



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(R. MWONGO, PJ)
ELECTION PETITION NO 112 OF 2017

IN THE MATTER OF ARTICLES 1,2,3,10,20,22,23,24,27,28,33,38,47,81,83,174,258 AND 259 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE POLITICAL PARTIES (AMENDMENT) ACT NO. 21 OF 2016

BETWEEN

ELIJAH GACHUKIPETITIONER

AND

JUBILEE PARTY.....RESPONDENT

FAITH WAIRIMU GITAU.....1ST INTERESTED PARTY

INDEPENDENT ELECTORAL AND BOUNDARIES .

COMMISSION.....2ND INTERESTED PARTY

WANJIKU MUHIA.....3RD INTERESTED PARTY

RULING ON PRELIMINARY OBJECTION

Background

1. On 26th April, 2017, the Jubilee Party held its party primaries or nominations for the seat of Women Representative for Nyandarua County. The winner of the primary would become the Party’s candidate for the same seat in the general election scheduled for 8th August, 2017. According to the results announced by the Party, Faith Wairimu Gitau (1st Interested Party herein) won the primary with 106,004

votes. Wanjiku Muhia (the 3rd Interested Party herein) emerged second with 75,296 votes. Third and fourth were Esther Wanjiku Muhoho (8,019 votes) and Jane Gathoni Kiambati (2,538 votes).

2. Ever since that *first nomination* process, there have been disputes regarding the outcome of the party primaries. The result has been so contested that continuous disputes have arisen regarding the outcome. The chequered journey of the contestation has run along the following lines, see-sawing the outcome.

3. The first nomination result was contested at the Party's **National Elections Appeals Tribunal Appeal No 180 of 2017**, which affirmed the result. That outcome was contested in **Complaint No 210 of 2017 Wanjiku Muhia v Jubilee Party and Faith Wairimu Gitau** in the Political Parties Disputes Tribunal. The Tribunal upheld the complaint. The matter moved on appeal to the High Court in **Election Petition Appeal No 25 of 2017**, wherein the appeal was allowed by Mutuku, J. Being dissatisfied, Hon Wanjiku Muhia appealed to the Court of Appeal in **Civil Appeal No 143 of 2017, Hon Wanjiku Muhia and Faith Wairimu Gitau and Jubilee Party**. The court allowed the appeal, set aside the judgment of Mutuku, J, and nullified the nomination of Faith Wairimu Gitau. On 8th June, 2017, the Court gave the following orders, *inter alia*:

“....

(iii) Jubilee Party, the 2nd respondent, is hereby directed to conduct a fresh nomination exercise for Women Representative, Nyandarua County, in accordance with the Party's Constitution and the Jubilee Party Nomination Rules, 2016, within (2) two days from the date hereof”

4. According to minutes of the Jubilee Party's National Elections Board meeting held on 9th June, 2017, the purpose of the meeting was:

“...for Nomination of Women Representative for Nyandarua County pursuant to Civil Appeal No. 143 of 2017 of the Court of Appeal”.

At that meeting, it was reported that carrying out fresh nominations in the county was not feasible due to tight time constraints set by the Court of Appeal order.

5. The minutes record the presence of four aspirants at the meeting, namely: Ms Jane Gathoni Kiambati; Hon Wanjiku Muhia, the Sitting Women Representative; Ms Faith Wairimu Gitau; and Ms Wanjiku Muhoho. It was proposed at the meeting that they agree on a nominee by consensus as one of the methods allowed for nomination. There was no consensus. It was then proposed that interviews be done to select the nominee. Hon Wanjiku Muhia left the meeting to consult her lawyer. When she returned, she declined to participate in the interviews giving her reasons. After consultations, she left the meeting.

6. The remaining three aspirants were then interviewed and Faith Wairimu Gitau emerged the winner with 84%. No indication of the nature of the interviews is given in the minutes. This nomination exercise held on 9th June, 2017 is the *second nomination* process following the first cycle that ended with the Court of Appeal decision. Hon Wanjiku Muhia, the sitting Women's Representative having found the nomination method disagreeable.

