



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(R. MWONGO, PJ)
ELECTION PETITION APPEAL NO 1 OF 2017

THE PARTY OF NATIONAL UNITY.....APPELLANT /APPLICANT

VERSUS

DENNIS MUGENDI.....1ST RESPONDENT

JEREMIAH MUGAMBI NJAGI.....2ND RESPONDENT

PATRICK MUCIRA WILSON.....3RD RESPONDENT

SIMON NJUE GITEGUA.....4TH RESPONDENT

AND

KITHINJI KIRAGU.....1ST PROPOSED INTERESTED PARTY

JEREMIAH NYAGA MOSES.....1ST PROPOSED INTERESTED PARTY

JAMES MURIITHI NDWIGA.....1ST PROPOSED INTERESTED PARTY

JOHN MUCIRA NJERU.....1ST PROPOSED INTERESTED PARTY

DAVID IRERI NTHIGA.....1ST PROPOSED INTERESTED PARTY

JOHN MUGO MATE.....1ST PROPOSED INTERESTED PARTY

JIM KARWENGO NYAGA.....1ST PROPOSED INTERESTED PARTY

NZANGI PHILIP KINYUTU.....1ST PROPOSED INTERESTED PARTY

JUDGMENT

Brief Background

1. This is an appeal by the Party of National Unity (“the Party” or “PNU”) against the judgment dated 2nd May, 2017, of the Political Parties Dispute Tribunal (PPDT) in PPDT Complaint No 38 of 2017.
2. The PPDT decision found, inter alia, as follows:
 - a. That the Party nominations carried out on Saturday, 22nd April, 2017 within Embu County were marred by irregularities and breaches of the Party’s constitution, nomination procedures and Kenya’s electoral laws.
 - b. That the said irregularities affected the outcome of the nominations exercise of 22nd April, 2017
3. Consequently, the PPDT granted the following reliefs and orders:
 - a. A declaration that the PNU nomination exercise of 22nd April, 2017 in Embu County was, and is, null and void
 - b. That the Party is restrained from issuing nomination certificates to any PNU candidate in the nomination exercise that took place on 22nd April, 2017
 - c. That the PNU shall, within forty eight (48) hours from the delivery of the PPDT judgment conduct a repeat nomination exercise within Embu County, strictly in accordance with the Party constitution, nomination rules and electoral laws.

The Appeal

4. The appellant Party’s appeal was filed by motion under certificate of urgency on 3rd May, 2017. The grounds of appeal contained in its Memorandum of Appeal are, inter alia:

“1. THAT the learned members of the Political Parties Disputes Tribunal erred in law and in fact in failing to appreciate that the Respondents herein did not have the requisite capacity to petition the Tribunal on account of the fact that they were not party members and/or candidates in the impugned nomination exercise.

2. THAT with regard to the foregoing, the learned members of the Political Parties Disputes Tribunal could only further err in law by nullifying elections in an entire county despite there being no complaint from the candidates who took part in the nomination.

3 THAT the learned members of the Political Parties Disputes Tribunal erred in law in failing to allow the relevant Party organs to dispense off with the internal Party Resolution Mechanisms first as provided by the Party regulations thus running a parallel process to the Party.

4....

5....

6....

7. THAT the learned members of the Tribunal erred in law and in fact by failing to appreciate that the nomination irregularities alleged to have occurred on the 22nd of April 2017 had only so occurred in a total of three wards in which wards the nomination exercise had been repeated on the 26th of April 2017.

8....

9....

10. THAT the learned members of the Tribunal erred in law by failing to appreciate that all the candidates affected by the decision of the Court had the constitutional right to be heard before a final determination was issued nullifying the entire nomination exercise.

11. THAT in totality, the learned members of the Tribunal erred in law and in fact by misinterpreting and misapplying the relevant laws.”

5. The motion was supported by the affidavit of Peter Kaberia, the Party’s National Treasurer and Acting Executive Director. The deponent annexed copies of:

- a. the Judgment of the PPDT dated 2nd May, 2017 (PK 1);
- b. the PNU Election and Nomination Rules as amended on 28th October, 2016 and deposited with the Registrar of Political Parties (PK2);
- c. the Ruling dated 2nd May, 2017, of the PNU National Nomination Dispute Tribunal in Complaint No 11 of 2017 (PK3); and
- d. a certified copy of a letter from the Registrar of Political Parties dated 3rd May, 2017, indicating that only the 1st Respondent was a PNU member (PK4).

