



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI  
COMPLAINT NO. 69 OF 2017

JOSEPH MBOYA NYAMUTHE ..... COMPLAINANT

VERSUS

THE ORANGE DEMOCRATIC MOVEMENT ..... 1<sup>ST</sup> RESPONDENT

DR. LILIAN GOGO ..... 2<sup>ND</sup> RESPONDENT

AND

HON. GEORGE ONER OGALO ..... 1<sup>ST</sup> INTERESTED PARTY

WILLIAM OMBURU ODAJE ..... 2<sup>ND</sup> INTERESTED PARTY

JOHN WASHINGTON AGUTU ..... 3<sup>RD</sup> INTERESTED PARTY

**JUDGMENT**

**Introduction**

1. This matter first came before this Tribunal via a notice of motion application filed under a certificate of urgency on 4<sup>th</sup> May, 2017 seeking interim reliefs. The Statement of Claim herein was filed later, on 6<sup>th</sup> May 2017, upon grant of leave by this Tribunal, the said Statement of Claim having been inadvertently omitted when the notice of motion application was filed.

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2. On 6<sup>th</sup> May, 2017, the 2<sup>nd</sup> Respondent raised a preliminary objection on jurisdiction: that under section 40 of the Political Parties Act, this Tribunal lacked the jurisdiction to hear and determine this matter as the Complainant had not attempted the Party's internal dispute resolution mechanisms (IDRM). This Tribunal, differently constituted (*M.O. Lwanga, Presiding, Desma Nungo, Paul Ngotho & Dr. Adelaide Mbithi*) upheld the preliminary objection holding that the claim was premature.
3. Aggrieved by that decision, the Complainant moved to the High Court on appeal and filed *Election Petition Appeal, No. 5 of 2017, Joseph Mboya Nyamuthe vs The Orange Democratic Movement & others*. The High Court heard the appeal and in a judgment delivered on 10<sup>th</sup> May, 2017, allowed it holding inter alia: *"the appeal is hereby allowed with a declaration that the political parties disputes tribunal has jurisdiction to hear a dispute arising out of party primaries under section 40 (1) (fa) which the honourable members of the tribunal did not address themselves to, hence misapprehended and misinterpreted section 40 of the political parties Act."*
4. The Honourable Court then ordered thus: *"the political parties disputes tribunal's decision/ruling upholding the 2<sup>nd</sup> respondent's preliminary objection dated 6<sup>th</sup> May, 2017 be and is hereby set aside and the file be remitted back to the tribunal to immediately reconstitute a fresh panel to hear and determine the appellant's/claimant's claim filed before the tribunal on 4<sup>th</sup> May, 2017."*
5. It is in accordance with this direction that we now proceed to hear this matter.

*Summary of the case*

6. The Complainant together with the 2<sup>nd</sup> Respondent and all the three Interested Parties participated in the 1<sup>st</sup> Respondent's nomination primaries for the position of Member of Parliament, Rangwe Constituency. Upon completion of the exercise albeit claims of election malpractices, the 2<sup>nd</sup> Respondent was declared winner and

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issued with a nomination certificate by the 1<sup>st</sup> Respondent as the Party's nominee for the position of Member of Parliament, Rangwe Constituency.

7. Aggrieved by that declaration, the 3 Interested Parties lodged an appeal with the Party's National Dispute Resolution organ (NAT) on 24<sup>th</sup> April, 2017 seeking a nullification of the results and a repeat of the whole exercise. The Claimant herein moved straight to this Tribunal seeking the following orders:

- (i) *That the nomination of the 2<sup>nd</sup> Respondent, Dr. Lillian Gogo as the 1<sup>st</sup> Respondent's nominee for the position of the Member of the National Assembly for Rangwe Constituency be and is hereby nullified.*
- (ii) *That this Honorable Tribunal be pleased to order for and do tally the results of the nomination of the Member of Parliament for Rangwe Constituency from Kochia, Kagan, East and West Gem Wards and the results thereof be declared.*
- (iii) *THAT in the alternative, this Honourable Tribunal be pleased to order the 1<sup>st</sup> Respondent to repeat the nomination exercise for its nominee for the position of the Member of the National Assembly for Rangwe Constituency.*

**Submissions**

8. The Complainant avers that on 23<sup>rd</sup> April, 2017, the Constituency Returning Officer, Mr. Panaito Illa, his Deputy, Dancan Ochieng and the chairman of the Constituency Election Panel, Mr. Benard Ouko convened a meeting with all aspirants. All aspirants were present except the 2<sup>nd</sup> Respondent. During the meeting, it was resolved that due to intelligence reports that uncovered a scheme to disrupt tallying of results at Rangwe Tallying Centre; a decision was made to move the tallying centre to Lwaho Secondary School. The aspirants were also given the official list of

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the party officials who were to conduct the process and shown a parallel list of officials allegedly prepared by 2<sup>nd</sup> Respondent for East and West Gem.

