



THE REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI  
COMPLAINT NO. 304 OF 2017

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TOM OSIMBO.....CLAIMANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT-KENYA.....1<sup>ST</sup> RESPONDENT

ADUMA OWUOR.....2<sup>ND</sup> RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION.....3<sup>RD</sup> RESPONDENT

VINCENT KODERA.....1<sup>ST</sup> INTERESTED PARTY

PAULINS OCHIENG.....2<sup>ND</sup> INTERESTED PARTY

JUDGMENT

1. The present complaint relates to the 1<sup>st</sup> Respondent's nominations for Member of the National Assembly, Nyakach Constituency. The Claimant approached the Tribunal by way of a Notice of Motion under Certificate of Urgency dated 25 May 2017. It is the Claimant's contention that he contested and won the nomination exercise conducted by the Claimant in respect of the said electoral seat and was issued with a provisional nomination certificate in accordance with the party rules.
2. The Claimant further asserted that the win was not contested by anyone to his knowledge. Nevertheless, the 1<sup>st</sup> Respondent proceeded to submit the name of the 2<sup>nd</sup> Respondent to the Independent Electoral and Boundaries Commission (IEBC) as its nominee for the said electoral seat. He therefore prayed that the IEBC be directed to remove the 2<sup>nd</sup> Respondent's name from the list and replace it

with his name as the lawful nominee for Nyakach Constituency Member of the National Assembly seat.

3. In support of his claim, he annexed his provisional nomination certificate as well as the affidavit of Vitalis Onditi Maina, the Returning Officer to which the 1<sup>st</sup> Respondent's nomination results for the said constituency were attached. The Returning Officer confirmed that he had declared the Claimant winner. He indicated, however, that he was unable to present the results at Thurdibuoro Secondary School on the 25<sup>th</sup> of April 2017, but presented the results the following day.
4. In response to the Complaint, the 2<sup>nd</sup> Respondent asserted that the provisional nomination certificate allegedly issued to the Claimant was issued by an unknown person and therefore could not be valid. He also maintained that the Claimant was not present at the Tallying Centre on the material day and therefore could not have been issued with a provisional nomination certificate after the tallying exercise as he alleged. The 2<sup>nd</sup> Respondent further contended that the Nyakach Constituency Returning Officer, Vitalis Onditi Maina, did not present results to the Kisumu County Returning Officer on the 26<sup>th</sup> of April 2017 as alleged or at all.
5. It was also the 2<sup>nd</sup> Respondent's position that the Tribunal lacked jurisdiction to hear the matter. In support of his assertions, he annexed a final nomination certificate dated 29 April 2017 and a certificate of nomination issued by the IEBC on 1 June 2017. In support of his claim, the Kisumu County Returning Officer, Mr Tom Okongo, swore a Replying Affidavit contending that the results supplied by the Nyakach Constituency Returning Officer were fraudulent as he was in possession of the original election materials which demonstrated that the 2<sup>nd</sup> Respondent had won the said nomination exercise.

6. There was no appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The 1<sup>st</sup> Interested Party, who was also a contestant in the said nomination exercise, averred that the Claimant was leading in the tallying done at the Pap Onditi tallying centre and that to his knowledge, the results were announced by Mr Vitalis Onditi Maina, the Constituency Returning Officer. These results demonstrated that the Claimant had won the said nomination exercise and was issued with a provisional nomination certificate to this effect.
7. The 1<sup>st</sup> Interested Party therefore contended that the substitution of the Claimant's name with that of the 2<sup>nd</sup> Respondent in the list submitted to the IEBC was a violation of the Claimant's constitutional rights as well as a contravention of the rights of the people of Nyakach Constituency to choose their political representative in accordance with Article 38 of the Constitution. He therefore urged the Tribunal to confirm the provisional certificate issued to the Claimant, to direct the issuance of the final nomination certificate and to direct that the 1<sup>st</sup> Respondent forward the Claimant's name to the IEBC as nominee for Nyakach Constituency.
8. The 2<sup>nd</sup> Interested Party, a member of the 1<sup>st</sup> Respondent also swore a Replying Affidavit with similar averments to those contained in the 1<sup>st</sup> Interested Party's Replying Affidavit.

### **Issue for Determination**

9. The 2<sup>nd</sup> Respondent contended that this Tribunal was divested of jurisdiction to determine the present dispute. Since jurisdiction goes to the root of the competence of this Tribunal to determine the matter, we will address it as a preliminary issue.

### **Analysis**

10. It is trite law that jurisdiction is everything and once a judicial or quasi-judicial body determines that it lacks jurisdiction, it must down its tools in respect of the dispute before it. Section 40 (1) of the Political Parties Act sets out the categories of disputes that this Tribunal can arbitrate over. These include disputes between political parties and members of a political party. The present dispute therefore falls within the category of disputes that may be arbitrated over by the Tribunal.
11. However, before the Tribunal can entertain a dispute listed in section 40 (1), it must satisfy itself that an attempt has been made to first resolve the dispute at the party level. This is with an end to strengthen party internal dispute resolution mechanisms (IDRM) and promote a democratic culture in the manner in which political parties conduct their affairs. In *Ibrahim Abdi Ali v Mohamed Abdi Farah & Another* [2016]eKLR Complaint 29 of 2013, this Tribunal found that:

*...this does not mean that an individual must always wait for a hearing and final determination from his party's internal dispute resolution mechanism before he can come to the Tribunal. Where a party can show that he had made honest attempts at resolving the dispute within the party but the party's process was not satisfactory for such reasons as delay, the individual cannot be faulted for moving to the Tribunal, even where his party has not concluded a hearing and a determination of his matter.*

12. From the material on record, the Claimant did not demonstrate that he attempted to activate the IDRM before approaching the Tribunal. We therefore find that the Claimant has violated the provisions of Section 40 (2) of the Political Parties Act, as he has not exhausted the 1<sup>st</sup> Respondent's IDRM before approaching this Tribunal.

### **Orders**

13. Accordingly, the Tribunal finds that it has no jurisdiction to hear and determine the complaint. The same is struck out for want of jurisdiction with no orders as to costs.

**Dated at NAIROBI this 2<sup>nd</sup> DAY of JUNE 2017**

- 1. Kyalo Mbobu (Chair) .....**
- 2. Paul Ngotho (Member).....**
- 3. Desma Nungo (Member).....**