



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI
COMPLAINT 224 OF 2017

JAFFAR A. KASSAM.....APPLICANT

VERSUS

ORANGE DEMOCRATIC MOVEMENT PARTY.....1ST RESPONDENT

MICHAEL MAGERE GUMO.....2ND RESPONDENT

RULING

1. The application for review that is the subject of the present ruling relates to the decision of this Tribunal issued on 11 May 2017. The Tribunal had nullified any nomination certificate issued in respect of the nominations for Member of the County Assembly for Parklands/Highridge Ward, Nairobi County that were conducted on 30 April 2017 by the 1st Respondent and directed that a final nomination certificate be issued to the 2nd Respondent herein.
2. In that Complaint, the 2nd Respondent had asserted that he had been declared the winner by the Returning Officer, one Modesta Akoki, but the 1st Respondent had declined to issue a nomination certificate to him. He relied on a decision of the Special County Appeals Tribunal dated 6 May 2017 upholding a provisional certificate allegedly issued to the 2nd Respondent, a provisional certificate dated 30 April 2017 and a tally sheet that he contended was the final tally sheet showing that he had won the said nomination certificate.

3. There was only one Respondent in that complaint, being the Orange Democratic Movement party. There was no appearance for the said Respondent, despite service. At the time, we found based on the information and evidence adduced that the current 2nd Respondent held the nomination certificate in respect of the said nomination exercise. We therefore proceeded to grant the 2nd Respondent's prayer for a nomination certificate in respect of the said electoral seat.
4. By a Notice of Motion dated 12 May 2017, the Applicant prayed that this Tribunal review and/or set aside its decision delivered on 11 May 2017 and declare the Applicant the duly nominated candidate for Member of the County Assembly, Parklands/Highridge Ward.
5. He contended that he had been issued with a final nomination certificate on 3 May 2017. In relation to the proceedings before this Tribunal, he asserted that he had neither been made a party to any IDRMs proceedings, nor made a party to the initial proceeding before this Tribunal involving the two Respondents. Since he had not been afforded an opportunity to be heard, he contended that the decision of this Tribunal had been reached in violation of his right to fair hearing and as such, ought to be set aside.
6. The Applicant challenged the provisional certificate issued to the 2nd Respondent on the basis that the 1st Respondent does not issue provisional certificates. Moreover, he took issue with the alleged provisional certificate on the basis that it had not been signed by the Returning Officer but rather by the Presiding Officer, Ernest Wanyonyi. He pointed out that this was matter fit for review on the basis of material non-disclosure of facts and asked that the judgment dated 11 May 2017 be set aside.
7. Mr Agonga for the 2nd Respondent contended that the application was incurably defective on the basis that the Applicant had never been party to the original

Complaint. He contended that what the Applicant sought was an appeal, not a review.

Issue for Determination

8. The Applicant seeks a review of this Tribunal's decision issued on 11 May 2017. We therefore have to satisfy ourselves that it is a matter fit for this Tribunal to sit in review of its own decision. Order 45 (1) of the Civil Procedure Rules entitles a person aggrieved by decision to apply for a review of judgment, before or without lodging an appeal, on the basis of

...discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order...

We find that the present application falls within the ambit of Order 45 of the Civil Procedure Rules.

Analysis

9. Consequently, with respect to the Notice of Motion dated 12 May 2017, the Tribunal finds that:

- a. Mr. Jaffer A. Kamar, the Applicant is entitled to the review he seeks, since he was not given an opportunity to be heard by the Tribunal before the judgment of 11 May 2017 was arrived at.

- b. The 1st Respondent, faced with provisional certificates bearing the names of the Applicant and of the 2nd Respondent, issued a final nomination certificate signed by the 1st Respondent's National Elections Board's Chairperson, Secretary and Executive Director.
- c. The 2nd Respondent has not disputed the validity of the 1st Respondent's final nomination certificate in the Applicant's favour dated 3 May 2017. We also note that the provisional certificate was issued by the presiding officer and that the tally sheet produced by the 2nd Respondent only related to one polling station, and could not have formed the basis for issuance of the final nomination certificate.
- d. The Tribunal was not aware of the 2nd Respondent's final nomination certificate in favour of the Applicant when it issued its judgment of 11 May 2017. The decision was therefore based on non-disclosure of material facts. The issuance of the final certificate is a new matter, which could not have been disclosed to this Tribunal because the Applicant was not a party to the proceedings before this Tribunal.

Orders

Accordingly, the Tribunal hereby orders that:

- a. Its judgment of 11 May 2017 is hereby set aside.
- b. The Applicant is hereby declared the 1st Respondent's nominee for the position of Member of the County Assembly, Parklands/Highridge Ward in Westlands Constituency.
- c. In view of the 2nd Respondent's omission to name the Applicant as a party from the beginning, the 2nd Respondent shall pay the costs incurred by the Applicant in this application.

Dated at NAIROBI this 13th DAY of MAY 2017

- 1. M. O. Lwanga (Presiding Member)**
- 2. Desma Nungo (Member)**
- 3. Dr. Adelaide Mbithi (Member)**