



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELECTION PETITION APPEAL NO. 10 OF 2017

BETWEEN

SAMMY KILUKEI AND 299 OTHERS.....1ST APPELLANTS

NDIRITU MURIITHI.....2ND APPELLANT

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

JOSHUA WAKAHORA IRUNGU.....2ND RESPONDENT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....INTERESTED PARTY

Being an appeal against the entire decision, judgment and orders of the Political Parties Disputes Tribunal sitting in Nairobi of 8th May 2017
in

THE POLITICAL PARTIES DISPUTES TRIBUNAL

DISPUTE NO. 62 OF 2017

HON. JOSHUA WAKAHORA IRUNGU..... COMPLAINANT

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

NDIRITU MURIITHI.....2ND RESPONDENT

KACHAYA WILLIAM & 96 OTHERS.....3RD RESPONDENTS

JUDGMENT

1. The judgment that is being challenged by the appellant was delivered on 8th May 2017 by the Political Parties Disputes Tribunal. The Tribunal directed the Jubilee Party (which was the 1st respondent in the matter and also the 1st respondent in the appeal) to issue a final nomination certificate to Joshua Wakahora Irungu (who was the complainant and who is the 2nd respondent herein) as a duly nominated candidate to vie for the position of governor for Laikipia County under the Jubilee Party.

2. The complaint followed the decision dated 3rd May 2017 by the Jubilee Party National Elections Appeals Tribunal that had directed the National Elections Board of the Jubilee Party to issue the certificate to Ndiritu Muriithi (who was the 2nd respondent but who is now the 2nd

appellant).

3. Some background to what led to the present appeal is important. Laikipia County has three constituencies: Laikipia West, Laikipia East and Laikipia North. The Jubilee Party held its party nominations on 26th April 2017 for all elective positions, including that of governor. The contestants for the governor position were the incumbent (2nd respondent), Ndiritu Muriithi (2nd appellant), Sam Thuita Mwangi, James Mathenge, Gitonga Kabugi and Richard Mburu Kamau. The 2nd respondent was declared the winner. That aggrieved the 2nd appellant and Sam Thuita Mwangi. The two filed a complaint to the Jubilee Party National Elections Appeals Tribunal. The Tribunal found that in respect of Laikipia North the results were grossly inflated, the voter turnout was unrealistic and improbable and the tally announced for the election had a much higher variance when compared to the tallies for senate and woman representative. It was further found that the 2nd respondent had used public officers working under him in the County government to manage the nomination which contravened the **Public Officers Ethics Act**. However, instead of nullifying the entire nomination for Laikipia, the Tribunal used the doctrines of necessity and materiality and nullified only the results of Laikipia North and directed the National Elections Board to issue a certificate to the 2nd appellant who had won in Laikipia East and Laikipia West. This led the 2nd respondent to complain to the Political Parties Disputes Tribunal whose decision led to this appeal.

4. Before going to the merits of the appeal, there was a preliminary point raised by the 2nd respondent and the 3rd respondents (Kachaya William & 96 Others) that touched on the capacity of the 2nd appellant to maintain this appeal. Their case was that the 2nd appellant had since resigned from the Jubilee Party and was seeking to contest for the governor position for Laikipia County as an independent candidate. It was contended that he had so resigned by 8th May 2017 when the Political Parties Disputes Tribunal was rendering its judgment. In evidence, the 2nd respondent swore a replying affidavit in which he annexed two letters from Lucy K. Ndungu (Registrar of Political Parties) that stated that as of 8th May 2017 the 2nd appellant was not a member of a fully registered political party, he had been cleared to contest as an independent candidate and that he had been asked to forward the symbol he would use to the Independent Electoral and Boundaries Commission (IEBC) (the interested party in this appeal). The question that was being asked was whether, having resigned from the Jubilee Party, the 2nd appellant could be allowed to urge this appeal in which he was seeking that the decision of the Political Parties Disputes Tribunal be set aside and the decision of the Jubilee Party National Elections Appeals Tribunal that directed that he be given the certificate of the winner be affirmed.

5. The 2nd appellant did not swear any further affidavit to challenge the factual position that was contained in the replying affidavit of the 2nd respondent, and the annexures. Prof. Ojienda (SC) for the 2nd appellant took the position that the allegations that his client has resigned from Jubilee Party or that he intended to contest as an independent candidate had not been materially substantiated. The kind of substantiation expected, he argued, was in the form of affidavits sworn by the Jubilee Party and the Registrar of Political Parties.

