



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI
COMPLAINT NO. 145 OF 2017

WILSON ONGELE OCHOLA COMPLAINANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT 1ST RESPONDENT

ABEL OSUMBA ATITO 2ND RESPONDENT

JUDGMENT

Summary of case

1. The Complaint is the incumbent Member of County Assembly Utalii Ward, Ruaraka Constituency in Nairobi County. He participated as an aspirant in the ODM nomination primaries conducted by the 1st Respondent in Utalii Ward, Ruaraka Constituency on 30th April, 2017 in which the 2nd Respondent was declared the winner. Aggrieved by that declaration, the Complainant lodged a complaint with the ODM Special County Appeals Tribunal (CAT). A decision was rendered on 6th May 2017 revoking and withdrawing the nomination certificate. However, pending the CAT decision, on 3rd May, 2017, the 1st Respondent unlawfully proceeded to award the 2nd Respondent with a nomination certificate.

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2. Aggrieved by these happenings, he filed this Complaint seeking the following orders:

- (i) *The Nomination Certificate dated 3rd May, 2017 allegedly issued to the 2nd Respondent be recalled and revoked.*
- (ii) *A Mandatory Order compelling the 1st Respondent to issue ODM Nomination Certificate to the Claimant and to present the Claimant's name to the Independent Electoral and Boundaries Commission, IEBC, as the ODM Member of County Assembly nominee for Utalii Ward.*
- (iii) *A Mandatory injunction restraining the 1st Respondent from presenting the 2nd Respondent's name or any other name other than the Claimant's name to the Independent Electoral and Boundaries Commission, IEBC, as the ODM Member of County Assembly Nominee for Utalii Ward.*

3. Together, with the Complaint was filed a notice of motion application under certificate of urgency seeking interim orders. The matter was certified urgent and an interim order issued restraining the 1st Respondent from presenting the name of the 2nd Respondent to the IEBC as the nominee of the ODM for the Utalii Ward, Ruaraka Constituency.

Submissions

4. The Complainant submits that when votes were counted and tabulated by the Presiding Officer, he emerged the winner with 1,241 against the 2nd Respondent's 1,238 of all votes cast. However, it was the 2nd Respondent who was declared the winner by the Constituency Returning Officer. He contends that the 2nd Respondent

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should not have participated in the nomination exercise as he had been fined Ksh. 200, 000 by the ODM Disciplinary Committee, but had not paid the same. That the decision by NEB to award the 2nd Respondent the nomination certificate is irregular, unlawful and null and void and violates the law, the Party Rules and the Special CAT's decision.

5. The Complainant submitted that Rule 19.1 of the 1st Respondent's Rules establishes the Special County Appeals Tribunal as part of the internal dispute resolution mechanism for a party dissatisfied by the outcome of its decision. He argues that no such appeal was preferred against the decision nullifying the 2nd Respondent's certificate. The Party cannot ignore decisions of its Special CAT. The Special CAT directed that the winner was to be declared in accordance with the Party constitution, Nominations and Elections Rules that cannot be ignored. That under Rule 17, a winner is declared for garnering the highest votes cast and tallied hence he should have been declared as such.

6. Vincent Ochieng Owuor, the Presiding Officer swore an affidavit on 12th May 2017 giving an account of what happened. That the Complainant emerged winner with 1241 votes and the 2nd Respondent 1238. Hence, he declared Wilson Ongele Ochola winner at the ward tallying centre, before chaos broke out, with lights being switched off. He went to the Constituency Tallying Centre at Chandaria and gave results to the Returning Officer to issue the certificate to Wilson Ochola Ongele and was shocked when Abel Atito was announced.

7. The 1st Respondent filed a replying affidavit sworn by its Legal Counsel, Anthony Muturi on 10th May 2017. The Party concedes that the elections were marred with chaos. That there was an Appeal filed, by the Complainant herein, before the Special

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CAT which was heard and a decision given. He also concedes that the certificate was erroneously given to 2nd Respondent during the pendency of the Special CAT determination and that the same has henceforth been withdrawn. At paragraph 10 of the affidavit, it is deponed thus:

“The 1st Respondent has invoked its rights as encapsulated in the Party Constitution, nomination and election rules and by a Judgment of 6th May 2017 withdrawn the original nomination certificate for Utalii Ward in Ruaraka Constituency within Nairobi County from the 2nd Respondent and the same is to be issued to the Complainant who won the Utalii Ward Nominations.”

