



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION PETITION APPEAL NO. 58 OF 2017

BETWEEN

HON. RACHAEL NYAMAI.....APPELLANT

VERSUS

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

HON. SAMUEL KALII KIMINZA.....2ND RESPONDENT

(Being an appeal from the Judgment and decree of the Political Parties Disputes Tribunal at Nairobi (Hon. Kyalo Mbobu, (Chairman), Hon. James Atema (Member), Hon. Paul Ngotho (Member), delivered on the 19th day of May, 2017 in Dispute No. 279 of 2017).

BETWEEN

HON. SAMUEL KALII KIMINZA.....COMPLAINANT

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

HON RACHAEL NYAMAI.....2ND RESPONDENT

JUDGMENT

1. The appellant Rachael Nyamai and the 2nd respondent Samuel Kalii Kiminza come from Kitui South Constituency in Kitui County. They are members of the Jubilee Party of Kenya (1st respondent). Each sought to be nominated by the 1st respondent to vie for the position of member of the National Assembly for the Constituency in the 8th August 2017 general elections, and paid the requisite fees. On 19th April 2017 the 1st respondent announced that the nominations for the County would be on 25th April 2017. On 24th April 2017 the nominations were postponed. On 30th April 2017 the Party conducted nominations for Kivou Ward, Nuu Ward and Mui Ward in Mwingi Central Constituency; the entire Kitui Central Constituency; Zombe Mwitika Ward in Kitui East Constituency; and only Kanziko Ward in Kitui South Constituency. The nomination for the member of the National Assembly of Kitui South Constituency was omitted. On 4th May 2017 the 2nd respondent formally complained to the Party about the lack of nomination and threatened to initiate legal proceedings. On 9th May 2017 he filed **Complaint No. 121 of**

2017 at the Political Parties Disputes Tribunal which was dismissed on the basis that he had not exhausted the 1st respondent's internal dispute resolution mechanism. It was, however, in the response by the 1st and 2nd respondents to the dismissed complaint that he came to know that the 1st respondent's National Elections Board had directly nominated the appellant to contest for the seat. On 10th May 2017 the 2nd appellant complained to the 1st respondent by letter through his advocates, Keli and Associates Advocates. When no response was forthcoming, on 17th May 2017 he filed his complaint, by way of notice of motion, to the Political Parties Disputes Tribunal (hereafter referred to as "the Tribunal"). The 1st and 2nd respondents responded to the complaint. The same was heard and a judgment delivered on 19th May 2017 declaring that the 1st respondent had failed to conduct free and fair nomination for the position of member of parliament for Kitui South Constituency, and that the purported direct nomination as well as the certificate issued by the 1st respondent to the appellant were null and void. The 1st respondent was directed to organise and conduct a fresh nomination exercise for member of the National Assembly for the Constituency within 96 hours.

2. The appellant was aggrieved by this decision and appealed to this court. The substance of the grounds of appeal can be reduced to two main issues:-

(a) the Tribunal erred in finding that it had jurisdiction to hear and determine the complaint because the 2nd respondent had not exhausted the 1st respondent's internal dispute resolution mechanism; and

(b) the Tribunal had erred in finding that the 1st respondent had wrongly and unlawfully adopted the direct nomination method to nominate the appellant to vie for the seat in the coming general elections.

3. The 1st respondent supported the appeal which sought the setting aside of the decision of the Tribunal, and the issuance of the declaration that the nomination issued to the appellant was legal, valid and proper.

4. The court was addressed on the appeal by Ms Mwadumbo for the appellant, Mr. Njomo for the 1st respondent and M/s Keli for the 2nd respondent. The parties each filed written submissions, over and above the affidavits that were filed. I have considered them.

5. **Section 40 of the Political Parties Act, No. 11 of 2011** provides as follows:-

"40 (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 parties; and

(f) appeals from decisions of the Registrar under this Act.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party disputes resolution mechanisms."

It follows that the Tribunal shall only hear an appeal between a political party and its member where the member's grievance or complaint has first been heard and determined by the party's internal dispute

resolution mechanism. Where the Constitution or statute has established a dispute resolution mechanism, that mechanism has to be used and exhausted.

6. Political parties are created under **Article 91** of the Constitution of Kenya 2010. Among other things, they are supposed to be democratic; abide by the principles of good governance, promote and practice democracy through regular, fair and free elections within the party; and respect and promote human rights and fundamental freedoms, and gender equality and equity. Under **Article 87(1)** parliament shall enact legislation to establish mechanisms for timely settling of election disputes. These provisions have been operationalised by the **Elections Act, 2011**, the **Independent Electoral and Boundaries Commission Act, 2011** and the **Political Parties Act, 2011 (Francis Gitau Parsimei & 2 others –v- National Alliance Party & 4 others [2012] eKLR)**. It is therefore clear that the nomination rights of the appellant and the 2nd respondent were supposed to be realised within a structured process provided by the 1st respondent. The Tribunal's jurisdiction, therefore, was not to be exercised in a manner that would make political parties superfluous or irrelevant (**Michael Wachira Nderitu & 3 Others –v- Mary Wambui Munene [2013]eKLR**). It is now accepted principle that where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional or statutory organs, the jurisdiction of a court or tribunal should not be invoked until such mechanisms have been exhausted (**International Centre for Policy and Conflict & 5 Others –v- Attorney General & 4 Others [2013]eKLR; Diana Kethi Kilonzo & Another –v- IEBC & 10 Others [2013]eKLR**).

