



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION APPEAL NO. 22 OF 2017**

**ALEXENDER KHAMASI MULIMI.....1<sup>ST</sup> APPELLANT**

**MICAH ANGATIA ZAKAYO.....2<sup>ND</sup> APPELLANT**

**MARK KASEMBELI FUNDIA.....3<sup>RD</sup> APPELLANT**

**ADIANO MATE.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**AMANI NATIONAL CONGRESS.....RESPONDENT**

**JUDGMENT**

1. The 1<sup>st</sup> to 4<sup>th</sup> Appellants were aspirants in the Respondent's primaries held in Kakamega County on 20 April 2017. It was their assertion that despite winning the nominations for the various Member of the County Assembly seats they were contesting, the Respondent failed to issue nomination certificates to them.
2. They approached the Political Parties Disputes Tribunal (hereinafter Tribunal) via a complaint dated 9 May 2017 seeking orders that the Respondent be directed to issue nomination certificates to them.
3. Two issues were identified by the Appellants for determination before the Tribunal:
  - a. Whether the Tribunal had jurisdiction to hear and determine the claim;**
  - b. Whether the Appellants should be issued with nomination certificates.**
4. At the hearing of this appeal, Mr. Havi for the appellants addressed the court on two issues:
  - a. Whether the appellants were successful in the nominations**
  - b. Whether the Respondent is obliged to issue nomination certificates and notify the IEBC**
5. Since the duties of the first appeal obliges the appellate court to look at the issues and draw own conclusions, I will address the two issues identified by the Tribunal after a determination of the question of jurisdiction.

**ANALYSIS**

## **Jurisdiction**

6. It was contended before the Tribunal that the Tribunal did not have jurisdiction over the dispute because the 2<sup>nd</sup> to 4<sup>th</sup> Appellants had not exhausted the internal party dispute resolution mechanism, their appeals having been filed out of time.

7. **Section 40 (2)** of the **Political Party Act** (hereinafter the Act) requires parties to exhaust internal dispute resolution mechanisms (IDRM). Parties are required by **section 13 (2)** of the Act to **‘hear and determine all intra party disputes arising from political party nominations within thirty days’**. A reading of both the **Elections Act** and the **Political Parties Act** reveals that there is an obligation on the part of political parties to hear disputes arising from nominations. Nevertheless, as stated by Onguto J in ***Eric Kyalo Mutua v Wiper Democratic Movement & Anor High Court Election Appeal 4 of 2017***, there is concurrent jurisdiction between the PPDT and the IDRM. As such, a balancing act is necessary between the Elections Act and the Political Parties Act, and it is open to the Tribunal to determine whether to entertain a dispute or refer it to the IDRM as the better forum for the resolution of a particular dispute.

8. Onguto J. however asserted that it is not open to the PPDT to decline jurisdiction or to dismiss a matter filed before it simply because the IDRM process was not initiated. I agree with that holding. This would especially be the case where a party member is frustrated by internal party mechanisms, where time does not favour the party being seized of the matter, or where the dispute is between a member and a non-member but does not relate to the party primaries.

9. It was contended that there was no IDRM process initiated by the 2<sup>nd</sup> to 4<sup>th</sup> Appellants. However, they have demonstrated that they did attempt to initiate the process following a delay in the issuance of the certificates, but the Respondent cited the party timelines as the justification for declining to entertain their respective claims. While the 1<sup>st</sup> Appellant had taken issue with the conduct of the nomination exercise in Mahiakalo Ward, Lurambi Constituency, the other Appellants only contended that the Respondent had failed to issue nomination certificates to them as a consequence of their win. The IDRM process initiated by the 1<sup>st</sup> Appellant resulted in the IDRM decision dated 6 May 2017. The Tribunal therefore found that only the 1<sup>st</sup> Appellant had exhausted IDRM.

10. Flowing from the reasoning of Onguto J that I have cited above, I beg to differ with the Tribunal. Where it can be demonstrated that attempts to resolve the dispute internally were frustrated, the dispute is properly before the Tribunal, whether the process is ongoing at IDRM or not. This is especially crucial where the Independent Electoral and Boundaries Commission has set strict timelines for submitting lists of candidates as is the case presently.

## **Whether the appellants were successful in the nominations**

11. The Appellants seek issuance of nomination certificates based on tallies they have supplied allegedly signed by the Returning Officers of Lurambi and Malava Constituencies. The 1<sup>st</sup> Appellant’s case is slightly different. He seeks a nomination certificate, but challenges the manner in which the nomination process was conducted. His prayer could not have been issued after the IDRM decision. The IDRM decision, having found that the nomination exercise was flawed, ordered a fresh exercise be conducted. It was therefore not open to the Respondent to issue a nomination exercise to the 1<sup>st</sup> Appellant, and this prayer could not have been granted by the Tribunal as framed.

