



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ELECTION PETITION APPEAL NO. 17 OF 2017**

**BETWEEN**

**SYMON KAITIKEI ROTIKEN.....APPELLANT**

**VERSUS**

**AGNES NAILANTEI SHONKO.....1<sup>ST</sup> RESPONDENT**

**JUBILEE PARTY NATIONAL.....2<sup>ND</sup> RESPONDENT**

**Being an appeal from the Judgment and Decree of the Political Parties**

**Disputes Tribunal at Nairobi (Honourable Mr Kyalo Mbobu, Mr James**

**Atema and Mr Hassan Abdi) delivered on the 10<sup>th</sup> day of May, 2017**

**in Political Parties Disputes Tribunal Complaint No. 86 of 2017).**

**BETWEEN**

**SHONKO AGNES NAILANTEI.....COMPLAINANT**

**VERSUS**

**JUBILEE PARTY.....1<sup>ST</sup> RESPONDENT**

**ROTIKEN SIMON KAITIKEL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This court became seized of the appeal today at 9.30a.m. It gave directions that the respondents be served for hearing at noon. The court was not able to sit until 1.00pm because of another matter it was hearing.

2. At the start of the hearing of the appeal, both M/s Wairimu Kamau for the appellant and Mr. Steve Ombasa for the 2<sup>nd</sup> respondent informed court that the repeat nomination that the Political Parties Disputes Tribunal (“PPDT”) had ordered was already underway in Narok North Constituency. This was to nominate the candidate for the Jubilee Party (2<sup>nd</sup> respondent) for the seat of member of the National Assembly in the coming general election. M/S Wairimu Kamau further informed the court that there was a stalemate on the ground because the 2<sup>nd</sup> respondent was conducting the nomination before there was agreement regarding the agents and the polling stations as ordered by the PPDT.

3. In my considered view, to the extent that the repeat nomination that was sought to be stopped is already underway many miles away from the court, the appeal has been overtaken by events. The court cannot be asked to act in vain.

4. On the merits of the appeal, the unchallenged facts were that on 25<sup>th</sup> April 017 the 2<sup>nd</sup> respondent carried out nomination to get its candidate for the National Assembly for Narok North Constituency. The appellant Symon Kaitikei Rotiken and the 1<sup>st</sup> respondent Agnes

Nailantei Shonko took part in the nomination. At the end of the exercise the appellant was declared the winner. The 1<sup>st</sup> respondent and two others who had been declared losers each filed a complaint with the Jubilee Party National Elections Appeals Tribunal in Appeal No. 18 of 2017. They complained that the nomination had been marred with irregularities. The complaint was dismissed. The 1<sup>st</sup> respondent complained to PPDT in Tribunal Case No. 86 of 2017. The respondents were the present 2<sup>nd</sup> respondent and the present appellant, respectively. PPDT heard the matter and on 10<sup>th</sup> May 2017 delivered a judgment in which it found that the nomination had not been free or fair. It nullified the finding that the appellant should be issued with the nomination certificate, and ordered that there be a fresh nomination exercise within 48 hours of the judgment. The last order was that the candidates and the 2<sup>nd</sup> respondent do agree on their agents and the specific polling stations where the fresh nomination be conducted, and that that agreement be within 12 hours from the date of the judgment. This is the judgment that aggrieved the appellant who came to this court in the instant appeal.

5. In ground No. 1 of the Memorandum of Appeal it was stated that PPDT had wrongly found that the Jubilee Party National Elections Appeals Tribunal had dismissed the 1<sup>st</sup> respondent's appeal orally and had further erred by setting aside the judgment of the Tribunal in its entirety allegedly because the 1<sup>st</sup> respondent had not been provided with written reasons. Yet, the said Tribunal had delivered a written judgment dated 3<sup>rd</sup> May 2017 giving reasons for the decision. M/s Wairimu Kamau addressed the court on this issue and made reference to the fact that she represented the appellant both at the Tribunal and at PPDT and produced the decision of the Tribunal delivered on 3<sup>rd</sup> May 2017. Her case was that PPDT had wrongly faulted the Tribunal by saying that it had issued an oral decision without reasons when, in fact, it had delivered a written decision with reasons. She submitted that the appellant's victory had been wrongly nullified on this basis.

