



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 190 OF 2017

KEFA WAFULA KARORI WERE.....COMPLAINANT

-VERSUS -

TUWEI MADGALINE CHEMUTAI 1ST RESPONDENT

JUBILEE NATIONAL ELECTIONS BOARD 2ND RESPONDENT

JUBILEE PARTY..... 3RD RESPONDENT

JUDGMENT

Summary of the Case

1. Both the Complainant and 1st Respondent were aspirants for Member of County Assembly Kapomboi Ward, Kwanza Constituency during the 3rd Respondent's nomination primaries held on the 26th April 2017. At the end of the exercise, the Complainant contends that he was declared the winner, by the Constituency Tallying Officer, Joab Makokha Aruba, and then taken to the County Tallying Centre where he was declared duly nominated and issued with an interim nomination certificate, signed by both Constituency and County Returning Officer. That the same was submitted to the Party headquarters where it was duly processed and his name entered into the party system.
2. Thereafter, the Complainant learnt that his name had been removed from the Party system, as the winner of Kapomboi Ward, and the 1st Respondent's name entered as the duly nominated candidate and issued with a nomination certificate. This

aggrieved the Complainant. he filed an appeal with the Party's NAT but it was dismissed on 8th May, 2017.

3. Further aggrieved, he filed this Complaint seeking the following orders:
 - (i) *That the deadline for vying as an independent candidate be extended and or enlarged for seventy-two (72) hours after the determination of this Complaint.*
 - (ii) *A declaration that the appellant is the duly nominated Jubilee Party Candidate for Kapomboi Ward and the certificate purportedly issued to Tuwei Magdalene Chemutai, is null and void.*
 - (iii) *The name of Tuwei Magdalene Chemutai, be removed from the system and or any other records of Jubilee party showing her as the duly nominated candidate and the name of the appellant, Kefa Wafula Karori Were be inserted and/or reflected in all the Jubilee party records for the nominated aspirants for the 2017 General Elections.*

Submissions

4. The Complainant case is that the results were declared on 27th April 2017 at around 11 am at the Constituency tallying Centre, Kwanza Friend School whereby he was declared the winner having garnered 4,195 votes against the 1st Respondent 1,836 votes. Thereafter, the Returning Officer one Mr. Joab Makokha Aruba presented him before the County Tally Center whereby he was declared a winner and issued with the interim nomination certificate signed by both the Constituency Returning Officer and the County Returning Officer. He relies upon the bundle of photographs taken at the County tallying centre when being given the interim nomination certificate.
5. It is his submission that on the 30th April, 2017 upon visiting the Jubilee Offices to take the nomination certificate, he discovered that his name had been removed and replaced with that of the 1st Respondent. He avers that the 1st Respondent was issued

with the nomination certificate 2 days after the nomination exercise. The Complainant urges this Tribunal to allow this Complaint and declare that he was the duly nominated Jubilee Party candidate for Kapomboi Ward.

6. The 1st Respondent submits that she was issued with a nomination certificate duly signed by the tallying officer Kwanza Constituency Mr. Joab Makokha Aruba and the County Returning Officer. Further that the Complainant certificate was signed by the Returning Officer, Endebes Constituency. It is her submission that she was the winner having garnered 2,109 votes against the Complainant's 1,885 votes. She relies upon the decision of the Jubilee NAT rendered on 8th May 2017, which upheld her nomination.
7. The 2nd and 3rd Respondents filed their reply to the Complaint on 12th May, 2017. They annexed a copy of the NAT decision dated 8th May, 2017. It is submitted that the 2nd and 3rd Respondents have never placed the Complainant's name in their system. They urge that the only proof of winning the primaries is being issued with a provisional certificate which was issued to the 1st Respondent. It submits that it has not been shown that the NAT decision was wrong to warrant it being set aside. They cite the case of *John Kiarie Waweru vs Beth Wambui Mugo & 2 others [2008] eKLR*, on the standard and burden of proof. It is further submitted that the votes in the Complainant's Tally were more than the total votes cast: that the Complainant garnered 4,195 votes whereas the total vote cast was 3551.

