



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 66 OF 2017

LIBAN HIRSI HASSAN APPELLANT

VS.

JUBILEE PARTY OF KENYA 1ST RESPONDENT

KARISA NZAI 2ND RESPONDENT

JUDGEMENT

1. Liban Hirsi Hassan (the Appellant) is aggrieved by the Decision of Political Parties Dispute Tribunal of 19th May 2017 which declined to uphold the Decision of Jubilee Party National Election Appeals Tribunal (hereinafter the Jubilee Internal Dispute Resolution Mechanism (IDRM) or Party Tribunal).

2. The common facts giving rise to this Appeal are that on 26th April 2017, the Jubilee Party held its Primary for the nomination of its candidate for Member of the Parliament for Jomvu Constituency. At the close of Polls, Karisa Nzai (the 2nd Respondent) was declared the winner and a Nomination Certificate was issued to him by the Party.

3. Dissatisfied with that outcome, the Appellant moved the Jubilee IDRM on Appeal. One of the grounds of Appeal, and which persists to date, is that the 2nd Respondent was not a member of the Jubilee Party and was not eligible for the Nomination. That he was in fact a Member of the Orange Democratic Movement(**ODM**) and had participated in the Primary of the said Party for Nomination as Candidate in the upcoming Elections.

4. At the IDRM, the Tribunal returned the following verdict:-

“In the absence of any presentation from the part of the Respondent and on the basis of the documentary evidence which were confirmed to be available in the website of the IEBC that the Respondent was actually gazetted as a Candidate, the Tribunal finds that the was and is not legible to be issued with a Jubilee certificate and therefore upholds the appeal. Consequently, the Appellant be issued with the nomination certificate to vie for Member of Parliament Jomvu Constituency”.

5. That should have been the end of the matter but it would seem that the National Election Board of Jubilee Party was reluctant to comply with the Order of its own Tribunal and vide a Notice of Motion dated 13th May, 2017, the Appellant moved the Political Parties Dispute Tribunal(**PPDT**) for the following final order:-

“5. THAT the Honourable Tribunal be pleased to grant an order of permanent injunction restraining the 1st Respondent by themselves, their officials, servants, agents and/or workmen from issuing a Nomination Certificate to any Jubilee Party Candidate other than Liban Hirsi Hassan, the Complainant herein”.

6. The verdict of the PPDT surprised the Appellant when it dismissed the said Application on 19th May 2017!

7. The Appeal before this Court is brought under the auspices of Section 41(2) of the Political Parties Act. There, an Appeal lies from the Decision of the PPDT to the High Court, on points of Law and Facts. The Appeal raised 7 grounds but the grievances are really on two substantive issues.

8. As a preliminary issue, it was pointed out that the 1st Appellant mis-interpreted and/or misapplied the Nomination Rules of The Jubilee Party and particular regard being given to Rule 39 which reads:-

‘The decision of the National Elections Board shall be a subject of Appeal to the National Appeals Tribunal whose decision shall be final’.

9. Secondly, that against the weight of evidence, the PPDT failed to hold that the 2nd Respondent was not a member of ODM Party.

10. This Court, entertaining this matter as a first Appellate Court and on both questions of Law and Fact, is duty bound to re-assess the evidence that was placed before the PPDT with a view to drawing its own conclusion. For this reason the original record was made available to this Court at the hearing of the Appeal.

11. It is not in dispute that the Primary from which this dispute arises was conducted under the aegis of the Jubilee Party Nomination Rules 2016 (hereafter the Rules). Part XII of The Rules is on Appeals organs, Constitution, Powers and Process. Rule 39 which falls under part XII provides:-

“The decision of the National Elections Board shall be a subject of Appeal to the National Appeals Tribunal whose decision shall be final”.

12. The Appellant herein, being aggrieved by a decision of the National Election Board Party, appealed to the Party Tribunal with success.

