



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELECTION PETITION APPEAL NO. 84 OF 2017**

**JAMES KARIUKI KARANJA.....APPELLANT**

**VERSUS**

**JOHN KAMANGU NYUMU.....1<sup>ST</sup> RESPONDENT**

**PATRICK THUKU.....2<sup>ND</sup> RESPONDENT**

**JUBILEE PARTY ELECTION NATIONAL BOARD..3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. This is an appeal from the judgment and decree of the Political Parties Dispute Tribunal (PPDT) delivered on the 23<sup>rd</sup> May, 2017. In the Memo of Appeal seven grounds are raised which summarized are that the PPDT erred:

- (1) For failing to find that the change of polling station in the repeat nomination exercise was an electoral irregularity.
- (2) In failing to find that the said change confused voters who had no notice of the change.
- (3) In failing to find that participation of the 2<sup>nd</sup> Respondent in the repeat nomination when he had resigned from membership of the 3<sup>rd</sup> Respondent affected the results of the election.
- (4) In dismissing serious errors that materially affected the results of the repeat nomination exercise as human errors which are meritable.
- (5) When it failed to consider all the issues bordering on electoral offences.
- (6) In failing to find that the nomination exercise carried out on 9<sup>th</sup> May 2017 was not credible, free and fair.
- (7) In failing to appreciate the overwhelming malpractices witnessed during the repeat nomination and failing to appreciate the public importance of the election dispute.

2. The Appellant in essence seeks to have the judgment set aside, he be declared duly the elected nominee of the 3<sup>rd</sup> Respondent in Ruai Ward; a nomination certificate issued to the 1<sup>st</sup> Respondent be

revoked and his name removed from the Party's list of MCA Nominee and replace it with the Appellant's name and that the name of the 1<sup>st</sup> Respondent forwarded to the IEBC be recalled. The Appellant in the alternative seeks to have a repeat of the nomination exercise and costs.

3. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent have opposed the appeal. The 1<sup>st</sup> Respondent has filed Grounds of opposition amongst them being that there is nothing for the court to stay since stay of execution applies to positive orders; that the application and appeal here has been overtaken by events; that the application is misconceived and without merit, that the appellant is guilty of laches and is underserving of the remedies sought.

4. I have considered submissions by the advocates to the parties with the grounds of opposition. The Appellant argued only three grounds of appeal being grounds 1, 2 and 3.

5. The issues for determination are quite clear which are:

(1) And (2) whether change of the Polling Station from Chokaa Catholic Church to Ruai Girls Secondary School was:

- (a) Without due notice
- (b) Without legal justification
- (c) Disenfranchising to the voters
- (d) Amounted to an irregularity

(2) Whether the nomination exercise was free and fair.

### **Whether change of Polling Station was a serious irregularity.**

6. The Appellant urged that the change of the Polling Station in question in the repeat nomination was done without notice. He urged that no such change could be effected without sufficient notice to candidates and voters and further without approval of National Elections Board of the 3<sup>rd</sup> Respondent and IEBC. He urged that the change of Polling Station infringed on the voters right to Fair Administrative action.

7. The 1<sup>st</sup> Respondent has in addition to the Grounds of Opposition filed two affidavits in reply to this appeal. I have considered them. It is the 1<sup>st</sup> Respondent's contention that the appeal is vexatious being the fifth time the Appellant has raised complaints before judicial bodies arising from the nominations in issue.

8. The 1<sup>st</sup> Respondent contended that the change of Polling Stations was justified and regular as Chokaa Polling Station was not among the gazetted polling stations. The Returning Officer who has sworn one of the replying affidavits avers that all the candidates and their Agents were all called and notified of the change and that all of them including the Appellant agreed to have the change effected. The deponent avers that he sought the relevant authority from those concerned before effecting the change.

9. The 1<sup>st</sup> Respondent urged that the change of the polling station does not go to the root of the election neither does the same alter the results as all candidates were affected.

10. The 3<sup>rd</sup> Respondent in response to the change of polling station urged that the 3<sup>rd</sup> Respondent acted within its powers under **Rule 25(1)(b)** of its Party Nomination Rules which empowers its County Election Board to nominate a Polling Station. The 3<sup>rd</sup> Respondent urged that in any event the Polling Station received votes from all candidates and so if there was a disadvantage it accrued to all. Further that it was not a requirement that IEBC be informed of the change.

