



REPUBLIC OF KENYA
POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 197 OF 2017

BEN ONGUSO.....CLAIMANT

VERSUS

LUCY BITUTU OSUSU.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT..... .2ND RESPONDENT

JUDGMENT

Summary of the Case

1. The Claimant has disputed the decision of the 2nd Respondent’s Special County Appeals Tribunal, which revoked the Claimant’s final nomination certificate and issued the same to the 1st Respondent without according him a hearing. The Claimant was one of the contestants in the 2nd Respondent’s party primaries held on 18th April 2017 for the position of the County Assembly Member, Ekerenyo Ward, North Mugirango Constituency, Nyamira County. The Claimant garnered 668 votes against the 1st Respondent who got 257 votes.
2. The decision of the 2nd Respondent’s Special County Appeals Tribunal was a consequence of an appeal filed before it by the 1st Respondent who challenged the Claimant’s nomination for the County Assembly Member, Ekerenyo Ward. It is the Claimant’s case that he only learnt of the said decision later and was neither called nor given the opportunity to present his case at the said Special County Appeals Tribunal.
3. The Claimant has moved to this Tribunal seeking for the following reliefs:

- a) An injunction restraining the 2nd Respondent from issuing the 1st Respondent with the final nomination certificate for the Ekerenyo Ward North Mugirango Constituency, Nyamira County and or forwarding the 1st Respondent's name as the nominee for the said ward.
 - b) An order to compel the 2nd Respondent to issue the Claimant with the final certificate of nomination and forward the name of the Claimant to the IEBC as the valid nominee for the position of the County Assembly Member, Ekerenyo Ward, North Mugirango Constituency, Nyamira County on the 2nd Respondent's ticket.
4. In response, the Respondents opposed the Claimant's assertions terming them as being baseless, premature and without justification. As a result, the Respondent's counsel has prayed to this Tribunal to uphold the verdict of the 2nd Respondent's Special County Appeals Tribunal and dismiss the Claimant's case forthwith.

Issues for Determination

5. The primary issue for determination is whether the Claimant was accorded a fair hearing by the 2nd Respondent's Special County Appeals Tribunal.

Analysis

6. The requirement for fair administrative action is one of the essential fundamental human rights enshrined in the Bill of Rights of the *Constitution of Kenya, 2010*. *Article 47* of the *Constitution* in this respect requires every person who is a subject of an administrative action to be accorded an expeditious, efficient, lawful, reasonable and procedurally fair opportunity.
7. This demands that an individual must be given written reasons for the actions if such person's fundamental rights and freedoms are likely to be adversely affected by an administrative action. *Article 50 (1) k* in this respect specifically demands that one must be accorded the opportunity to adduce and challenges evidence. The case of *Stephen Nendela vs. County Assembly of Bungoma and 4 Others [2014] eKLR* at *paragraph 28* and *29* explains that the accused person does not refer to a person

- accused in a criminal trial only, but also any person accused of any allegation which if proved against such a person, the consequence will be prejudicial to him.
8. In order to actualise this vital condition, the Fair Administration of Actions Act, 2015 has been enacted with the goal to *“provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal and promote efficient administration.”*
 9. In this respect, *section 4 (1) (2) (3) and (4)* of the *Fair Administration of Actions Act, 2015* carefully and saliently particularises the activities that must be undertaken by the administrator of actions in order to conform with the requirements of *Article 47* of the *Constitution of Kenya, 2010*.
 10. Subsection 1 stipulates that *“Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair”* while *Subsection 2* provides that *“Every person has the right to be given written reasons for any administrative action that is taken against him.”*
 11. *Subsection 3* to this end requires the administrator of actions to ensure the prior service of charges and adequate notice of the nature and reasons for the proposed administrative action, an opportunity to be heard and make representations in that regard, notice of the right to legal representation, where applicable, making available the information, materials and evidence to be relied upon in making the decision or taking the administrative action, among others.
 12. *Subsection 4* on the other hand obligates the administrator of actions to accord the person against whom the administrative action is taken the chance to attend the proceedings, in person or in the company of an expert of his choice, be heard, cross examine persons giving adverse evidence against him and request for an adjournment of the proceedings, where necessary to ensure fair hearing.
 13. Question: was the Claimant accorded a fair hearing by the 2nd Respondent’s County Appeals Tribunal?