7. Undeterred, Hon Wanjiku Muhia on 13th June, 2017, filed a Judicial Review application (**JR No 308**) in the High Court, reported in **Republic v The Jubilee Party IEBC and Faith Wairimu Gitau Ex parte Hon Wanjiku Muhia [2017] eKLR**. There, she sought *inter alia*, to quash the decision of the Jubilee Party reached on 9th June, 2017 to nominate Faith Wairimu Gitau as its nominee for the position of Women Representative; to prohibit the IEBC from clearing, publishing or gazetting Faith Wairimu as the Jubilee Party Women Representative nominee; and to compel Jubilee Party to conduct fresh nominations by way of secret ballot/ elections for the position of Women Representative for Nyandarua County. The application was heard by Odunga, J and was struck out for being incompetent.

8. I have given the above summarised background from the various pleadings filed in this matter to

contextualise and give perspective to the on-going dispute concerning the nomination of the Nyandarua Women's Representative seat under the Jubilee Party. It is not intended to delve into the merits of the substantive Petition or Notice of Motion application, as what I am dealing with is the 1st Interested Party's Preliminary Objection seeking to strike out the entire petition.

The Petition

9. The present matter was filed as an Election Petition by way of notice of motion under certificate of urgency on 19th June, 2017. The reliefs sought in the petition are:

“a. A declaration that the Respondent is under an obligation to ensure and promote the participation of the people in the nomination of candidates for elections.

b. A declaration that the decision/interview by the Respondent motivated by article 11 of its constitution that denied its members an opportunity of participating in the nominations of the Women Representative of Nyandarua County is unconstitutional and illegal.

c. A consequent order that the nomination process leading to the nomination of Hon. Faith Wairimu Gitau as the Respondent's nominee for the seat of Women Representative Nyandarua County is/was illegal and unconstitutional.

d. An order quashing the nomination of Hon. Faith Wairimu Gitau for being illegal and Unconstitutional.

e. An order compelling the Respondent to conduct fresh nominations for the seat of Women Representative Nyandarua County by way of secret ballot within 72 hours.

f. Any other order or relief that this court will be pleased issue”

10. The Notice of Motion, filed simultaneously with the Petition, seeks the following prayers:

“a. Spent....

b. Pending interparties hearing and determination of this Application, this Honourable Court be and is hereby pleased to issue a restraining order restraining and/or barring the Independent Electoral and Boundaries Commission from publishing, gazetting and or presenting the name of Hon. Faith Wairimu Gitau or any other person as the dully nominated representative of the Respondent for the seat of Women Representative Nyandarua County.

c. In the interim and Without prejudice to order (b) above, this Honourable Court be and is hereby pleased to quash any gazette notice that seeks to represent Hon. Faith Wairimu Gitau as the dully nominated candidate for the Respondent for the seat of Women Representative Nyandarua County.

d. Pending the Inter-partes hearing and determination of this Petition, this Honourable Court be and is hereby pleased to issue a restraining order restraining and/or barring the Independent Electoral and Boundaries Commission from publishing, gazetting and or presenting the name of Hon. Faith Wairimu Gitau or any other person as the dully nominated representative of the Respondent for the seat of Women Representative Nyandarua County.

e. Pending the Inter-partes hearing and determination of this humble Application and Petition, this Honourable Court be and is hereby pleased to issue a conservatory order suspending the operation of Article 11 of the Respondent's Constitution.

f. The costs of this application be provided for.”

Preliminary Objection

11. A Preliminary Objection was filed by the 1st Interested Party on 21st June, 2017 and served at the hearing of the application on the same date. On account of the urgency of the matter, all the parties agreed that the objection be heard first and a determination do issue before the application or substantive petition is heard.

12. The grounds upon which the Preliminary objection is founded are stated as follows:

“1. THAT the Petition is res judicata JR 308 of 2017 Republic vs Jubilee Party and Faith Gitau ex parte Wanjiku Muhia where all issues being raised herein were canvassed.

2. THAT the court has no jurisdiction to hear this matter. The matter ought to have been filed before Political Parties Dispute Tribunal or the Independent Electoral and Boundaries Commission.

3. THAT the suit is an attempt to vary the orders made by the court of appeal or extend the time limits set by the Court of Appeal in 143 of 2017”

Parties’ Submissions

13. The 1st Interested Party argued that the present matter was not a constitutional petition, in that there was no prayer that the Party was in violation of the Constitution. On the contrary, it was a rehashing of applications and orders sought in other fora, including the PPDT, the High Court and the Court of Appeal. It was submitted that the Petitioner was the employee of the 3rd Interested Party. Having failed in the nominations, she thus secured the Petitioner as her proxy in the suit.