6. The Appellant served the motion on the Respondents counsel on 3rd May, 2017 after the matter was fixed for hearing on 4th May, 2017.

7. At the hearing, Mr Omogeni and Mr Welukwe represented the Appellant and Mr Mwenda appeared for the Respondents. Although Mr Mwenda had not filed any response, he was ready and willing to proceed with oral hearing of the appeal so long as the PPDT file could be availed. Given the urgent nature of the matter and the need for expedition, the court ordered the PPDT file to be availed forthwith, and consequently the hearing proceeded.

8. By consent the parties agreed that the application be abandoned favour of hearing the appeal. Accordingly, they also agreed that the document marked PK4 annexed at pages 37-39 of the affidavit of Peter Kaberia be struck off as it had not been availed during the PPDT proceedings. There was contention whether the document marked PK 3 annexed to Peter Kaberia’s affidavit, but which had not been before PPDT, should be admitted. It was thus agreed, by consent, that that question should form one of the issues for determination in the appeal.

Parties’ Submissions

9. Starting with Ground 11 of the Memorandum of Appeal, Mr Omogeni submitted that the PPDT did not have jurisdiction to hear and determine the dispute because **Article 88(4)(e)** of the Constitution provides for settlement of disputes arising from nominations to be settled by the Independent Electoral and Boundaries Commission (IEBC). Counsel added that **Section 40(1) (fa)** of the Political Parties Act enacted in 2016 and providing for the PPDT to hear disputes arising out of party primaries was inconsistent with the constitution. In terms of **Article 2(4)** any law that is inconsistent with the constitution, is void to the extent of the inconsistency and any act or omission done thereunder in contravention of the constitution is invalid. In that regard, Counsel urged that the actions of the PPDT were in contravention of the constitution and its decision was therefore invalid. Counsel argued that the only way to provide for another body to hear such disputes was to amend **Article 88(4)(e)** .

10. Counsel referred to a case filed by the Law Society of Kenya in respect of which Parliament had amended the Judicial Service Act to include a provision in respect of the appointment of the Chief Justice. The five judge bench of this court found the amendment unconstitutional and struck it down. [The case is Petition No 3 of 2016 **Law Society of Kenya v the Attorney General and the National Assembly and 6 Others eKLR (2016)**].

11. On this ground Counsel finally referred to the preamble to the Political Parties Act which he argued clearly indicated the purpose of the Act to be to provide for the registration, regulation and funding of political parties and connected purposes. It was clear therefore that the Act was not intended to provide for dispute resolution by such an entity as the PPDT.

12. In reply to the argument on jurisdiction, Mr Mwenda submitted that PPDT's jurisdiction was enshrined in **Section 40** of the Political Parties Act. **Article 88(4)(e)** should not be read in isolation, but together with Article 87 which empowers Parliament to enact legislation to establish mechanisms for the timely settlement of election disputes. **Section 40** of the Political Parties Act provides the only forum for resolution of nominations disputes since there is no forum in the Elections Act providing for IEBC to resolve such disputes.

13. In his response Mr Omogeni emphasised that **Article 88** set out the functions of the IEBC, one of which was to deal with nominations. The legislation enacted was the Elections Act which at **section 74** clearly provides for timely resolution of elections disputes by IEBC, including disputes relating to or arising from nominations. Nowhere in the Act is the PPDT given any such powers.

14. Counsel asserted that **Section 40(1)(e)** was a vain attempt to transfer the constitutional and statutory functions of IEBC to the PPDT, a body not even envisaged in the constitution. Citing the case of **Supreme Court Application No 5 Gatirau Peter Munya and Dickson Kithinji v IEBC and Another [2014 eKLR]**, Counsel urged that a statutory provision in an Act of Parliament cannot be equated to a constitutional provision.

15. Mr Omogeni's next ground was that the persons who filed the complaint before the PPDT were not candidates, as required under Clause 46 of the **PNU Election and Nomination Regulations**. The Clause reads:

“Any candidate aggrieved by the decision of the Returning Officer may appeal to the Chairman of the National Dispute Tribunal within 48 hours of the declaration of the results”

Counsel highlighted that the entitlement to appeal was reserved to “**candidates**”, arguing that nominations deal with the personal rights of individuals in the party who are candidates for nomination.

