



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 20 OF 2014

EMILIANO KIPKORIR TONU.....PETITIONER

VERSUS

THE NATIONAL ALLIANCE PARTY.....RESPONDENT

JUDGMENT

1. The petitioner is a retired military officer. In the general election held on 4th March 2013, he was an aspiring candidate for the seat of senator, Uasin Gishu County. He intended to run on the ticket of the National Alliance Party (hereafter *TNA party*). It was not to be. TNA and another party, United Republican Party (hereafter *URP*) formed an alliance zoning out their dominant spheres. As a result, TNA did not carry out nomination of candidates in Uasin Gishu.
2. The petitioner completed forms *A* and *B* for membership of TNA; paid registration fees of Kshs 2,000; and, met nomination fees for candidates of Kshs 250,000. On 15th January 2013, the petitioner started his campaigns in earnest. He claims he incurred Kshs 847,670 to print posters, fliers, stickers and related materials; participated in recruitment of party members; and, paid rent for party offices amounting to Kshs 26,000. He also claims to have lost gainful employment; and, incurred costs of a helicopter pilot amounting to Kshs 2,100,000. There were also transport and communication expenses of Kshs 864,000; and, “untimely disposal of his assets” worth Kshs 1,000,000.
3. Those matters are detailed at length in his witness statement filed on 6th November 2014; verifying affidavit sworn on 5th November 2014; and, a bundle of receipts and documents annexed to the petition. The narrative by the petitioner is reaffirmed by four other witness statements from Peter Njuguna, Dickson Mutalungu, Thomas Ogolla and Jacob Bitok. They all state that the petitioner ran a spirited campaign for the TNA party in Uasin Gishu.
4. The petitioner craves the following reliefs: first, a declaration that his political rights enshrined in Articles 38 and 91 of the Constitution were violated by the respondent; secondly, an order for damages of Kshs 5,000,000 for “discrimination, humiliation, embarrassment and harassment”; a refund of the sums particularized in paragraph 2 of this judgment; an apology; and, costs of the petition.
5. The petition is contested. There is a replying affidavit sworn on 4th December 2014 by Onyango Oloo, the secretary general of TNA. At paragraph 9, he concedes the twin claims of Kshs 250,000 nomination fees; and, Kshs 2,000 registration fees. He denies all the other claims *in toto*. In particular, he avers that the present claim is an electoral dispute that should have been lodged either with the TNA organs; or, the Political Parties Disputes Tribunal; or, the Independent Electoral and Boundaries Commission. In the circumstances, he contends that the petition is incompetent.
6. The respondent also avers that the petitioner has failed to disclose the terms of the pre-election coalition agreement between TNA and URP. Under that agreement, TNA was not to field