14. It was also contended that the prayers sought in the Petition were similar to those sought in **JR No 308**, and that Odunga, J, heard and determined the same matters. The only difference was asserted to be that a proxy had been placed in the matter as a petitioner. Several prayers in the Petition were identified as being similar to reliefs sought in the Judicial Review matter.

15. Reliance was placed on the decision of Odunga, J in **JR 308** to demonstrate that the matters canvassed in that suit were the same as those to be canvassed in the present application and petition. The only difference being that the applicant Petitioner in this case was not involved in the previous matters either before Odunga J, or in other courts or dispute resolution fora.

16. The case of **Omondi v National Bank of Kenya** was cited for the proposition that litigation must come to an end, and all matters of similar nature should be heard together and not in instalments. Ringera J, as he then was, articulated as follows:

“...the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their cases at once.”

17. The Supreme Court case of **Moses Mwicigi and 14 Ors v IEBC and 5 Ors [2016] eKLR** was cited at paragraph 109, for the proposition that where a constitutional declaration was sought in a petition involving an electoral process, it could not be said that the petition concerned only a constitutional issue.

18. The 1st Respondent supported the preliminary objection, adding that if the Petitioner had any serious grievance concerning the Jubilee Party Rules, he would have raised it as far back as 26th April, 2017 when the nominations took place, or at any of the other hearings in court or other fora which have hosted

these suits. His affidavit in support of the motion disclosed that he was aware of the Party Rules at that early date. Accordingly, it was submitted, the petition can be classed as an abuse of the court process.

19. It was further submitted that the Petitioner, if he had a dispute with the Party, should resolve the same through the legally recognised mechanisms and under **Section 40** of the **Political Parties Act**. Apparently, however, he had never raised any concern with the Party Constitution or Nomination Rules. His late recourse to the court in this matter is therefore a waste of judicial time, which the court should not allow. Reliance was placed on the case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR** which held that judicial time is the only resource which courts have at their disposal and its management does positively affect the entire system of the administration of justice.

20. The **Muchanga** case also adopted the dicta of Lord Roskill in **Ashmore v Corp of Lloyds [1992] All ER 486** where he stated:

“It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see that they are tried expeditiously and as inexpensively as possible.....Litigants are not entitled to the uncontrolled use of a trial judge’s time. Other litigants await their turn. Litigants are only entitled to so much of the trial judge’s time as is necessary for the proper determination of the relevant issues”

21. The 1st Respondent also raised the matter of issue estoppel and res judicata, citing the case of **ET v Attorney General & Another [2012] eKLR** at paras 49, 53 and 57. There the court stated that a claim may be debarred by res judicata or issue estoppel, on the broad principle that prevents a party from re-litigating an issue of fact or law that has been determined by a prior order or judgment. Further that:

“ The courts must always be vigilant to guard against the litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court .

22. The Petitioner opposed the objection. In his response, through counsel, the Petitioner submitted that he was a full member of the Jubilee Party. He argued that the petition was not res judicata since all the previous suits concerned the question: who won the nomination. In the present petition, the key issue revolves around the right of a party member, not party to any prior dispute, to exercise his right to vote for a candidate of his choice in his own party. Thus the crux of the case was about protecting the will of the people of Nyandarua to participate in an electoral process through a mode agreed by the people.

23. It was contended by the Petitioner that the crucial issue in the petition concerned the invocation by Jubilee Party of the illegal and unconstitutional use by the Jubilee Party of a selection process for candidates for the position of Women Representative. In preparing himself for the fresh nominations ordered by the Court of Appeal the Petitioner had satisfied himself that under **Article 11** of the **Party Constitution**, there was provision for free, fair and transparent nominations. Instead, the Party conducted interviews of the candidates and selected a winner without the participation of the people of Nyandarua.

