



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION APPEAL NO. 127 OF 2017

THE ELECTIONS ACT 2011

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 38, 47 AND 50 OF THE
CONSTITUTION OF KENYA**

**IN THE MATTER OF CONTRAVENTION OF SECTIONS 39 AND 40 OF THE POLITICAL
PARTIES ACT**

HENRY MILIMU SHILILU APPELLANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT..... 1ST RESPONDENT

HERBERT SORE MAKATIANI..... 2ND RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES

COMMISSION3RD RESPONDENT

JUDGMENT

1. The appellant herein Henry Milimu Shililu and the second respondent one Herbert Sore Makatiani took part in the 1st respondent's joint nomination primary exercise held on the 28th April, 2017 for the nomination of a member of County Assembly Isukha South Ward, Shinyaru Constituency, Kakamega County wherein the 2nd respondent was pronounced victorious by the returning officer.

2. Aggrieved by the declaration of results, the appellant lodged an appeal before the party's county special appeals tribunal who on 6th May, 2017 upheld his appeal on grounds that he had won the nomination by majority votes and declared him a winner thereby revoking the nomination certificate issued to the 2nd respondent.

3. After delivery of the decision of the party's tribunal on 6th May, 2017, the applicant moved to the Political Parties Tribunal (PPDT) on 8th May, 2017 and filed complaint No. 147/17 seeking orders restraining the 1st respondent from giving a final nomination certificate to the 2nd respondent. Despite service of this application, the 2nd respondent did not enter appearance hence on 11th May, 2017, the appellant and 1st respondent compromised the application by recording a consent order in which the 1st respondent was directed to issue the claimant (appellant) with nomination certificate.

4. On 16th May, 2017, the 2nd respondent filed an application for review before the PPDT seeking review orders to set aside the consent which was issued without his knowledge nor participation hence condemned unheard. His application was however dismissed on 25th May, 2017 as it lacked merit. Dissatisfied with this decision, the 2nd respondent moved to the high court to challenge the consent order which effectively took away his nomination certificate. Justice Serگون upheld the appeal on 2nd June, 2017 and set aside the consent order, cancelled the nomination certificate purportedly issued to the appellant and directed for the hearing of the complaint filed by the appellant.

5. While all these proceedings were pending before PPDT for rehearing, the 2nd respondent presented a nomination certificate he had been given by the returning officer but later on revoked by the party internal dispute resolution mechanism (tribunal) to Independent Electoral and Boundaries Commission (IEBC) for clearance as the party nominee which they did on 31st May, 2017. Having discovered that the 2nd respondent had presented his nomination certificate as the nominee for ODM Isukha Ward, to IEBC who had cleared him, he filed an application dated 6th June, 2017 before PPDT enjoining IEBC as an interested party seeking orders restraining IEBC from clearing and or gazetting the 2nd respondent.

6. Before that application could be heard, the appellant filed another complaint before IEBC vide complaint No. 207/17 seeking similar orders. Upon hearing the application, IEBC tribunal dismissed the complaint on 5th June, 2017 on grounds that they had no jurisdiction as similar application was still pending before PPDT. Following the dismissal of his complaint before the IEBC tribunal, the appellant went back to PPDT and conceded that his application dated 6th June, 2017 against IEBC had been overtaken by events and therefore application was dismissed.

7. On 21st June, 2017, the 1st respondent filed a notice of preliminary objection challenging the jurisdiction of PPDT in entertaining the claim as it was an internal party dispute which had not been exhausted by the party's IDRM. By the tribunal's decision dated 22nd June, 2017 the preliminary objection was dismissed. Meanwhile, the appellant (claimant), filed an amended statement of claim on 23/6/2017 which later proceeded for hearing and judgment delivered on 29th June, 2017 dismissing the same on grounds that the appellant had not been vigilant in prosecuting his claim and that the orders sought were overtaken by events as the 2nd respondent had already been cleared by IEBC as ODM nominee for Isukha Ward for the 8th August, 2017 general election hence the orders sought could not be granted in vain.