7. Did the Tribunal have jurisdiction to hear and determine the complaint by the 2nd respondent? There is no dispute that the 2nd respondent was a registered member of the 1st respondent who had paid to participate in the nomination to pick the Party's candidate to vie for the position of member of the National Assembly for Kitui South Constituency. The appellant was the other candidate who had paid the nomination fees. There is no dispute that the nomination exercise for the seat was not conducted. Instead, and without reference to the 2nd respondent, the appellant was handed a direct nomination by the 1st respondent. Under **section 13** of the **Elections Act**, it was up to 1st respondent to nominate its candidates for the general elections. To be able to carry out the nominations it had a Constitution and the Nomination Rules. Article 11 of the Nomination Rules required it to:-

“conduct free, fair and transparent nominations in national and county elections through the Independent Electoral and Boundaries Commission or other democratic method acceptable to the members under the supervision of the National Elections Board and the County Elections Board.”

Under **Chapter XV** of the **Nomination Rules** it was provided that:-

“The party shall in areas of special interest where nominations cannot be conducted to issue direct nomination certificate to such candidate, or where there are more than one aspirant, by consensus or any other appropriate means agreed select one among them to be nominated.”

8. The 2nd respondent was aggrieved by the direct nomination which, according to the appellant and 1st respondent, had been done in accordance with the Party's Nomination Rules. This was a legitimate grievance. The question that the Tribunal was asked to determine was whether the 2nd respondent had exhausted the 1st respondent's internal dispute resolution mechanism. There was no dispute that the 2nd respondent had written to the 1st respondent complaining about the direct nomination of the appellant and raised reasons why he thought what had been done was contrary to the 1st respondent's Nomination Rules. He sought that action be taken on the dispute within the next 48 hours. The letter was dated 10th May 2017. It does appear that there was no action taken. At least, there was no response to the letter. According to the 1st respondent, the letter was not considered as an appeal. This was because, according to Rule 38 of the Nomination Rules:-

“The appeal shall be lodged in the prescribed format and paying the prescribed fee as per the

schedule”.

I have considered the affidavit by the 2nd respondent and the submissions of his counsel. It has been noted that he was a paid up member of the 1st respondent, and had paid the nomination fees. He annexed receipts of payment as evidence. He did not say that the appeal he lodged was in the prescribed form. He also did not say that he paid the prescribed fees when he lodged the appeal. He did not produce before the Tribunal, or before this court, any receipt of payment.

9. The Tribunal acknowledged what the appellant had said in response to the complaint by the 2nd respondent. This is when it observed:-

“7. The 2nd respondent filed an affidavit sworn by herself on 19th May 2017. She avers that the Claimant herein has not lodged an appeal in the prescribed format or paid the prescribed fees with the party. She therefore avers that the Claimant has once more decided to ignore the internal dispute resolution mechanisms and therefore the Tribunal does not have jurisdiction to hear and determine the matter.”

10. It is trite that once the issue of jurisdiction is raised before a court or tribunal it has to be determined first before a further step towards the hearing and determination of the dispute is undertaken. In the case of **Owners and Masters of the Vessel “Joey” -v- Owners and Masters of the Motor Tugs “Barbara” and “Steve B”** [2000] LLR 2789 (CAK); [2008] IEA 367) it was held that:-

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by the court on its own motion must be decided forthwith on the evidence before the court.”

11. Quite unfortunately, the Tribunal did not address itself on the question of jurisdiction. This question had been specifically raised by the appellant and the 1st respondent. The Tribunal instead went on to deal with the merits of the complaint: whether or not the 1st respondent was right and within the Nomination Rules to adopt the method of directly nominating the appellant to vie for the seat of the member of National Assembly representing Kitui South Constituency. The Tribunal fell into grave error when it did not determine whether or not it had jurisdiction to hear and determine the dispute, given the evidence that had been placed before it. The issue was simple. The 2nd respondent was relying on the 1st respondent’s Nomination Rules to say that that appellant had been improperly nominated. The Rules also applied to him. They provided that he had to appeal using a prescribed method, and had to pay the prescribed fees. He had not done this. By way of analogy, if a party presents a plaint before court for which there is prescribed fees and does not pay, then he cannot be said to have filed the plaint. There would be no plaint on which the court can hear him. In short, the 2nd respondent had no appeal filed by him in accordance with the Nomination Rules to which he had subscribed. Secondly, according to Rule 39 of the Rules the decision of the National Elections Board was appealable to the National Elections Appeals Board. The letter by the 2nd respondent was addressed to the Executive Director, Jubilee Party (Jubilee Headprinters). It was neither to the National Elections Board nor to the National Elections Appeals Board. In short, the 2nd respondent did not exhaust the 1st respondent’s internal dispute resolution mechanism and therefore the Tribunal did not have the jurisdiction to hear and determine his complaint against the appellant and the 1st respondent.

12. In conclusion, the judgment and orders of the Tribunal dated 19th May 2017 were made without

jurisdiction and were therefore a nullity. They are hereby set aside with costs to the appellant.

DATED, DELIVERED and SIGNED at NAIROBI this 22ND day of MAY 2017.

A.O. MUCHELULE

JUDGE