



REPUBLIC OF KENYA
POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 233A OF 2017

JAMES KEGORO ONKANGI.....COMPLAINANT

VERSUS

AMANI NATIONAL CONGRESS PARTY.....1ST RESPONDENT

JUSTUS MOCHOGE.....2ND RESPONDENT

JUDGMENT

Summary of the Case

1. The Claimant and the 2nd Respondent were both contestants in the 1st Respondent's party primaries held on 18th April 2017 for the position of the Member of National Assembly, Kitutu Chache South Constituency within Kisii County. It is the Claimant's case that 1st Respondent's nomination process was marred with irregularities and as such, ought to be declared null and void.
2. The Claimant lodged his appeal with 1st Respondent's Disputes Resolution Committee, which, after considering the evidence by the Claimant and other persons, held in Claimant's favour and ordered the 1st Respondent to identify a suitable candidate in a manner that is compatible with the Elections Act and 1st Respondent's party constitution.
3. The Claimant, apprehensive that the 1st Respondent having issued the 2nd Respondent with the final nomination certificate was not likely to repeat the

nomination as directed by its Disputes Resolution Committee, approached this Tribunal for the following reliefs:

- a) An injunction to restrain the 1st and the 2nd Respondent from presenting the 2nd Respondent's name to the IEBC as the nominee for the position of the Member of National Assembly, Kitutu Chache South Constituency.
 - b) An order declaring the 1st Respondent's nomination for Kitutu Chache South Constituency irregular, unfair and a nullity.
 - c) An order declaring the Claimant as the valid 1st Respondent's nominee for the position of the Member of National Assembly, Kitutu Chache South Constituency.
 - d) An order directing the 1st Respondent to conduct fresh nominations in the alternative for the position of the Member of National Assembly, Kitutu Chache South Constituency.
4. In reply, the 2nd Respondent has denied the Claimant's allegation saying the nomination process was credible, free and fair and hence, implored this Tribunal to dismiss the Claimant's complaint forthwith.

Issues for Determination

5. The primary issue for determination is whether the 1st Respondent's nominations for the position of the Member of National Assembly, Kitutu Chache South Constituency held on 18th April 2017 was free, fair and credible.

Analysis

6. The requirement for free and fair elections is one of the general principles undergirding Kenya's electoral processes. For an election exercise to be said to have been free and fair, according to *Article 81* of the *Constitution of Kenya, 2010*, the following conditions must be met. They include allowing voting through secret balloting, freedom from violence, intimidation and improper influence or corruption, elections being conducted transparently by an

independent body and administered in an impartial, neutral, efficient, accurate and accountable manner.

7. These requirements also underlie the citizens' rights and freedoms contained in *Article 38* of the *Constitution of Kenya, 2010*, and as such, are binding on political parties' nomination processes. *Article 38* guarantees the right of every citizen to make political choices, which includes the right to form and participate in the activities of a political party. In this regard, one has the right to take part in a free, fair and regular elections based on universal suffrage and the free expression of will to vie for any office of any political party to which such a person is a member.
8. To this end, *Article 91 (1) (d)* of the Constitution specifically obligates political parties in Kenya to abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party. To fulfil these constitutional requirements, *section 9* of the *Political Parties Act, 2011* read together with the *Second Schedule* of the same sets out the key issues that must be contained in the constitutions of all duly registered political parties in Kenya.
9. The relevant issue for our purposes in the matter is the rule that a political party constitution must establish guidelines for, among other things, the nomination of candidates for elections.
10. The 1st Respondent's nomination rules also guarantee the rights and freedoms of their members to a free, fair and credible elections. As a political party that is duly registered in Kenya, the 1st Respondent owed to its members the obligation to conduct a free, fair and credible nomination process. This meant, among other things, that the exercise ought to have been free from violence, intimidation of voters or influence by corruption and accurate recording of the results of votes balloted by the Returning Officer.

11. The Claimant swore affidavit citing several incidences of electoral malpractices. These included late arrival of ballot boxes and ballot papers at the polling stations, several polling centres did not receive voting materials and thus no voting took place, loss of ballot papers, ballot boxes and failure to announce results, ballot boxes in certain areas being delivered by the Claimant's rival and failure to use party register to conduct the nomination process.
12. The 1st Respondent's Disputes Resolution Committee also concurred with the Claimant's observations that the 1st Respondent's nomination exercise for the position of the Member of National Assembly, Kitutu Chache South Constituency did not meet the requirements for a free, fair and credible election and as such, ordered the 1st Respondent to settle on a methodology to determine a suitable candidate for the said position.
13. Question: what is the correct methodology for determining the suitable candidate in this case, should it be through a party primary exercise or direct nomination?
14. To answer this question, it is vital seeking recourse to the provisions of the 1st Respondent's party constitution. *Rules 8.11* and *8.12* of the said constitution establishes two ways of determining the nominee for an election. *Rule 8.11* deals with direct nomination while *rule 8.12* is concerned with nominations through a party primary process. The rules provide:
Rule 8.11 "Where there is only one successful applicant or the applicant unopposed such applicant shall be declared the ANC candidate."
Rule 8.12 "If there is more than one aspirant, the National Elections Board will prepare and announce the list of all approved applicants and organise party nominations as appropriate."
15. Clearly, there was more than one aspirant who had shown interest in the nomination for the position of the Member of National Assembly, Kitutu Chache

South Constituency on the 1st Respondent's party ticket. For this reason, it would only be fair and just to give the 1st Respondent's party members the opportunity to exercise their democratic right in accordance with *Articles 38, 81 and 91* of the *Constitution* and nominate their preferred candidate that is between the Claimant and other aspirants.

16. To this end, we hold the view that correct methodology for determining the 1st Respondent's nominee for the position of the Member of National Assembly, Kitutu Chache South Constituency is through a party primary process and not direct nomination. Accordingly, this Tribunal agrees with the Claimant in so far as it relates to directing the 1st Respondent to conduct fresh nominations for the position of the Member of National Assembly, Kitutu Chache South Constituency.

Orders

17. In the premises, this Tribunal orders as follows:

- a) That the Claimant's case be and is hereby allowed with respect to prayers (a) (b) and (d).*
- b) That the 1st Respondent be and is hereby restrained from issuing the final nomination certificate to any other person for the position of the Member of National Assembly, Kitutu Chache South Constituency, Kisii County.*
- c) That, in the event that the 1st Respondent has issued the final nomination certificate to the 2nd Respondent or any another individual for the position of the Member of National Assembly, Kitutu Chache South Constituency, Kisii County, the same is hereby declared null and void.*
- d) That the 1st Respondent be and is hereby restrained from presenting the 2nd Respondent's name to the Independent Electoral and Boundaries Commission as the valid nominee for the position of the Member of National Assembly, Kitutu Chache South Constituency, Kisii County.*

- e) *That the 1st Respondent be and is hereby ordered to conduct fresh nominations for the position of the Member of National Assembly, Kitutu Chache South Constituency, Kisii County within 48 hours of the pronouncement of this judgment.*
- f) *No orders as to cost in order to foster party unity, growth and democracy. Orders accordingly.*

DATED AT NAIROBI THIS 17TH DAY OF MAY 2017

Kyalo Mbobu (Chairman)

James Atema (Member).....

Hassan Abdi (Member).....