16. In response, Mr Mwenda submitted that the complainants were party members in terms of **Article 4** of the Constitution of the Party of National Unity, as amended in 2012. In Parts II and III of that Article, counsel pointed out, members had rights and duties including the following:

“III: A party member shall

a. defend and uphold the Party Constitution

...

g. Observe discipline and practice justice and democratic principles”

Accordingly, there was nothing to prevent the complainants from raising issue with the injustice and disenfranchisement they had observed in the party nominations.

17. In his next limb of appeal, Mr Omogeni submitted that the PPDT purported to nullify the entire election in Embu County, including the results of unopposed candidates and candidates who had not objected. It was a grave injustice to condemn unheard persons who were not even mentioned as respondents. This flew in the face of their political rights, in addition to their right to a fair trial under **Article 50** of the constitution, which right could not be curtailed under **Article 25(c)**.

18. Further, Counsel contended that the PPDT failed to allow the internal party dispute resolution mechanism to be exhausted. He pointed to Rule 46 of the Party Election and Nomination Regulations

requiring a candidate to appeal within 48 hours of the declaration of results. Instead, the original complaint to the Party mechanism exhibited at page 56 of the Complaint before PPDT, was dated 24th April, 2017, yet the nominations were repeated on 26th April, 2017, and results declared on that day, as indicated in the ruling of the PNU Nomination Dispute Tribunal exhibited as “PK3” page 35 of Peter Kaberia’s Replying Affidavit. Thus, the PPDT misdirected itself when, on 28th April, 2017, it declined to allow the party internal dispute resolution mechanism to conclude and render its decision.

19. Mr Mwenda in response to the issue concerning non-exhaustion of the internal party dispute resolution mechanism argued that the issue was raised as a preliminary objection during the PPDT hearing on 29th April, 2017, and the tribunal dismissed the objection. He submitted that Peter Kaberia on behalf of the party had deponed and filed with the tribunal an affidavit dated 2nd May, 2017. At page 61 thereof, there is an exhibit from the Returning Officer who stated that: ***“the last person I issued with an interim certificate was Mr Kithinji Kiragu for Governor, at around 5.30 am (Sunday morning)”***. Counsel pointed out that Sunday was 23rd April, 2017.

20. Counsel argued that the complainants filed their complaint to the party National Nomination Dispute Tribunal within 48 hours of declaration of the last results on 23rd April. That tribunal failed to render its decision within 48 hours as provided for by Clause 51 of the PNU Election and Nomination Regulations. Consequently, the complainants were entitled to file a complaint with the PPDT which they did on 28th April, 2017. Any decision made after

21. In the result, Counsel submitted, even if the court were to admit the ruling of the PNU Nomination Dispute Tribunal, it would note that the same was delivered on 2nd May, 2017 outside of the 48 hours stipulated for to rendering a decision under Clause 51 of the Regulations.

22. The final limb argued by the appellant was concerning the burden of proof and whether in light of the evidence, the PPDT was justified in annulling the entire Embu County nominations. The appellant argued. That the PPDT gave undue weight to the evidence provided by the respondents. Indeed, in his submissions Mr Weluke for the appellant urged that the list of proposed polling stations exhibited by the respondent at page 74-78 of the complaint before the PPDT.

23. Counsel urged that the court do consider whether **section 35 and 36** of the **Evidence Act** were satisfied as to admissibility and weight to be attached thereto.

The Issues

24. After hearing the parties and considering the documents presented, the following are the issues for determination:

- a. Whether the PPDT had jurisdiction to hear the complaint before it, and in particular, whether:**
 - i. the PPDT can hear party nominations disputes in light of the provision of Article 88(4)(e) of the Constitution**
 - ii. The Party’s internal dispute resolution process had been exhausted**
- b. Whether the document marked PK 3 annexed to Peter Kaberia’s affidavit, but which had not been before PPDT, should be admitted**
- c. Whether on the strength of the evidence before it, the PPDT was entitled to annul the entire Embu Party nominations of 22nd April, 2017 without giving a hearing to other interested persons including other nominees**

Analysis and Determination

Jurisdiction of PPDT to hear the nominations disputes

25. I will commence with the easier limb of the two issues as to Jurisdiction, viz: whether the internal dispute resolution mechanism had been exhausted.

