



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL  
COMPLAINT NO. 52 OF 2017

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SAMUEL OWINO WAKIAGA.....COMPLAINANT

-VERSUS -

CYPRIAN AWITI..... 1<sup>ST</sup> RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3<sup>RD</sup> RESPONDENT

JUDGMENT

*I. INTRODUCTION*

1. Both the Complainant and the 1<sup>st</sup> Respondent participated in the Orange Democratic Movement (ODM) nomination exercise for Governor Homa Bay County held on the 24<sup>th</sup> April 2017. At the conclusion of the nomination exercise, the 1<sup>st</sup> Respondent was declared the winner and issued with a provisional nomination certificate. This declaration aggrieved the Complainant who moved the party National Appeals Tribunal (NAT) via *Appeal No 24 of 2017*, challenging the decision to issue the provisional certificate to the 1<sup>st</sup> Respondent.
2. The NAT considered the issues raised and in its decision of 29<sup>th</sup> April 2017 held that the electoral process in Homa Bay County did not comply with the provisions of Rule 18 of the ODM Party Nomination and Election Rules. It proceeded to cancel the results of the elections and ordered that

the party proceeds to determine a party nominee for ODM Homa Bay Gubernatorial elections in a manner compatible with the party constitution, Nomination and Elections Rules.

3. Further aggrieved by the decision of the NAT, the Complainant moved this Tribunal by way of a complaint dated 2<sup>nd</sup> May 2017 seeking the following specific orders:

(a) *A declaration that the Homa Bay ODM party primaries held on the 24<sup>th</sup> April 2017 were not free and fair.*

(b) *A declaration that the Homa Bay ODM party primaries held on the 24<sup>th</sup> April 2017 did not produce a candidate for governor.*

(c) *A declaration that the nomination of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent to be its candidate for governor of Homa Bay, is illegal unfair cynical, insensitive, discriminative and against public policy.*

(d) *An order of prohibition to prohibit the 2<sup>nd</sup> Respondent from nominating the 1<sup>st</sup> Respondent as its candidate for governor of Homa Bay County.*

(e) *An order for Mandamus compelling the 2<sup>nd</sup> Respondent to nominate and issue a certificate thereof to the complainant to vie for the position of governor, Homa Bay County.*

(f) *Costs.*

4. Filed simultaneous with the complaint was a notice of motion application dated 2<sup>nd</sup> May 2017 under Certificate of urgency seeking *inter alia* that: the 2<sup>nd</sup> Respondent be restrained from presenting the 1<sup>st</sup> Respondent as the duly nominated ODM governor candidate for Homa Bay County. The mater was certified urgent and in the interests of justice, an interim order

issued restraining the 2<sup>nd</sup> Respondent from presenting the 1<sup>st</sup> Respondent as the duly nominated ODM governor candidate for Homa Bay County.

## ***II. SUBMISSIONS***

5. In urging his case, the Complainant relies upon the Complaint and the Supporting and Supplementary affidavits dated 2<sup>nd</sup> and 5<sup>th</sup> May 2017 respectively.
6. It was submitted that the primaries were marred with massive irregularities and rampant cases of violence and intimidation mostly orchestrated by the 1<sup>st</sup> Respondent. That the elections were so flawed that it was difficult to tell the total number of votes cast or even those garnered by each of the aspirants, as a consequence of which the NAT annulled the decision declaring the 1<sup>st</sup> Respondent as the winner.
7. Flowing from the decision of NAT, the 2<sup>nd</sup> respondent resolved for direct nomination for its candidate. However, the Complainant urges that in this instant case, the option of direct nomination is not available to the 2<sup>nd</sup> Respondent, being the party that bungled at its primaries. He contends that the concept of direct nomination should only apply where a single candidate has expressed a desire and submitted his or her credentials to the party to contest. He argued that direct nominations deny other candidates their right to go through the requisite compliance processes breaching their constitutional rights under Article 38 of the Constitution.
8. The Complainant submitted that in issuing a direct nomination to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent flouted the rules of the Party which

require that the NEC Organ of the Party must communicate their approval to the NEB before a direct nomination can be issued. He urges this Tribunal to find that, it would be immoral, insensitive, absurd and against public policy for the 2<sup>nd</sup> Respondent to offer a direct nomination when he, the complainant, has expended a lot of time, energy and money to campaign.