11. It has not been disputed that the 3<sup>rd</sup> Respondent made a change of one Polling Station from Chokaa Catholic Church to Ruai Girls Secondary School. It is not disputed that the former was not an IEBC gazetted Polling Station and that the latter was. The averment by the Returning Officer that he summoned all candidates and their Agents, including the Appellant; and that all agreed to the change has not been controverted.

12. The Respondents have shown that the change from Chokaa Catholic Church to Ruai Girls Secondary School was necessary and justified and that the same was effected after the requisite notice was communicated in person to all concerned parties. If the change caused disenfranchisement of any of the voters, then it cut across all the candidates.

13. The Appellant has not shown that he suffered greater prejudice than the other candidates. I do not agree with the Appellant that the PPDT erred in failing to find the change in Polling Station a nomination inequality. I find that the change was regular, it was justified and that all parties were notified of the change within a reasonable time.

#### **Whether the nomination exercise was free and fair.**

14. The Appellant has contended two things regarding the nomination exercise. One that the inclusion of a candidate, the 2<sup>nd</sup> Respondent in the ballot paper created confusion and affected the results. Two that the fact the nomination certificate read 9<sup>th</sup> May 2017 instead of 10<sup>th</sup> May 2017 was proof the results of the nomination were predetermined.

15. The 1<sup>st</sup> Respondent contends that no confusion was caused and further that having garnered only 5 votes the inclusion of the 2<sup>nd</sup> Respondent in the ballot paper did not affect the elections.

16. In regard to error in date which read 9<sup>th</sup> instead of 10<sup>th</sup> May 2017, it was the 1<sup>st</sup> Respondent's submission that the PPDT in error gave the date of their ruling as 9<sup>th</sup> instead of 10<sup>th</sup>. The 1<sup>st</sup> Respondent urged the court to note that the nomination certificate issued to him was received by him on the 17<sup>th</sup> May 2017.

17. The 3<sup>rd</sup> Respondent on its part urged the court to note that due to constraints on time, when PPDT ordered a repeat of the nomination exercise, the party used the same nomination papers it had used in the earlier exercise and that was how the 2<sup>nd</sup> Respondent's name, who withdrew from the party after the first nomination had his name in the ballot. It urged further that votes cast in favour of the 2<sup>nd</sup> Respondent had no consequence on the voting.

18. The elections in issue here are the party nominations for the representative of the 3<sup>rd</sup> Respondent in the MCA election of Ruai Ward, in Kasarani Constituency. As has been stated by many courts, including mine, the purpose of the nomination exercise is first and foremost to help the party concerned to get the best suited nominee to represent it at the final polls. This can only be achieved through a nomination process where the party is able to determine who garnered the highest number of votes to entitle him or her to be issued with a nomination certificate by the Political Party.

19. No party wants to be represented by anyone but the best and who is the best can only be expressed by the membership of the party through votes. Further no one candidate can be allowed to declare themselves the winners, or to manipulate the process to help them gain an advantage over the other candidates.

20. In this appeal it has been clearly demonstrated that the 1<sup>st</sup> Respondent garnered the highest votes in both the first and the repeat nomination exercises. In both elections, the 1<sup>st</sup> Respondent emerged the clear winner and was declared so at both times.

21. The Appellant lost in both. What is clear is that no electoral malpractice has been alleged or

established. What the Appellant complains about is inclusion of a non-member in the ballot paper at the repeat nomination. The appearance of the 2<sup>nd</sup> Respondent in the ballot paper was clearly explained. Reason was the 3<sup>rd</sup> Respondent was ordered to repeat the nomination exercise and had a short time with a weekend in between. It chose to use the same nominations ballot papers for that reason.

22. I find the explanation is reasonable and the 3<sup>rd</sup> Respondent decision to use same ballot papers justified in the circumstances. I am satisfied there was no ill intention or irregularity in the process.

23. The court has been notified that the 2<sup>nd</sup> Respondent garnered 5 votes. Those votes cannot in any way affect the election results. The gap between the winner and the first winners up was over 1200 votes. Besides the Application has not shown what prejudice the Appellant suffered by the inclusion of 2<sup>nd</sup> Respondent who had quit the 3<sup>rd</sup> Respondent's party by the time the repeat nominations were held. I find that he suffered no prejudice at all.

24. The upshot of this appeal is **that the same has no merit whatsoever and dismissed.**

25. **There will be no order as to costs.**

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE, 2017.**

**LESIT, J.**

**JUDGE**