



**Karauri v Jubilee Party & another (Civil Case 44 of 2013)
[2024] KEHC 12412 (KLR) (Civ) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 44 OF 2013

JM NANG'EA, J

OCTOBER 15, 2024

BETWEEN

MATHEW ADAMS KARAURI PLAINTIFF

AND

THE JUBILEE PARTY 1ST DEFENDANT

GEDION KAUMBUTHU MEENYE 2ND DEFENDANT

JUDGMENT

The pleadings

1. The plaintiff brought this suit against the defendants, jointly and severally, vide plaint dated 15/2/2013 and amended on 6/3/2018 seeking the following reliefs;
 - a. A declaration that the purported nomination of the 2nd defendant as TNA's candidate for the Meru County Senate seat was and remains null and void.
 - b. A further declaration that TNA's and the 2nd defendant's acts and/or omissions complained of in the Plaint amounted to oppressive and illegal conduct which deprived the plaintiff of his constitutional rights to participate in political activity guaranteed by *the constitution*.
 - c. Ksh. 3,002, 280 (sic).
 - d. General damages as may be assessed by the court.
 - e. The costs of the suit and interest on (c) and (d) above.
2. The plaintiff avers that he was a registered member of The National Alliance ("TNA"), a political party in Kenya, in the lead-up to the general elections conducted on 4/3/2013. In 2016 TNA is said to have



- merged with 11 other political parties to form the 1st defendant. According to the plaintiff, he was the sole TNA candidate in the party nominations held on 17/1/2013. Following the merger the plaintiff states that the 1st defendant took over records, assets, liabilities, rights and obligations of its dissolved constituent parties including TNA in accordance with the Political Parties (Amendment) Act, 2016.
3. The plaintiff contends that ballot materials for use in the party nominations were never availed, prompting him to complain to TNA's Meru County Elections Board which advised him to pick his nomination certificate from the party's Headquarters in Nairobi there being no opposition to his candidature. He did go to pick the certificate but the party's officials allegedly declined to issue the document to him. Upon investigations, he established that the 2nd defendant had already been given the party nomination. The plaintiff disputes the decision contending that the 2nd defendant could not have been qualified to obtain the ticket for the Senate seat because he was a Parliamentary candidate for Imenti North Constituency on the ticket of the Grand National Party. The plaintiff therefore laments that the 2nd defendant's nomination was the result of an unlawful collusion and/or conspiracy between the defendants.
 4. Aggrieved, the plaintiff appealed to TNA's disputes Tribunal on 19th January 2013 which found in his favour and communicated its decision to him orally with a promise that the formal ruling would be given later. The ruling never came and he further appealed to the Independent Electoral & Boundaries Commission (IEBC) Disputes Tribunal being Appeal No. IEBC/NDRC/161/2013. By ruling given on 28/1/2013 in the presence of all the parties, the Tribunal is said to have allowed the appeal and ordered TNA to issue the nomination certificate to the plaintiff to contest for the Meru County Senate seat and include him in its list of nominated candidates to the exclusion of the 2nd defendant and any other contestants.
 5. The plaintiff further avers that the 2nd defendant reacted by filing Nairobi H. C Miscellaneous Application No. 28 of 2013 invoking this court's judicial review jurisdiction to challenge the IEBC Tribunal decision. After hearing the parties, the court dismissed the application and upheld the IEBC Tribunal ruling. Still, TNA allegedly persisted in its refusal to issue the nomination certificate to the plaintiff and, consequently, he was unable to present documents to the IEBC by the set deadline of 1st February 2013 at 4.00 PM and was locked out of the elections. He complains that were it not for the defendants' unlawful acts and/or omissions, he stood an overwhelming chance of election as the Meru County Senator given inter alia his goodwill and support of the electorate having previously served several terms in parliament. The plaintiff states that he was thus denied the privileges and remuneration attaching to the position of a Senator.
 6. The plaintiff therefore accuses the defendants of committing illegalities, fraud, breach of contract and malice, particulars of which are set out in the plaint, hence the suit.
 7. The 1st defendant filed defence disputing all the material claims in the suit. In particular, the allegations of fraud and/or other unlawful conduct by the 1st defendant are traversed. The 1st defendant also intimated that it would apply for the suit to be struck out for being bad in law and on account of being filed before a court without jurisdiction. For these reasons inter alia the court is urged to dismiss the suit with costs.
 8. The 2nd defendant entered appearance but failed to file defence within the period prescribed by the law. On the plaintiff's application, interlocutory judgement was entered against him on 22/4/2013. The 2nd defendant then purported to file defence dated 20/4/2013 after the interlocutory judgement. By ruling delivered on 5/3/2014, my sister (R. E. Ougo J) struck out the defence because of the irregularity.



