendations on Taita Taveta gubernatorial elections *mutatis mutandi* and unanimously resolve to nominate Hon. John Mbadi Ng'ongo as the candidate for Suba South National Assembly seat

46. The recommendations on Taita Taveta referred to are also provided for in the same page and are

- a) that the provision certificate be withdrawn in accordance with the recommendation of NAT**

- b) that the central committee adopts its decision of 28th April 2017, that given that IEBC had put 30th April 2017 as the last day of conducting nominations, it would be impossible to comply with. In any event, it was noted that nominations had actually happened in the said ward and MCA results declared.
- c) In view of the foregoing, the Committee invoked its powers under Article 7.5 A. 2 (viii) and Rule 3.3 of the ODM Elections and Nomination Rules. It unanimously resolved that Hon. Thomas Mwadeghu is nominated as the Party candidate for governor of Taita Taveta County

47. In essence the Central Committee relied upon Article 7.5A. 2(viii) of the Constitution and Rule 3.3 of the Nomination Rules to nominate Hon. John Mbadi the candidate for Suba South Constituency. At this juncture we wish to point out that we have perused the ODM Constitution as amended and adopted by the National Governing Council held on 5th December 2014 at Bomas of Kenya provided as an annexure to the replying affidavit of the 3rd Respondent. At page 48 and it does not provide for provision 7.5A.2(viii). However, it was urged at the hearing and conceded by the advocate for the claimant, that their Constitution was amended in 2016 and this provision included to provide for direct nomination.

48. We therefore find that in as much as the Party may have powers to offer direct nomination, the conditions set out under Rule 3.3 of the Nomination Rules have to be met. This condition is that the NEC must provide a written approval to the National Elections Board to grant a candidate an automatic nomination. In this instant case, the respondents have not shown any written approval from the NEC directing that the 1st Respondent be granted a direct nomination.

49. The Complainant also argued that the Central Committee of the ODM party acted *ultra vires* by granting the 1st Respondent an automatic nomination. As stated the ODM constitution mandates only the NEB to deal with the planning, organizing, directing, conducting, supervising and/or coordinating the election and nomination of candidates. This mandate has not been delegated or shared amongst the various bodies established by the Constitution. We therefore find that the central committee acted beyond its mandate by resolving to nominate the 1st Respondent as candidate for Suba South Constituency.

50. The NAT directed that the National Election Board of the ODM party proceeds to conduct a fresh nomination exercise, for a party nominee in respect of Suba South Constituency National Assembly seat. Rule 18 of the nomination rules titled '*Nomination Procedures for Member of County Assembly, Governor, Member of the Senate, Member of the National Assembly and County Woman Representative*'. The procedures can be summarized as:

- a) *Party primaries shall be by way of Universal Suffrage of all registered party members at the polling station or by sub-branch electoral process*
- b) *The party nomination shall be held at least six months before the date of election in respect of Zone A; 3 months in respect of Zone B;*
- c) *With the approval of NEC the NEB may directly nominate candidates using any other criteria in regard to Zone C as set out in the second schedule;*
- d) *NEC by a resolution determine the mode of elections in any electoral area provided that NEB shall publish such resolution not later than 21 days to the date of the party primaries;*
- e) *Voting shall be by secret ballot; and*
- f) *The NEB shall designate such number of polling station*

51. We have perused the Second Schedule to the Nomination Rules and we are satisfied that Homa Bay County is not one of the regions in respect of the 3rd Respondent may directly nominate candidates.
52. A reading of these procedures show that the rules of procedure are couched in mandatory terms and therefore the 3rd Respondent ought to have complied. Therefore, we find that according to the party constitution, nominations shall be conducted by way of universal suffrage unless otherwise directed by NEC.
53. We are also mindful that Section 5 of the Political Parties Act more specifically sub section c, g, and h which provides that;

5. Every political party shall—

(c) respect, uphold and defend their respective political party constitutions, political party election rules, political party nomination rules and any other political party rules and regulations developed and agreed upon in accordance with this code of conduct;

(g) respect, uphold and promote democratic values and principles, performing inclusive participation of party members and accountable representation in governance for the development of the country;

(h) respect, uphold and promote good governance, integrity, respect, tolerance, transparency and accountability;

54. In this instant complaint the Respondents have stated that following the decision of the NAT of the 3rd Respondent, in implementing the decision, proceeded to conduct a sitting of the Central Committee, which resolved to award a direct nomination to the 1st Respondent. Whereas the Central Committee is provided for within the structure of the party, it does not have the mandate to issue a direct nomination to an aspirant. That is the preserve of NEB, following the written approval of NEC.

There is no evidence that NEC directed the Central Committee to exercise its mandate in issuing a direct nomination to the 1st Respondent. The Central Committee therefore had no jurisdiction to issue a direct nomination to the 1st Respondent.

55. Before making our final orders we note that in the judgment of the NAT the assertion of the Complainant was that in 7 polling stations namely Oma Primary School, God Oloo Primary School, Koga Primary School, Mikuyu Primary School, Miriya Primary School, Kiembe Primary School, Nyakiya Primary School and urged the Tribunal to deduct the results in those polling stations from the tally. Clearly, the complainant was aggrieved not by the entire exercise but by the seven polling stations. The Tribunal also noted Mr. Mbadi's concession that the process was not free and fair. It then proceeded to cancel the results and ordered fresh nomination in the entire Constituency.

56. Upon evaluation of the complaint before us and the submission of parties it is this Tribunal's finding that only the results of the seven contested polling stations ought to have been canceled. Where an anomaly can be isolated and confined to a particular polling station, we do not think that the cure is to have fresh nominations in the entire Constituency, only those specific polling stations should be isolated and have fresh nomination. In this regard see Complaint No 45 of 2017 *William Chepkut V Jubilee Party and Another* where this Tribunal only ordered fresh nomination in one identified polling station Munyaka Primary School.

57. Moreover, the party had conducted a nomination process where the members of the 3rd Respondent exercised their right to nominate a candidate for member of the National Assembly for Suba South. This created a legitimate expectation that when the results were annulled, they would be allowed to express their will through a

repeat of the nomination exercise. The decision by the 3rd Respondent to issue a direct nomination to the 1st Respondent denied them this opportunity.

58. Guided by the foregoing we make the following orders:

- a) The decision of the Central Committee issued on 29 April 2017 to award a certificate of nomination to the 1st Respondent to contest as candidate representing the 3rd Respondent for the Suba South Constituency is declared null and void.*
- b) The 3rd Respondent is hereby ordered to conduct fresh nominations for Suba South Constituency Member of the National Assembly in the following polling stations Oma Primary School, God Oloo Primary School, Koga Primary School, Mikuyu Primary School, Miriya Primary School, Kiembe Primary School and Nyakiya Primary School within 72 hours of this Order.*
- c) That each party bears its own costs.*

Orders accordingly.

DATED and DELIVERED at Nairobi this 5th day of May 2017.

1. Kyalo Mbobu

Chairman

2. James Atema

Member

3. Hassan Abdi

Member