9. The Complainant was therefore shocked when the Returning Officer reported at Ragwe Tallying centre on the 24<sup>th</sup> April, 2017. He then outlined a range of alleged electoral malpractices such as: materials arrived late at Randung Primary; voting in some places being presided over by non-official officers (people who were not on the list aspirants had been given on 23<sup>rd</sup> April, 2017); cases of violence in Orero and Omoche; and in Sinogo the Complainant's name was missing and the Returning Officer only included his name by hand writing late in the afternoon when voting was long underway.
10. He averred that he tried to access Rangwe tallying centre in vain as Rangwe Town Centre was in complete turmoil having been taken over by armed goons. Even the Returning Officers for Kagan and Kochia wards were denied access to the Tallying Centre and were stranded with ballot boxes and results from 61 polling stations. That the Constituency Returning Officer's phone was off and no results were announced at Ragwe tallying centre. The deputy Returning Officer informed him that goons in the company of the 2<sup>nd</sup> Respondent rounded up the Returning Officer before he could announce results.
11. He submitted that while in Homa Bay on 26<sup>th</sup> April, 2017 he learnt on Ramogi FM News bulletin that the Returning Officer, Mr. Panaito Illa had allegedly announced the results declaring the 2<sup>nd</sup> Respondent the winner with a total of 20, 584 votes with the 1<sup>st</sup> Interested Party second with 2,185 votes. There were no results for other aspirants announced. As he did not know about the results, he could not appeal to the, NAT but the interested parties did lodge an appeal on 26<sup>th</sup> April, 2017. He submits that however, while that appeal was pending the 1<sup>st</sup> Respondent through the chairperson of its National Elections Tribunal, Ms. Judy Pareno, purportedly

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announced what she said was outcome of the nomination results declaring the 2<sup>nd</sup> Respondent winner with 20, 854 and the 1<sup>st</sup> Interested Party with 5,185. Other aspirants not mentioned.

12. The submits that he later met the Returning Officers for Kagan, Mr. David Anuro, and Mr. Benard Ouko for Kochia, at the 1<sup>st</sup> Respondent's office in Nairobi, when they came to submit their returns since they had completely failed to reach the Constituency Returning Officer. They had copies of the results which was an indication that those results were clearly not included in the final tally.
13. The main complaint of the Complainant is that contrary to provisions of the 1<sup>st</sup> Respondent's constitution and the rules governing election and nomination of candidates, no results for the nomination for the member of parliament for Rangwe Constituency were announced at the Tallying Centre, and that the purported results announced over the radio were not accurate and that the said results were not announced efficiently and promptly.
14. In his submissions dated 16<sup>th</sup> May 2017 and a further affidavit dated 15<sup>th</sup> May, 2017, he reiterates the factual information stated above. He gives the composition of Rangwe Constituency as being composed of 92 polling stations. It is submitted that the Constituency Returning Officer admitted announcing results when he had not received results from Kagan and Kochia wards. Hence only announced only from 41 polling stations in Gem east and Gem West over 20, 000 voters He refers to affidavit of the Returning Officer for Kagan Ward, Mr. David Anuro on 26<sup>th</sup> April, 2017 explaining how chaos made him not access Ragwe Town and that of Returning Officer for Kochia Ward Mr. Benard Ouko sworn on 26<sup>th</sup> April, 2017. That Mr. Tom Chariga had no authority to unilaterally change the tallying centers after they had been set and agreed on by a panel and communicated to candidates.

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15. The 1<sup>st</sup> Interested Party, George Oner Ogalo filed an affidavit dated 16<sup>th</sup> May, 2017. He entirely supports the Complaint and states that what is stated by the Complainant is what happened. Further he adds that the votes cast in East and West Gem wards far exceeded the registered voters. That he would have won if all votes were tallied. That no results were received by the Returning Officer and hence he could not tabulate and announce anything credible as he had no tallying sheets when he announced the results. He points out that the 1<sup>st</sup> respondent should be taken to have admitted all the applicant has said since it has not put in any replying affidavit to deny the allegations since were served and have a senior counsel advocate on record and the 2<sup>nd</sup> Respondent's affidavit is not sworn on behalf of the 1<sup>st</sup> Respondent.
16. The 2<sup>nd</sup> Respondent filed a replying affidavit dated 12<sup>th</sup> May 2017 and submissions in opposition to the application dated 15<sup>th</sup> May 2017. She submits that she emerged winner with a whopping 20,584 votes as announced by the Returning Officer, Mr. Panaito Illa and produced what she deems the constituency tallying sheet. That she was duly issued with a nomination certificate on 25<sup>th</sup> April, 2017. That results were announced at Nyajanja Tallying centre, the constituency tallying centre for Kochia ward in Rangwe Constituency but the designated one was Olare primary school and had been changed single handedly and illegally by chair of the county election committee.
17. She submitted that the ODM nomination and Election rules at rule 4 provides for county returning officer and constituency returning officers appointed by the NEB. That tallying and announcement of constituency results is an exclusively belongs to the constituency Returning Officer. That presiding officers from different polling station were transmitting results directly to Mr. Panaito through messages and phone calls to enable quick tallying. That tallying sheets only appeared at the party's

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NEB when a complaint was filed. That the intentional delay to submit results by Benard Ouko and David Odoyo to doctor results to benefit the incumbent MP.