13. Thereafter, the Appellant moved the PPDT seeking the enforcement of the Decision of the Party Tribunal. The record shows that at the PPDT, the Jubilee Party resisted the Appellants Motion through the Affidavit of Marykaren Kigen-Sorbit sworn on 18th May 2017. She describes herself as the Deputy Executive Director and Director of Legal Affairs of the Jubilee Party.

14. She depones as follows in paragraphs 5 and 6 of her Affidavit:-

“5. THAT when the Claimant appeared before the Elections Tribunal, he misrepresented crucial facts as a result of which the ruling was made in his favour. Thereafter, the party was able to establish the following:-

a. That the Claimant had not effected service of the Complaint upon the 2nd Respondent herein contrary to the Rules of procedure.

b. That it was false that the 2nd Respondent was a member of ODM and a Candidate for JOMVU Parliamentary seat during the nominations on 19th April, 2017.

c. The Jubilee Party was presented with evidence from Mombasa Elections Board that the 1st Respondent had long resigned as a member of ODM and joined Jubilee Party as required. Annexed hereto and marked ‘MKI’ is a copy of a bundle of letters attesting to that fact.

6. THAT based on the foregoing, the Judgement by the Elections Tribunal was overturned since it was based on lies to the knowledge of the Claimant and the Nomination Certificate awarded to the 2nd Respondent as a Candidate for Jomvu Parliamentary Elections in August, 2017.

15. The Deponent was in effect saying that Party Tribunal had a change of heart and had overturned the Decision sought to be enforced. This, in my view, would be both confusing and perplexing because there is no evidence that the Deponent was a Member of the Party Tribunal and, certainly, she was not on the Panel that made the Decision. Secondly, it would be strange and against the Rules of Nature Justice and a basic tenet of fair administrative action (Article 47 of The Constitution) for the Party Tribunal to reverse its Decision without hearing the affected Parties.

16. Anyhow, the pith of the argument by the Appellant in respect to Rule 39 is that the Decision of the National Appeals Tribunal was final in respect to the National Elections Board and would not be subject of an Appeal.

17. The Motion dated 13th May 2017 by the Appellant which originated the proceedings before the PPDT, was not an Appeal from the Decision of The National Appeals Tribunal. To the contrary it sought an affirmation of the Decision of the said Tribunal and enforcement of its order. The Appellant was forced to take this route because:-

“6. THAT on the 10th day of May, 2017, the Jubilee National Elections Appeals Tribunal decided the Petition in my favor (copy of the said Ruling attached and marked as LHH20 and directed that I be issued with the Party’s Nomination Certificate to run for the position of Member of Parliament for Jomvu Constituency under the Party’s ticket.

7. THAT there is therefore the urgent need to have the requisite nomination certificate issued in my name and equally my name forwarded and be presented to the Independent Electoral and Boundaries Commission (IEBC).

9. The Complainant had a legitimate expectation that he would be awarded the Party certificate following the ruling by the Jubilee Party Appeals Tribunal dated the 10th day of May, 2017.

10. That if was the duty of the 1st Respondent, and/or through themselves, their agents and/or workmen to ensure the order of the Jubilee Party Appeals Tribunal dated 10th May, 2017 has been complied with by including the Complainant’s name into the Jubilee Party list that is to be presented to the Independent Electoral and Boundaries Commission (IEBC).

11. That it is a constitutional right for the Complainant to participate in the General Election on a Jubilee Party Ticket having been

declared the winner of the Party nominations conducted on 26th April, 2017.

12. That the official timelines set for Party Primaries necessitate this matter to be heard as a matter of urgency”.

These are the averments of the Appellant in his affidavit in support of the Petition.

18. Clearly, it was the perceived reluctance of the Jubilee Party to act on the decision of one of its organs that motivated the Complaint by the Appellant to the PPDT. As I see it there was now crisis as the Party was disregarding the Decision of its own Appeals Tribunal in respect to a Party Primary.