26. The Party Returning Officer's statement annexed to the affidavit of Kaberia dated 2nd May and filed before the PPDT is the starting point. He stated that: the polling was done on 22nd April, 2017 (page 59); that some wards-Ngandori/Ruguru had no ballot papers; there was no voting in Nginda and Gatari South Ward (page 60); during tallying all MCAs aspirants except of the three affected wards were present; that he was instructed by PNU H/Q to inform the three wards where voting was not conducted that ***“a repeat of the exercise will be carried out on the next day, Wed 26th April”*** (page 63).

27. The statement of Kithinji Kiragu, the winner of the Party gubernatorial nomination, which is annexed at page 66-70 in Kaberia's affidavit, confirms that no polling took place in Ruguru Ngundori ward (paras 5-6 page 68). Further, the Forms 35a Declaration of Governor Results annexed at pages 6-36 of Kaberia's affidavit are dated 22nd April 2017. Those for Nginda , Gatari South and Ruguru Ngandori wards are dated 26th April, 2017.

28. There is no doubt from the aforesaid evidence that nominations took place for the named wards on 26th April, 2017, whilst for the rest of the areas, nominations took place on 22nd April, 2017. I note that the Party's National Nominations Dispute Tribunal stated in its ruling on 2nd May, 2017, that:

“The final results for the Embu nominations were declared on 26/04/2017. This complaint was therefore filed prematurely.”

It is incorrect and farcical that a body in whom the Party and its members had invested confidence and hopes of integrity and independence, as an impartial arbiter to uphold the rule of law and engender free and fair elections, to make a statement of fact that is factually inaccurate and grossly misleading. Where Party affairs are conducted under such adjudicatory mischief as demonstrated by that tribunal, the likely outcome would be member discontent and ultimately electoral chaos.

29. The aforesaid ruling was in response to the complainant's complaint dated 24th April, 2017. It was issued long after most results were declared on 22nd April, 2017. As a result, the ruling is in its entirety a nullity.

30. In the result, the complainants' complaint was not decided or responded to within 48 hours as required by the Party Election Regulations. To that extent, the complainants had exhausted the Party's internal dispute resolution mechanism. A Party regulation can be breached by an act of omission or commission. In the absence of a decision or response to their complaint, the complainants (respondents herein) were entitled to file the same with the PPDT. On that limb, therefore, I find and that the PPDT was entitled to hear the complaint.

31. On the second limb on the issue of jurisdiction, the first question to ask is: what did the Constitution intend in **Article 88(4)(e)**? The Article states:

“ (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

.....

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of

election results”

(emphasis supplied)

32. In his argument, the appellant was essentially urging that a textual approach to the interpretation of that provision be applied. That is to say that every dispute involving nominations in the electoral process could only be resolved by the IEBC. He is fortified in his argument by the fact that the legislature enacted legislation namely, **section 74** of the **Elections Act** to effect **Article 88**. The section provides:

“Pursuant to Article 88(4)(e) of the Constitution The Commission is responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results”

This is a replication of Article 88(4) (e) of the Constitution.

33. The approach to constitutional construction required by **Article 259** of the constitution is rather broader. The provision reads:

“ (1) This Constitution shall be interpreted in a manner that—

a. promotes its purposes, values and principles;

b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. permits the development of the law; and

d. contributes to good governance.

(2).....

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking” (emphasis supplied)

This provision requires the courts to invoke a broad purposive interpretation of the constitution.

34. As a start, it is therefore necessary to understand what is meant by “nominations” in **Article 88(4)** and its scope as envisaged under the constitution and other legislation.

35. The constitution has no definition of the word nomination. The word is however found in other provisions of the Constitution, most relevantly: Articles :

- **82(1)(b)** - Parliament shall enact legislation to provide for the nomination of candidates;

- **88(4) (k)** – making the IEBC responsible for ***“the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties”*** (Emphasis supplied)

The statutory regime in Kenya, defines and outlines nomination and some of processes of nomination in the manner shown hereunder.

36. **Section 2** of the **Elections Act, 2011** states that:

“nomination’: means submission to the Commission of the name of a candidate in accordance

with the Constitution and this Act.’