18. Lastly she urges this Tribunal in determining this matter consider whether allegations can change fact that she was issued by nomination certificate because she came first. and also consider the matter vis a vis strict timelines as to when nomination exercises should pave way for the general elections of 8<sup>th</sup> August 2017.
19. On 6<sup>th</sup> May, 2017 during the canvassing of the preliminary objection the 3<sup>rd</sup> Interested Party indicated that he was no longer interested in this matter and hence will not participate.

**Issue for determination**

20. This matter requires that we determine: *whether the election and declared of the 2<sup>nd</sup> Respondent as the duly nominated 1<sup>st</sup> Respondent's Member of Parliament for Rangwe Constituency is valid.*

**Determination**

21. We have evaluated the Statement of claim, the numerous affidavits on record and the parties' submission in this matter. We note from the onset that the Complainant is supported by the 1<sup>st</sup> Interested Party while the 3<sup>rd</sup> Interested Party withdrew from this matter.
22. As rightly pointed out by the 1<sup>st</sup> Interested Party, the 1<sup>st</sup> Respondent has not filed a response to this matter. As a Tribunal, we register our reservations on the apparent behavior of political parties (herein exhibited by the 1<sup>st</sup> Respondent) towards this Tribunal. This Tribunal is meant to sustain and enhance democracy within parties in the spirit of multiparty democracy in the Constitution. The Tribunal is an institution through which political parties can resolve their issues, impartially, without the

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otherwise rigorous process of litigation in the Courts. As such, it is only prudent that both political parties and their members embrace it. Hence, where a member of a political party files a matter before this Tribunal against the party, the most prudent thing for the political party to do is appear and help reach a just decision.

23. We have evaluated the record before us and it is this Tribunal's finding that the Ragwe Constituency nomination exercise was anything but free and fair. Indeed, it was a mockery of the electoral process within the party and the same cannot be sustained in any court of law. The allegations of malpractices by the Complainant are so overwhelming that the 2<sup>nd</sup> Respondent has not sufficiently rebutted them. In some instances, we have noted that even the 2<sup>nd</sup> Respondent herself has admitted to some of malpractices, such as use of a different tallying centre and the relying of results via phone messages where the same was not prior arranged. The 2<sup>nd</sup> Respondent wants to have her cake and eat it. Why claim the irregularities and seek to benefit from that flawed exercise?

24. The affidavits of the Returning Officers Benard Ouko and David Odoyo paint a very sad state of affairs. These two are the 1<sup>st</sup> Respondent's officials. Where the same people who are charged with conducting the election outrightly state that the same was flawed, the process loses its legitimacy. Be it as it may, while the 1<sup>st</sup> Respondent defends her victory and declaration by producing the tallying sheets, the 1<sup>st</sup> Respondent who is the owner and custodian of the same has not corroborated her case. We find it hard to outrightly rely on these tallying sheets when the same are contested given that the two Returning Officers, Benard Ouko and David Odoyo deposed that they never submitted their tallying sheets.

25. In a nutshell, we find that the entire nomination process was flawed as it was marred by very serious irregularities and malpractices and was clothed in mystery and confusion. The 1<sup>st</sup> Respondent urged us to consider the fact that the

irregularities will not change the fact that she came first. We disagree with her. Whether she came first is immaterial where the election in which she came first is nothing but a nullity and a mockery of the political party's democracy. She also urged us to consider the strict timelines for the coming August General elections and the fact that there may be no time for fresh nominations. Again we disagree. Timelines cannot be a panacea for perpetration of election irregularities.

26. We wish to reiterate what we said in *Complaint No. 167 of 2017, James Munyi Ngangu v Orange Democratic Movement & another* thus: "We would like to observe that where a nomination exercise has been annulled by either the respective Party's Appeals Tribunal and/or this Tribunal and a fresh process ordered, it is prudent that a political party moving to execute such an order should give audience to all the parties involved. Such a practice is not only sound in law but it also helps entrench democracy and accountability within political parties."

27. As a consequence, we make the following orders:

- (i) *The Statement of Claim dated 5<sup>th</sup> May 2017 is allowed.*
- (ii) *The nomination of the 2<sup>nd</sup> Respondent, Dr. Lilian Gogo as the 1<sup>st</sup> Respondent's nominee for the position of the Member of the National Assembly for Rangwe Constituency is hereby nullified.*
- (iii) *The 1<sup>st</sup> Respondent's National Election Board is hereby directed to determine the Party's nominee for Rangwe Constituency National Assembly seat in a manner compatible with the Party constitution, Election and Nomination Rules within the next 48 hours of the pronouncement of this Judgment.*
- (iv) *Each party to bear its own costs.*

28. Orders accordingly.

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**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MAY 2017**

**Kyalo Mbobu** .....

**Chairman**

**James Atema** .....

**Member**

**Hassan Abdi** .....

**Member**