



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
ELECTION PETITION APPEAL NO 48 OF 2017

BETWEEN

DAVID KIBITOK BUNGEI.....APPELLANT

VERSUS

KENYA AFRICAN NATIONAL RESPONDENT

(Appeal from the Judgment of the Political Parties Disputes Resolution Tribunal (Hon. Kyalo Mbobu, James Atemi & Hassan Abdi Dei) Delivered on 14th May, 2017 at Political Parties Dispute Resolution Tribunal Case. No. 156 of 2017)

JUDGMENT

1. The Appellant **David Kibitok Bungei** is a member of the **Respondent Kenya African National Union** and is desirous on contesting of the party Ticket as a member of National Assembly for **Chesumei Constituency Nandi County**. It was his contention that the said nomination exercise was to be held on 26/4/2017 but was advised on phone that it had been postponed to a date to be advised later.

2. Being aggrieved by the party's decision, the Appellant on 10/5/2017 under certificate of urgency filed a statement of claim at the Political Parties Dispute Resolution Tribunal in which he sought the following prayers:-

a. A declaration that the certificate issued by the Respondent for nominee member of Parliament Chesumei Constituency within Nandi County as null and void.

b. The Respondent to conduct a free and fair exercise as required by the Law and as per the party's nomination Laws and Regulations.

3. The Respondent filed a response to the said claim through an affidavit sworn by **Edward Kivuvani** in which it was confirmed that no nominations were held in the said constituency and none were scheduled to be conducted and therefore the complaint was prematurely instituted since the Appellant had not commenced IDR. It was further stated that under Article 24(a) of the party Constitution part 5 par 6 the party through NEC reserve the right to nominate a candidate directly where a nomination by voting has not taken place.

4. Based upon those pleadings the Tribunal heard the claim and on 1/5/2017 rendered their Judgment

where it dismissed the claim on the basis that the claimant had failed to specify when and to whom the certificate was issued and who the other aspirants were.

APPEAL

5. Being aggrieved by the Tribunal decision the Appellant filed this appeal and raised the following grounds of Appeal:-

- 1. The Tribunal erred in Law and in fact in finding that the complaint was seeking blanket orders the weight of the evidence.**
- 2. The Tribunal erred in Law and in fact in its analysis of evidence and the law applicable thereby making wrong conclusions and deductions as pertains to general damages awardable in this case.**
- 3. That the Tribunal erred in Law and in fact by failing to appreciate and to take into consideration the evidence in the affidavit filed by the Appellant and thereby arriving at the wrong conclusion.**
- 4. The Tribunal erred in Law and in fact in failing to look at the evidence by the Appellant contained in his affidavit and therefore ended up at the wrong conclusion in terms.**
- 5. The Tribunal erred in Law and in fact by finding that the appeal should fail for failure to disclose the status of the other nominees of the Respondent party and in the process disregards the evidence by the Appellant.**
- 6. The Tribunal totally misapprehended the facts of the case leading to erroneous application of the facts into Law.**

The Appellant sought an order that the Judgment of the Tribunal No. 156 of 2017 be set aside and an order made that the whole Judgment awarded was wrong and that KANU party be ordered to do party primaries and on involved of the Appellant in the alternative mechanism of nominating its nominee before issuing any aspirant with a nomination certificate.

SUBMISSIONS

6. Directions were given that the Appeal be heard by the way of submission where it was submitted by Mr. Kariuki on behalf of the Appellant that the party had not disclosed to him whether they had nominated anybody and further that the Appellant was entitled to a fair process having been cleared and paid the necessary fee. He therefore submitted that the same was entitled a fair process under Article 24 of the KANU constitution which includes vetting and nomination.

7. On behalf of the Respondent Mr. Makau submitted that there was no error both of fact and Law in the decision of PPDT and that the political parties operates within their constitution which for KANU they reserve the right to issue direct nomination which he confirmed the party had done.

8. Having confirmed that the Appellant was not accorded a right to fairly participate in the nomination exercise the court made the following:

a. The appeal is hereby allowed and the decision by the Tribunal be and is hereby set aside and substituted with an order as follows:

- 1. THAT The Respondent to conduct its nomination for the candidate for position of Member of Parliament for Chesumei Constituency in Nandi County within the next 48 hours.**
- 2. THAT Any nomination here before conducted without subjecting the Appellant to the**

party nomination procedures be and is hereby revoked.

3. THAT Each party to bear the cost

4. THAT A detailed Judgment shall be issued on 31/5/2017

9. Political parties in Kenya now plays a very important role for which they have been elevated to constitutional status and protected as such under Article 38(1)(a) which provides that Every citizen is free to make political choices which includes the right:

a. To form or participate in forming a political party

b. To participate in the activities or recruit members for a political party

c. To campaign for a political party or cause

10. To show the central role of political parties in the Kenya parliament has enacted political parties Act No. 11 of 2011 and in the First Schedule thereof a code of conduct for political parties is established in which the political parties are required to do some of the following:

4(b) Respect and uphold the democratic process as they compete for political power so as to implement their policies.

5(a) Respect the rights of all person to participate in the political process including youth minorities and marginalized groups.

6(a) Respect and uphold and acted the constitution of Kenya

(b) Respect and uphold the Act and any other written Law relating to elections and political parties.

(c) Respect, uphold and defend their respective political party constitutions, political party election rules, political party nomination rules and any other political party rules and Regulations developed and agreed upon in accordance with this code of conduct.

(d) Respect, uphold and promote democratic practices through regular fair, free, and credible elections within the political party and among others have a democratically elected governing body and political party organ.

(e) Respect uphold and promote democratic machines through free, fair and credible political party nomination.

11. From the material placed before the PPDT it is clear that the Respondent had failed in respect of the Appellant to comply with its own rules and Regulations and to the code of conduct as regards political parties stated herein and therefore the political rights of the Appellant had been infringed for which he was entitled to a remedy the PPDT having found rightly that they had jurisdiction to adjudicate upon the matter in terms of provision of section 40(1) (fa) of the Act and should not have been left without a remedy and therefore the Tribunal fell into error.

12. In the final analysis I find merit in the appeal herein which I hereby allow and set aside the Tribunal decision dismissing the Appellant claim and substitute the same with an order directing the Respondent to involve the appellant in the alternative mechanism of nominating its nominee before issuing any aspirant with nomination certificate within the next 48 hours.

13. This being a party dispute noting that political parties under code of conduct 4(c) are required to promote consensus building each party shall bear its cost.

DATED, SIGNED and DELIVERED at Nairobi this 24th day of **May, 2017**.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Kariuki for the Appellant

Mr. Makau for the Respondent

Tabitha court clerk