6. I have seen the written decision of the Tribunal as annexed by counsel. It is also true that at paragraph 8 of the decision of PPDT it was observed as follows:

**“Up to this moment, there is no evidence of a written ruling or reasons having been supplied by the 1<sup>st</sup> respondent to the Claimant. The 1<sup>st</sup> respondent does not deny that the Claimant's appeal was dismissed orally. We find that the oral dismissal and failure to provide written reasons for the decision was a violation of the Claimant's rights to fair administrative action. We hold that the Claimant was entitled under Article 47 of the Constitution and the Fair Administrative Action Act, 2015 to reasons for the decision. As a result, the decision is set aside in its entirety.”**

7. It is quite clear that PPDT was not provided with the written decision of the Tribunal. That was the complaint by the 1<sup>st</sup> respondent against the appellant and the 2<sup>nd</sup> respondent, both of whom were parties to the matter. Counsel M/s Wairimu Kamau took part in the proceedings. She is not saying she had the decision of the Tribunal and presented it to PPDT. To produce the alleged decision before this court cannot assist her. In any case, the 2<sup>nd</sup> respondent was the owner of the decision and PPDT complained that it had not supplied it, leading to the result now being complained of. Given the circumstances, it is reasonable to conclude that the decision of the Tribunal is an afterthought. If it existed, it was not produced to PPDT. It follows that the complaint against PPDT is unfair and without merit.

8. A judgment is a decision of a court or tribunal regarding the rights and liabilities of parties in a legal action or proceedings. It generally provides the court or tribunal an explanation of why it has chosen to make a particular order. The 1<sup>st</sup> respondent was entitled to a written judgment that had reasons for the orders that the Tribunal was making. She was not accorded this right.

9. Further, when the 1<sup>st</sup> respondent complained to PPDT her case was that the nomination in which the appellant was declared the winner by the 2<sup>nd</sup> respondent was marred with irregularities. PPDT also observed that political parties (and the 2<sup>nd</sup> respondent is one) enjoy a constitutional status, operate on public funds and funds from their members, and therefore owe it to their members to invest in proper systems to be able to conduct efficient, free and fair primaries. Now that the 1<sup>st</sup> respondent was complaining that the nomination had not been conducted properly, and therefore the appellant had not validly won, it was incumbent upon the 2<sup>nd</sup> respondent to show that it had conducted a free and fair nomination in which the declared winner had validly won. PPDT found that the 2<sup>nd</sup> respondent had not rebutted the allegations by the 1<sup>st</sup> respondent. It went on to find that the allegations by the 1<sup>st</sup> respondent had been established, and on the basis nullified the nomination and its results. Before this court, Mr Ombasa appeared for the 2<sup>nd</sup> respondent. His client did not swear any replying affidavit. It therefore did not challenge the finding against it that was made by PPDT. There is no claim that before PPDT there was any affidavit sworn and filed by the 2<sup>nd</sup> respondent to challenge the allegations that had been made by the 1<sup>st</sup> respondent. I find that PPDT cannot at all be faulted on its finding on this point.

10. The appellant's counsel swore an affidavit in support of urgency in which she claimed that one Jared Juma based at Suyianka Lempaa & Co. Advocates who prosecuted the 1<sup>st</sup> respondent's complaint before the PPDT was not a qualified advocate, and annexed a printed copy of Law Society of Kenya – Advocates search engine to show that indeed he was not a qualified advocate; that his name was not on the copy. To start with, the said copy is not certified by the Law Society of Kenya. Counsel did not seek to confirm from the Society that the said advocate is not on their roll, or lacks a current practicing certificate. I find that the claim by counsel for the applicant was not substantiated. But more important, this claim was not one of the grounds in the Memorandum of Appeal. A party is bound by his pleadings.

11. I hope I have said enough to show that this appeal lacks merits. The same is therefore dismissed with costs.

**DATED, DELIVERED and SIGNED at NAIROBI this 12<sup>TH</sup> day of MAY 2017.**

**A.O. MUCHELULE**

**JUDGE**