8. It is this decision by PPDT dated 29th June, 2017 that provoked the current appeal through a memorandum of appeal dated 3rd July, 2017 in which the appellant listed six grounds as hereunder:

(a) That PPDT erred in law by failing to declare the appellant as a winner of the nomination conducted by the 1st respondent on 28th April, 2017;

(b) That PPDT failed to consider the 1st respondent's special county appeals tribunal's decision dated 6th May, 2017.

(c) That PPDT gave contradictory orders against its judgment which is not supported in law.

(d) That PPDT failed to appreciate that IEBC illegally cleared the second respondent as the rightful candidate for the 1st respondent.

(e) That PPDT failed to appreciate that proceedings cannot run concurrently at the tribunal and the IEBC committee on the same subject matter and

(f) That PPDT erred by purporting to run away from a complaint that clearly falls within its jurisdiction.

9. The appellant therefore sought for orders as follows:

- (a) That PPDT's judgment delivered on 29th June, 2017 be set aside.**
- (b) That the court do uphold the 1st respondent's special county appeals tribunal delivered on the 6th May, 2017 revoking the 2nd respondent's nomination and withdrawing the nomination certificate issued to him.**
- (c) That the honourable court to declare the appellant the legitimate nominee of ODM Isukha Ward.**
- (d) That the honourable court to compel the 1st respondent to issue the appellant with nomination certificate and submit his name to the 2nd respondent (IEBC).**
- (e) That the honourable court to compel the 3rd respondent (IEBC) to expunge the name of the 2nd respondent from the register of cleared contestants and the same be replaced with that of the appellant.**
- (f) That the honourable court to compel the 3rd respondent to gazette the appellant as the 1st respondent's nominee for member of county assembly Isukha South Ward Shinyalu Constituency.**
- (g) Any other relief court may deem fit.**
- (h) Costs of the suit.**

10. Simultaneously filed with the memorandum of appeal is a notice of motion dated 3rd July, 2017 but filed on 4th July, 2017. Upon service of the memorandum of appeal and notice of motion, the 1st respondent filed a replying affidavit dated 10/7/2017 and filed in court on 11th July, 2017. The 3rd respondent (IEBC) also filed grounds of opposition dated 11th July, 2017 and filed on even date. By consent, parties agreed to dispense with hearing of the application in favour of the hearing of the substantive appeal.

11. During the hearing, Mr. Makhanu for the appellant took the court through a detailed chronology of events till the filing of the appeal. He argued that, the appellant having been declared as the winner of the nomination exercise held on 28th April, 2017 by the party's special tribunal on 6th May, 2017 thereby revoking the nomination certificate of the 2nd respondent, and further that the said orders having not been set aside, the appellant remains the bonafide and rightful nominee on ODM ticket Isukha Ward.

12. Learned counsel challenged PPDT's decision on grounds that, it failed to appreciate that the appellant was the winner and that the 2nd respondent cannot benefit from an irregularity and or illegality hence denying the electorate their right to elect a leader of their choice through universal suffrage. Counsel submitted that the court has wide powers to declare the appellant the winner and direct IEBC to clear him.

13. In response, learned counsel for the 1st respondent Mr. Assa Nyakundi, submitted that, the decision made by the party's special appeals tribunal (IDRM) was fraudulently issued without the participation of the 2nd respondent. Counsel submitted that PPDT properly held that the orders sought by the appellant were overtaken by events considering that IEBC who were not served with any stay order have already cleared the second respondent hence IEBC cannot be compelled to recognize the appellant. He urged the court to find that it is too late in the day to issue the orders sought hence an exercise in futility as the claim and orders sought cannot be implemented at this point in time since the second respondent has already been cleared and gazetted.

14. Mr. Murangasia for the 2nd respondent associated himself with Nyakundi's submissions arguing that equity is not for the indolent and that delay defeats equity. Counsel submitted that the appellant had not proved that he won the elections since he was not issued with any nomination certificate and that he took too long to prosecute his claim which is now time barred and not implementable and to allow the same will constitute a breach of constitutional mandate of the 3rd respondent (IEBC) to conduct timely elections.

15. Mr. Muyundo for the 3rd respondent submitted that there was no order issued against IEBC not to clear the 2nd respondent. He argued that, the 2nd respondent having been cleared and gazetted, the process is irreversible and on a balance of convenience, the court should let the process continue uninterrupted.