24. Counsel argued that an interview tests cognitive knowledge and intellectual capacity of an individual, and is not appropriate to political participation and identification of the will of the people. As such, the petitioner’s key grievance was that the Jubilee Party had invoked a mode of nomination by conducting interviews, which was not prescribed in the Constitution. Whilst **Article 11** of the **Party Constitution** provides for “consensus” what the Party had conducted was unconstitutional. The court was urged to find that an interview is an illegitimate and undemocratic approach. Whereas the right to participate in a democratic electoral process is a fundamental human right what had occurred had been violation of the Petitioner’s political rights.

25. As far as res judicata is concerned, the question concerning the violation of an individual’s political rights on account of nomination interviews had not been tested in any of the previous cases. The matter before the court could not go before the Political Parties Disputes Tribunal, because it had no jurisdiction to deal with the interpretation of what ought to be a democratic mode of party nomination. The interview mode of nomination had never been brought to the people for acceptance

26. The 1st Interested Party in his reply pointed out that the interview issue had been dealt with by Odunga J in **JR 308** at pages 17, 19 and 20-22 of his judgment. The question asked there was: whether the Party Constitution could be brought to the High Court for interpretation. Counsel identified paragraphs 19-20 in the Applicant's supporting affidavit where he admits that the Party Constitution is not a law but a policy document. As such its interpretation was a role which should be played by the PPDT.

27. The 1st Respondent in reply pointed out the provisions in the **Party's Constitution** at **Article 11.4.3** that apply to Nominations of County candidates of the Party. In addition, **Clause XV General Provisions** of the **Party Nomination Rules, 2016** which allow for a selection process for nomination were highlighted.

28. Having heard the parties on the Preliminary objection and having considered the grounds of the preliminary objection, the two issues of res judicata and jurisdiction of this court are, in my view, the central issues for determination by the court. The third ground of the objection is essentially subsumed in the second issue questioning the overall jurisdiction or competence of this court to hear the petition.

Analysis and Determination

Res Judicata

29. The doctrine of res judicata is fairly broad. It prohibits re-litigation by the same parties on determined matters; it also prohibits re-litigation over the same issues by addition of new parties or new causes of action; it further prohibits seeking of the same remedies by parties by sleight of hand where either a new party is introduced or a new cause of action or new perspective and approach is taken in a different fora where the substantial remedy or remedies have already been sought and determined.

30. The question at hand, therefore, is whether there are issues in the present case which are being re-litigated, or in respect of which the same remedies are being sought herein as have previously been sought and disposed of.

31. According to the decision of Odunga J, in **JR No 308 of 2017**, the following remedies, inter alia, were sought there:

"1. That the Honourable Court be pleased to and do hereby grant Judicial Review Order of Certiorari to remove into this Honourable Court and quash the decision of the Jubilee Party to nominate the Interested Party Faith Wairimu Gitau for the position of Women Representative Nyandarua County through an illegal process in exclusion of the Applicant.

.....

3. that the Honourable Court be pleased and do hereby grant Judicial Review Order of Mandamus to remove into this Honourable Court and compel the Jubilee Party to conduct fresh nominations by way of secret ballot /elections for the position of Women Representative Nyandarua County." (emphasis added)

32. The above two prayers, and in particular the threads in the highlighted parts, are closely similar to the highlighted parts in the prayers sought in the present petition at paragraphs (b), (c) and (e) of the Petition, as follows:

"b. A declaration that the decision/interview by the Respondent motivated by article 11 of its constitution that denied its members an opportunity of participating in the nominations of the Women Representative of Nyandarua County is unconstitutional and illegal.

A consequent order that the nomination process leading to the nomination of Hon. Faith Wairimu Gitau as the Respondent's nominee for the seat of Women Representative Nyandarua

County is/was illegal and unconstitutional.

.....

An order compelling the Respondent to conduct fresh nominations for the seat of Women Representative Nyandarua County by way of secret ballot within 72 hours.”(Emphasis supplied)

33. It is true that the parties in the **JR 308** suit are different from those in this petition. It is also true that the former is a cause of action in Judicial Review, whilst the latter is a cause of action in constitutional law. These, however are the very evasions to res judicata that are mentioned in **Omondi v National Bank**. In my view, to the extent that there are similarities between the remedies sought in the petition and those sought in the Judicial Review matter, and there being overlaps of parties in both, the doctrine of res judicata would apply.

