



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO 81 OF 2017

MICHAEL GITHII GAKUNGU.....APPLICANT/APPELLANT

VERSUS

MBOGO JOHN JOSEPH NJUGUNA RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION INTERESTED PARTY

(Being an Appeal from the Judgment and Decree of the Political Parties Disputes Tribunal in Complaint No. 268 of 2017 delivered on 25th May, 2017 at Nairobi.)

BETWEEN

MBOGO JOHN JOSEPH NJUGUNACLAIMANT

VERSUS

JUBILEE PARTY OF KENYA RESPONDENT

JUDGMENT

1. The Appellant **Michael Githii Gakungu** and the 1st Respondent **Mbogo John Joseph Njuguna** are both members of **Jubilee Party of Kenya**, The 2nd Respondent and in that capacity contested for nomination as candidate for the position of member of County Assembly for Kiru Ward, Mathioya Constituency in Muranga County while the interested Party IEBC is the constitutional body mandated to manage elections in Kenya.

2. The said nominations or party primaries were held on 26/4/2017 where allegedly the 1st Respondent was declared the winner with a total vote of 3496 against the Appellant who came second with 3134 votes. Being aggrieved by the said results the Appellant moved to the 2nd Respondent **National Election Appeals Tribunal in Appeal No. 484 of 2017** against the constituency Returning officer one **Robert Muiruri** where he complained that the returning officer willingly and negligently declined to announce him as the winner .

3. The Jubilee Tribunal rendered its Judgment thereon in which it held that failure on the part of the Returning Officer to declare the complainant as the winner of the nomination led to the conclusion that the process was not transparent, free and fair and did not reflect the will of the people of Kiru Ward and proceeded to declare the 1st Respondent win null and void and declared the Appellant the winner.

4. Being dissatisfied with the Jubilee Ruling wherein he was not a party, The 1st Respondent moved to PPDT in **Tribunal case No.268/2017** and in his statement of claim alleged that the Appellant had been awarded nomination certificate after he lodged a complaint with Jubilee Appeal Tribunal which nullified his nomination and stated that the Returning officer had sworn an affidavit to confirm his win in an election which was free and fair.

5. Upon perusing the original Tribunal file I was unable to confirm whether the 2nd Respondent filed a response to the claim therein and it is also clear that the Appellant was not made a party to the proceedings before the Jubilee Appeal Tribunal.

6. The Tribunal rendered its verdict in the following terms:-

10 The claimant adduced two documents, which demonstrated that the Returning officer declared Mbogo Joseph John Njuguna as the winner it is unclear under what circumstances the retallying was done by the OCPD Mathioya and whether it was in accordance with the party rules.

11 It is not disputed that the claimant was not heard in Appeal 484 of 2017, even though his nomination was directly in issue A declaration was therefore issued to the effect that the 1st Respondent was duly nominated.

7. The above Judgment is what led to the filing of the appeal herein in which the Appellant raised the following grounds of Appeal:-

1. The Honourable Tribunal erred in Law by violating the Appellant's Constitutional right to a fair hearing.

2. The Honourable Tribunal erred in Law and in fact holding that the 1st Respondent herein is the duly nominated Jubilee Party of the Kenya candidate for the position of member of the County Assembly for Kiru Ward, Mathioya Constituency in Muranga County.

3. The Honourable Tribunal erred in Law and in fact in allowing the 1st Respondent's complaint without hearing the Appellant who had been confirmed as the winner of the nominations for Kiru Ward, Mathioya Constituency in Muranga County by the 2nd Respondent's National Elections Appeals Tribunal.

8. The Appellant therefore sought the following orders:-

a. THAT The appeal be allowed.

b. THAT the Appellant be confirmed as the 2nd Respondent candidate for Kiru Ward, Mathioya Constituency Muranga County in the forth coming General Election Scheduled for 8th August 2017 and any certificate issued to the 1st Respondent by the 2nd Respondent be and is hereby cancelled.

c. THAT The interested party be and is hereby directed to accept nomination papers of the Appellant, MICHAEL GAKUNGU as the 2nd Respondent (JUBILEE PARTY OF KENYA) candidate for Kiru Ward Mathioya Constituency, Muranga County.

d. THAT Cost be granted

9. The Appeal was certified urgent and fixed for hearing when the court made the following Directions.

1. THAT the election was free and fair with the only issue in dispute being that tallying was not properly done.

2. To dispose of this Appeal Each party to produce form 3(e) which were given to their agents at the polling station for scrutiny by the court.

3. The 2nd Respondent to supply the court with original form 3(e) and form 4(ii) (b).

4. The Returning officer to be summoned to attend court for cross examination by the parties herein.

10. This Appeal was therefore heard by way of cross examination of the Returning Officer who testified on oath and confirmed that as per the documents supplied to him by the presiding officers upon which the Aggregate Results were entered it was the 1st Respondent who won the elections. It was his evidence that any alterations to the said form was done by the presiding officers and the Agents of all the candidates signed at the back of the said form.

11. He confirmed having issued the Appellant with Aggregate Results produced as MGGI but stated that the same was issued under duress He therefore maintained that it is the 1st Respondent who won the nomination as per the documents which he forwarded to Jubilee Party and that the tallying confirms his win.

12. At the close of cross examination the parties were invited to make written submission and at the time of the Judgment it is only the Appellant who filed his submissions where it was submitted that the Appellant was not given a hearing before the PPDT and therefore did not present his case and that it is the Appellant who was declared the winner.

13. From the original Tribunal file, the pleadings before the court and the evidence of the Returning Officer together with the original documents presented to court by Mr. Omuganda Advocate for the 2nd Respondent the following issues turns out:-

1. Before the Jubilee National Appeal Tribunal No. 484/2017 the Appellant only sued the Returning officer but failed to enjoin the 1st Respondent whose win he sought to overturn.

2. The Appellants main complaint at the Jubilee Tribunal was that the Respondent (The Returning Officer) willingly (sic) and negligently declined to announce the Appellant as a winner whereas before me the same has produced an Aggregate Results allegedly issued to him on 27/4/2017.

3. THAT whereas both Aggregate Results form produced by the Appellant and the 1st Respondent are signed, the original forms produced by the 2nd Respondent does not have the signature of the Returning officer.

4. That at the PPDT the 1st Respondent only sued the 2nd Respondent but failed to enjoin the Appellant whose certificate he sought to nullified.

14. It is clear from the records of the proceedings before both Jubilee Appeal Tribunal and PPDT that both the Appellant and the 1st Respondent have not approached the court with clean hands and he who seeks equity must do equity.

15. I have taken time to analyze the original form 3(e) presented by the 2nd Respondent and make the following comments thereon.

1. MIORO PRIMARY SCHOOL – There is an alteration in favour of both the Appellant and the 1st Respondent.

KIAMBUTHIA PRIMARY SCHOOL – There is an alteration of the figures in respect of the 1st Respondent from 303 to 309.

3. KAIRO PRIMARY SCHOOL – The figures are over written.

4. KIRU PRIMARY SCHOOL – Change in favour of the 1st Respondent for 21 to 121

5. NGURUINI – There is an alteration in favour of the 1st Respondent.

6. 4. KAMAGORO TEA COLLECTION CENTRE – The figures are over made.

7. THANGAMA TEA COLLECTION – The figures in favour of the 1st Respondent seem to be altered.

16. The Returning officer has maintained under oath and in cross examination that the figures were not altered by himself but by the Presiding officers. Since the presiding officers are identifiable from the said forms and in the interest of the party since the presiding officers can be found I hereby direct the 2nd Respondent to obtain affidavit from the seven (7) presiding officers in respect of the disputed polling station to be placed before me on 5/6/2017 at 8.30 for the conclusion of the Judgment here now that I have heard from the Returning officer.

DATED, SIGNED and DELIVERED at Nairobi this 31st day of **May, 2017.**

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Kuria for the Appellant

Mr. Ombasa for the Respondent

Tabitha court clerk