



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI
COMPLAINT NO. 24 OF 2017

BETWEEN

DENIS WAFULA OKINDA.....CLAIMANT/APPLICANT

AND

LINUS OUMA ASIBA.....1ST DEFENDANT

THE RETURNING OFFICER

MATAYOS SOUTH WARD.....2ND DEFENDANT

ORANGE DEMOCRATIC MOVEMENT.....3RD DEFENDANT

CHAIRMAN, ORANGE DEMOCRATIC MOVEMENT.....4TH DEFENDANT

SECRETARY GENERAL,

ORANGE DEMOCRATIC MOVEMENT.....5TH DEFENDANT

CHAIRPERSON, NATIONAL ELECTIONS

BOARD ODM.....6TH DEFENDANT

JUDGMENT

A. Complaint.

[1] This is a complaint against the judgment of the Busia County Appeal’s Tribunal in Petition No. 4 of 2017. The claimant moves this tribunal by his Plaint dated 20th April 2017. Herein, he states that he was an aspirant in the 3rd defendant’s party nominations for position of Member of County Assembly

Matayos South Ward carried out on 13th April 2017. He states that he was declared winner after garnering 1096 votes. As such, he was issued with a provisional nomination certificate as *bona fide* nominated candidate of Matayos South Ward.

[2] The claimant is represented by Mr. Ashioya. He asserts that the 1st defendant contested the nomination in *ex parte* proceedings in the party's Busia County Appeal's Tribunal via Petition No. 4 of 2017. (Hereafter the party's Internal Dispute Resolution Mechanism (IDRM)). On 17th April 2017, the party's IDRM nullified the nomination and revoked the provisional certificate that had been issued to the claimant. It also barred him from further party activities on the grounds of causing violence. It also directed the returning officer to issue a certificate of nomination to the 1st defendant.

[3] Aggrieved, the claimant now seeks redress from this Tribunal vide way of the claim herein. It is pertinent to note at this juncture, that when the matter came up for hearing before this Tribunal on 25th April 2017, a consent was entered into by the parties to set aside the decision by the party's IDRM dated 17th April 2017. However, on 26th April, through an urgent Notice of Motion application, the 1st defendant submitted that the consent was entered into without his participation. This Tribunal satisfied of the same, vacated the consent order and directed for the matter to be heard *inter partes*. During the hearing the applicant notified the Court that the 2nd, 4th, 5th and 6th defendants had withdrawn their cases.

[4] The claimant alleges that he was never served with a hearing notice of the party's IDRM hearing and that the entire process, both before the party IDRM and before this Tribunal no proof of the same has presented. He claims that he

only got to know of the hearing through social media specifically ‘facebook’ and ‘whatsapp’. He contends that the lack of service and his consequent non-attendance to the party’s IDRM hearing means that he was not accorded a fair hearing and is contrary to Article 159 of the Constitution and sections 3 and 4 of the Fair Administrative Action Act.

[5] The claimant prays for this Tribunal to stay the execution of decision of party’s IDRM dated 17th April 2017, to issue a permanent injunction to the defendants or any of their agents from issuing a nomination certificate for Matayos South Ward to the 1st defendant pending the hearing and determination of this suit, to recall and revoke the nomination certificate from the 1st defendant in the event it has been issued, alternatively, in the event that it has been issued, to revoke it and the 2nd- 6th defendants be restrained from forwarding the 1st defendant’s name to IEBC as the party nominee Member of County Assembly Busia County Matayos South Ward elections.

B. Response

[6] The 1st defendant through his counsel Mr. Khaseke, filed a replying affidavit dated 28th April 2017. He asserts that he was a candidate in the Orange Democratic Movement Party primaries for member of the County Assembly for Matayos South Ward that was conducted on 13th April 2017. The crux of his response is that the nomination exercise was marred with violence occasioned by the plaintiff as well as massive irregularities and violations of the party’s code of conduct and nomination rules for Member of County Assembly Matayos South Ward. Dissatisfied with this exercise, he filed a petition on 15th April 2017 to the party’s IDRM and attached evidence of the flawed nomination exercise.

[7] He submits that he was requested to furnish the Party's IDRMM with the complainant's phone number, which he did. He also submits that the party's IDRMM established that the complainant was absent despite having been duly informed of the hearing date which was 16th April 2017. The 1st defendant also contends that the claimant has neither protested against the judgment of the Party's IDRMM nor sought to set it aside. He contends that the allegations made are an afterthought, in bad faith, insincere and an abuse of this Tribunal. He urges this Tribunal to dismiss the complaint and uphold the Party's IDRMM's judgment.

C. Issue for determination

[8] From the pleadings, written and oral submissions, we have isolated the following issue for determination: *Whether the claimant was given an opportunity to be heard.*

D. Analysis

[9] The claimant contends that as he was not served, he was not given an opportunity to be heard. Consequently, it falls upon us to determine whether or not he was denied a fair hearing by the party's IDRMM. Our focal point in this will be the judgment of the party's IDRMM. We need not go further than paragraph one of the said judgment which we now reproduce for ease of reference and clarity:

"The Petition (sic) Mr. Linus Ouma Asiba filed a Petition to this Tribunal on 15th April 2017. The respondent was duly informed by the secretariat on the same day. He came in person and accompanied by very many supporters. He indicated that he will not file any response. He also declined to attend the hearing."

[10] Flowing from the foregoing, it is evident that the respondent therein (now claimant) was not only notified of the hearing but he also came in person and signified that he would not be filing any response. He also snubbed the hearing. Curiously though, at the hearing before us, Counsel vehemently denied that the claimant went to the hearing. However, intriguingly enough, Counsel for the claimant did not challenge this aspect of the judgment in his pleadings.

[11] Indeed, the very Act he referred us to; Fair Administrative Act at section 4 (3) provides that:

3. *where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-*

(a) *Prior and adequate notice of the nature and reasons for the proposed administrative action;*

(b) *an opportunity to be heard and to make representations in that regard;*

[12] We are convinced that the Party's IDRMs complied with section 4 of the Fair Administrative Act. The claimant had notice of the hearing and chose not to attend the party's IDRMs hearing. Consequently, we are unconvinced that the claimant was not given an opportunity to be heard. He can therefore, not in good faith urge us to find that he was not accorded a fair hearing.

E. Reliefs

[13] The upshot of this decision is that the judgment of Orange Democratic Party's Busia County Appeal's Tribunal in Petition No. 4 of 2017 dated 17th April 2017 is upheld. For the avoidance of doubt, the Complaint dated 20th April 2017 is dismissed with no orders as to costs.

DATED AT NAIROBI THIS 28TH DAY OF APRIL 2017.

- 1. M. O. Lwanga Member**
- 2. Paul Ngotho Member**
- 3. Dr. Adelaide Mbithi Member**
- 4. Desma Nungo..... Member**