The Plaintiff's Evidence

9. The plaintiff's evidence was recorded before a different court on 8/3/2022. This court took over the case on 29/7/2024 and directed, after hearing the parties, that the matter would proceed from the point the previous trial court left off.
10. The plaintiff's testimony as per his statement dated 15/3/2013 adopted as his evidence underscores the averments in the amended plaint. He told the court that he had been elected as Member of Parliament for Tigania for four five-year terms in 1979, 1983, 1987 and 1997. In the elections held on 4/3/2013 subject of this suit he was to be the sole TNA candidate for the Meru County senatorial seat having been unopposed in the party nominations. The 2nd defendant was instead unlawfully given the nomination certificate despite being a member of a different party, the Party of National (PNU). The plaintiff asserted that he was TNA's member at the material time after enrolling on 10/9/2012 and obtaining a membership card. He also contends that he paid the requisite nomination fees of Ksh. 250,000 to the party.
11. The plaintiff continued to testify that he campaigned hard for the seat by inter alia erecting bill boards at a cost of Ksh. 400,000 and purchasing other campaign materials like T-shirts. He expected to win the election as TNA was very popular in Meru County. The court was told that the party ended up losing the senate seat but got the most votes in the County. TNA also allegedly got many Members of the County Assembly elected on its ticket.
12. In support of his evidence, the plaintiff tendered his bundle of documents filed herein as per list dated 15/3/2013. The exhibits include the IEBC Disputes Tribunal ruling dated 28/1/2013 that directed issuance of the nomination certificate to the plaintiff; the High Court ruling dated 5/2/2013 in the above stated Miscellaneous Application No. 28 of 2013 which dismissed the 2nd defendant's challenge of the IEBC decision; Invoice dated 13/2/2013 for Ksh. 400,000 purportedly paid to Magnate Ventures Ltd for erection of his campaign billboards.

The defendants' case

13. Both defendants didn't offer evidence.

The plaintiff's submissions

14. Learned Counsel for the plaintiff submit that owing to the defendants' failure to adduce evidence, they must be adjudged liable in law. Reference is made in this regard to decided cases including the case of Kenya Power & Lighting Company Ltd V. Samuel Gathiari Cerere (2019) eKLR and Nesco Services Limited V. CM Construction (EA) Limited (2021) eKLR in which it is held that where a party fails to tender evidence in rebuttal of the opposite party's prima facie credible testimony then that party's liability is proven on a balance of probability. The plaintiff's advocates also cite section 112 of the *Evidence Act* which provides:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

15. Counsel further refer the court to judicial determinations in Oiro V. Jubilee Party & Another (Cause E036) (NRB) of 2022 {2022} KEPPDT 1069 (KLR) (Civ) (9 May 2022) (Judgement) and James Onyango Oyoo V. Hezron Otieno Mc'Ombewa Civil Appeal No. E 305 OF 2022 eKLR. These decisions remind political parties of their duty to inform candidates vying for political seats on their



