



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI
COMPLAINT NO 217 OF 2017

MOSES SAOYO KUSERO.....COMPLAINANT
VERSUS
JUBILEE PARTY OF KENYA.....1ST RESPONDENT
AMOS SOITEI SEMEIYAN.....2ND RESPONDENT

JUDGMENT

Introduction

1. The parties in this complaint are aspirants for the position of member of County Assembly, Keekonyikie Ward, Kajiado West Constituency, Kajiado County. They participated in the party primaries held on 25th April, 2017 by the 1st Respondent. The Claimant asserts that he emerged victorious, but the 1st Respondent overturned his victory and has since declined to issue him with a certificate. He seeks an order directing the 1st Respondent to issue him with the nomination certificate.

Claimant's Case

2. The claimant asserts that he was announced the winner of the party primaries having garnered 3117 votes, while the 2nd Respondent came second with 2, 963 votes. The 2nd Respondent successfully appealed to the Jubilee Tribunal based on the Ward Presiding Officer's evidence that his votes had been under-stated by 200.
3. Claimant contends that while the appeal has never been concluded, he has never been issued with the nomination certificate. The 2nd Respondent became disgruntled and registered as an independent candidate. The Claimant has attached correspondence between the Registrar of Political Parties and the 2nd Respondent in this regard.
4. The 2nd Respondent complained to the Jubilee Tribunal, where the Returning Officer stated that there had been an error and the claimant was wrongly

pronounced winner. He claims that he has not been issued with the nomination certificate as the appeal has not been concluded.

5. On the other hand, the Claimant also filed a preliminary objection on the basis that the 2nd Respondent had moved this Tribunal before exhausting internal dispute resolution mechanism.
6. In the case of *Ibrahim Abdi Ali v Mohamed Abdi Farah & Another, PPDT Complaint No. 29 of 2015* we held that:

We are aware of the fact that Section 40(2) of the Political Parties Act 2011 demands that the Tribunal cannot be moved “unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms”. However, this does not mean that an individual must always wait for a hearing and a final determination from his party’s internal dispute resolution mechanism before he can come to the Tribunal. Where a party can show that he made honest attempts at resolving the dispute within the party but the party’s process was not satisfactory for such reasons as delay, the individual cannot be faulted for moving to the Tribunal even where his party has not concluded a hearing and a determination of his matter. The Tribunal must be free to consider each case on its own merits and to determine when to allow a case from a complainant who, for some reason, has not come with a final determination from his party’s internal dispute resolution mechanism to ensure that such complainants are not disadvantaged in any way.

7. Relying on this decision, we dismiss the preliminary objection and assume jurisdiction over this claim.

1st Respondent’s Case

8. The 1st Respondent filed a Replying Affidavit sworn on 13th May, 2017 by Mary Karen Sorobit, the 1st Respondent’s Deputy Director Legal and Compliance.

9. She asserts that the Claimant is making heavy weather of an innocent mistake or human error. Her evidence is that the Returning Officer had misread the results for and inadvertently pronounced the Claimant winner.

2nd Respondent's Case

10. The 2nd Respondent in his response alleges that he had garnered 585 votes and not 385 votes, thus making his votes 3,163 and not 3,117. He relies on the statement by the Ward Presiding Officer to that effect. Accordingly, the 2nd Respondent should have been the winner.
11. He states that he is still a member of the Jubilee Party and is not, was not, and does not intend to be an independent candidate. He prays that we dismiss the complaint with costs and issue a declaration that he is the winner.

Issues for determination

12. Having reviewed the pleadings, submissions and evidence on record, these are the two main issues for determination in this complaint:
- (a) Who won the nomination exercise in Keekonyike Ward?**
 - (b) Is the 2nd Respondent Party less, a Jubilee Party Member or an Independent Candidate?**
 - (c) What are the appropriate reliefs in the circumstances?**

Analysis

- (a) Who won the nomination exercise in Keekonyike Ward?**
13. According to the 2nd Respondent when the change of 200 votes in his tally became 3,163 and not 3,117 thus making him the winner, not the Claimant.
14. We have not been shown any election form in which the correction was made or signed against by candidates or their agents. Only the Ward Presiding Officer's letter is on record. We are not persuaded that the Presiding Officer can unilaterally alter the outcome of an election by claiming he had made an error long after the declaration had been made. Mistakes in tallying could only be corrected in the presence of candidates or their agents. On a balance of probabilities, we uphold the results declared by the Returning Officer as more reflective of the true outcome of the election.

15. We are satisfied that the Claimant had won the nomination and that the allegation of tallying errors was nothing, but a ploy to deprive him of his victory.
(b) Is the 2nd Respondent Party less, a Jubilee Party Member or an Independent Candidate?
13. The Claimant asserts that the 2nd Respondent states that he is still a member of the Jubilee Party and is not, was not, and does not intend to be an independent candidate. This Tribunal adjudicates claims between independent candidates and political parties. Our jurisdiction over the matter is not affected by the change in status from party-member to independent candidate in a dispute relating to party primaries.
14. The facts of this case are peculiar. On 3rd May, 2017, while his appeal before the Jubilee tribunal was pending, 2nd Respondent resigned from the party and registered as an independent candidate. He was notified that his **Beaded Walking Stick on a Wall Symbol** was recommended as it was not similar to the symbol of a fully registered political party. He was directed to forward his symbol to IEBC under section 31 and 32 of the Elections Act, 2011. On the same day he was informed by the Registrar that he was not a registered member of any party.
15. This was well within the 8th May, 2017 deadline imposed by Article 85(a) of the Constitution for separation from a political party. Under section 14(3) and (3A) resignations take effect upon the Registrar's **receipt** of notification by a member or a political party to the effect that the member has resigned.
15. On 9th May, 2017, by an undated letter, the 2nd Respondent asked the Registrar of Political Parties to revoke his registration as an independent candidate, which the Registrar did the same day. The basis for this belated request was that the Jubilee Appeals Tribunal declared him winner on 8th May, 2017.
16. An independent or non-party politician is an individual not affiliated to any political party. We hold that the 2nd Respondent having resigned as a member of Jubilee Party on 3rd May, 2017 and registered as an independent candidate ceased affiliation with Jubilee Party. Resignation from a political party takes effect immediately it is received by the Registrar of Political Parties.
17. Therefore, the 2nd Respondent's letter of 9th May, 2017 could have revoked his registration as an independent candidate, but it could not immediately have

restored him to membership in the party. That was an exercise in futility. The 2nd Respondent has maneuvered himself into a legal maze.

Relief

19. The claimant's complaint is allowed. We make the following orders:
- (a) **An order be and is hereby issued directing the 1st Respondent to issue a nomination certificate to the Complainant within 12 hours from the pronouncement of this judgment.**
 - (b) **We make no orders as to costs.**

DATED and DELIVERED at Nairobi this 13th day of May 2017

Kyalo Mbobu

Chairperson

James Atema

Member

Hassan Abdi

Member