



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO 65 OF 2017

ASHRAF HASSAN BAYUSUF.....APPELLANT

VERSUS

JUBILEE PARTY OF KENYA.....1ST RESPONDENT

YASSIR NOOR MOHAMED NOOR.....2ND RESPONDENT

*(Being an appeal from the entire Judgment & Decree of the
Political Parties Disputes Tribunal Dated and delivered on
the 19th May 2017 at Nairobi in complaint No.244 of 2017)*

BETWEEN

YASSIR NOOR MOHAMED NOOR.....COMPLAINANT

VERSUS

JUBILEE PARTY OF KENYA.....1ST RESPONDENT

ASHRAF HASSAN BAYUSUF.....2ND RESPONDENT

JUDGMENT

1. The Appellant **Ashraf Hassan Bayusuf** and the 2nd Respondent **Yasir Noor Mohamed Noor** are both members of the **Jubilee Party Of Kenya**, 1st Respondent and in that capacity took part in the Jubilee Party nomination for Nyali constituency together with three (3) others conducted on 26/4/2017 in which the Appellant was allegedly declared a winner with a total vote of 1404 while the 3rd Respondent was third with 895 votes.

2. Being dissatisfied with the said elections the 2nd Respondent filed an Appeal NO. 382/2017 against the

Appellant and the National Election Board at the **Jubilee Appeal Tribunal** in which he alleged that the 1st Respondent failed to observe its nomination Rules which appeal was dismissed on 10/5/2017.

3. Being dissatisfied with the said decision the 2nd Respondent moved to the PPDT and filed COMPALINT NO. 244 OF 2017 in which he sought the following prayers:

a. An injunction against the Respondent from nominating and or presenting the name of the Appellant to IEBC as a candidate for member of National Assembly for Nyali constituency

b. An order for the repeat of the said nomination.

c. In the alternative for an order directing the 1st Respondent to nominate the claimant as its candidate for member of the National Assembly for Nyali Constituency for the election of 8/8/2017.

4. The 2nd Respondent further filed written submission and the matter fixed for hearing on 18/5/2017 when it was adjourned to 19/5/2017 to enable the Appellant file his Response which he did together with grounds of opposition and a Replying affidavit in which it was deponed that before the elections it was agreed by all the aspirants to have only 15 polling stations and that the exercise be conducted using only the voters identity card and membership card as opposed to the Register.

5. Based upon the said pleadings the PPDT rendered its Judgment on 19/5/2017 and found on fact that the nominations exercise was marred by irregularities and made the following orders:

a. The 1st Respondent be and is hereby ordered to forth With conduct a fresh nomination exercise to determine its nominee for the position of members of the National Assembly of Nyali Constituency taking into consideration the interest of the complaint and the 2nd Respondent (Appellant) together with the party members and in compliance with 1st Respondent constitution and Election and nomination Rules.

b. The nomination certificate issued by the 1st Respondent arising out of the nomination exercise of 26th April 2017 be and hereby nullified.

c. Notice of this decision to issue to IEBC.

APPAEL

6. Being aggrieved by the said decision the Appellant filed this appeal and filed memorandum of Appeal raising the following grounds:

a. The Hounarable Tribunal erred in Law and fact in making a decision without hearing the Appellant.

b. The Hounarable Tribunal erred in Law and fact in declaring that the 1st Respondent repeat its nomination exercise in Nyali constituency and sought for the following orders:

i. The whole Judgment of the Hounarable Tribunal delivered by the Said Tribunal on 19/5/2017 be set aside.

ii. The Tribunal file No. 244 of 2017 be availed to the court to read through and address itself on the issue of denying the Appellant an opportunity to present his case.

iii. From the outcomes of the said perusal of the court PPDT file the court do declare and expunge from the records and submissions presented before it by the 2nd

Respondent herein.

iv. From the outcome of the perusal of the said file this court do declare that the political parties Dispute Tribunal erred in Law and in fact by ordering a repeat of the nomination exercise.

7. The 2nd Respondent filed a Response to Appeal on 24/5/2017 in which it was stated that the Appellant filed a reply to the claim and written submissions at the PPDT which were considered and dismissed. It was stated that the Appellant had not annexed the consent signed by the parties in respect of the manner the nomination was to be conducted and that the order for repeat nomination excise are fair and just as the parties will be given another opportunity to participate in a free, impartial, accurate and accountable manner.

SUBMISSIONS

8. It was submitted by the Appellant that the Tribunal erred in Law and fact in ordering for fresh nomination and that the Respondent moved to PPDT as an abuse of court without prosecuting his Appeal at the Jubilee Tribunal and is therefore guilty of material non disclosure. It was submitted that the Appellant had obtained 1404 votes at the exercise where the 2nd Respondent was third with 894 votes and that his complaint was that two stations had been left out. It was submitted that the 2nd Respondent suffered no prejudice since that affected all the Aspirants.