16. I have considered the grounds of appeal herein and submissions by both counsels. The first ground of appeal and very critical is with regard to the winner of the nomination exercise for the position of member of county Assembly Isukha Ward on the 28th April, 2017 on ODM ticket.

17. According to the appellant, the 2nd respondent was irregularly declared the winner of the nomination exercise by the returning officer before final tallying was complete hence his appeal to the party's county special tribunal who upheld the same and declared him the winner having garnered the majority vote. To prove that he was the winner, the appellant attached to his affidavit in support of his application to PPDT dated 8th May, 2017 a copy of results prepared by his agents (see annexure marked HMS-1) showing that he had won with 2,541 against Sore (2nd Respondent) with 2,111, Liz Amula 2,308 and Kizili, 2412. Obviously, this is not an official result to be relied on to determine a winner.

18. According to the decision of the special county appeals tribunal dated 6th May, 2017, the tribunal observed that although tallying was done, no results were announced by the Returning Officer and instead he issued a provisional nomination certificate to the 2nd respondent irregularly. The tribunal made a finding that there was enough evidence produced to support the claims of the appellant and therefore directed that appellant be issued with nomination certificate which was never done. The tribunal did not disclose the nature of evidence placed before it nor the reason why the 2nd respondent did not participate in the proceedings before it.

19. On the other hand, the 2nd respondent in his affidavit sworn on 16/5/2017 in support of his application dated same day but erroneously indicated as filed on 15th May, 2017, he averred in Paragraph 10 that on the 28th April, 2017 he was attacked together with the returning officer by the appellant and his supporters after realizing that he was about to emerge the winner during the tallying exercise. As a consequence of the said violence, the results could not be announced. That due to the violence meted out by the appellant, the NEB ODM directed that the returning officer do issue the 2nd respondent with the nomination certificate.

20. Bishop Wabuka the returning officer in his affidavit sworn on 16th May, 2017 filed before PPDT in claim No. 147/2017 in support of the 2nd respondent's application dated 16th May, 2017 and further in his report dated 29th April, 2017 confirmed that the exercise was not credible and that he announced results minus results from two polling stations where violence broke out thus making it impossible to get the total number of votes. The good bishop equally did not produce any tallying sheets nor a signed declaration form or copy of the results indicating what each candidate scored in each polling station in that repeat nomination exercise. In a nutshell, both parties are in agreement that there is no evidence to prove as to who won the nomination which was marred with violence as no valid declaration of results was made.

21. In their judgment, the tribunal correctly observed and held that, "it was clear that there was no declaration of results as admitted by the returning officer hence it was not possible to determine who the winner was as there was no final result and therefore the nomination certificate issued to the 2nd

respondent was impeachable". To that extent, I do agree with the tribunal that in the absence of credible results being announced, nobody would claim victory. What did the special tribunal rely on to arrive at the decision they did without a declaration of final results?

22. The appellant cannot rely on a consent order signed on 11th May, 2017 which was set aside by the high court to claim victory. He is basically relying on the special tribunal's verdict which the 1st respondent (ODM) has dismissed as fraudulently conducted and does not recognize. ODM chairperson Judy Pareno equally dismissed the tribunal's proceedings as fraudulently conducted (see her affidavit sworn on 16th June, 2017). Curiously the verdict of the special county tribunal was signed by half of the members raising questions as to whether all members ever participated in the proceedings or not.

23. It is no wonder that PPDT was not able to clearly state whether there was a winner or not. Having held as such, I do agree with the appellant in respect of ground No. 1 that PPDT did not pronounce or declare who the winner was. As clearly stated above, there is no evidence placed before the ODM special tribunal (IDRM), ODM National Election Board, PPDT nor before me to discern or ascertain who the winner was. In the absence of tallying of all votes from all polling stations, I can categorically state that there is no clear winner of the 28th April, 2017 Isukha Ward for the nomination of a candidate on the position of MCA on ODM ticket. To hold otherwise would disenfranchise the people of Isukha from exercising their sovereign power under article 1 of the constitution through their democratically elected leaders or representatives.

24. Although the special tribunal's verdict which is questionable in several respects has formally not been set aside, the national elections board did not issue the appellant with a nomination certificate as directed by the said tribunal because of the alleged violence and non-declaration of results. A court cannot shut its eyes and uphold an irregularity simply because a flawed system declared somebody a nominee without following due process.

