



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**ELECTION PETITION APPEAL NO.88 OF 2017**

**VICTOR RODGERS OCHIENG.....APPELLANT**

**VERSUS**

**PAMELA AWUOR OYOO.....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT (ODM)....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....INTERESTED PARTY**

**JUDGMENT**

The Appellant, Victor Rodgers Ochieng and the 1<sup>st</sup> Respondent, Pamela Awuor Oyoo were among the candidates who participated in the Orange Democratic Movement (ODM) party primaries that were held to nominate the Member of County Assembly for Migosi Ward in Kisumu County on 25<sup>th</sup> April 2017. The Appellant and the 1<sup>st</sup> Respondent both claim that they were declared winners during the said nomination exercise. Both the Appellant and the 1<sup>st</sup> Respondent presented before the Political Parties Disputes Tribunal (PPDT) and this court provisional nomination certificates and final nomination certificates which were allegedly issued by the 2<sup>nd</sup> Respondent after each of them was declared to have won during the said nomination exercise. Interestingly, both provisional nomination certificates are dated 25<sup>th</sup> April 2017. The final nomination certificates are also dated 29<sup>th</sup> April 2017. The provisional nomination certificate issued to the Appellant was signed by acknowledged Presiding Officer Laban Bosire Ouko while it is not clear who signed the provisional nomination certificate that was issued to the 1<sup>st</sup> Respondent.

On 13<sup>th</sup> May 2017, the 1<sup>st</sup> Respondent lodged a complaint before the PPDT seeking to overturn the final nomination certificate that was issued to the Appellant. The 1<sup>st</sup> Respondent alleged that she won the nomination exercise and was rightfully issued with the final nomination certificate by the 2<sup>nd</sup> Respondent. In her complaint before the Tribunal, the 1<sup>st</sup> Respondent did not attach any documents to prove that she won the said nomination exercise. She only attached the provisional nomination certificate and the final nomination certificate that were allegedly issued to her by the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent lodged the complaint directly to the PPDT before first invoking the 2<sup>nd</sup> Respondent's Internal Dispute Resolution Mechanism (IDRM). The 1<sup>st</sup> Respondent explained this failure to invoke the 2<sup>nd</sup> Respondent's IDRM to have been on account of inability to access the said IDRM's office.

The 1<sup>st</sup> Respondent was ordered by the Tribunal to serve all the Respondents. In the case of the Appellant, this is what the process server Mark Okinda deponed in the affidavit of service:

***“4. THAT on 14<sup>th</sup> May 2017, I called the 2<sup>nd</sup> Respondent on his telephone number 0720824763, 0722962063, but did not pick the calls.***

***5. THAT after making several attempts without success I sent him a text informing him that a case had been filed against him before the Tribunal.***

***6. THAT I took photographs of the documents and order and sent to him by Whatzup on both lines.”***

This is what the Tribunal accepted to be proper service. It proceeded to hear the complaint lodged by the 1<sup>st</sup> Respondent in the absence of the Appellant. It granted the orders sought by the 1<sup>st</sup> Respondent as a result of which the nomination certificate issued to the Appellant was ordered cancelled. The Appellant was prohibited and restrained from presenting his nomination certificate for the said Migosi Ward to the Independent Elections and Boundaries Commission (IEBC). When the Appellant became aware of this decision, he lodged an appeal to this court.

In his memorandum of appeal, the Appellant raised several grounds of appeal challenging the decision of the Tribunal. The Appellant was aggrieved that the Tribunal had proceeded to hear the 1<sup>st</sup> Respondent's complaint when it was clear that he had not been properly served. He complained that he was therefore condemned unheard. He faulted the Tribunal for failing to hear his case on the merits. He asserted that he was the one who had been declared the winner during the nomination exercise that was held by the 2<sup>nd</sup> Respondent on 25<sup>th</sup> April 2017. In the premises therefore, the Appellant urged the court to set aside the Tribunal's decision and substitute it with a decision declaring that the Appellant is the rightful nominee for the 2<sup>nd</sup> Respondent party for the said Member of County Assembly seat for Migosi Ward in Kisumu County.

During the hearing of the appeal, this court heard oral rival arguments made by Mr. Onyango for the Appellant and by Mr. Juma for the 1<sup>st</sup> Respondent. This court was satisfied that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were properly served after the Appellant showed the court the duly received copies of the pleadings that were served upon the said respondents. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not attend court. The court proceeded with the appeal in their absence. This court has carefully considered the submission made by the said counsel. Due to the exigencies of time, this court will not reproduce the arguments made but will set out the relevant parts of the submissions made in its decision.

There are three issues that came to the fore for determination by this court. The first issue is whether the 1<sup>st</sup> Respondent properly invoked the jurisdiction of the PPDT noting that she had not first attempted to lodge the complaint before the 2<sup>nd</sup> Respondent's IDRM. The 1<sup>st</sup> Respondent explained that she was unable to access the 2<sup>nd</sup> Respondent's IDRM because at the time, the offices of the 2<sup>nd</sup> Respondent's IDRM were closed. Learned counsel for the 1<sup>st</sup> Respondent submitted that the members of the 2<sup>nd</sup> Respondent's National Appeals Tribunal (NAT) went underground when goons rendered it impossible for said NAT to hold its sittings. The 1<sup>st</sup> Respondent submitted that, in any event, **Section 40(1)(fa)** of the **Political Parties Act** granted the Tribunal jurisdiction to hear the dispute before an aggrieved party had exhausted the avenue of the party's IDRM. On his party, the Appellant was emphatic that before the party's Internal Dispute Resolution Mechanism is invoked, the PPDT did not have jurisdiction in the first instance to consider the complaint.

