



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 60 OF 2017

HON. NICHOLAS ODONG’O ORICHO..... COMPLAINANT

-VERSUS -

ORANGE DEMOCRATIC MOVEMENT

PARTY OF KENYA1ST RESPONDENT

ODM NATIONAL ELECTION BOARD.....2ND RESPONDENT

HON SHAKEEL SHABBIR AHMED 3RD RESPONDENT

HON. GOR SUNGUH 4TH RESPONDENT

-AS CONSOLIDATED WITH-

COMPLAINT NO. 78 OF 2017

HON SHAKEEL SHABBIR AHMEDCOMPLAINANT

-VERSUS -

ORANGE DEMOCRATIC MOVEMENT

PARTY OF KENYA 1ST RESPONDENT

HON. NICHOLAS ODONG’O ORICHO..... 2ND RESPONDENT

JUDGMENT

Summary of the Case

1. These two Complaints were consolidated by an order issued on 8TH May 2017, with *Complaint No. 60 of 2017*, designated as the lead file. Further, on 9th May 2017, by consent of the parties, oral hearing was dispensed with and it was

agreed that the matter be determined based on affidavits of the parties. In this Judgment, for clarity we refer to the parties as referenced in *Complaint 60 of 2017*.

2. The subject matter herein relates to the ODM nomination exercise for Kisumu East Constituency Member of Parliament nominations primaries held on 25th April, 2015. At the conclusion of the exercise, the Complainant was declared the winner and awarded a nomination certificate. This aggrieved, the 3rd and 4th Respondent who filed an appeal before the ODM National Appeal Dispute Tribunal (NAT).
3. NAT rendered its decision on 2nd May, 2017 allowing the appeal with the consequence that the nomination certificate held by Complainant, Mr. Nicholas Oricho, was withdrawn. It ordered that the Party proceeds and carry out a fresh, the process of determining the party nomination for Kisumu East Constituency parliamentary elections in a manner compatible with the party constitution and Rules.

Submissions

4. The Complainant’s case is he was never aware of IDR process, that is the appeal filed by the 3rd and 4th Respondents as he was never called. That he only became aware of the decision cancelling his certificate through the media that Kisumu East Constituency results have been nullified. He submits that he wrote a letter dated 3rd May 2017 to Board complaining he was never summoned. He prays that the Tribunal declares him as the duly nominated candidate having been so declared by the Returning Officer and issued with a

**Hon. Nicholas Odong’o Oricho & Another v Orange Democratic Movement
Party of Kenya & 3 Others [2017] eKLR**

certificate on 29th April, 2017. In the alternative, he prays that this Tribunal orders for fresh IDRMs proceedings.

5. The 3rd Respondent filed *Complaint No. 78 of 2017*. He argues that he emerged the winner with 17, 233 votes but the Returning Officer, Thomas Riaga had disappeared hence, to date those results have not been officially declared. He submitted that the Complainant was declared a winner at a location which was not the designated Constituency tallying centre. On 27th April, 2017 he filed an appeal with Kisumu County ODM Election Appeals Board, which allowed it with and ordered that the party carry out a fresh, the process of determining the party nomination for Kisumu East Constituency parliamentary elections in a manner compatible with the party constitution and Rules.
6. He seeks: an order compelling the 1st Respondent to carry out fresh party nominations as so ordered by NAT; and an order to the 1st Respondent to issue the provisional certificate to the winner, who is the 3rd Respondent. As regards the IDRMs process, which Mr. Nicholas contended he was not informed of, it is submitted that the responsibility to inform parties of the appeal lies squarely on the 1st and 2nd Respondent.
7. The 1st, 2nd and 4th Respondent did not file and response or affidavits in this two matters.

Issue for Determination

8. We have defined the following issues for determination:

**Hon. Nicholas Odong’o Oricho & Another v Orange Democratic Movement
Party of Kenya & 3 Others [2017] eKLR**

- (i) *Whether the Complainant’s (Nicholas Odongo Oricho) right to fair hearing curtailed before the NAT.*
- (ii) *Whether the nomination certificate issued to Nicholas Odongo Oricha should be upheld.*
- (iii) *The appropriate reliefs.*

Determination

9. The Complainant avers that he did not take part in the proceedings before the NAT, hence the process and decision contravened his right to fair hearing. The 3rd Respondent referred to Rule 3.2 and shifted the burden of effecting service to the 1st and 2nd Respondent. Rule 3.2 provides for the duties of the NEB *inter alia*: (a) *To ensure a free and fair electoral process; (f) Taking all necessary measures to ensure party elections and nominations are transparent, peaceful, free and fair.* We do not agree that this rule bestows upon NEB the duty to effect service. While this rule relates to the powers of the NEB, the appeals was filed before the National Appeal Tribunal which is another organ of the Party.
10. Due process requires that the Complainant is informed of a dispute filed against him. It is his right. The duty to effect service is on the party that files a matter before a tribunal. We have perused the NAT decision and we note that the Complainant was named as a respondent. While the decision does not address the issue of service, we note that it makes reference to submissions of parties thus: **“having considered the evidence before us and the submissions by the parties, we are satisfied that the declaration of results in respect to this election was not done in a manner that was consistent with the party nominations**

election Rules.” a reference to submissions of parties in our consideration may be interpreted as both appellants and the respondent. Without further evidence on this issue, we are unable to conclusively determine lack of service.

11. As to whether the nomination certificate issued to Nicholas Odongo Oricho should be upheld, we note that the NAT withdrew it upon making a finding that: *“the declaration of results in respect to this election was not done in a manner that was consistent with the party nominations election Rules.”* No sufficient evidence has been tendered before this Tribunal to rebut this finding.
12. We also take note of the various prayers by the parties. The Complainant urges this Tribunal to declare him the duly nominated ODM Kisumu East Constituency Member for Parliament nominee or in the alternative, that the ODM NAT conducts a fresh hearing with all the parties involved. As the NAT decision has been affirmed by the Tribunal, these orders cannot issue. On his part, the 3rd Respondent urges the Tribunal to order that he be issued with the nomination certificate having won the nominations or in the alternative; he seeks an order that fresh elections be conducted. He also concedes that the nomination process was marred by irregularities. As he was never declared by the Returning Officer as the winner and has not sufficiently adduced evidence to confirm his victory, we are unable to make that declararion.
13. Upon evaluation of the evidence and submissions of the various parties we are inclined to make the following orders:

(i) *The Complaint No. 60 of 2017 dated 4th April, 2017 is dismissed.*

(ii) *The Complaint No. 78 dated 5th May, 2017 is allowed in the following specific terms:*

(a) *The decision of the 1st Respondent’s National Appeals Tribunal of 2nd May, 2017 is affirmed.*

(b) *The withdrawal of the provisional nomination certificate issued to Nicholas Odongo Oricho as the duly nominated ODM Kisumu East Constituency nominee Member of Parliament Nominee is upheld.*

(c) *The 1st Respondent’s National Election Board is directed to determine the Party nominee for Member of National Assembly for Kisumu East Constituency in a manner consistent with its constitution, Election and Nomination Rules.*

(d) *In the interests of Party unity, each party shall bear its own costs.*

14. Orders accordingly.

DATED and DELIVERED AT NAIROBI this 10TH DAY OF MAY 2017

1. **Kyalo Mbobu**
Chairman

2. **James Atema**
Member

3. **Hassan Abdi**
Member

**Hon. Nicholas Odong’o Oricho & Another v Orange Democratic Movement
Party of Kenya & 3 Others [2017] eKLR**