- tickets on the method used to arrive at a decision as to who gets the nomination certificate, failure to which unfairness and/or illegality is perpetrated.
16. The plaintiff's advocates also place reliance on sections 38 A, 38 C and 38 E of the *Political Parties Act*. Section 38 A of the Act provides that a political party shall conduct its nomination process through direct or indirect method while section 38 E requires political parties to notify their members as well as the Registrar of Political Parties of the method intended to be used to carry out the nominations, which method shall be in accordance with the party's nomination rules. Section 38 C entitles registered members of a political party to participate in the nominations conducted by the political party.
 17. The plaintiff therefore contends that his constitutional rights of association; to make political choices including vying for political office and campaigning for a political cause as well as the right against discrimination guaranteed by Articles 36 (1), 38 (1) (c) and 27 (4) and (5) of *the Constitution* were infringed.
 18. It is further the plaintiff's submission that a political party must abide inter alia "by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party" in line with Article 91(1)(d) of *the Constitution*.
 19. Regarding the claim for special damages, the plaintiff's Counsel maintain that the pleaded sums have been strictly proven as required in law and should be granted as prayed.
 20. The plaintiff also claims general damages for the alleged violation of his constitutional rights to participate in the political process. His advocates pitch tent on case law in *Peter Ndegwa Kiai T/A Pema Wines & Spirits V. Attorney General & 2 Others (Civil Appeal No. 243 of 2017 (2021) KECA 328 (KLR)*. In this case the Court of Appeal while also citing the English Privy Council observed that monetary awards for constitutional violations are not confined to awards of compensatory damages in the traditional sense. In addition to upholding or vindicating contravened constitutional rights, the court may also award compensation to the wronged person. The superior further stated that an additional award may be necessary to reflect the sense of public outrage at the violation. It was, however, noted that award of damages in constitutional petitions is discretionary and depends on the facts and circumstances of each case.
 21. Learned Counsel for the plaintiff do not suggest a figure in general damages they desire for their client. A pointer is, however, given, Counsel stating that the plaintiff's salary as Senator would have been Ksh. 600,000 per month for a 5 – year term under *the constitution*.

The 1st Defendant's Submissions

22. The 1st defendant does not seem to have filed submissions.

The 2nd Defendant's Submissions.

23. The 2nd defendant's advocates confirm that he was a member of the Grand National Party before he was recruited or scouted to join the 1st defendant in November 2012. He then resigned from his former party and got TNA's nomination certificate to contest for the Meru County Senate seat. As per the plaintiff's evidence, the 2nd defendant concedes that he lost the legal challenges mounted by the former and did not eventually contest for the position.
24. The 2nd defendant's main argument is that the court is bereft of jurisdiction to entertain this case on the basis of the doctrine of exhaustion of remedies. According to him, the plaintiff should have, in the first instance, approached the 1st defendant for refund of his alleged election expenditure before lodging appeal with the Political Parties Disputes Tribunal (PPDT) pursuant to section 40 (1) of the *Political*