34. The test in cases such as these is to ask the question: what is the common thread that seems to weave itself through the two suits? In the case of **ET v AG** a similar situation presented itself to the court where the parties in two matters differed, but the issues seemed to be similar. There the court decided as follows:

“In my view the addition of the Attorney General and the exclusion of the petitioner’s mother, who was present in the first suit are merely cosmetic changes which do not affect my conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as a party to evade the general principle.”

35. I adopt a similar view with regard to the subject matter concerning the thread running through the suit and the commonality of parties in the present case. To my mind, the question of denial of an opportunity for a person to participate in the nomination process, and the illegality of such a process, and the demand for a cancellation and repeat of the nomination exercise are the golden threads clearly running through the two matters.

36. To the extent mentioned herein, I would find and hold, as I hereby do, that the substance of the matter in **JR No 308** and the substance of the petition herein, share so many similarities that the latter is an abuse of the court process and is res judicata.

Jurisdiction

37. The weightier question which I have to determine is whether this court has the jurisdiction or competence to determine this dispute, for if it doesn’t, then I must down my tools.

38. It is not in dispute that the Court of Appeal on 8th June 2017, ordered the Jubilee Party to *“conduct a fresh nomination exercise for Women Representative, Nyandarua County, in accordance with the Party’s Constitution and the Jubilee Party Nomination Rules, 2016, within (2) two days”*.

39. It is also not disputed that the Jubilee Party did conduct such fresh nominations as evidenced by the Minutes of the Party’s meeting of 9th June, 2017. That exercise, however repugnant or acceptable, was the start of a fresh nomination. It is not disputed that the fresh nomination exercise was conducted under **Article 11** of the **Jubilee Party’s Constitution**. What is impugned by the Petitioner is whether the Party could legally and constitutionally conduct the exercise through an interview process, and if so, whether that amounts to a free, fair and inclusive nomination exercise.

40. **Article 11** of the **Jubilee Party Constitution** provides:

“The party shall conduct open free and transparent nominations in national and county elections through consensus, secret ballot, or through the Independent Electoral and Boundaries

Commission (IEBC) or other democratic method acceptable to the members under the supervision of the National Elections Board and County Elections Board”

41. The Petitioner had no problem with this provision. What concerned him, as a paid up, card carrying member of the Party, was the use of an interview process to select a nominee, using a method not agreed upon by the party members.

42. Under **Article 11.4** of the **Party Constitution**, a candidate seeking nomination for a county position (such as Women Representative) on a party ticket is required to, inter alia:

“1... apply in writing to the Elections Board and provide copies of the following:

...a detailed curriculum vitae

....

academic and/ or professional certificates;

2. Pay a non-refundable nomination fee....;

3. Be nominated in accordance with the Party Nomination Rules and Regulations” (emphasis supplied)

Thus the Party was obliged to use its **Party Nomination Rules** for the fresh nomination as ordered by the Court of Appeal.

43. The **Party Nominations Rules, 2016** provide in “**Part XV General Provisions**” at **Paragraph i.** as follows:

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

It is not clear what “**areas of special interest**” refers to, but counsel at the bar indicated that it could include situations where there are extremely strict timeline constraints, such as those ordered by the Court of Appeal.

44. In any event, it is clear from the Minutes of 9th June of the Party, that the sitting Women Representative, Hon Wanjiku Muhia, did not agree to the interview method proposed for nomination by the Party. Accordingly she walked out of the meeting and did not attend the interview to which the three other aspirants subjected themselves. The Petitioner himself was not involved in that process. However, he has disputed it as undemocratic and unconstitutional and hence filed the petition herein.

45. In those circumstances, what was an aggrieved Party member, whether the Petitioner or a sitting Women’s Representative, expected to do? The answer is found in **Article 15.6** of the **Party Constitution**, which provides:

“Any member aggrieved in respect of all other party elections and or nominations shall lodge a complaint with the National Elections Appeals Tribunal. The decision of the National Elections Appeals Tribunal shall be final” (emphasis supplied)

There was no evidence shown that the Petitioner lodged a complaint with the National Elections Appeals Tribunal. That was the legal first port of call.

46. The other legal option open to the Petitioner for the resolution of his grievance or dispute with the Party, was to invoke **Section 40(1)(fa)** of the **Political Parties Act, 2011** (as amended). That section,

empowering the Political Parties Disputes Tribunal to determine such disputes, provides as follows:

“(1)The Tribunal shall determine –

.....

