



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI

COMPLAINT NO. 142 OF 2017

VICTOR ODUOR WESONGA COMPLAINANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT PARTY RESPONDENT

AND

RENSEN THOYA INTERESTED PARTY

JUDGMENT

Case summary

1. The Complainant and four others were candidates in the ODM nomination primaries for member of County Assembly, Mikindani Ward, Mombasa County conducted on 29th April, 2017. He submits that the nominations were first scheduled for 22 April, 2017. On that day only one station, Kaw Shee Primary conducted the exercise due to violence and as a consequence the National Election Board cancelled the exercise and rescheduled it. On 29th April, 2017, nominations were only conducted in two stations: Mikindani Primary and St. Mary Primary school. In the two he got 511 against Renson Thoya'a 396 but the Returning Officer used cancelled results of 22nd April, 2017 from Kaw Shee to declare the Interested Party winner. Aggrieved, he filed an appeal with the

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party's National Appeal Tribunal against the conduct of the Returning Officer. No hearing has been forthcoming despite attending.

2. On 8th May 2017, we granted interim orders from restraining the Respondent from issuing a nomination certificate for position of Member of County Assembly, Mikindani Ward and restraining it from submitting the name of any other person to the Independent Electoral Boundaries Commission as the duly nominated candidate until this complaint was heard and determined. On 10th May, 2017, the Complainant filed a memorandum of claim. He argued that despite the 8th May, 2017 Order, a certificate has been issued. He sought an order that the Complainant is the party's candidate nominee for Member of County Assembly, Mikindani Ward and a declaration that the issued provisional nomination certificate is null and void.
3. The Interested Party Renson Thoya filed grounds of objection dated 10th May 2017 and a Replying Affidavit in which he urges that the Complaint be dismissed as it is incompetent, frivolous and abuse of court process and that the complainant did not exhaust IDRM. He states that nominations in Kwa Shee polling station were on 22nd April, 2017 hence there was no need to repeat it on 29th April 2017 as it was peaceful. That he was declared winner with 592 votes and issued with provisional nomination certificate. He makes reference to the report of the Returning Officer to the National Election Board dated 2nd May 2017. He submits that it is not uncommon if one polling station is omitted and refers to this Tribunal's decision in respect of Fafi Constituency where this Tribunal recommended the repeat of nominations.
4. Counsel Mr. Ndubi for the Respondent agreed with the complainant and adopting his affidavit.

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Determination

5. First we disagree that the Complaint filed is incompetent, frivolous and abuse of court process. The Complaint emanates from the Respondent's nomination primaries and the grievance raised therein, being declaration of results using cancelled results, is a competent ground. Hence that ground falls.
6. As regards non-compliance with IDRM, we dismiss this as we have constantly held that where one clearly shows that he invoked and attempted IDRM but was frustrated, that is sufficient ground. Notably, the Respondent has not raised this challenge and is in agreement with the Complainant. There is on record a letter to the party dated 29th April, 2017. That jurisdictional challenge also fails.
7. It is common ground that the nominations exercise for 22nd April 2017 was cancelled and that it only happened in Kwa Shee Primary School polling station. If those results were cancelled, there is no justification for including the same in the 29th April, 2017 tally. That is sufficient ground to nullify the results of 29th April, 2017.
8. As regards the reference to Fafi Constituency decision, we note that the circumstances were different. The sampling directed in Fafi was as a result of a second order given the unique circumstances therein. The same was also to be agreed upon by the parties. As the Respondent agrees with the Complainant, and given the narrow margin of the win we find that the complaint has merit.
9. Consequently, we make the following orders:
 - (i) *The Complaint contained in Memorandum of Claim dated 10th May 2017 is allowed in the following specific terms:*
 - (a) *The declaration of the Interested Party issued on 29th April 2017 by the Respondent as the duly nominated*

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*ODM party candidate for Member of County Assembly,
Mikindani Ward, Mombasa County is hereby set aside.*

*(b) The nomination certificate issued to the Interested Party
by the Respondent as the duly nominated ODM party
candidate for Member of County Assembly, Mikindani
Ward, Mombasa County is hereby revoked.*

*(c) The 2nd Respondent's Party National Election Board is
directed to determine the Party nominee for Member of
County Assembly, Mikindani Ward in a manner
compatible with the Party constitution, Election and
Nomination Rules*

(ii) The Respondent shall bear the costs of the Complainant.

(iii) The other parties to bear their own costs

10. Orders accordingly.

DATED and DELIVERED AT NAIROBI this 12TH DAY OF MAY 2017

Kyalo Mbobu

Chairman

James Atema.....

Member

Hassan Abdi.....

Member