



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION APPEAL NO. 15 OF 2017

HUSSEIN OMAR ABAJILO ARARU 1ST APPELLANT
KANU NATIONAL ELECTIONS BOARD 2ND APPELLANT
KENYA AFRICAN NATIONAL UNITY 3RD APPELLANT

VERSUS

HUSSEIN JARSO GODANA RESPONDENT

(Being an appeal from the entire judgment & decree delivered by the Political Parties Dispute Tribunal on 9th May, 2017 at Nairobi

in

Complaint No. 82 of 2017)

JUDGMENT

The appellants herein have moved this court by way of a memorandum of appeal dated 11th May, 2017 and amended on 12th May, 2017. They have appealed against the order/judgment of Political Parties Disputes Tribunal [PPDT] delivered on 9th May, 2017, listing three [3] grounds of appeal as follows:

- 1. That honourable Tribunal erred in law and fact in finding and holding that the respondent was validly cleared for nominations by the KANU National Elections Board and therefore ordered a fresh nomination exercise.*
- 2. That honourable Tribunal erred in law and fact in finding and holding that the Tribunal had jurisdiction to entertain the complaint when the internal dispute mechanism had not been exhausted as per the provisions of the Political Parties Act and the Constitution of the KANU party.*
- 3. That the 1st appellant was never served to appear before the Political Parties Dispute Tribunal and the orders thereof were adverse and prejudicial to the 1st appellant who was condemned unheard.*

In his amended memorandum of claim filed in Complaint No. 82 of 2017 before the PPDT, the

respondent herein alleged that having declared his interest to vie for the Moyale Township Ward seat, he submitted his papers to the party, Kenya African National Unity [KANU] [the 3rd appellant herein] and was subsequently issued with a candidate clearance certificate for party nominations by both the chairman of the National Elections Board [NEB] and the party Secretary General.

That following the said clearance, he had a legitimate expectation that the party would abide by the provisions of the constitution, the Elections Act as well as the relevant party rules which provide that; to qualify for a nomination as a candidate, one must be a gold member of the party. It was further alleged that the complainant had complied with all the requirements and had a legitimate expectation that in the event of another member seeking the same seat, the party would conduct free and fair primaries in accordance with the party regulations. That he was not aware of any other aspirant seeking the party ticket for the same ward but on 2nd May, 2017, when he visited the party headquarters with a view to collecting his nomination certificate following communication by the NEB, he was informed that the Nomination Certificate had been issued to the 1st appellant.

He averred that the issuance of the certificate to the 1st appellant was done in blatant disregard to the applicable laws as well as the party rules. That there were no party primaries that were conducted to settle on the party candidate and he had at no time been notified of any party decision to award the 1st appellant herein the party ticket. He further averred that the party delegates and the NEB did not pick the 1st appellant as the party candidate and that if it did, the mandatory requirements set out in the Constitution for the election of a member of county assembly were not satisfied in that he does not hold a Kenya Certificate of Secondary Education [KCSE] qualification.

In its judgment delivered on 11th May, 2017, the Tribunal allowed the claimant's [respondent's] claim, nullified the certificate issued to the 1st appellant and ordered for a repeat of nomination within 48 hours of its judgment. The said judgment is what triggered the appeal herein.

When the appeal came up for hearing, counsel for the appellants submitted that the 2nd and 3rd appellants did not conduct nomination in that area but instead did a direct nomination. He argued that PPDT did not have jurisdiction to entertain the complaint before it and in support of this contention he relied on **section 40 (2) of the Political Parties Act**, which, he submitted, stipulates that the Tribunal has no jurisdiction to entertain any dispute until the internal mechanisms are exhausted. He also relied on **article 21 (1) of the KANU Constitution** whose contents are similar to those of **section 40 (2) of the PPA**.

The court was told that since political parties operate within the Constitution as well as their nomination rules, such nomination process should be guided by the party constitution as well as party nomination rules. He relied on **section 31 (1) (a) of the Elections Act**. He also cited **Article 24 (9) of the KANU Constitution** which provides for direct nomination and when the same shall not be applicable. In his concluding remarks, he told the court that, in the proceedings before the Tribunal, the 1st appellant had not been served, was condemned unheard and therefore the orders issued resulted in fundamental breach of his constitutional rights.