25. By refusing to recognize and to issue a nomination certificate to the appellant, the 1st respondent was not satisfied with the special tribunal's verdict which they correctly did. I do agree with the counsel for the 1st respondent Mr. Assa Nyakundi that the declaration of the appellant as the winner of the nomination was without basis and this court cannot compel the 1st respondent to issue a nomination certificate to the appellant based on nonexistent results. The failure is on the party system in handling their primaries which this court does not want to be engaged in. As to how they arrived at the conclusion to issuing the 2nd respondent nomination certificate is also a mystery because no proceedings or resolutions were made by the ODM national elections board in conjunction with the National Executive Committee under Article 3 and 18.8 of ODM election and nominations rules to directly nominate a candidate without going for nomination exercise. In the same vein, the 2nd respondent did not prove that he won the nomination. Be it as it may, the ODM National Executive Committee and National Election Board reserves the right to nominate a candidate directly under Article 3.3 and 18.1(A) of the party's nomination rules for electoral areas falling under Zone C to which Kakamega County does not fall.

26. Having held that there was no proof of the outright winner, grounds No. 2 and 3 are automatically disposed of despite the fact that PPDT did address their mind to the same but never made any conclusive determination.

27. Regarding ground No. 4 that PPDT failed to appreciate that IEBC illegally cleared the 2nd respondent, PPDT did not have enough evidence to suggest who the winner was and whether the party had used their constitution under Article 3:1 and 18.1(A) to unilaterally nominate a candidate of their choice without necessarily going for repeat exercise.

28. Did PPDT run away from the complaint that fell squarely within their mandate by refusing to order IEBC not to clear and degazette the second respondent on grounds that it was too late? It is clear that, general elections are scheduled for 8th August, 2017. According to PPDT, it could not serve any purpose to issue any orders to IEBC as the process of nomination and clearance was over.

29. Under ordinary circumstances, once a court finds an illegality like it did in this case, PPDT would have stopped clearance of the 2nd respondent pending full disclosure for or declaration of results showing total number of votes cast and garnered by each candidate.

30. It is clear that PPDT did not make any conclusive finding. The tribunal shied away from declaring whether the appellant won or not. It is therefore not clear as to what orders they were contemplating that was overtaken by events and therefore could not issue in vain.

31. The 1st respondent failed to guide the nomination process properly right from the polling stations, special appeals tribunal and the National Election Board. Whereas the election body accepts that there was no winner, none of the two should benefit or take advantage of a weak system or deliberate mismanagement of electioneering process to ascend to power or gain some benefit. The appellant did everything possible to get redress. He was not indolent nor did he delay in prosecuting his case as alleged.

32. The people of Isukha spoke by freely expressing their wish in electing a leader of their choice through universal suffrage (Article 38 (2)), and participated in a political process rightfully (Article 91 (1) (e) and therefore expect to be represented by a candidate of their choice to serve their interests. Where the party machinery tampers with, manipulates and or interferes with the electoral process or its results, a court will not hesitate to intervene in the interest of justice thereby vitiating such results. To buttress this proposition, Lord Denning had this to say in the case of **Morgan vs Simpson (1974) 3 All ER 722**:

“Collating all these cases together, I suggest that the law can be stated in these propositions (1) if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected or not.....(2) if the election was so conducted that it was substantially in accordance with law as to elections, it is not vitiated by a breach of the rules or a mistake of election. (3) But, even though the election was conducted substantially in accordance with the law as to election, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the results then the election is vitiated”.

It therefore follows that failure to tabulate votes from all polling stations and then announce results through a duly signed declaration form by a returning officer was a gross omission or mistake to warrant vitiation of the results.

33. Accordingly, the appeal herein partially succeeds and partially fails to the extent that nobody won the elections and ODM (NEB), must go back and do the tallying of the votes from all polling stations and announce the results afresh from Isukha Ward and submit the right candidate to IEBC subject to the necessary statutory time lines. If the party is time barred, it will be their mistake as the inevitable will be failure to fill a candidate as a party which is a lesser evil than a candidate being denied his constitutional and democratic rights and legal redress where his rights have been trampled upon.

34. In conclusion, the court makes the following orders:

(a) That the nomination of Herbert Sore Makatiani (the 2nd respondent herein) as an ODM candidate for Isukha Ward Shinyalu Constituency, Kakamega County be and is hereby nullified and set aside.

(b) That the nomination certificate issued to the second respondent Herbert Sore Makatiani as an ODM nominee for the position of Member of County Assembly Isukha Ward be and is hereby revoked and withdrawn.

(c) That the Chairman Independent and Electoral Boundaries Commission be and is hereby ordered/directed to degazette the name of Herbert Sore Makatiani as candidate for the position of Member of County Assembly Isukha Ward, Shinyalu Constituency, Kakamega County as a candidate on ODM ticket in the forthcoming 8th August, 2017 general elections.

(d) That the ODM party do retallying of the election results and votes cast on 28th April, 2017 during the ODM party nomination primaries held at Isukha Ward and declare the winner.

(e) That each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of:

..... Counsel for the appellant
..... Counsel for 1st respondent
..... Counsel for 2nd respondent
..... Counsel for interested party
..... Court Assistant

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**IN THE MATTER OF CONTRAVENTION OF SECTIONS 39 AND 40 OF THE POLITICAL
PARTIES ACT**

MOFFAT MAITHA MUIA APPELLANT

VERSUS

FRIDAH MUENDI..... 1ST RESPONDENT

JUBILEE PARTY..... 2ND RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES

COMMISSIONINTERESTED PARTY

(Being an Appeal from the Judgment of the Political Parties Dispute Tribunal at Nairobi delivered on 29th June, 2017 by Hon. Milly Lwanga Ondongo, Hon. James Atema & Hon. Hassan Abdi in PPDT Complaint No. 307 of 2017)

FRIDAH MUENDI APPELLANT

VERSUS

MOFFAT MAITHA MUIA 1ST RESPONDENT

JUBILEE PARTY..... 2ND RESPONDENT

INDEPENDENT ELECTORAL BOUNDARIES

COMMISSIONINTERESTED PARTY

JUDGMENT

35. The appeal before me emanates from the decision of the Political Parties Disputes Tribunal (hereinafter referred to as PPDT) rendered on the 29th May, 2017 in which the appellant's complaint No. 307/2017 was dismissed.

36. The appellant herein Moffat Maitha Muia together with Fridah Muendi (1st respondent), Philip Joseph Ivilu and Evans Ratemo Motuka participated in the Jubilee Party (2nd respondent) party primaries for the nomination of a Member of County Assembly Matungulu West Ward, Matungulu Constituency held on the 27th April, 2017 in which the appellant emerged victorious.

37. Aggrieved with the outcome, the 1st respondent lodged an appeal (Appeal No. 255/17) before the second respondent's National elections appeal tribunal (herein referred to as "NEAT") on grounds that the election was marred with massive irregularities and malpractices and that the appellant was not a member of the second respondent (Jubilee Party). Her appeal was consolidated with appeal No. 364/2017 lodged by another candidate Evans Ratemo Motuka based on same grounds.

38. Following exparte proceedings held before the party's appeals tribunal (NEAT) after the 1st respondent failed to respond to the complaint, a decision was made in favor of the 1st respondent on 11th May, 2017 after finding that the appellant was indeed not a member of Jubilee party. Consequently, the tribunal declared null and void the results declaring the 1st respondent as the nominated member of county assembly (MCA) Matungulu West Ward and therefore declared the 1st respondent as the winner hence directed the party national elections board (NEB) to issue her with the nomination certificate which they did.

39. Upon presentation of nomination certificate to the Independent and Electoral Boundaries Commission (hereinafter referred to as "IEBC"), the 1st respondent's name was published on 20th May, 2017 as the second respondent's nominee.

40. Later, the NEB revoked the nomination certificate issued to the 1st respondent upon receiving a complaint from the appellant who allegedly furnished them with proof that he was indeed a bonafide member of Jubilee Party. As a result of that finding, the appellant was issued with a fresh nomination certificate on 9th May, 2017

41. Provoked by the revocation of her nomination certificate, the 1st respondent lodged a complaint before PPDT being complaint No. 307/17 vide notice of motion dated 25th May, 2017 seeking orders restraining IEBC from publishing or gazetting the name of the appellant (Moffat Maitha) as the nominee Matungulu Ward. On 2/6/2017, PPDT ruled in favour of the second respondent (Fridah Muendi) and revoked the nomination certificate issued to the appellant by the second respondent. The tribunal (PPDT) directed IEBC to remove the appellant's name from the list of nominees and replaced him with the 1st respondent.