6. My view of the matter is that, the sworn statement by the 2nd respondent as supported by the letters from the Registrar of Political Parties, and especially when considered that the letter dated 8th May 2017 was addressed to the 2nd appellant, provided sufficient factual basis for this court to find that the 2nd appellant was no longer a member of the Jubilee Party, and that he had been cleared by the Registrar of Political Parties to contest the governor's position in Laikipia County as an independent candidate.

7. Under **section 33 of the Political Parties Act (No. 24 of 2011)** a person can only qualify to be nominated as an independent candidate for a county election if he does not belong to any political party. The 2nd appellant is not a member of any fully registered political party.

8. Further, the basis upon which one can complain about a decision of a political party and its dispute resolution mechanism is if he is a member of the party. It is on the basis of that membership that he can participate in the nominations called by the party, and, if aggrieved, he can appeal to the Political Parties Disputes Tribunal for a remedy. Once he ceases to be a member of the party, he cannot seek to be nominated, or to be declared a nominee, on the party ticket. Once he ceases to be a member of the party he cannot have the locus to complain about the nominations of the party, and cannot appeal either to the Political Parties Disputes Tribunal or to this court seeking a determination on the nominations.

9. In short, the 2nd appellant did not have the capacity and locus to file this appeal. His appeal is consequently incompetent and this court has no jurisdiction to hear or determine it.

10. The second issue raised by the 2nd respondent was that the 1st appellants had no locus to maintain the appeal. The point was not substantiated, but when Mr. Amuga for the respondent addressed the court he stated that whereas Sammy Kilukei participated in the proceedings of the Political Parties Disputes Tribunal the other 299 had not, and therefore that these 299 individuals could not appeal a decision whose proceedings they had not participated in. Counsel had legitimate complaint. However, the more important issue was that the appeal Sammy Kilukei and the 299 others sought to argue was intended to have set aside the decision of the Political Parties Disputes Tribunal, and to have affirmed the decision of the Jubilee Party National Elections Appeals Tribunal. The decision was to have the 2nd appellant declared as the nominee for the Laikipia County governor position for the Jubilee Party, and to be given a certificate to that effect. In my view, it would be an exercise in futility to delve into the merits of the appeal as sought by the 1st appellants. This is because the candidate they support, and whom they want to be given a certificate to contest for the governor seat for Laikipia County, is no longer a member of their party, the Jubilee Party. He cannot, even if the appeal were to succeed on merits, be legally permitted to contest on Jubilee Party or to participate in any repeat nomination by the Jubilee Party. To that extent, therefore, the appeal by Sammy Kilukei and the 299 individuals (all 1st appellants) is incompetent as they are, as Jubilee members, pushing the agenda of a candidate who has resigned from the party and seeks to contest as an independent.

11. The 3rd respondents, represented by Mr. Karungo, supported the decision by the Political Parties Disputes Tribunal. They also supported the contention that since the 2nd appellant was no longer a member of the Jubilee Party he could not bring the appeal. They asked that the appeal be struck out with costs.

12. The last preliminary issue was raised by the Independent Electoral and Boundaries Commission (the interested party): that they had been wrongly joined in the appeal as they had not participated in the proceedings before the Jubilee Party National Elections Appeals Tribunal or at the Political Parties Disputes Tribunal. The court was addressed on this point by Mr. Nyamodi. It is true from the record that IEBC did not take part in the proceedings at the Jubilee Party National Elections Appeals Tribunal and at the Political Parties Disputes Tribunal. It was dragged into the appeal because of the fear by the appellants, as shown in the supporting affidavits, that if the appeal is not allowed the orders of the Political Parties Disputes Tribunal will be complied with, leading to the 1st respondent issuing a certificate of nomination to the 2nd respondent who will in turn present the certificate to it (IEBC). Beyond this, IEBC had no role at all in the appeal. Strictly, IEBC was wrongly joined. But because they were going to be affected had the appeal succeeded, I would not strike out the appeal on that score.

13. In summary, therefore the appeal by the appellants is found to be incompetent and is struck out with costs.

DATED, DELIVERED and SIGNED at NAIROBI this 10TH day of MAY 2017.

A.O. MUCHELULE

JUDGE