



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO.172 OF 2017

BETWEEN

YASIR NOOR MOHAMMED NOOR.....APPELLANT

AND

JUBILEE PARTY OF KENYA.....1ST RESPONDENT

ASHRAF HASSAN BAYUSUF.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court

at Nairobi (Wakiaga, J.) delivered on 29th May 2017

in

Election Petition Appeal No. 65 of 2017)

JUDGMENT OF THE COURT

This appeal arises out of political party primaries conducted by Jubilee Party (*the 1st respondent*) on 26th April 2017.

Briefly the facts are that *Yasir Noor Mohammed Noor, (the appellant)* and *Ashraf Hassan Bayusuf (2nd respondent)*, together with 5 others, are members of the 1st respondent and were aspirants during the nomination for the position of the Member of National Assembly, Nyali Constituency.

At a meeting of the 1st respondent, Election Representatives and all aspirants, it was agreed that the nomination exercise would take place in 15 polling stations which were listed as;

- a) Fadhili Adhim Primary School
- b) Victoria Baptist Primary School
- c) Free Town Primary School

- d) Khadija Primary School
- e) Kongowea Primary School
- f) Kongowea Methodist church
- g) Kongowea Social Hall
- h) Mkomani ASK Show Ground
- i) Nyali Elim Church
- j) Maweni Primary School
- k) Kadzandani Primary School
- l) Bahawani Primary School
- m) Bombolulu Workshop
- n) KRA Customs
- o) Ziwa la Ng'ombe Primary School
- p) Tumaini Church

After the nomination exercise, the 1st respondent was allegedly declared the winner of the nominations with a total vote of 1404, while the appellant having garnered 895 votes was declared to be in third position.

The appellant was aggrieved by the outcome, and lodged a complaint with the Jubilee Appeals Tribunal.

For reason that he was not called for the hearing of his appeal, on 12th May 2017, the appellant appealed to the Political Parties Dispute Tribunal (PPDT) where he complained that the 1st respondent had failed to observe its nomination rules, that require only party members shall be eligible to vote; by opening the exercise to non-party members to vote and by failing to conduct nomination in Tumaini church and Fadhil Adhim Primary School Polling Stations, it had breached, violated and or infringed **Article 38 of the Constitution, section 13** of the **Elections Act** and **rule 13** of the **Elections (General) Regulations** and therefore the nomination exercise was not free and fair. The following orders were sought;

- a. ***“An injunction against the Respondent from nominating and or presenting the name of the Appellant to IEBC as a candidate for member of National Assembly for Nyali constituency.***
- b. ***An Order for the repeat of the said nomination.***
- c. ***In the alternative for an order directing the 1st Respondent to nominate the claimant as its candidate for member of the National Assembly for Nyali Constituency for the election of 8/8/2017”.***

In its decision the PPDT found that there were election irregularities in the nomination exercise and made the following orders;

- a. ***“The 1st Respondent be and is hereby ordered to forthwith conduct a fresh nomination exercise to determine its nominee for the position of member of the National Assembly of Nyali Constituency taking into consideration the interest of the complaint and the 2nd Respondent***

(Appellant) together with the party members and in compliance with 1st Respondent constitution and election and nomination Rules.

b. The nomination certificate issued by the 1st Respondent arising out of the nomination exercise of 26th April, 2017 be and is hereby nullified.

c. Notice of this decision to issue to IEBC”.

The 2nd respondent was aggrieved by the decision of the PPDT, and appealed to the High Court on the grounds that he had garnered 1404 votes while the appellant had only garnered 894 votes and that his complaint that voting did not take place in the two polling stations namely; Tumaini Church and Fadhili Adhim Primary School with 3684 and 1155 registered voters respectively was not sufficient to warrant an order for the repeat of the nominations.

After considering the parties pleadings and submission the High Court in its determination, concluded that the irregularities alleged by the appellant did not substantially affect the outcome of the nominations, and ordered that;

a. “The Judgment of the PPDT dated 19/5/2017 and all subsequent orders issued as a result thereof be and is hereby set aside.

b. Each party to bear his own costs this being a dispute involving members of the 2nd Respondent who still need each other”

The appellant was thus aggrieved by the High Court’s decision and appealed to this Court on the grounds that the High Court erred in failing to evaluate the facts in light of the provisions of **Article 38 of the Constitution** thereby occasioning a miscarriage of justice; that had the court taken into account the principles of **Article 81 (a) and (e) of the Constitution**, it would have found that the 1st respondent’s nominations were not conducted by an independent body, were not transparent, and were not administered in an impartial, neutral, efficient, accurate and accountable manner; that the nominations were not conducted in accordance with the provisions of **section 13 (1) of the Elections Act** and **rule 13 of the Elections (General) Regulations**, and were therefore illegal; that the learned judge wrongly found that the appellant did not pray for a repeat of nominations in all the Polling Stations despite its having been specifically prayed for in the pleadings; that the learned judge misapprehended and misapplied the provisions of section 83 of the Elections Act in holding that the PPDT did not give an analysis of both the qualitative and quantitative effect of the alleged irregularities and in concluding that the appellant did not suffer over and above all the other contestants.

Learned counsel, Mr Y. M Aboubakar filed and highlighted the appellant’s written submissions, while Mr. Omuganda learned counsel for the 1st respondent and Mr. Mbichere learned counsel for the 2nd respondent made oral representations before us. We have considered the record, the respective submissions by learned counsel and the authorities cited. Under **rule 32 (5)** of this Court’s rules, this Court, after hearing an appeal, can render its decision, but reserve the reasons for arriving at such decision. The rule provides;

“Notwithstanding sub rule (1), the Court may at the close of the hearing of an application or appeal, give its decision but reserve its reasons and in such a case the reasons may be delivered in court or deposited in the Registry or sub-registry in the place where the application or appeal was heard within ninety days and where the reasons are so deposited, copies thereof shall be available to the parties and they shall be so informed.”

Accordingly, it is our view that the appeal is merited. And for the reasons which we shall give on 28th July 2017, we hereby allow the appeal, set aside the judgment of the High Court of 29th May 2017 and order the 1st respondent to conduct fresh nominations for the Member of the National Assembly for Nyalii

Constituency within the next forty eight (48) hours from 4.00 p.m today the 30th June 2017. Each party to bear own costs.

It is so ordered.

Dated and delivered at Nairobi this 30th day of June, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR