



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
ELECTION PETITION APPEAL NO.78 OF 2017

SYMON KAITIKEI ROTIKEN.....APPELLANT

VERSUS

AGNES NAILANTEI SHONKO.....1ST RESPONDENT

JUBILEE PARTY NATIONAL ELECTIONS BOARD.....2ND RESPONDENT

JUDGMENT

The Appellant, Symon Kaitikei Rotiken and the 1st Respondent, Agnes Nailantei Shonko participated in the primary nominations organized by the 2nd Respondent which sought to nominate its candidate for the Narok North parliamentary seat in Narok County. The first nominations which were held on 25th April 2017 were nullified by the Political Parties Dispute Tribunal on 10th May 2017. In its judgment, the Tribunal ordered the 2nd Respondent to conduct fresh nominations for the said parliamentary seat within forty-eight (48) hours of its judgment. It further directed the 1st Respondent and the candidates “to agree on their agents and specific polling stations where the fresh nominations shall be conducted, within the next 12 hours.” In compliance with this order, the 2nd Respondent held fresh nominations on 12th May 2017. According to the results on record, the Appellant garnered 20,499 votes while the 2nd Respondent got 350 votes. The 1st Respondent was not satisfied with this subsequent nomination. She filed an application before the Political Parties Disputes Tribunal seeking to have the said results nullified on the grounds, *inter alia*, that the 2nd Respondent had conducted the repeat nomination exercise in breach of the orders which were earlier issued by the Tribunal. The Tribunal found merit with the application. It found that the repeat nominations conducted by the 2nd Respondent on 12th May 2017 had been undertaken contrary to the orders of the Tribunal issued on 10th May 2017. It nullified the nomination certificate issued to the Appellant and directed that another repeat nomination be held by the 2nd Respondent within 72 hours of the Ruling. This Ruling was delivered on 25th May 2017. It is Ruling that provoked the present appeal.

In his memorandum of appeal, the Appellant challenged the decision of the Tribunal on various grounds which may be summarized as follows: he was aggrieved that the Tribunal had failed to consider the totality of the evidence presented to it and thereby arrived at the erroneous decision that the repeat nominations were not held in accordance with the orders that it had earlier issued. The Appellant was aggrieved that the Tribunal had failed to appreciate that in both nominations the Appellant had obtained 10,000 votes more than the 1st Respondent and therefore there was no justification to order another repeat nomination. The Appellant stated that the order that a repeat nomination be held was untenable because

the 1st Respondent was no longer a member of Jubilee Party having voluntarily resigned from the party and joined another party. The Appellant reiterated that as a non-member of Jubilee Party, the 1st Respondent had no *locus standi* to participate in nomination exercise held by Jubilee Party to nominate its candidate for the said Narok North Constituency seat. In the premises therefore, the Appellant urged the court to allow the appeal, set aside the order issued by the Tribunal and proceed to restore the nomination certificate issued to the Appellant by the 2nd Respondent.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Naeku for the Appellant, Ms. Mboce for the 2nd Respondent and by Mr. Munaawa for the 1st Respondent. This court has read the pleadings filed before the Tribunal. It has also considered the submission made before this court by learned counsel. There are several issues that came to the fore for determination during the hearing of this appeal. The first issue is whether the Tribunal had jurisdiction to hear the subsequent application which was lodged by the 1st Respondent even after evidence had been presented before it that there was a possibility that the 1st Respondent was no longer a member for Jubilee Party after she is said to have resigned from the party and joined another party.

In paragraph 17 of its Ruling, this is what the Tribunal said when addressing the question of its jurisdiction:

“The Respondents (Appellant and the 2nd Respondent in this appeal) submit that this Tribunal lacks jurisdiction over the application since the claimant (the 1st Respondent) has since become affiliated to another political party. We reiterate that the primary dispute relates to a political party primary conducted by the 1st Respondent and in which the claimant and the 2nd Respondent participated on 25th April 2017 and again on 12th May 2017. This specific application is in respect of the 1st Respondent’s party primaries conducted on 12th May 2017 under the orders of this Tribunal. The jurisdictional argument is a ploy to dislodge the claimant from this Tribunal’s seat of justice.”

The Appellant argued before this court that the 1st Respondent had resigned from Jubilee Party and therefore she had no business challenging the election of Jubilee Party’s nominee for the Narok North Constituency seat. The Appellant produced a letter which was allegedly written by the 1st Respondent to Jubilee Party in which she indicated that she had resigned as a member of the party. The Appellant further annexed a list of party members kept by the Registrar of Political Parties which confirmed that the 1st Respondent was a member of Chama Daima Mwangaza Party. The 1st Respondent disputes the claim that she had resigned from the Jubilee Party. She told the court that someone with ill intentions forged her signature and presented the resignation letter to Jubilee Party. She had reported the incident to the police. The incident was under investigations. She showed the court a letter from Chama Daima Mwangaza Party which indicated that she was not a member of that party.