9. It was submitted that the 2nd Respondent abandoned his complaint before the Jubilee Tribunal and moved to the PPDT directly and the Appellants objection was not considered. It was further submitted that the information before the Tribunal was not enough to order for repeat nominations.

10. On behalf of the 1st Respondent it was submitted that the 2nd Respondent complaint at the party Tribunal was dismissed since the same did not appear to prosecute it and that the Tribunal found that no irregularities were detected. It was submitted that the voting took place in all polling stations and if there were any irregularities they were not substantive enough to change the final result. It was submitted that a complaint was not raised on all polling stations and therefore the Tribunal could not order repeat nomination in all polling station.

11. On behalf of the 2nd Respondent it was submitted that the same presented his complaint before the party Tribunal before moving to PPDT and therefore relied on his grounds in response to the appeal herein.

ANALYSIS AND DETERMINATION

12. From the pleadings and submissions before the court it is clear that the Appellant and 1st Respondent main complaint is that the allegations made by the 2nd Respondent before the PPDT was that voting did not take place in two stations namely **Tumaini Church And Fadhili Adhiu Primary School** with registered voters of 3684 and 1155 respectively and that voting at **Kongowea Primary School, Kongowea Social Hall, Khadija Primary School, Frere Town Primary School and KRA Custom** were conducted using incomplete party register which was not enough to enable the Tribunal to order a repeat in the whole constituency.

13. It is the contention of the Appellant that his Reply to these allegations before the Tribunal wherein he explained what had been agreed upon and what happened had not been taken into account by the Tribunal. It is further contended that the 2nd Respondent had not finalized the internal party dispute settlement mechanism before proceeding to PPDT.

14. This being an appeal on both fact and Law, the court is under a duty to reevaluate all the evidence tendered before the Tribunal and to come to its own conclusion thereon. The second Respondent having filed Appeal No. 382 of 2017 with the Jubilee Party National Election Appeal Tribunal was not a bar to

him approaching the PPDT directly by virtue of section 40(1)(fa) however, having filed the said Appeal he could only approach the PPDT on appeal against the decision of the Jubilee Appeal Tribunal.

15. The PPDT in its Judgment challenged herein having found that there were irregularities in the nomination exercise failed to consider whether irregularities were substantive enough so as to affect the outcome of elections from the tallying thereon as provided by the 2nd Respondent himself and whether the exclusion of the polling stations could have affected the outcomes of the elections as per the **Supreme Court Decision In Raila Odinga And Others Vs IEBC & 3 Others Election Petition No. 5 Of 2013.**

16. Since the 2nd Respondent main complaint at the PPDT was that the votes as tallied were not a reflection of the eligible voters who are members of the party in Nyalı constituency I am of the considered view that the PPDT did not give an analysis of both qualitative and quantitative effect of the alleged irregularities and therefore find merit on the appeal herein since the 2nd Respondent did not suffer over and above all the other contestant.

17. Section 83 of the Election Act which empowers the court to validate or invalidate an election following a petition provides as follows:

83 “No election shall be declared to be void by reason of non-compliance with any written Law relating to election if it appears that the election was conducted in accordance with the principles laid down in the constitution and in that written Law or that the non –compliance did not affect the result of the election”

18. It is also trite Law that the Tribunal could only lawfully determine issues that were specifically placed before it and could not go the issue which were not pleaded see **Gandy Vs Caspair Air Charters Ltd [1956] 23 EACA 139 where Sir Sinclair V.P Said**

The object of pleadings is of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

19. From the record of Appeal it is clear that the 2nd Respondent claim was in respect of the two primary schools and therefore by ordering election for the whole constituency the Tribunal fell into error by giving a relief that was not supported by the pleadings before it for which its decision ought to be set aside which I hereby do.

20. Having reviewed the evidence tendered before the Jubilee Tribunal and PPDT I come to the conclusion that the irregularities pleaded by the 2nd Respondent did not substantially affect the outcome of the nomination noting that it is the 2nd Respondent who provided the Tribunal with the tallies confirming the win by the Appellant

21. In view of the matters stated herein above I hereby make the following orders:

a. The Judgment of the PPDT dated 19/5/2017 and all subsequent orders issued as a result thereof be and is hereby set aside.

b. Each party to bear his own cost this being a dispute involving members of the 2nd Respondent who still need each other

DATED, SIGNED and DELIVERED at Nairobi this 29th day of May, 2017.

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J. WAKIAGA

JUDGE

In the presence of:-

No appearance for the 1st Appellant

Mr. Nyaberi for the 1st Respondent

Mr. Ombaso for Mr. Omuganda for the 2nd Respondent

Paul/Tabitha court clerk