Black’s law Dictionary, 6th Edition at page 1049 defines nomination as;

“An appointment or designation of a person to fill an office or discharge a duty. The act of suggesting or proposing a person by name as a candidate for an office.” (Emphasis supplied)

37. I now deal with nominations at two overarching levels in the election process..

i. Nomination At The Political Parties Level- By A Political Party

38. Various responsibilities are placed on a political party in respect of nomination. First, **Section 13** of the **Elections Act, 2011** provides for nomination of candidates by a political party as follows:

“(1) A political party shall nominate its candidates for an election under this Act at least ninety days before a general election under this Act in accordance with its constitution and nomination rules.

2. A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission.

(2A) A political party shall hear and determine all intra party disputes arising from political party nominations within thirty days.”

39. The political parties are required by dint of **section 27** of the **Elections Act, 2011** to submit their party nomination rules to the Independent Electoral and Boundaries Commission (IEBC). Further, **section 27 (2B)** provides that the IEBC:

“...shall by notice in the Gazette, issue Regulations prescribing guidelines to be complied with and the process by which political parties nominate candidates for nomination in accordance with Article 88 (4) (d) of the Constitution failing which the rules shall become void. [Emphasis supplied]

40. In essence, a political party shall nominate its candidates for an election under the Elections Act at least ninety days before a general election under the Act in accordance with its constitution and nomination rules.

Section 13(2) Elections Act provides:

“A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission.

41. Second, a party is required to prepare and present a list of its nominated candidates to the IEBC for the prospective election. Ideally, the name of the person nominated at the party nominations will be the one to whom the Returning Officer of the Political Party has issued a nomination certificate. Thus, in its list of candidates, a party would have to present to the IEBC a list of nominated persons, one each vying for the elective seat. This is done in accordance with **Regulation 14 of the Elections (General) Regulations, 2012 Regulation 14 (1) of the Elections (General) Regulations, 2012** which provides that:

“Each political party intending to present a candidate in an election shall, after its nominations and on such date or within such period as the Commission may designate, submit a list of persons nominated as candidates indicating the elective posts to which they are seeking election.”

42. Thirdly, there is nomination done by and within the political party in conformity with **Article 90** of the **Constitution**. This arises where a political party is required to submit names of persons who would

stand elected if the party were to be entitled to all the seats provided under **Article 90 (1)** of the Constitution on the basis of proportional representation. That is to say, the persons would be nominated on the strength of seats held by the political party in Parliament.

(ii) Nomination at the IEBC level (Presentation of party nominees)

43. This arises where candidates who have been issued with nomination certificates in their political party to vie for elective posts under the political party present their documents to the IEBC Returning Officer. These are referred to as political party candidates. See **Regulations 16, 22, 26, 30 and 34 of the Elections (General) Regulations**. (Presidential, National Assembly, Senate, Governor and County Assembly seats). This is the nomination that is carried out on the "**Nomination day**" as defined in **Section 2 of the Elections Act**.

44. Finally, there is the nomination under Article 90 whereat the IEBC receives a list of persons nominated by the Political party for purposes in pursuance of proportional representation. IEBC would then have to ascertain that there is proportional representation by the political party in terms of Article 90 of the Constitution.

45. At each stage of the various nominations described above, disputes can and often do arise. The question is whether the constitutional intention was for IEBC to handle disputes relating to nominations at Party level or only those at IEBC level.

46. This question was resolved by the Supreme Court in the case of **Moses Mwigigi & 14 Others v Independent and Electoral boundaries Commission & 5 Others [2016] eKLR**.

"[94] Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations. This position has been aptly remarked in the case of National Gender and Equality Commission, where the High Court thus observed (paragraph 50):

"Section 34(6) of the Elections Act, 2011 specifically provides that, 'The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned.' This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under Section 39, Part VI of the Political Parties Act, 2011 or to the High Court in appropriate circumstances" [emphasis supplied].

[95] The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55." (emphasis added)

47. In light of this decision by the Supreme Court, it is no wonder that the legislature amended the Political Parties Act in 2016 to provide for political parties to be responsible for their own internal governance issues, and to keep IEBC at arms' length. Thus, political parties must first resolve their intra party disputes internally using their rules and where a party to a dispute is aggrieved by the decision of their party, they may complain or appeal to the Political Parties Disputes Tribunal. Thereafter, the appeal is to the High Court.