12. What is now pending is the actualization of that part of the IDRM decision, which the Respondent contended they were ‘working on’. The Tribunal was not informed what steps were being taken to comply with the IDRM decision. Since the Tribunal is established to promote internal party democracy, it should have directed the party to comply with the IDRM directive within a specific timeframe so as to preclude the IDRM decision from being rendered nugatory. This commends itself as the appropriate order in respect of the 1<sup>st</sup> Appellant’s case.

13. The Respondent challenged the authenticity of the tallies supplied to the Tribunal. The Secretary-General of the party, Dr Godfrey Osotsi, contended that from his own knowledge, the Appellants had not won the nomination exercises. It was also contended that neither the candidates nor their agents signed the results supplied by the Appellants, and therefore they did not comply with Rule 6.23. Moreover, the Appellants did not supply any proof that the person who prepared the tallies was in fact the appointed Returning Officer of the respective constituencies where they vied. The evidentiary value of the documents would have been greater had the documents been produced by their respective makers. Since they bore the burden of proving the authenticity of the results produced, the Tribunal concluded:

***The Tribunal found it rather unusual that there would be a discrepancy on the document used by the Returning Officers within the wards. The Tribunal is not well placed to inquire into and make a conclusive determination of the results in the absence of any testimony or production of the same by the author or maker of the said documents.***

14. I find that the Tribunal, having assessed the material placed before it by the Appellants, rightly found that the Appellants had not discharged the burden of proof. Therefore, contrary to Mr Havi's assertion, based on the Supreme Court decision in **Raila Odinga & Others v IEBC & Others SCEP 5 of 2013**, the Tribunal found that the burden of proof did not shift to the respondent to provide the correct tallies or proof of the results.

15. In respect of the 1<sup>st</sup> Appellant, it was contended that the Respondent had not complied with the IDRM decision. However, the nomination certificate issued by the Respondent to Likami Williams Musundi is dated 4<sup>th</sup> May 2017. It was therefore issued prior to the IDRM decision of 6<sup>th</sup> May 2017 and not in defiance of the same.

16. In respect of the tallies, Mr Havi for the appellants brought to this Court's attention that the requirements cited by the Respondent relate to polling stations. There was no requirement that either the candidates or their agents sign the results as prepared by the Returning Officer. He made reference to Rule 6.39 on the procedure at the tallying centre. The role of the Returning Officer is simply to tally the results, including recounts where they are needed, and declare the results publicly. Be that as it may, a look at the tallies supplied by the Appellants shows that the formats of the documents are different. This is unusual for official party documents which ought to have a standard form. It also does not change the fact that the documents were not produced by their makers.

### **Whether the Respondent is obliged to issue nomination certificates and notify the IEBC**

17. As a consequence of the foregoing, it is clear that the Tribunal properly exercised its discretion in declining to order the grant of nomination certificates to the 2<sup>nd</sup> to 4<sup>th</sup> Appellants. The Tribunal was not satisfied that these Appellants were justified in seeking the prayers they sought. The reason why the burden of proof is high in electoral disputes, as stated in **Joho V Nyange & Anor No 4 (2008) 3 KLR (EP) 500**, is that these disputes affect not only the disputants but the wider public. This Court finds that the Tribunal properly assessed the facts and exercised its discretion, and it is not satisfied that it should interfere with the Tribunal's exercise of discretion.

18. As for the 1<sup>st</sup> Appellant, there is a pending IDRM decision requiring that a fresh nomination exercise be carried out in respect of Mahiakalo Ward. Political parties, having undertaken to comply with the code of conduct upon registration, are under an obligation under **section 6 (I)** of the same Act to **'respect, uphold and promote democratic practices through free, fair and credible political party nominations'**. The Respondent has a duty to comply with the decision of its own organ, the Internal Disputes Resolution Committee, accordingly upholding and promoting its democratic practices. That organ, where relevant to the 1<sup>st</sup> Appellant herein recommended **" the annulment of the nominations and advises the National Elections Board to either carry out the nominations afresh using the party register or 1<sup>st</sup> Respondent use other legal means to identify the most suitable candidate to carry the party flag..."**

### **ORDERS**

**19. I therefore direct the Respondent to comply with the IDRC decision regarding the 1<sup>st</sup> Appellant dated 6<sup>th</sup> May 2017 within 72 hours of today.**

**20. For the foregoing reasons the prayers of the 2<sup>nd</sup> to 4<sup>th</sup> Appellants must therefore fail and are accordingly dismissed.**

**21. Each party will bear its own costs.**

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2017.**

**LESIT, J.**

**JUDGE**