19. This scenario reveals a special feature of the Jurisdiction of the PPDT as granted by section 40(1) and (2) of The Political Parties Act and how it plays out in real life. Section 40 reads as follows:-

“(1) The Tribunal shall determine-

- a) Disputes between the members of a political party.
- b) Disputes between a member of a political party and a political party.
- c) Disputes between political parties.
- d) Disputes between an independent candidate and a political party.
- e) Disputes between coalition partners and
- f) Appeal from decisions of the Registrar under this Act.
- g) Disputes arising out of party Primaries”.

(2) Notwithstanding Subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b) or (e) unless the dispute has been heard and determined by the Internal Political Party Dispute Resolution Mechanism”.

20. In respect to disputes arising out of Party Primaries there is no requirement that the Disputants begin their journey at the IDRDM before resorting to the PPDT. That said it seems good practice that the first port of call should be at the IDRDM because Disputants may find a quick, cheap and perhaps Consensual Resolution of their grievances within the family setting of The Party.

21. However, the decisions of the IDRDM are not enforceable and it is envisaged that the Parties to the dispute would submit to then without coercion. But this did not happen here. The Appellant found himself in a quagmire as the National Elections Board was reluctant to give effect to the Order of its own IDRDM.

22. In that unhappy position the Appellant, moved the PPDT for recognition and enforcement of the Decision of the IDRDM. The request was resisted by the Party and the 2nd Respondent. The consequence of which was that a dispute that the IDRDM had decided was now resubmitted to PPDT for determination.

23. When the PPDT is seized of a matter such as this, then it is acting in its original Jurisdiction and it may depart and affirm the Decision of the IDRDM. Where a dispute is first commenced at the IDRDM and again submitted to the PPDT in its Jurisdiction under section 40(1)(fa), then it takes the character of an Appeal but is nevertheless not one as the Jurisdiction of the PPDT in those provisions is not Appellate.

24. Being of that view, this Court comes to the conclusion the posturing by the Party and the 2nd Respondent (in seeking that the PPDT departs from the decision of the IDRDM) did not turn the proceedings before the PPDT into an Appeal from the Decision of IDRDM. For that reason Rule 39 of the Nomination Rules could not bar the Respondents from taking up their defences.

25. This Court now turns to determine whether, on the facts before it, the PPDT erred in reaching the Decision it did.

26. The evidence of the Appellant was that the 2nd Respondent was a member of ODM Party and not Jubilee Party. To demonstrate this, the Appellant produced an excerpt of a Gazette Notice showing that the 2nd Respondent is a member of ODM and had been gazzetted to contest in the Party Primary for ODM. In addition, the Tribunal was shown a sample of a Ballot Paper in respect to the said Primary in which the name of the 2nd Respondent (as Karisa Nzai Munyika) appeared as a Candidate.

27. To this the 2nd Respondent retorts that in a letter of 18th January 2017 to ODM and received by the Party on 15th February 2017, he resigned as a Member of ODM. A copy of that letter is said to have been received by the Independent Electoral & Boundaries Commission (IEBC) on the same day. In addition, The Tribunal was shown a Complaint Letter from Mburu Nyamboye & Co. Advocates, said to be the 2nd Respondent’s Lawyers, protesting an impression allegedly created by ODM that the 2nd Respondent was still its Member.

28. In addition, the 2nd Respondent produced a receipt dated 7th March 2017 from the Jubilee Party for payment of Kshs.250,000 as

Nomination fees. With it is also a Letter from the said Party acknowledging receipt of the 2nd Respondent Nomination Papers.

29. The Tribunal is asked to find that on the strength of Gazette Notice and Ballot Paper, the 2nd Respondent was and still is a Member of ODM. The 2nd Respondent disagrees and points to his Letter of resignation and further argues that the issue of the Gazette and printing of Ballot Papers was not within his control and cannot be read as proving his membership with ODM.

