



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI  
COMPLAINT NO 229 OF 2017

MELVIN K KUTOL.....APPLICANT  
VERSUS  
NIXON KIPROTICH MOROGO.....1<sup>ST</sup> RESPONDENT  
JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT  
JUBILEE PARTY DISPUTES TRIBUNAL.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

**Introduction**

1. The Claimant participated in the 2<sup>nd</sup> Respondent’s nominations for Member of County Assembly, Solai Ward, Rongai Constituency in Nakuru County. They contested the 2<sup>nd</sup> Respondent’s nominations held on 26<sup>th</sup> April, 2017 which the Claimant won. His victory was overturned by the 3<sup>rd</sup> Respondent as a result of which he moves this Tribunal for relief. He seeks an order setting aside the judgment of the 3<sup>rd</sup> Respondent herein.

**Claimant's Case**

2. He claims he won those nominations, having garnered 1,494 against the 1<sup>st</sup> Respondent’s 1,491 votes as per the provisional tallies announced by the Returning Officer. However, the approved results sent to the NEB showed that he had garnered 1,498 votes against the 1<sup>st</sup> Respondent’s 1,485 votes.

3. The 1<sup>st</sup> Respondent and another aspirant by the name Mary Kamangu appealed against his victory to the National Appeal Tribunal. Mary Kamangu claimed that her 37 votes at Solai Valley Polling Station had been allocated to the Claimant thus

pushing him to victory. The tribunal nullified the results from Solai Valley polling station and declared the 1<sup>st</sup> Respondent winner based on the remaining results.

4. He contends that Mary Kamangu's appeal was dismissed while a similar appeal filed by the 1<sup>st</sup> Respondent was heard ex parte on 29<sup>th</sup> April, 2017. The complainant protested and his defence was heard again in the absence of the 1<sup>st</sup> Respondent.

#### *1<sup>st</sup> Respondent's Case*

5. The 1<sup>st</sup> Respondent did not file any documents in this appeal.

#### *2<sup>nd</sup> and 3<sup>rd</sup> Respondent*

6. Mary Karen Kigen-Sorobit, the 2<sup>nd</sup> Respondent's Deputy Executive Director and Director Legal and Compliance swore an affidavit dated 13<sup>th</sup> May, 2017 in opposition to the appeal. She averred that in the course of the earlier appeals within the party, the tallying sheets had been recalled and retallied. What emerged was that the 1<sup>st</sup> Respondent had gained 1,479 votes as opposed to the complainant's 1,414 votes.

#### **Analysis**

7. The 2<sup>nd</sup> Respondent had an obligation to ensure that the voting system employed for the Solai Ward primaries was simple, accurate, verifiable, secure, accountable and transparent. What emerges in this appeal is that the 2<sup>nd</sup> Respondent, being unable to verify the results from Solai Polling Station, opted to cancel all the results from that polling station. Such a cancellation was a drastic and unnecessary measure that was not proportional or reasonable in the circumstances considering the tight margins between the aspirants.

8. The appropriate order would have been one for scrutiny and recount of all the votes cast in favour of every candidate at Solai Valley Polling Station. In *William Maina Kamanda v Margaret Wanjiru Kariuki [2008] eKLR* it was held that:

**It is now well established that an order of scrutiny can be made at any stage of the hearing before final judgment whether on the court's own motion or if a basis laid requires so. It can be made... there is ground for believing that there were irregularities in the election process or if there was a mistake or mistakes on the part of the Returning Officer or other election officials**

9. It is the duty of this Tribunal to give effect to will of party members as expressed in party primaries.
10. We hold that the proper thing to do would have been to carry out a scrutiny and recount of the ballots from the contested polling stations. Cancelling the votes in totality because of the incompetence of the 2<sup>nd</sup> Respondent's presiding officer was unreasonable and unjustifiable in the circumstances of this case. In a tightly contested party primary, cancellation of results from a disputed polling station can give one aspirant undue advantage over the others.
11. The decision of the Jubilee Appeals Tribunal cancelling the results from Solai Valley polling station is hereby nullified.

### **Reliefs**

12. In *Complaint No 40 John Mruttu v Thomas Ludindi Mwadeghu & 2 others* we held that in every matter over which we have jurisdiction, this Tribunal can grant any order that is just and equitable in accordance with section 11(1) of the Fair Administrative Action Act, 2015. The proper discharge of this Tribunal's mandate

requires it to grant effective remedies, which means the most appropriate remedy in the circumstances of the case.

13. Accordingly, the justice of this case requires us to make the following orders:

(a) A declaration be and is hereby issued that the 2<sup>nd</sup> Respondent's decision to nullify the results from Solai Valley polling station, Solai Ward station is and of no effect in law.

(b) An order be and is hereby issued directing the 2<sup>nd</sup> Respondent to recount the votes from Solai Valley polling station in the presence of all parties or their agents and to use the results of the recount to determine the outcome of the nomination for member of County Assembly, Solai Ward, within 36 hours from the pronouncement of this judgment.

(c) In the alternative, in the event that the polling material subject of order (b) above have already been destroyed or is otherwise unavailable, an order be and is hereby issued directing the 2<sup>nd</sup> Respondent to conduct a fresh nomination exercise for Solai Valley polling station, Solai Ward, within 48 hours of the pronouncement of this judgment.

(d) In the interest of party unity, let each party bear its costs of this petition

DATED and DELIVERED at Nairobi this 15<sup>TH</sup> day of MAY 2017

Kyalo Mbobu .....

Chairperson

James Atema .....

Member

Hassan Abdi .....

Member