14. In order to answer this question, it is crucial to point out that the dispute at hand has arisen from the activity of a political party, the Respondent, in relation to one of its members. To be specific, the 2nd Respondent's County Appeals Tribunal took steps and withdrew the Claimant's nomination certificate without taking into consideration the Claimant's right to be heard, adduce and challenge evidence presented against his victory by the 1st Respondent.
15. As a political party, the 2nd Respondent was required to act in accordance with the law and respect the fundamental rights and freedoms of its members in whatever decision the 2nd Respondent makes. The 2nd Respondent's party constitution in *rule 19.2.9* stipulates that Appeals tribunal will determine disputes in accordance with the *Constitution of Kenya, 2010* and other laws.
16. This means that the 2nd Respondent's Special County Appeals Tribunal ought to give a party member a reasonable opportunity to be heard and make a defence to the allegations or charges made against him or her in accordance with the rules of natural justice and fair play. However, to deny or to fail to inform the Claimant of the charges facing him at the 2nd Respondent's Special County Appeals Tribunal clearly flew in the face of the well established principle and the right to fair administrative action.
17. Indeed, from the evidence adduced before this Tribunal, the Claimant was never informed of any proceedings before the 2nd Respondent's Special County Appeals Tribunal and hence was not aware or would not have been aware of the allegations against labelled against him by the 1st Respondent to warrant the cancellation of his nomination certificate.
18. It is trite that a political party member facing an administrative action must be entitled to fair administrative action. This Tribunal is under sacred obligation to ensure that the 2nd Respondent's actions did exactly that and complied with the

provisions of the *Constitution of Kenya, 2010* and the *Fair Administrative of Actions Act, 2015* in relation to fair administrative action.

19. We are guided by the decision of the High Court in *Republic v Truth, Justice and Reconciliation Commission Ex-Parte Beth Wambui Mugo* [2016] eKLR at paragraph 60 where it was held that:

The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined inter alia develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Article 47 of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

20. In this regard, for a hearing to be said to be fair, one should be sufficiently informed of the allegations facing him and he should be given adequate or reasonable notice of the charges to enable him deal with them. In this case, we find that the Claimant's rights to fair administrative action was flouted when he was not informed by 2nd Respondent's Special County Appeals Tribunal of the charges

brought against him by the 1st Respondent that resulted in the withdrawal of his nomination certificate.

21. For that reason, we hold that the Claimant has succeeded to establish sufficient grounds to warrant the setting aside of the decision of 2nd Respondent's County Appeals Tribunal dated 4th May 2017.

Orders

22. In the premises, we allow this Complaint and make the following orders:

- a) The Claimant was not accorded a fair hearing by the 2nd Respondent's County Assembly Tribunal.*
- b) That the decision and/or judgment of the 2nd Respondent's Special County Appeals Tribunal dated 4th May 2017 be and is hereby set aside.*
- c) That the nomination certificate issued to the 1st Respondent be and is hereby declared null and void.*
- d) That the 2nd Respondent be and is hereby ordered to issue the Claimant with the final certificate of nomination and forward his name to the IEBC as the valid nominee for the position of the Member of County Assembly, Ekerenyo Ward, North Mugirango Constituency, Nyamira County within 12 hours of this judgment forthwith.*
- e) The 2nd Respondent be and is hereby ordered to bear the Claimant's cost of this Complaint.*

Orders accordingly.

DATED AT NAIROBI THIS 13TH DAY OF MAY 2017

Kyalo Mbobu (Chairman)

James Atema (Member).....

Hassan Abdi (Member).....