- Parties Act* which requires the Tribunal to determine inter alia disputes between a member of a political party and the political party. Such disputes between a member of a political party and the political party are first addressed through the party's internal organs before any appeal to the PPDT in terms of section 40 (2) of the *Political Parties Act*, according to the learned Counsel for the 2nd defendant.
25. In *Paul Partoire Ole Kaika V. Orange Democratic Movement, Petition No. 87 of 2014* (eKLR) the 2nd defendant's advocates cite, a similar petition is said to have been struck out on the same grounds. Following jurisprudence emanating from the famous case of Owners of Motor Vessel "Lillian S" V. Caltex Oil (Kenya) Limited (1989) eKLR, the 2nd defendant's advocates submit that the court should not therefore take any further step in the matter for want of jurisdiction. The Supreme Court of Kenya decision in Samuel Kamau Macharia & Another V. Kenya Commercial Bank Limited & 2 Others (2012) eKLR is further cited for the proposition that jurisdiction flows only from *the constitution*, legislation or both. Furthermore, the court is referred to the Speaker of the National Assembly V. James Njenga Karume (1992) eKLR in which the Court of Appeal held that where there is a clear procedure for redress of a particular grievance prescribed by *the constitution* or an Act of parliament, the procedure should be strictly followed.
26. Concerning the plaintiff's claim for special damages, the 2nd defendant submits that it is not strictly proven as against him as required in law. The court is told that payments made to TNA and the 1st defendant, like nomination, party membership and advertisement fees cannot be claimed from him. Regarding the plaintiff's alleged election expenses including those incurred on billboards, printing of campaign materials and purchase of a recruitment card, the 2nd defendant contends that the expenditure is not proven. The case of Makori Ombeti & Another V. Stanley Muthuure being Civil Appeal No. E006 OF 2023 (2024) eKLR as restating the legal position that invoices are not evidence of payment and that actual payment receipts should be tendered.
27. The 2nd defendant also submits that the plaintiff has not discharged the burden of proof of the allegation of collusion and/ or conspiracy against him which he shoulders by dint of section 107 of the *Evidence Act*.
28. The 2nd defendant therefore concludes that this dispute being political in nature should not have found its way to the court for the reasons given.

Analysis and Determination

29. Having read through the pleadings, evidence and submissions on record, the following issues arise for determination:
- a) Whether the court has jurisdiction to hear and determine the suit.
 - b) Whether the 1st defendant took over assets, liabilities records, rights and/or obligations of TNA which the plaintiff accuses of denying him the right to contest for election.
 - c) Whether the plaintiff's constitutional right to vie for a political seat was violated by the defendants.
 - d) The quantum of general and special damages, if any, awardable to the plaintiff.
 - e) The question of who bears the costs of the suit.
30. The facts of this case are largely undisputed. The plaintiff lodged a complaint with TNA's disputes resolution organ which ostensibly ruled in his favour but didn't render a written ruling. The plaintiff then complained to the IEBC Tribunal which ruled in his favour and directed TNA to issue him with



the nomination certificate. The 2nd defendant was dissatisfied with the decision and filed an application before the High Court seeking to have the order quashed but was unsuccessful. It appears undisputed that the 2nd defendant did not eventually contest for the seat he was eyeing.

31. Articles 22 and 23 of *the Constitution* grant this court the authority to enforce the Bill of Rights including ordering compensation for proven violation of constitutional rights. Before determining whether the plaintiff's constitutional right to contest in the elections in question was infringed as claimed, I will first dispose of the objection as to this court's jurisdiction.
32. The 2nd defendant mainly relies on the doctrine of exhaustion of remedies in his submissions on the issue of jurisdiction. The case of *Usikimye CBO & 4 Others V. Chebochok & 4 Others; Law Society and 9 others(Interested Parties) (Constitutional Petition E006 of 2014 (2024) KEHC 10121 (KLR) (15/8/2024* which in turn quotes the Court of Appeal holding in *Geoffrey Muthinja & Another V. Samuel Muguna Henry & 1756 Others (2015) eKLR* lays the law as hereunder:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same should be exhausted before the jurisdiction of the court is invoked. “ The superior court added that “the exhaustion doctrine is a sound one and serves the purposes of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts”.
33. The same position was taken in the case of *Paul Partoire Ole Kaika supra* relied upon by the 2nd defendant. The plaintiff in this case was therefore obligated to exhaust his party's internal disputes resolution mechanisms before approaching the court if dissatisfied, failure to which the suit could be struck out for want of jurisdiction.
34. The situation herein, however, is that the plaintiff did in the first instance prefer his complaint to the 1st defendant's disputes resolution body. No formal decision was made, leading to an appeal to the IEBC. The 2nd defendant seems to suggest that even his claim for compensation should have been referred to the 1st defendant for consideration first before institution of the suit. In the court's view, it suffices that he lodged his main complaint of denial of his constitutional right to vie for elective public office with his party. It was up to the 1st defendant to either give him a nomination certificate if he lawfully merited or compensate him if appropriate. Besides, the plaintiff avers in the suit that he demanded for compensation which was not forthcoming, hence the suit. The defendants have not disputed receipt of the demand notice.
35. The court accordingly finds and holds that the plaintiff exhausted the 1st defendant's internal disputes resolution mechanisms and thus lawfully filed the suit. This court therefore has jurisdiction to hear and determine the dispute.
36. The onus is on the plaintiff to prove his case on a balance of probability which is the legal standard of proof in civil cases. Having so restated, it is common ground that the 1st defendant did take over the assets, records, liabilities and obligations of TNA following the merger involving other political parties. Issue (b) as framed is thus determined in the affirmative as well.
37. The plaintiff's evidence that he was a member of the 1st defendant and lawfully won nomination unopposed to contest for Meru County Senate seat in the elections conducted on 4/3/2022 has not been challenged. None of the defendants offered evidence in rebuttal. The 2nd defendant's attempt to challenge IEBC's decision in favour of the plaintiff in court also failed. As held in the case of *Nesco*