On his part, counsel for the respondent submitted that the PPDT has original jurisdiction over the matters such as the one before the court notwithstanding that the internal mechanisms have not been exhausted. He relied on **PETITION NO. 7 OF 2017, JOSEPH MBOYA MYAMULE V ODM**. He averred that, that notwithstanding, the 1st appellant submitted himself to the internal dispute organ of the party vide his complaint which was acknowledged on 5th May, 2017. That his complaint was not acted upon and that left him with no option but to go to the PPDT. He argued that it would be unfair to submit the respondent to the same party mechanism when the same party is hell bent on frustrating him.

He averred that the appellants are merely buying time to avoid contempt of court pleadings. He submitted that National Executive Council reserves the right to directly nominate a candidate but the right is not absolute. He averred that the same is not available if there is contemplation of nomination by voting. He argued that the respondent had been cleared for the nomination by the party's NEC and the

secretary General whereas the 1st appellant was not cleared for the same nomination. He relied on **article 24 (3) of the KANU Constitution** which sets out the prerequisites for clearance for nomination and among them is the gold membership card which the respondent duly submitted. He further urged that no evidence has been tendered to prove that the 1st appellant was cleared as no clearance could have been given to him without gold membership card.

It was his further submission that if the party was intent on giving a direct nomination to the 1st appellant, then it would not have cleared the respondent for nomination and one would have expected that there would be fair nominations. He told the court that the 1st appellant has not met the constitutional threshold to vie for nomination.

In his reply, and regarding the letter of complaint referred to by counsel for the respondent, he told the court that the same was sent to the KANU Appeals Tribunal which was the right organ to hear the dispute. That the letter was received on the same day when the complaint was filed before the PPDT and therefore, it is erroneous to accuse the appellants for failing to act on his complaint when it is clear that he filed both of them simultaneously. He urged that there is no evidence before the court to show that there was a contemplated nomination by voting.

In conclusion, the court was told that the 1st appellant did not have a forum in which he could have proven that he was qualified for the position.

The court has considered the memorandum of appeal and the submissions by the respective parties. The issue of jurisdiction has been raised. It is alleged that the PPDT had no jurisdiction to deal with the dispute as the party's internal mechanism had not been exhausted. It is trite law that jurisdiction is everything and without it, a tribunal or a court of law cannot make any further step and should down its tools. This is well demonstrated in the case of **OWNERS OF THE MOTOR VESSEL "THE LILLIAN S" V CALTEX OIL (KENYA) LTD, (1989) KLR 1.**

Regarding the jurisdiction of PPDT, **section 40 (i) (Fa) of the PPA** gives PPDT jurisdiction to entertain and determine disputes arising out of party primaries. This therefore, means that the Act grants powers to the PPDT to handle disputes having their origin in party primaries.

As rightly argued by Justice Onguto in Election Petition Appeal No. 4 of 2017, there is concurrent jurisdiction and a party may either opt to file a complaint before the PPDT or the party's internal dispute resolution mechanism and I concur with that finding. A party does not have to seek redress before the internal organs of the party before approaching the PPDT.

The other issue for determination by the court is whether the respondent was validly cleared for nomination by the KANU National Elections Board. The procedure for nominating party candidates for elections is set out in **article 24 of the KANU Constitution**, revised 2012. Under **sub clause (3)**, applicants for the KANU ticket for any seat, shall duly complete KANU nomination forms and return the same to the Chairman of the NEB within a specified time together with the other documents listed therein. In addition, such non refundable fee in cash or banker's cheque or other pre-approved mode of payment as may be determined by NEC.

Clause 4 provides that the NEB shall within seven days after the closure of the time for receipt of applications, publish in a national newspaper the names of all candidates cleared to contest the nominations for the KANU ticket, including the date of the nominations thereof. However, NEC shall reserve the right to nominate a candidate directly **PROVIDED**, direct nomination shall not be applicable where a nomination by voting has already taken place. The respondent herein, maintains that he had been cleared for nomination while the appellants say otherwise. In fact, the respondent maintains that he was the sole KANU candidate and by nominating the 1st appellant, the 3rd appellant violated his constitutional rights.