- candidates in URP strongholds including Uasin Gishu. The respondent denies that the petitioner was discriminated, humiliated, or harassed by the respondent.
7. On 26th April 2016, the petition was listed for hearing. Neither the respondent nor its counsel appeared. The court directed that the petition be heard by way of oral submissions; depositions; pleadings; and, the witness statements on record. The petitioner made oral submissions in support of the petition. I have considered the petition, the witness statements, replying affidavit, and the submissions.
 8. I will deal first with the partial *admission* of the claim. The respondent expressly concedes at paragraph 9 of the replying affidavit that “*it is willing to refund to the petitioner Kshs 250,000 nomination fees; and, Kshs 2,000 registration fees*”. Those prayers in the petition need *not* be proved. I accordingly enter *judgment* for the petitioner against the respondent in the sum of *Kshs 252,000*.
 9. I will now turn to the other limbs of the petition. I am satisfied that the petitioner was an aspiring candidate for the senate seat in Uasin Gishu. The conduct of the respondent or its officials in January 2013 gave the impression that TNA would field candidates in Uasin Gishu. Party nominations were slated for 17th January 2013. The national chairman, Johnson Sakaja; and, the director of communications, Michel Waikenda, visited Uasin Gishu County. They assured the petitioner and other aspirants that the nominations would be conducted fairly in the county. Granted those circumstances, the pre-election coalition agreement dammed the flow and momentum of the petitioner’s campaign. The petitioner thus has a real and genuine grievance for wasted energy and costs on a campaign; a false start.
 10. It is trite that special damages must be specifically pleaded; and, strictly proved. See *Kampala City Council v Nakaye* [1972] E.A 446. The receipts marked *BEKT 5* are for campaign posters, fliers and so forth. They are all issued between 25th September 2012 and 8th January 2013 by a business styled *Seol Investments*. They all total Kshs 847,670. They are *not* accompanied by a revenue stamp as required by the Stamp Duty Act. The receipts are thus *inadmissible* in evidence. There is also *no* evidence of the payment of Kshs 26,000 paid as *rent* for party offices. Equally, there is no documentary evidence to support the claim for loss of gainful employment; and, costs of a helicopter pilot amounting to Kshs 2,100,000. The same can be said of the claim for transport and communication expenses of Kshs 864,000 and for “untimely disposal of assets” worth Kshs 1,000,000.
 11. The burden of proof for the special damages fell upon the petitioner. See sections 107 (1) and 109 of the Evidence Act. See also *Margaret Wanjiru Ndirangu & 4 others v Attorney General* Nairobi, High Court Petition 210 of 2013 [2015] eKLR. From a legal standpoint, the petitioner has failed to prove the claim on a balance of probabilities. The claim for all those heads of special damages is accordingly *dismissed*.
 12. I will now turn to the political rights of the petitioner. I have already found that the pre-election coalition agreement between TNA and URP frustrated the petitioner’s candidature. I agree with the respondent that the petition is completely *silent* on the pre-election coalition agreement. There is a sense in which the non-disclosure left the court in a blind spot. I note from annexure *BEKT 1* that the petitioner was a *member* of the TNA party. His interim membership card number 933901 is annexed to the petition. I thus readily find that the petitioner was *bound* by the *pre-election coalition agreement*.
 13. I agree that the pre-election coalition agreement was detrimental to the petitioner’s political ambitions in Uasin Gishu. The Constitution guarantees the petitioner political rights in Article 38 as read with Article 91 (1) (e). But when I unpack the claim, it simply amounts to a *nomination* or *election dispute*. The Constitution and our laws provide for clear legal mechanisms of resolving nomination and electoral disputes.
 14. Prior to the general election, the petitioner could have utilized internal TNA party dispute resolution mechanisms. The petitioner was also at liberty to refer the dispute to the Independent Electoral and Boundaries Commission (IEBC). The IEBC is vested with wide powers to independently manage the electoral process. An election is a continuum that starts before polling day; spills over into the IEBC; and, ends up in the *election courts*. Along that journey, various institutions have been granted distinct mandates to resolve certain disputes. The IEBC, for example, has power to resolve certain disputes over *nomination* of candidates. Article 88 (4) (e) of the Constitution is express in that respect. See generally *International Centre for Policy &*

- Conflict and 4 others v Uhuru Kenyatta and others*, Nairobi, High Court Consolidated Petition 552 of 2012 [2013] eKLR, *George Wanjohi v Steven Kariuki & others*, Supreme Court, Petition 2A of 2014 [2014] eKLR. Lastly, the petitioner could have approached the Political Parties Disputes Tribunal created by section 40 of the Political Parties Act 2011.
15. The petitioner did not refer the dispute to any of those organs. He instead presented this petition on 6th November 2014, nearly *a year and eight months* after the general election of 4th March 2013. Quite apart from the *laches*, I find that the petition is *incompetent*. Having *by-passed* the Constitutional and legal institutions for settlement of *pre-election nomination disputes*, the petitioner is now *estopped* from claiming a violation of his political rights. The original jurisdiction of the High Court is circumscribed in that respect. See *International Centre for Policy & Conflict and 4 others v Uhuru Kenyatta and others*, Nairobi, High Court Consolidated Petition 552 of 2012 [2013] eKLR. I have also found that the petitioner was a *member* of TNA and *bound* by the pre-election coalition agreement with URP.
16. Save for the admitted part of the claim, I have reached the conclusion that the petitioner failed to discharge his burden of proof on a balance of probabilities. It follows as a corollary that the petitioner is *not* entitled to the declarations, damages, compensation, apology or other reliefs sought in the petition.
17. The upshot is that judgment on *admission* is entered for the petitioner against the respondent in the sum of Kshs 252,000. Interest shall apply at court rates from 6th December 2012 (the date of the deposit) until full payment. The remainder of the petition is devoid of merit and is *dismissed*. Costs follow the event and are at the discretion of the court. Since the petitioner has only succeeded in part; and considering his predicament; and, in the interests of justice, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 24th day of May 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

The petitioner (in person).

No appearance for the respondent.

Mr. J. Kemboi, Court Clerk.