42. Upon receipt of these orders, the appellant moved to the high court vide appeal No. 95/17 arguing that he was never served with the application heard before the PPDT exparte and that the orders made condemned him unheard. Justice Serگون on 15th June, 2017 upheld the appeal and directed that the

appellant be served and the complaint by the 1st respondent (No. 307/17) be heard afresh.

43. After hearing both parties as directed by the high court, PPDT on 29th June, 2017 delivered its judgment thereby allowing the 1st respondent's claim and declared her the Jubilee Party nominee based on grounds that the appellant was not a member of Jubilee Party as at 27th April, 2017 when party primaries were held. Effectively, the 2nd respondent was directed to issue the 1st respondent with the nomination certificate and forward her name to IEBC which they did.

44. Confronted by this decision, the appellant lodged memorandum of appeal dated 4th July, 2017 to this court challenging the judgment of PPDT on the following grounds:

(a) That the tribunal erred in law in finding that the appellant was a member of NARC and not Jubilee Party as at when Jubilee joint primaries were held at Matungulu Ward.

(b) That the tribunal failed to consider tangible evidence on record confirming the appellant's resignation from NARC party as provided under Section 14 of Political Parties Act.

(c) That the tribunal members failed to appreciate and consider Jubilee Party nomination rules thereby arriving at an impugned judgment.

(d) That the tribunal erred in law in making final orders nullifying the nomination of the appellant and directing the 2nd respondent to forward the name of the 1st respondent to IEBC for gazetteement contrary to party constitution and nomination rules, elections act, political parties and the Constitution of Kenya 2010.

45. The appellant sought for orders as hereunder:

(a) That appeal be allowed and judgment of PPDT delivered on 29th June, 2017 be set aside.

(b) That appellant be declared the bonafide nominee of the 2nd respondent for the member of county assembly Matungulu West Ward.

(c) That the 2nd respondent be directed to forward the name of the appellant to the interested party (IEBC) for gazetteement as a duly nominated member of county assembly for Matungulu West Ward.

(d) That an order do issue directing the interested party to receive, accept and gazette the name of the appellant accordingly.

46. Filed together with memorandum of appeal is a notice of motion dated 4th July, 2017 filed same day but whose hearing was dispensed with by consent of both parties in favour of the hearing of the substantive appeal. Upon service of the memorandum of appeal and application thereof as directed by the court on 5th July, 2017, the 1st respondent and 2nd respondent filed their respective replying affidavits on 12th July, 2017 and the matter proceeded for hearing the same day.

47. I have considered the petition of appeal herein, materials filed before me and submissions by both counsels. The issues for determination are:

(a) Was the appellant a member of NARC party or Jubilee as at 27/4/2017 when Jubilee party primaries for nomination of MCA Matungulu West Ward was held.

(b) When is resignation of a member from a party deemed to take effect in accordance with Section 14 (2) (3) of the political parties Act.

(c) Were the Jubilee party joint nomination primaries Matungulu West Ward held on 27/4/2017.

(d) Can the court order removal of the 1st respondent's name from the list of nominees held by IEBC at this point in time and substitute with that of the applicant if it finds that the appellant is the bonafide winner (nominee).

48. I wish to start with issue No. 3 as to who won the party primaries. According to the tallying sheets and declaration of results form filed by the returning officer dated 27/4/2017, it was the appellant who emerged the winner with 1130 votes, the 1st respondent 241, Joseph Ivulu 70 and Evans Ratemo 204. This evidence which is attached to the replying affidavit of one Stephen Ombasa Osoro legal counsel for the 2nd respondent in his affidavit dated 30/5/2017 in response to the 1st respondent's claim No. 307/17 before the tribunal is not challenged. There is no dispute that in terms of majority votes, it was the appellant who emerged top and therefore won the nomination exercise.