.....

(fa) disputes arising out of party primaries” (emphasis supplied)

47. Does this dispute fit the criteria? I understood the Petitioner’s submissions to mean that he disputed that the PPDT had jurisdiction or power to interpret the constitution of the Party. Petitioner’s Counsel argued at the hearing that:

“...the method used by the Party was interview – a mode not within its constitution. That is why we are before you....”

And later:

“An interview tests cognitive knowledge and understanding of an individual, the intellectual capacity of the person. Political participation is about the will of the people. The Petitioner is only asking the court to protect the will of the people of Nyandarua....”

.....

Here Jubilee has invoked an illegal and unconstitutional mode of nomination.....”

Still later, he queried:

“Could this matter go before the PPDT? It has no jurisdiction to deal with interpretation of what can be described as a democratic mode of party nomination”

48. The jurisdiction bestowed by Parliament to the PPDT is to determine disputes arising out of party primaries. **Section 2** of the **Political Parties Act** define **“party primaries”** as follows:

“means the process through which a political party elects or selects its candidates for a forthcoming general election or for a forthcoming by-election” (emphasis supplied)

49. From the foregoing, it is clear that all processes of election or selection utilised by a party to pick its candidates for an election are matters within the mandate of the PPDT to resolve. In my view this includes matters of interpretation of the question whether a selection process was democratic or not, legal or not. There is no exception indicated as to what dispute concerning a party primary cannot be determined by the PPDT.

50. There is a misguided perception both among legal practitioners and the laity, that tribunals are incapable or inadequately enabled to undertake serious legal and even constitutional adjudicatory roles. In our constitutional architecture, tribunals are recognised under **Article 1(3)(c)** of the **Constitution** as one of the state organs to which the peoples’ sovereign power is delegated. Under **Article 159 (1)** of the **Constitution** tribunals are among the organs to which the people of Kenya vest judicial authority to be exercised by or under the Constitution. Under **Article 159(2)** of the **Constitution**, they operate by and are guided in accordance with the same principles for the exercise of judicial authority as are the courts. Subject to their mandate, they carry the same heavy burden as the courts of applying the Constitution in obedience to the national values and principles of governance

51. The PPDT is established under **section 39** of the **Political Parties Act**, and under **section 41(4)** must:

“...apply the rules of evidence and procedure under the Evidence Act (Cap 80) and the Civil Procedure Rules (Cap 75) with the necessary modifications...”

In this light, I see nothing that prevents the PPDT from hearing the Petitioner’s dispute which arose from party primaries and concerned a selection process for nomination of a candidate. That is in fact the direct and specialised mandate of the PPDT.

52. It bears reiterating what Mumbi J, said in **Stephen Asura Ochieng & 2 Others v ODM & 2 Others [2011] eKLR** concerning the object of establishing the PPDT:

“[12] To my mind, the intention behind the establishment of the Political Parties Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of the Constitution which provides for the exercise of judicial power by courts and tribunals established under the constitution and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between members of political parties amongst themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases”

Conclusion

53. The upshot of all the foregoing is that on the issue of res judicata, I agree with the objector that a number of the issues now before the court, and earlier outlined, are substantially issues that have previously been before the court in **JR 308**. Accordingly, they are res judicata and cannot be heard by this court.

54. On jurisdiction, I am persuaded to agree with the objector that after the Court of Appeal ordered fresh nominations, and they were done using whatever method, that constituted the commencement of a second nomination process. That second nomination process, like the first, has a logical trajectory of dispute resolution under law, commencing with the Party internal dispute resolution mechanism, then on to the PPDT, and finally to the High Court and Court of Appeal. The Petitioner was obliged to follow that process of dispute resolution in this case.

Disposition

55. The preliminary objection succeeds on both the issues of res judicata and jurisdiction, and is hereby upheld.

56. The court has no jurisdiction to hear and determine the petition herein, which is hereby struck out.

57. No orders as to costs are made.

58. Orders Accordingly

Dated and Delivered at Nairobi this 23rd Day of June, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1.for the Petitioner/Applicant

2.for the Respondent

3.for the 1st Interested Party

4.for the 2nd Interested Party

5.for the 3rd Interested Party

Court Clerk.....