- Services Limited supra cited by the plaintiff as well as in many other superior courts' decisions, the 1st defendant is precluded from contesting the plaintiff's evidence in the circumstances.
38. Clearly, the 1st defendant violated the plaintiff's constitutional right to vie in the elections in question guaranteed in Article 38 (3) (c) of *the Constitution*. His evidence that he was a member of the party and that he complied with the requirements of the 1st defendant including paying the requisite nomination fees and appearing for the nomination exercise has not been discounted. The plaintiff's right to participate in the activities of the 1st defendant by dint of Article 36 (1) and his right against discrimination as provided for in Article 27 (5) of *the constitution* were also palpably infringed upon as contended.
 39. Again, the court finds and holds in the affirmative, that the plaintiff's constitutional rights complained of were violated by the 1st defendant.
 40. The plaintiff alleges that the 2nd defendant engaged in a conspiracy or collusion with the 1st defendant to deny him the latter's nomination certificate to contest for the Meru County Senate seat. As already noted, the 2nd defendant did not file defence and therefore couldn't adduce evidence. He, however, states in his submissions that the plaintiff's allegations in the amended plaint are directed at the 1st defendant, not him. He contends that he had no capacity to influence the 1st defendant's operations.
 41. I have perused the amended plaint. At paragraph 16 a) to i), the plaintiff sets out particulars of alleged illegality, fraud, breach of contract and malice attributed to the two defendants. Indeed most of the stated wrong doing is directed at the 1st defendant and/or its predecessor, TNA. It is only paragraph 16 f) which faults the 2nd defendant as well, accusing him of conspiring with the 1st defendant to issue the nomination certificate to the former who was not a member of the party. The Black's Law Dictionary 6th Edition defines "conspiracy" as a "combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act.....". This agreement need not be in writing but may be inferred from the conduct of the parties concerned.
 42. The 2nd defendant has not testified to debunk the plaintiff's claim of his involvement in a conspiracy to deny him his party's ticket to contest in the elections. Neither has he shown that he was in fact a member of TNA at the material time, information that was only within his knowledge and that of TNA/the 1st defendant. In the circumstances, I find that the plaintiff has proven the 2nd defendant's liability as well on a balance of probability.
 43. The plaintiff claims special damages of Ksh. 3,002,280 made up of nomination fees (Ksh. 250,000), membership fees (Ksh. 2,020), billboards erection costs (Ksh. 446,000), printing of campaign materials expenses (Ksh. 2,252,500), purchase of membership recruitment cards (Ksh. 10,000) and publication of advertisement in the Daily Nation Newspaper (Ksh. 41,760).
 44. As per the submissions of learned Counsel for the plaintiff and the 2nd defendant, the law requires the plaintiff not only to specifically plead special damages but also strictly prove the same. The 2nd defendant asserts that the claims in respect of nomination fees, party membership fees and publication and advertisement costs cannot be claimed as against him. With respect to the other claims, he faults the plaintiff for failing to exhibit actual payment receipts saying that the invoices tendered are not proof of payment.
 45. It is indeed trite law that invoices are not proof of payment. The plaintiff ought to produce receipts evidencing payment of the costs allegedly incurred. The claims for Ksh 446,000 and Ksh. 2, 252, 500 on account of billboards and printing expenses respectively are not supported by payment receipts