49. Going back to ground No. 1, was the appellant a Jubilee party member as at 27/4/2017? According to the 1st respondent's evidence filed before the Jubilee national elections and appeals tribunal, the appellant was not a Jubilee party member as at 27/4/2017 since he had not resigned from NARC party. Jubilee appeals tribunal (NEAT) found that by 27/4/2017 the appellant was not a member of Jubilee, had no Jubilee party registration number and that a further search at the office of the registrar confirmed that the appellant was a registered member of NARC being registration No. 188065.

50. PPDT upheld the party appeals tribunal verdict. According to Section 14 (b) of the Political Parties Act, a member of a political party who intends to resign from a political party shall give a written notice prior to his registration to (a) the political party

(b) Clerk to the relevant house of parliament, if the member is a Member of Parliament.

(c) The clerk of county assembly, if the member is a Member of County Assembly.

Sub-section 2 goes further to provide: Registration of a member of a political party shall take effect upon receipt of such notice by the political party or clerk of the relevant house or county assembly.

Sub-section 3 further provides that:

“The political party of which the person is a member, the member, or the clerk of the relevant house of parliament or of a county assembly of which the person is a member shall notify the registrar of such registration within three days of resignation.

51. According to the appellant, he resigned on 13/3/2017 from NARC party. He attached resignation letter to his replying affidavit dated 28th June, 2017 but filed before PPDT on 29/6/2017. The resignation letter bore a stamp of the office of registrar political parties on the face of it dated the 13/3/2017 and another stamp from NARC reflecting the same day. He also attached a letter from Registrar of Political Parties dated 19/6/2017 confirming that the appellant was a member of Jubilee party. The letter however did not state from when the appellant became a member of Jubilee. The appellant further attached a letter from NARC dated June, 2017 confirming that the appellant resigned from their party on 13/3/2017.

52. Based on this evidence, Mr. Ayieko for the appellant submitted that, the effective date of resignation from a political party is the date notice of resignation is received by a political party from which a member is resigning. He cited the case of **Wavinya NdetiRepublic V IEBC and 4 others. Judicial Review Misc Application No. 301/2017** in which the court held that the effective date of resignation of a member from a party is the date of receipt of the resignation notice and not when the Registrar of Political Parties acknowledges receipt and updates the register.

53. I do agree with Mr. Ayieko that resignation from a party is effective from the date of notification of the intended resignation is received by the party or clerk of relevant house in this case the county

assembly of Machakos. The 1st respondent did not challenge the resignation letter addressed to NARC by the appellant and the acknowledgement stamps thereof by NARC and registrar of political parties. These evidence is not controverted.

54. I am in agreement with Mr. Ayieko that counsel for the appellant that had the Jubilee NEAT had the chance to hear the appellant; they would have arrived at a different conclusion. That is why, the National Elections Board and National Executive Committee overruled NEAT'S decision after finding that there was sufficient evidence to prove that the appellant had indeed resigned. The second respondent is in support of the appeal having acknowledged that the appellant was indeed their member.

55. The 1st respondent is relying on the confirmation from the registrar of political parties that the respondent was a member of Jubilee as at 24/5/2017. As already stated, resignation takes effect upon receipt of resignation notice by a party or clerk of relevant house which has not been challenged. It is no wonder that the 2nd respondent had cleared the appellant to run for that post as its member.

56. It was therefore erroneous for PPDT to have relied on the date the registrar political parties registered the appellant as a Jubilee member as the effective date of registration.

57. I do also agree with Miss Mbece, counsel for the 2nd respondent that nomination issues are party matters to which courts should let a party constitution and rules apply. Unless there is a clear violation of the party constitution and election rules, a court should exercise restraint in intervening with party affairs. In this case, the party national elections board and national executive committee had powers under Article 37.5. Of the party's (Jubilee) national elections and nomination rules after consultation to overrule decisions of the tribunal and order fresh nomination or declare a winner without going for repeat nomination if there are grounds to nullify the results.

58. Indeed the tribunal (NEAT), had no opportunity to hear the appellant's side of the story. For NEAT to have gone to the website of Jubilee to confirm whether the applicant was a member of Jubilee was to say the least not necessary because that is not a requirement under Section 14 of (1) (2) of the Political Parties Act. A political party may receive a notice but fail to update its website.