48. It should be noted that the **Political Parties Act** is a legislation first enacted under the Constitution 2010, with the stated object – found in its preamble – of:

“...providing for the registration, regulation and funding of political purposes and for connected purposes”

49. In my view **Section 40(1)(e)** of the Political Parties Act comprises part of the governance provisions enabling parties to ensure members and citizens the full benefit and enjoyment of their political rights under **Article 38**, and is squarely in tandem with **Article 259(1)(b)** and **(d)** in terms of advancing the rule of law and human rights and contributing to good governance in that an entity such as the Political Parties Disputes Tribunal which, unlike the IEBC, is an independent organ having no intimate connection to the overall electoral management process in the way in which the IEBC regulates and manages elections. This is also in consonance with **Article 91** of the constitution requiring political parties to respect the right of all persons to participate in the electoral process, and **Article 92(i)** entitling Parliament to enact legislation for the omnibus purpose of:

“any other matter necessary for the management of political parties”

50. I conclude on this issue by stating that , generally, where the IEBC is required to be involved in party governance issues, it is in the provision of broad frameworks, guidelines and monitoring mechanisms thereof to enable parties to essentially manage their affairs.

51. I therefore have no hesitation in finding and holding that the PPDT had the jurisdiction and competence to hear and determine the present dispute.

Whether the document marked PK 3 annexed to Peter Kaberia’s affidavit, but which had not been before PPDT, should be admitted

52. In the course of the analysis above, I dealt with the document exhibit PK3 in the Affidavit of Peter Kaberia. It is the Ruling of the PNU Nomination Dispute Tribunal. As earlier stated this document was not availed before the PPDT at its hearings. Strictly, therefore it should not feature in the appeal. However, it was demonstrated by Mr Mwenda, and the court accepted, that even if the ruling had been admitted that tribunal made its decision out of time. I did find the ruling to be a nullity, and the question of its admission is no longer relevant.

Whether on the strength of the evidence before it, the PPDT was entitled to annul the entire Embu Party nominations of 22nd April, 2017

53. I have carefully perused the documentation which was availed before the PPDT tribunal. The list of proposed polling stations at pages 74-78 of the complaint comprised the respondent’s evidence, annexed to the affidavit of one Simon Njue Gitegua. Although it is true that the document is not signed, I do not see anywhere in the record of the tribunal’s proceedings that the appellants challenged or objected to the said document. That was the opportunity at which any document would have been tested and the deponent called to speak to it. As this was not done, I am loathe to disturb the tribunal’s discretion in relying on it or any other document, and attaching weight thereon..

54. On the discharge of the burden of proof, the only comment I would make is that I do find that generally the respondent made a case that the bulk of the nominations were conducted on 22nd April, 2017, despite the Party’s denial of that fact. Further, the Appellant brought into the proceedings a ruling of the Party Nominations Dispute tribunal which, in my view, only served to demonstrate that perhaps worse breaches of the Party Constitution and the law were visited on the complainants and other party members

55. On the whole, and on the basis of the record of the tribunal and the material provided to it, the tribunal stated the test it applied at paragraph 9 of its decision as follows:

“...the burden of proof in election matters is higher than a balance of probabilities but lower than beyond reasonable doubt. The test to be applied is first whether there was substantial compliance with the law; the party’s constitution, nomination rules and election laws. Thereafter

the next consideration is whether non-compliance, where proved, materially affected the result of the election”

56. In my view, the tribunal accurately identified the appropriate tests and applied them, save that I assume that the reference to “election” therein was intended to refer to nominations. I would leave it at that.

Disposition

57. The upshot of the foregoing analysis is that I am not persuaded to disturb the decision of the Political Parties Dispute Tribunal, which I hereby uphold.

58. The orders of the Political Parties Disputes Tribunal in paragraph 15(1) - (4) of its decision dated 2nd May, 2017, are hereby upheld, with the rider that the forty eight (48) hours ordered therein will have effect from the delivery of this judgment.

Orders accordingly.

Dated and Delivered at Nairobi this 5th Day of May, 2017

RICHARD MWONGO

PRINCIPAL JUDGE

Delivered in the presence of:

1. Mr. Welukwe for the Appellant/Applicant
2. Mr. Mwenda for the Respondent

Court Clerk Geoff Omuse