9. Opposing the Complaint, the 1<sup>st</sup> Respondent submits that he was successfully announced the winner after garnering over 157, 000 votes and issued with a provisional nomination certificate. He refers to the official bundle of the tallied results to show that he garnered 159, 220 votes against 94, 474 votes of his closest challenger. He faults the findings of facts by the NAT on the grounds that: it failed to consider that the Complainant did not prove any of the allegations against his conduct during the nomination exercise; failed to prove any allegations of elections malpractices and irregularities against the County Returning Officer; it failed to consider that any irregularities (which are denied) could not have materially affected the victory which was by a margin of over sixty thousand votes.
10. He submits that the 2<sup>nd</sup> Respondent acted in accordance with the Party's constitution, Nomination and Election Rules, particularly Rule 3.3 and Article 7(5) of the Constitution in according him a direct nomination. He submits that this Complaint is frivolous, vexatious and abuse of this Tribunal. He urges the Tribunal to dismiss this complaint with costs.
11. The 2<sup>nd</sup> Respondent relies upon the replying of Antony Moturi dated 4<sup>th</sup> May 2017 and a further affidavit sworn by Oduor Ongwen filed on 6<sup>th</sup> May 2017. He submits that this complaint is misconceived, bad in law and should be dismissed as it challenges the nomination certificate issued to

the 1<sup>st</sup> Respondent following the party primaries held on 24<sup>th</sup> April 2017, which certificate was withdrawn by the NAT on the 29<sup>th</sup> April 2017.

12. It was submitted that in compliance with the order of the NAT, the 2<sup>nd</sup> Respondent, after the recommendation of the Special Central Committee, resolved to issue a direct nomination to the 1<sup>st</sup> Respondent as its candidate for the Homa Bay Gubernatorial Seat in accordance with Rule 3.3 of the ODM Elections and Nomination Rules and Article 7(5)(f) of the Constitution. He contended that the Central Committee acted pursuant to the instructions given by the NEC. He produced the minutes of the NEC held on 22<sup>nd</sup> February 2017 at Orange House, Nairobi and the minutes of the 2<sup>nd</sup> Central Committee special session held on the 29<sup>th</sup> April 2017 at Park Place Hotel.
13. It was further urged that the 2<sup>nd</sup> Respondent decision took into account the IEBC deadline of 30<sup>th</sup> April, 2017 which constricted the timelines thus not allowing for a repeat election following the nullification of the results. While the Complainant referred to Article 38 of the Constitution, it was also urged that the same article of the Constitution entitles a political party to fill candidates at any elections, which right ought to be preserved at all times.
14. In response to the assertion that the Central Committee did not have powers to grant direct nomination, the 2<sup>nd</sup> Respondent referred to article 7.5A.2 (vi) of the party constitution which mandates the Central Committee to implement the decision of the NEC. Moreover that the NEC had directly granted the CC the full mandate to make such decision and therefore it acted within the powers of the NEC thus it acted within the laws and regulations of the ODM Constitution and Rules.

15. The 2<sup>nd</sup> Respondent urges the Tribunal to take into account the IEBC timelines for 30<sup>th</sup> April 2017, as the deadline for parties' primaries and which constricted timelines did not allow for a repeat election following the nullification of results the 2<sup>nd</sup> Respondent proceeded to issue a direct nomination to the 1<sup>st</sup> Respondent herein.

### **III. ISSUES FOR DETERMINATION**

16. From the submissions of the parties herein, the following single issue crystalizes for determination, and that is, *whether the decision of the NAT was implemented by the 2<sup>nd</sup> Respondent; that is, whether the issuance of direct nomination to the 1<sup>st</sup> respondent was proper.*

### **IV. ANALYSIS**

17. A holistic appreciation of the record before us reveals that the crux of this complaint is the legality or otherwise of the 1<sup>st</sup> Respondent's direct nomination following the decision of NAT. It suffices it to say that the Complainant is challenging the implementation of that decision by the ODM party. In rendering its decision, NAT gave the following orders, that:

- (a) The Provisional Certificate issued to Hon, Cyprian Awiti as the Homa Bay Gubernatorial Candidate be and is hereby dismissed.**
- (b) That the Party does proceed to determine a party nominee for ODM Homa Bay Gubernatorial elections in a manner compatible with the Party Constitution, Nomination and Elections.**

18. Following these orders, it is the Respondents submission that, by a Special meeting held on the 29<sup>th</sup> April 2017, the Central Committee, with the direction of the NEC gave a written approval to the NEB to grant the 1<sup>st</sup> Respondent direct nomination. The written approval was granted vide a Resolution passed in a NEC meeting held on 22<sup>nd</sup> February 2017 at Park Place Hotel.

19. We reproduce a verbatim extract of the NEC meeting's minutes:

**"The NEC fully mandates the Central Committee to make decisions pertaining to nominations, which would otherwise require recourse to NEC, including resolving of nomination disputes, appointing of the National Appeals Tribunal and granting direct tickets to aspiring candidates as appropriate and that such decision made by the Central Committee will be deemed to have been made by the NEC. The Central Committee will be required to give full report of such decisions at the next ordinary meeting of NEC."**

20. It is imperative to note that the order granted by NAT directed the party to **"proceed to determine a party nominee for ODM Homa Bay Gubernatorial elections in a manner compatible with the Party Constitution Nomination and Elections Rules."** This Tribunal notes that NAT did not outrightly order that fresh nominations were to be conducted. The order was instructive that the party determines a nominee in a manner compatible with its constitution, Nomination and Elections (Rules). Rule 19 of the Nomination and Elections Rules which provides for NAT does not specify the orders that NAT may grant. It may grant 'any' order that is just and equitable, hence the order it made in this matter.

21. Pursuant to Rules 3.3 and 18.1 of the Elections and Nomination Rules, the party may proceed to nominate a candidate by either automatic nomination or by conducting primaries by way of universal suffrage. Initially, in this case, the Party had opted to conduct primaries by way of universal suffrage. However, the results of this exercise were nullified by NAT. NAT then made an order in which it directed the Party to now proceed in a manner compatible with the Party constitution, Nomination and Election Rules. By being asked to determine a candidate, the party was given the opportunity to decide its mode afresh after the nullification of the primaries held on the 24<sup>th</sup> April 2017.
22. It is our finding that in granting direct nomination, the party acted in compliance with the NAT decision, the party constitution, and Elections and Nomination Rules. We refer to this Tribunal's decision *Complaint No. 42 of 2017, Caroli Omondi v John Mbandi & Another* in which we stated:

**“[I]n 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.”**

23. The question that lies for determination then is whether the party acted within their laws in determining the candidate for Homa Bay gubernatorial seat. The Complainant urged that the process did not comply with the law because the Central Committee acted without the approval of the NEC. The 2<sup>nd</sup> Respondent produced an extract of the minutes of the NEC meeting held on 22<sup>nd</sup> February, 2017 in which

meeting, NEC mandated the Central Committee to exercise this special function. These minutes were admitted on record and contents were not challenged. We have perused them and are satisfied that the NEC delegated its power to the Central Committee of “**granting direct tickets to aspiring candidates as appropriate**”.

24. Consequently, we hold that the 2<sup>nd</sup> Respondent acted in accordance with the laid down process in issuing the 1<sup>st</sup> Respondent with a direct nomination for ODM candidate for Homa Bay County. We find no justification in law to interfere with the decision to award an automatic nomination to the 1<sup>st</sup> respondent. We have said in the past that this Tribunal will not interfere with the internal mechanisms and operations of a Party where the same is conducted pursuant to a Party’s governing Rules and Regulations.

25. We therefore proceed to make the following orders:

*(1) The Complaint dated 2<sup>nd</sup> May 2017 be and is hereby dismissed.*

*(2) In the interest of the Party’s unity, each party shall bear its own costs.*

26. Orders accordingly.

**DATED and DELIVERED AT NAIROBI this 7<sup>TH</sup> DAY OF MAY 2017**

1. **Kyalo Mbobu** .....  
**Chairman**
  
2. **James Atema** .....  
**Member**

3. Hassan Abdi .....  
Member