8. The 1st Respondent further agrees and confirms that the 2nd Respondent had not paid a fine of Ksh. 200, 000 imposed by its Disciplinary Committee, within the requisite 7 days as ordered. It is its concession that the Special CAT decision binds it and should be upheld. The Party acknowledges that the nomination certificate issued to the 2nd Respondent was irregular as the same was issued on 3rd May, 2017 when the appeal before the CAT was pending.

9. The 2nd Respondent urged that we have no jurisdiction under section 40(2) of the Political Parties Act since IDRMs had not been exhausted. He filed a replying affidavit deposing that the elections were peaceful. He submits that the presiding officer of Drive Inn polling station disappeared with the Complainant and a Presiding Officer cannot declare a winner. Only a Returning Officer can do that, hence he was duly declared and issued with a provisional nomination certificate dated 1st May 2017. He produced video clips to buttress the submission that the elections were peaceful. That he got 666 votes against the Complainant's 603, which

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evidence he contends would have changed the decision of the Special CAT had it been availed.

10. Abraham Oyugi Dollah swore an affidavit on 12 May, 2017 in support of the 2nd Respondent's case. He was the Returning Officer, Ruaraka Constituency. That then the Presiding Officer of Drive Inn failed to report and upon consultation with NEB, he elevated Reagan Ochieng as the Presiding Officer. In his tally Abel Osumba Atito garnered 1238 while Wilson Ongele Ochola garnered 1231 votes. Hence, he declared the 2nd Respondent winner and issued a provisional nomination certificate. What he did was in accordance with the party's constitution and election Nomination rules.
11. He prays that the Complaint be dismissed with costs and he be declared the winner and be issued with the nomination certificate having been so declared by the Returning officer.

Issues for determination

12. The following issues falls for determination:

- (i) *Whether we have jurisdiction;*
- (ii) *Who is the duly nominated ODM Party Member of County Assembly, Utalii Ward, Ruaraka Constituency?*
- (iii) *Appropriate reliefs*

Determination

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13. The question of jurisdiction can be summarily determined. We hold that we do have jurisdiction. This Complaint emanated from the Party primaries and what is being questioned is the award of the nomination certificate to the winner. The chain of litigation is traceable to the Special CAT and the implementation of that decision is also an issue. Hence, the matter is rightly before the Tribunal.
14. The narrow margin of the wins as claimed by either party in this matter makes the election “too close to call”. An election that is too close to call may even be determined on the basis of a single vote. Hence, it gives little room for error as every vote counts. Accordingly, when allegations of chaos and disruptions are experienced, they have to be taken seriously.
15. We note that the Complaint was raised before the Special CAT and the decision reached is on record. The CAT made a finding that *the Election process was flawed, and that there was no proper tallying of the votes and so no clear winner.*” It then made the following orders:
- (1) *The Nomination of the Respondent Mr. Abel Osumba is hereby suspended and the Interim Certificate withdrawn.*
 - (2) *That the Party to commence afresh the process of determining the Party nominee for the Utalii ward seat in a manner consistent with the Party constitution, nominations and election rules.*
 - (3) *The Party to investigate allegations by the petitioner that the Respondent was subject to its internal disciplinary process and fined the sum of Kshs. 200, 000 and which amount the Respondent has not paid.*

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16. Upon reading this decision and evaluation the submissions of parties, we do not find any need to counter its factual findings. We note that as to the irregularities of the process, it was found that all parties agreed. Hence that factual inquest will not be reopened before this Tribunal.

17. We have also noted the affidavit of the 1st Respondent in which it entirely agrees with the Complainant. The 1st Respondent has confirmed that pursuant to the Special CAT finding it has conducted investigations and found that indeed the 2nd Respondent did not pay the fine within 7 days. This Tribunal will not interfere with the internal operations of political parties especially as regards discipline of its members where the same are organized and carried out in accordance with its party Election and Nomination Rules. Hence, we defer to the 1st Respondent's as regards the 2nd Respondent's conduct.

18. We therefore make the following orders:

- (i) *The Statement of claim dated 8th May 2017 is allowed.*
- (ii) *A mandatory order is hereby issued directing that the 1st Respondent to issue the ODM Nomination Certificate to the Claimant, Wilson Ongele Ochola, and to present the Claimant's name to the Independent Electoral and Boundaries Commission (IEBC) as the ODM Member of County Assembly nominee for Utalii Ward.*
- (iii) *In the interests of Party unity, each party to bear its own costs.*

19. Orders accordingly.

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DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2017

Kyalo Mbobu

Chairman

James Atema

Member

Hassan Abdi

Member