- and are accordingly rejected. I will allow the claims for Ksh. 2,020, Ksh. 10,000, Ksh. 41,760 and Ksh. 250,000 in respect of party membership fees, purchase of a recruitment card, advertisement costs and nomination fees respectively having been proven as required by law.
46. Consequently, I find the defendants liable to defray special damages in the sum of Ksh. 303,780, jointly and severally.
 47. Turning to the claim for general damages, comparable common law measures of general damages is a useful guide in assessment of presumed compensatory damages or general damages as such damages are commonly referred to (see the South African Constitutional Court case of *Ntanda Zeli Fose V. Minister of Safety & Security*; 1996(2) BCLR 232 (W)).
 48. The United States Supreme Court in *Carey V. Phipus* 435 US 247 (1978) held that general damages are not awarded for violation of procedural due process. The court further observed that nominal and proven compensatory damages may be awarded to vindicate the infringed right. The court, however, retains the discretion to assess an appropriate measure of damages based on the particular circumstances of the case before it.
 49. These principles were adopted in the Kenyan case of *Peter Ndegwa Kiai* supra cited in the plaintiff's submissions. The Court of Appeal held in that case that in cases where a person's constitutional rights are violated, "an additional award, not necessarily of a substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches". In the cited case, the Court of Appeal awarded the petitioner Ksh. 5, 000,000 for proven destruction of his property worth Ksh. 32,000,000 by State agents in violation of the right to property guaranteed by Article 40 of *the Constitution*.
 50. In this case the plaintiff does not complain of loss of property per se. He has, however, proven that his constitutional right to offer himself for election to public office was frustrated by the defendants. A deterrent measure is thus necessary for such flagrant violation and to show utter disapproval. The alleged loss of salary at the rate of Ksh. 600,000 per month during the plaintiff's expected five-year term as Meru County Senator cannot be considered, however, for the reason that it is a special damages claim that should have been pleaded and strictly proven.
 51. Doing the best I can given the facts and circumstances obtaining herein, the plaintiff is hereby granted Ksh. 500,000 in general compensatory damages to be satisfied by the two defendants jointly and severally.

Final Determination

52. In the final analysis, the court determines the suit as hereunder;
 - (a) A declaration issues that the purported nomination of the 2nd defendant as TNA's / the 1st defendant's candidate for the Meru County Senate seat in the general elections of 4/3/2013 was unconstitutional, illegal and therefore null and void.
 - (b) A further declaration issues that TNA's / the 1st defendant's acts and/or omissions the plaintiff complains of in this suit amounted to oppressive and illegal conduct that deprived him of his constitutional right to participate in political activity .
 - (c) The plaintiff is awarded special damages in the sum of Ksh. 303,780 against the two defendants, jointly and severally.
 - (d) The plaintiff is granted general compensatory damages in the sum of Ksh. 500,000 against the defendants, jointly and severally.



- (e) The plaintiff will have the costs of the suit and interest at the court rates. Interest on special damages and general damages shall be computed from the date of filing suit and delivery of judgement respectively.

53. Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 15TH DAY OF OCTOBER 2024 IN THE PRESENCE OF:

The plaintiff's advocate, Ms Kisui for Mr. Macharia

The 1st defendant's advocate, Ms Mwangi

The 2nd defendant's advocate, Mr Mugwuku and Mr Mwangi

J. M. NANG'EA

JUDGE.