30. There is no doubt that at one time or other the 2nd Respondent was a Member of ODM, although the Appellant insists that this is so to date. What then is the Law on Resignation of a Member from a Political Party? Section 14(1) and (2) of The Political Parties Act is unequivocal and provides:-

(1) A Member of a Political party who intends to resign from the political party shall give a written notice prior to his resignation to

a) The political party.

b) The clerk of the relevant House of Parliament, if the member is a member of Parliament, or

c) The clerk of County assembly, if the member is a member of a County assembly.

(2) The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House of county assembly”.

31. There is evidence by the 2nd Respondent that on 18th January 2017, the 2nd Respondent wrote a Letter addressed to Orange Democratic Movement , Orange House, Menelic Road, Kilimani Road, resigning as a Member of the said Party. On the Letter is a receipt stamp of ODM dated 15th February 2017 acknowledging thereof. Although the Appellant was doubtful about its authenticity, questioning why a Letter of 18th January 2017 would be received on 15th February 2017, the Appellant did not produce any evidence to undergrid its doubts.

32. In addition the 2nd Respondent produced copies of Media Reports in which it was reported that there was a ploy by ODM to block him from contesting in the Elections by registering him as an Aspirant of their Party. There is also the protest letter of Mburu Nyamboye &co. Advocates dated 18th April, 2017. In respect to this letter Counsel for the Appellant notes that it does not bear a receipt stamp of ODM nor is there evidence of follow up actions by the 2nd Respondent or its Lawyer.

33. The Law is that the resignation of a Member of a Political Party shall take effect upon receipt of a Resignation Notice by the Political Party (Section 14(1) & (2) of The Political Parties Act). There is some evidence that a resignation letter dated 18th January 2017 by the 2nd Respondent was received by ODM on 15th February, 2017. If this evidence is to be believed then the 2nd Respondent’s Resignation as from ODM would be with effect from 15th February, 2017, being the date the Resignation Letter was received.

34. Is that evidence debunked by the publication of the 2nd Respondent as a Candidate for ODM or the appearance of his name on the Ballot Paper of its Party Primary? Is this proof that the 2nd Respondent participated in the ODM Nominations?

35. The Gazette Notice produced pronounces itself to be published by IEBC pursuant to, inter alia, the provisions of section 31(c) of The Elections Act. These provisions provides:-

“The Commission shall publish, in the Gazzette, the names of the Persons contesting in a Party Primary under subsection (1) and the date of the Party Primary within seven days of receipt of the names of Party Candidates”.

Where does the Commission get the names of the Contestants? The answer is in section 31(2B):-

“A Political Party shall, at least twenty-one days before the Nomination day submit to the Commission the names of the Persons contesting in its Party Primary and the date of its Party Primary”.

36. The Law is that it is a Party that submits the names to IEBC. In this case there would be a rebuttable presumption that it would be ODM that submitted the name of the 2nd Respondent to IEBC. There was no evidence produced by the Appellant to rebut this presumption. There is no evidence to demonstrate the circumstances under which ODM submitted the name to IEBC. He who asserts must prove. The Appellant carried the burden of proving that one of the reasons that ODM submitted the name was because the 2nd Respondent was its Party Member. This is a burden the Appellant did not discharge.

37. On the issue of the Ballot Paper, there is no evidence as to who printed the Ballot Paper. But if it is accepted that it was ODM, then ,the Appellant needed to prove that the Party did so because the 2nd Respondent was its member and had offered himself as a Candidate in the nomination and not out of the mischief that the 2nd Respondent had alluded to.

38. This Court agrees with Counsel for the 2nd Respondent that the Gazette Notice and printing of the Ballot Papers were matters outside his control. It seems to me that in the absence of evidence to the contrary and /or other evidence, the evidence of the Gazette and the Ballot Paper alone do not displace the evidence that the 2nd Respondent resigned from ODM with effect from 15th February 2017.

39. That being my view of this matter, I cannot fault the Decision of the PPDT and the Appeal is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 25th day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT:

N/a for Appellant

Omuganda for 1st Respondent

Taib for 2nd Respondent

Alex – Court clerk