



Case Number:	Civil Appeal 205 of 2017
Date Delivered:	21 Jul 2017
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Philip Nyamu Waki, Daniel Kiio Musinga, William Ouko
Citation:	Clifford Odhiambo Mwalo v Roy Ochieng Samo & 3 others [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	Election Petition Appeal No. 29 of 2017)
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL

AT NAIROBI

(CORAM : WAKI, MUSINGA & OUKO, JJ.A.)

CIVIL APPEAL NO. 205 OF 2017

BETWEEN

CLIFFORD ODHIAMBO MWALO.....APPELLANT

VERSUS

ROY OCHIENG SAMO.....1<sup>ST</sup> RESPONDENT

ORANGE DEMOCRATIC PARTY.....2<sup>ND</sup> RESPONDENT

ODM NATIONAL ELECTIONS BOARD.....3<sup>RD</sup> RESPONDENT

INDEPENDENT ELECTROAL AND

BOUNDARIES COMMISSION.....4<sup>TH</sup> RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court*

*of Kenyaat Nairobi (Mwongo, J.) given on 18<sup>th</sup> June, 2017*

in

ELECTION PETITION APPEAL NO. 29 OF 2017)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This appeal arises from the decision of Mwongo, P.J. made on 22<sup>nd</sup> June, 2017 which simply reads: **“The matter is marked as settled.”** It is necessary to set out the background that gave rise to that short impugned decision or finding.

2. The appellant and the 1<sup>st</sup> respondent, among others, participated in the 1<sup>st</sup> respondent’s nominations on 25<sup>th</sup> April, 2017 for the Kajulu Ward Member of County Assembly seat, Kisumu County.

3. The 1<sup>st</sup> respondent was declared the winner and issued with an interim certificate of nomination on

29<sup>th</sup> April, 2017. However, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents issued the appellant with a final nomination certificate. As a result, the 1<sup>st</sup> respondent filed a complaint at the Political Parties Disputes Tribunal (PPDT) challenging the 2<sup>nd</sup> respondent's action of issuing the final nomination certificate to the appellant.

4. The PPDT allowed the 1<sup>st</sup> respondent's complaint and restrained the 2<sup>nd</sup> respondent from issuing a nomination certificate to any person other than the 1<sup>st</sup> respondent.

5. The appellant, being aggrieved by that decision, preferred an appeal to the High Court, essentially complaining that the PPDT failed to consider important documents that had been presented to it which revealed that he was the bona fide winner of the nomination contest. He urged the court to allow the appeal, set aside the judgment of the PPDT; and declare him the validly nominated ODM candidate for the said position.

6. The High Court (Mwongo, P.J.), having heard all the parties' representations, in his judgment delivered on 19<sup>th</sup> May, 2017, allowed the appeal and set aside the judgment of the PPDT. The learned judge further ordered ODM (the 2<sup>nd</sup> respondent) **“to use its internal dispute resolution mechanism to resolve the dispute between the parties within 24 hours from the date hereof, failing which the ODM party shall hold and complete fresh nominations for MCA for Kajulu Ward no later than Monday, 22<sup>nd</sup> May, 2017.”**

7. In compliance with the High Court judgment, the 2<sup>nd</sup> respondent's Internal Disputes Resolution Mechanism (IDRM) chaired by Assa Nyakundi, sat and heard the disputants in the presence of their respective advocates.

8. On 16<sup>th</sup> June, 2017 the 2<sup>nd</sup> respondent's tribunal rendered its decision and held, *inter alia*:

***“5. In the matter at hand the Returning Officer declared Roy Ochieng Samo the winner. However, Lameck Onyango did not forward the results from the ward as required to the Constituency Returning Officer. However, the Returning Officer Mr. Riaga was able to declare results for this ward using results presented by other presiding officers from Kajulu Ward. Lameck Onyango surfaced later declaring Clifford Odhiambo Mwalo winner. We find that Lameck Onyango had no authority to do so. Besides Lameck Onyango had to be arrested by police following his inexplicable disappearance.***

***This in itself makes it impossible to rely on results presented by Lameck Onyango.***

***We are satisfied that the proper person to be issued with the nomination certificate was Roy Ochieng Samo and not Clifford Odhiambo Mwalo. The certificate issued to Clifford Odhiambo Mwalo dated 29<sup>th</sup> April 2017 was issued in error and through misrepresentation. The party considers it null and void and of no effect.”***

9. By a letter dated 19<sup>th</sup> June, 2017 the 2<sup>nd</sup> respondent forwarded to the High Court's Deputy Registrar its aforesaid decision. On 22<sup>nd</sup> June, 2017 the matter was mentioned before Mwongo, P.J. The advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondent urged the Court to mark the matter as settled in terms of the decision reached by the 2<sup>nd</sup> respondent's tribunal. The appellant's advocate reserved his comments, having told the court that he had not seen the decision.

10. The learned judge marked the matter as settled as earlier stated. The appellant, being dissatisfied with the order marking the matter as settled, preferred a second appeal to this Court. In his memorandum of appeal, he faulted the learned judge for upholding the decision of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in spite of glaring misapprehension of law and facts apparent in the process.

11. When the appeal came up for hearing before this Court on 19<sup>th</sup> July, 2017, **Mr. Awele** appeared for the appellant and made oral submissions in support of the appeal. The 1<sup>st</sup> respondent was represented by **Mr. Wasuna** and **Miss Opar**, with **Mr. Nyakundi** appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, while **Mr. Juma** represented the 4<sup>th</sup> respondent.

12. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed submissions and their counsel orally highlighted the same. Mr. Juma made brief submissions in opposition to the appeal.

13. We have carefully considered the record of appeal as well as the submissions of counsel. We are of the considered view that this appeal is without merit and hereby dismiss it. The effect of that finding is that the decision of the 2<sup>nd</sup> respondent's internal dispute resolution tribunal dated 16<sup>th</sup> June, 2017 shall stand. The costs of the appeal are awarded to the 1<sup>st</sup> respondent.

14. The reasons on the findings and orders herein shall be given on 29<sup>th</sup> September, 2017.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of July, 2017.**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**



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