Issues for determination

8. The single issue for determination in this matter is: *who between the Complainant and the 1st Respondent holds a valid nomination certificate as the duly nominated candidate for Member of County Assembly for Kapomboi Ward?*

Determination

9. The NAT decision considered two issues for determination: *“(i) whether the Complainant had a valid interim Nomination certificate, and if so; (ii) whether the 1st Respondent forged the Interim certificate of Nomination in her possession.”* It is common ground that at some point, each party was issued with interim certificates. The NAT found that the Complainant had not proved that the interim certificate that the 1st respondent had had been forged. That was the turning point of the NAT’s decision. It then held that: *“As a matter of fact, both parties confirmed that the Interim certificate issued to the Complainant is questionable and has no probative value as it was signed by a Returning Officer of another Constituency being Endebes Constituency, and not that of Kwanza Constituency.”* On this ground, the NAT found that the Interim Certificate had been issued by an unauthorized person.
10. The two people who would have unraveled the mystery in this matter are the two Returning Officers: from Kwanza Constituency and Endebes Constituency. Both are officials of the Party. The NAT decision does not indicate whether they appeared to give evidence or not. We have perused the record and these two have not filed an affidavit giving an account of what happened. The 2nd and 3rd Respondents should have had then depose to affidavits on what happened. As the two are officials, of the 2nd and 3rd Respondents their accounts on the events of the day would have resolved this mystery. without an impartial account of what happened, we are left with two parallel allegations that do not explain each other.
11. The Complainant alleges that the nomination certificate issued to the 1st Respondent was not based on any declared results and is therefore irregular. He has allegedly produced photographic evidence taken at the Tallying Centre when he was being presented with the nomination Certificate. He states the time, the place and date of issuance of the interim nomination certificate. On the other hand, the 1st Respondent submits that she was issued with an interim certificate and relies on the fact that the

Complainant certificate was issued by the Returning Officer from Endebes Constituency and not Kwanza Constituency. The Respondent does not inform this Tribunal as to when and where she was issued with the nomination certificate.

12. We find that the NAT decision did not address the crux of this matter. While the NAT focused on the criminal aspect of the certificates: whether the 1st Respondent's certificate was a forgery or not, the gist of this case is in determining what actually happened from the tallying point to the declaration of results and the issuance of the certificates. Forgery as alleged herein, should be deferred to a criminal court. Hence we are inclined to set aside the NAT decision.
13. The upshot of the foregoing is that the justice of this matter lies in remitting the matter back to the 2nd and 3rd Respondents for finalization of the nomination process in accordance with the Party's Elections and Nomination Rules. As the contestation is from the tallying point, it would only be prudent that a re-tallying is done in the presence of all the parties and their agents and the results be announced duly by the designated Returning Officer.
14. As regards the prayer for extension of time for the deadline for vying as independent candidates, this Tribunal lacks the Jurisdiction to consider such a prayer. We make the following orders;
 - (1) *The Memorandum of Complaint dated 9th May, 2017 is allowed.*
 - (2) *The Jubilee Party National Elections Appeals Tribunal decision dated 8th May, 2017 is hereby set aside.*
 - (3) *We make the following specific orders:*
 - (a) *The Declaration of the Complainant, Kefa Wafula Karori Were, as the duly nominated Jubilee Party candidate for Member of County Assembly, Kapomboi Ward, Kwanza Constituency, Trans Nzoia County, is nullified.*

(b) The issuance of an Interim Nomination certificate to the 1st Respondent, Tuwei Magdalene Chemutai, by the 2nd and 3rd Respondents as the duly nominated Jubilee Party candidate for Member of County Assembly, Kapomboi Ward, Kwanza Constituency, Trans Nzoia County, is nullified.

(c) The tallying and subsequent declaration of results for the Jubilee Party nomination exercise for Member of County Assembly, Kapomboi Ward, Kwanza Constituency, Trans Nzoia County, held on 26th April, 2017 is hereby set aside.

(d) The 2nd and 3rd Respondents are hereby directed to proceed and re-tally the results of the Jubilee Party nomination exercise for Member of County Assembly Kapomboi Ward, Kwanza Constituency, Trans Nzoia County, conducted on 26th April, 2017, within the next 24 hours of this Judgment.

(e) Upon the re-tally in (d) above, the 2nd and 3rd Respondents shall proceed to declare the results and announce the winner.

(4) We make no order as to costs.

15. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2017

Kyalo Mbobu

Chairman

James Atema

Member

Hassan Abdi

Member