The 2nd Respondent showed the court another letter from the Registrar of Political Parties which indicated that the 1st Respondent was not a member of Jubilee Party and was not affiliated to any party. Clearly, the issue as to whether the 1st Respondent was a member of Jubilee Party was germane to the issue that the Tribunal was determining. The Tribunal fell in grave error when it gave short shrift to the argument presented by the Appellant to the effect that where it was established that the 1st Respondent was not a member of Jubilee Party, then the Tribunal lacked jurisdiction to adjudicate a complaint presented by a non-member challenging the nomination exercise of the party. This court’s re-evaluation of the reasons advanced by the Tribunal in declining to consider the question whether the 1st Respondent was a member of Jubilee Party led it to the conclusion that the Tribunal had a mind-set to reach a pre-determined determination irrespective of whether there was merit in the preliminary and weighty issue presented on whether the 1st Respondent was a member of Jubilee Party.

This court re-evaluation of the evidence placed before it on the issue of whether the 1st Respondent is a member of Jubilee Party leads to the determination that a legitimate question was raised regarding the

membership of the 1st Respondent in Jubilee Party. The Tribunal should have investigated this claim. It did not matter that at the first time the Tribunal assumed jurisdiction when the 1st Respondent lodged a complaint before it the question as to the membership of the 1st Respondent in Jubilee Party was not an issue before it. This court takes judicial notice of the fact that many contestants in dominant political parties resigned their membership of the said political parties when they lost nomination in the primaries that were held by the said dominant political parties. It was not therefore outside the realm of possibility that the 1st Respondent may have resigned from Jubilee Party after losing in the nomination exercise.

The Tribunal's jurisdiction to hear disputes is provided under **Section 40** of the **Political Parties Act**. **Section 40(1)(b)** of the **Act** mandates the Tribunal to hear a dispute between a member of a political party and the political party. The Tribunal had no jurisdiction to purport to hear a dispute between a person whose membership is in question against a political party which asserts that the person is not its member. As was held in the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** per Nyarangi, JA:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

In the present appeal, the Tribunal ought to have made an inquiry when the issue was raised whether the 1st Respondent was a member of Jubilee Party. When documentary evidence was presented to the Tribunal which *prima facie* established that there was a possibility that the 1st Respondent was not a member of Jubilee Party (having voluntarily resigned from the party), the Tribunal should have downed its tools and proceeded no further because it lacked jurisdiction to entertain the application that was brought before it. On re-evaluation of the evidence presented by the parties to this appeal on the question whether the 1st Respondent ceased to be a member of Jubilee Party, this court holds that there was *prima facie* evidence that the 1st Respondent indeed resigned as a member of the Jubilee Party. Although the 1st Respondent has challenged the documents produced before this court by the Appellant and the 2nd Respondent regarding her resignation as a member of Jubilee Party, this court is not persuaded, without further proof, that the 1st Respondent was able to dislodge the *prima facie* evidence that she was no longer a member of Jubilee Party.

As regard the issue whether the repeat nominations were conducted in accordance with the directions which had earlier been issued by the Tribunal, this court, upon re-evaluation of the evidence placed before the Tribunal and the submissions before this court, reached the determination that the directions issued by the Tribunal were vague and not specific enough to be complied with by the 2nd Respondent within the short period that the Tribunal had directed for the repeat nominations to be held. For instance, it could not possible for the 2nd Respondent to meet with the candidates, print new ballot papers and conduct fresh nominations within 48 hours, taking into consideration the size, the terrain and the road network in Narok North Constituency. The evidence presented before the Tribunal clearly showed that

the 2nd Respondent did the best that it could in the circumstances and within the time that the Tribunal required it to conduct the repeat nomination.

For the Tribunal to condemn the 2nd Respondent for allegedly conducting a repeat nomination without abiding by its directions when the said directions were vague and lacked specificity was to say the least unfair to the 2nd Respondent. The finding made by the Tribunal to the effect that the repeat nominations were conducted in breach of its directions is therefore not supported by evidence and cannot be sustained. Again, it was apparent to this court that the Tribunal's assumed mind-set precluded it from impartially considering the totality of the evidence that was placed it before it reached the impugned determination.

The upshot of the above reasons is that the Appellant established sufficient grounds to enable this court allow the appeal. The appeal is allowed as a result of which the Ruling delivered by the Political Parties Disputes Tribunal on 25th May 2017 is set aside on the grounds that the Tribunal lacked jurisdiction to consider the application which had been lodged by the 1st Respondent when legitimate questions were raised regarding her lack of membership of Jubilee Party. The Tribunal did not also consider the merits of the evidence that was placed before it and reached the erroneous conclusion that the repeat nomination exercise had been conducted contrary to its orders which it had issued on 10th May 2017. For the avoidance of doubt, the Appellant Symon Kaitekei Rotiken shall be at liberty to present his nomination to the Independent Electoral and Boundaries Commission (IEBC) as the nominee of Jubilee Party for the seat of Narok North Constituency. There shall be no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF MAY 2017

L. KIMARU

JUDGE