59. Equally, I do not agree with Mr. Nyangayo counsel for the 1st respondent who submitted that, resignation becomes effective upon receipt of such notice by registrar of political parties. That is not the requirement under Section 14 (1) (2) of the Political Parties Act. Ideally, Nyangayo's proposition should have been the requirement under Section 14 of the Political Parties Act but unfortunately, it is not the law for now and the same section is clearly subject to abuse hence the need to amend the same to extend the requirement for resignation to include receipt of the same by the registrar of political parties for it to be complete.

60. Having held that the appellant had properly resigned and that he was a member of Jubilee party as at 27/7/2017, and further considering that he had won by the majority votes, this court will not hesitate to find that the appellant is the bonafide winner of the joint nomination primaries Jubilee party for the position of MCA Matungulu West Ward, Matungulu Constituency, Machakos County. Accordingly, the decisions of PPDT dated 29/6/2017 and that of the Jubilee NEAT delivered on 11/5/2017 are hereby set aside.

61. On the other hand, even if NEAT had found that the appellant was not a member, the best they would have done was to uphold the appeal and order for a repeat nomination between the remaining candidates instead of declaring a loser as the winner.

62. The 1st respondent cannot be a beneficiary of an illegality or irregularity in declaring her as the winner. To confirm the 1st respondent as the winner would be akin to glorifying an illegality and further disenfranchising the members of Jubilee party of Matungulu West Ward who exercised their sovereign power under Article 1 of the Constitution to be represented by a democratically elected representative and Article 91(1) on the right to participate in political activities.

63. Based on the foregoing, the nomination certificate issued to the 1st respondent by the 2nd respondent as Jubilee party nominee for Matungulu West Ward, Matungulu Constituency, Machakos County is hereby revoked and IEBC is directed to remove her name from the list of contestants in the forthcoming general election scheduled for 8/8/2017 and consequently degazette her name as a candidate for the said position.

64. Can the court direct issuance of a fresh nomination certificate to the appellant? Having revoked the certificate for the 1st respondent, naturally it would follow that a fresh certificate do issue to the appellant by the 2nd respondent.

65. However, we are remaining with three weeks to the general election and ballot papers have already been procured and printed a fact to which I take judicial notice of. How practical is it to have the name of the appellant printed in the Ballot paper at this point in time? It is almost impossible and to direct IEBC to gazette and include the name of the appellant will be costly and will have serious ramifications including stopping general elections for that ward. It will not serve public interest which reigns superior to private interest considering that enormous resources have already been put into place and the negative effect it will have on other innocent candidates from other and who are ready for general elections. For those reasons, I will hesitate and decline to direct IEBC to gazette the appellant and include his name in the Ballot papers which exercise is already complete.

66. The net effect will be that Jubilee party will suffer the inevitable consequence of not filling a candidate for MCA Matungulu Ward in the forthcoming 8/8/2017 general elections. I hope this will be a lesson for political parties to behave in a decent manner in the year 2022 general elections during party primaries by conducting nominations in good time.

67. Based on the foregoing, the court makes the following orders:

(a) That the appeal herein be and is hereby allowed and judgment by PPDT delivered on 29/6/2017 set aside.

(b) That the appellant herein be and is hereby declared the winner and the bonafide nominee for the position Member of County Assembly Matungulu West Ward, Matungulu Constituency, Machakos County pursuant to the joint party primaries held on the 27/4/2017.

(c) That the 2nd respondent do issue the appellant with fresh nomination certificate.

(d) That nomination certificate issued to the 1st respondent Fridah Muendi whose name was forwarded to IEBC as nominee for Jubilee party for the position of MCA Matungulu West Ward be and is hereby revoked and the same marked as withdrawn.

(e) That IEBC and or the Chairman IEBC be and is hereby directed to degazette the name of the 1st respondent Fridah Muendi as nominee (a candidate) on Jubilee ticket for position of MCA Matungulu West Ward, Matungulu Constituency during the forthcoming general elections scheduled for 8/8/2017.

(f) That each party to bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of:

.....**Counsel for the appellant**

..... **Counsel for 1st respondent**

..... **Counsel for the 2nd respondent**

..... **Court Assistant**