This court has keenly perused the proceedings of the PPDT together with the pleadings and the

documents filed therein, and in particular, the supporting affidavit sworn by the respondent on the 5th day of May 2017. In the said affidavit, he has annexed a KANU golden membership card which is marked as annexure “HJG1”. He has also annexed a copy of the clearance certificate dated 28th March, 2017 from the KANU National Elections Board which has been duly signed by the Secretary General, Hon Nick Salat. In addition, he has also annexed a Candidate Clearance Certificate for Party Nominations Elections, dated 5th April, 2017 which is duly signed by the Chairman of NEB and by the Director of Elections. It is noted that it has not been alleged or suggested that those documents are not genuine. In fact counsel for the appellants did not address either the Tribunal or this honourable court on those documents.

Am persuaded by the arguments made by the counsel for the respondent that his client had been cleared for nomination for Moyale Township Ward and this explains why he wrote the undated letter that was received by KANU Elections Board on 5th May, 2017, but that notwithstanding, the 3rd appellant went ahead and nominated the 1st appellant as the candidate for Moyale township Ward. The question that this court has to ask itself is; was the said nomination done in accordance with the provisions of KANU Constitution?

Article 24 (9) of KANU Constitution, provides for direct nomination where a nomination by voting has not yet taken place. On the other hand, part 5 clause 6 of the same constitution provides that:

“If only one candidate has applied and has been cleared by the National Elections Board, then such candidate shall be declared nominated, with the approval of the National Executive Council but in the event two or more are cleared then article 24 [sub article 8, sub article 9 and sub article 10 of the party’s constitution shall apply.”

My understanding of part 5 clause 6 is this:

- i. If only one candidate has been cleared for nomination by the National Election Board, such a candidate will be declared nominated but with the approval of NEC.*
- ii. But in the event that two or more are cleared, then the provisions of article 24 sub Articles (8), (9) and (10) shall apply.*

Sub **article 8** stipulates how the nominations are supposed to be carried out and that is; by way of secret ballot. If on the other hand a candidate is nominated under **article 24 (9)**, the decision of NEC shall be final SUBJECT to **article 21**. For avoidance of doubt, **article 21** provides for dispute resolution.

What this means then, is that, even where a candidate has been given a direct nomination under **article 24 (9)** the same can still be challenged under **article 21**, if the aggrieved candidate refers the same to the Election Appeals Tribunal. In this instant case, the respondent wrote an undated letter which is stamped as having been received by the KANU Elections Board on 5th May, 2017. The subject matter of that letter is; complaint for wrong issuance of a nomination certificate for Moyale Township Ward, to Hussein Omar Abajilo Araru. It has been argued that the letter was received on the same day that the complaint was filed at the PPDT and for that reason, the KANU Elections Board was not given time to address. This court concurs with the counsel for the Appellants in that regard, but that notwithstanding, and from my understanding of article 24 (9) and part 5 (6) of the KANU Constitution, the scenario presented by this case is that there was only one candidate who had been cleared for party nomination/elections, who in this case is the respondent, and there is evidence to that effect which has not been controverted by the appellants.

From the pleadings both at the PPDT and before this court, no evidence has been presented whatsoever to prove that the 1st appellant had indeed applied for nomination. In fact, if the party had strictly followed the provisions of article 24 (9) and part 5(6) of KANU Constitution, the respondent ought to have been given a direct nomination by the 3rd appellant having been the only candidate who had been cleared for nomination. This court find and hold that the Respondent was validly cleared for nomination to vie for

Moyale Township Ward seat.

As to whether the 1st appellant had qualified for nomination or not, no evidence was availed to this court on the basis of which it can address that issue and in any event, the court has already made a finding that there is no evidence that he applied and/or was cleared for nomination.

In the result:

- 1. The appeal is hereby dismissed and the decision by the PPDT is upheld. The nomination certificate given to the first appellant is hereby declared null and void.***
- 2. The 3rd appellant to conduct free, fair and fresh nominations within 72 hours from the date of this judgment.***
- 3. Each party to bear its own costs.***

Dated, signed and delivered at Nairobi this 19th day of May, 2017.

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L. NJUGUNA

JUDGE