This court has carefully considered the arguments made in regard to this issue. This court holds that

whereas **Section 40(1)(fa)** of the **Political Parties Act** grants an aggrieved party from a dispute arising out of party primaries direct access to the PPDT, nevertheless, such aggrieved party is required to give cogent evidence that he or she attempted to access the party's IDRМ and was either frustrated or thwarted from presenting his or her complaint to the said IDRМ. In the present appeal, it was clear that the 1<sup>st</sup> Respondent did not make any effort to access the party's IDRМ before lodging the complaint before the PPDT. There is no document which was exhibited by the 1<sup>st</sup> Respondent which showed that he had attempted to access the 2<sup>nd</sup> Respondent's IDRМ and was frustrated or prevented from doing so.

The second issue for determination is whether the Appellant was served when the 1<sup>st</sup> Respondent lodged her complain before the PPDT. The 1<sup>st</sup> Respondent agrees that she served the Appellant through a short message text sent to his mobile phone. She also said that she photographed the pleadings and sent them to the Appellant's mobile phone through the Whatsup App. The Appellant insists that he was not served. It was clear to this court that such service is not contemplated under the **Political Parties Disputes Tribunal (Procedure) Regulations, 2017. Rule 10** of the said **Regulations** provides thus:

***“(1) The complainant shall serve the complaint on the Respondent within seven days of filing the complaint with the Tribunal.***

***(2) A complaint shall be served by –***

***(a) direct service;***

***(b) advertisement in a newspaper of national circulation.”***

From the above Rule, it is clear that the Appellant was not properly served. The Appellant's complaint that he was condemned unheard is therefore valid. The 1<sup>st</sup> Respondent explained that she was granted leave by the PPDT to serve the Appellant in the manner that she did. That could the case. However, the Tribunal had no jurisdiction to ride roughshod on its own rules so as to satisfy the legal requirement of service. The Tribunal acted contrary to the rules of natural justice that prohibits a tribunal or a court from condemning any party before giving him or her a hearing. It was clear to this court therefore that the orders issued by the Tribunal were issued in the absence of the Appellant who was an affected party and whose presence was necessary before the Tribunal rendered its decision.

The third issue for determination is who as between the Appellant and the 1<sup>st</sup> Respondent was rightfully declared the winner during the primaries that were held by the 2<sup>nd</sup> Respondent for the said seat for Member of County Assembly for Migosi Ward in Kisumu County. Although the 1<sup>st</sup> Respondent claimed that she won during the said nomination exercise, she did not present any credible evidence before either the Tribunal or this court to support her assertion that she was the winner. Other than the provisional nomination certificate which was apparently signed by an unauthorized person, and a final nomination certificate which may have been dubiously acquired, the 1<sup>st</sup> Respondent did not present any tangible evidence to prove that she won during the said nomination exercise. On the other hand, the Appellant provided a tallying sheet duly signed by the Presiding Officer Laban Bosire Ouko which clearly showed that he had won the said nomination exercise. For added measure, the Presiding Officer wrote a letter to the National Elections Board of the 2<sup>nd</sup> Respondent confirming that indeed the Appellant had won during the said nomination exercise. The said Presiding Officer issued the provisional nomination certificate to the Appellant. The Appellant was also issued with the final nomination certificate by the 2<sup>nd</sup> Respondent. This court therefore holds that the Appellant presented credible evidence before this court that he was the one who was declared the rightful winner for the Member of County Assembly seat for Migosi Ward, Kisumu County after the said nominations exercise organized by the 2<sup>nd</sup> Respondent that were held on 25<sup>th</sup> April 2017.

*In light of the above findings, what orders will this court issue to give effect to the will of the voters of Migosi Ward who are members of the 2<sup>nd</sup> Respondent expressed during the nomination exercise held on 25<sup>th</sup> April 2017"* This court was informed by counsel for the 1<sup>st</sup> Respondent that the 1<sup>st</sup> Respondent had already presented her nomination papers to IEBC as the nominee for the 2<sup>nd</sup> Respondent party for the said seat for the Member of County Assembly for Migosi Ward, Kisumu County. That may be the case. However, an obvious injustice was occasioned in this case and this court will give an appropriate remedy.

In the premises therefore, the appeal lodged by the Appellant is hereby allowed. The orders issued by the Tribunal in its judgment dated 18<sup>th</sup> May 2017 are hereby set aside in their entirety. It is substituted by the order of this court declaring the Appellant, Victor Rodgers Ochieng as the nominee for Orange Democratic Movement Party for Member of County Assembly for Migosi Ward Kisumu County. If IEBC has accepted the 1<sup>st</sup> Respondent as the 2<sup>nd</sup> Respondent's nominee for the said seat, such acceptance is hereby revoked. Any certificate issued by IEBC to the 1<sup>st</sup> Respondent recognizing her as the nominee for the 2<sup>nd</sup> Respondent for the said seat of Member of County Assembly for Migosi Ward, Kisumu County is hereby cancelled and declared null and void and of no legal effect or consequences. The Independent Electoral and Boundaries Commission (IEBC) shall accept the nomination papers presented by the Appellant as the duly recognized nominee of Orange Democratic Movement Party for the said position of Member of County Assembly for Migosi Ward Kisumu County. The 1<sup>st</sup> Respondent shall pay the cost of the Appellant both at the PPDT and before this court on this appeal. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**



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