



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI  
COMPLAINT NO. 254 OF 2017

ALFRED NDEMO ONGERA.....1<sup>ST</sup> APPLICANT  
IBRAHIM ATUTI NDEMO.....2<sup>ND</sup> APPLICANT  
MARY KEMUNTO RATEMO.....3<sup>RD</sup> APPLICANT  
KENNEDY NYANKIEYA NYAMWEYA.....4<sup>TH</sup> APPLICANT  
ALFRED AKUNGA NYANGWESO.....5<sup>TH</sup> APPLICANT

VERSUS

JUBILEE PARTY OF KENYA..... RESPONDENT

RULING

Background

1. By a judgment issued by the Tribunal on 10<sup>th</sup> May 2017 in complaints Nos. 122/2017, 123/2017, 128/2017 and 129/2017, the Respondent was compelled to forthwith carry out a fresh, free and fair nomination for the Gubernatorial position in Kisii County and the Parliamentary position on Kitutu Chache North Constituency and Bonchari Constituency. The Applicants herein were the Complainants in those proceedings.

The application

2. Following the above judgment, the Complainants/Applicants have filed a Notice of Motion application dated 13<sup>th</sup> May 2017. The following orders, are pending determination: -

- a) *THAT* this Honourable Tribunal do issue a Warrant of Arrest directing the Inspector General of the National Police Service or any office under his control to bring before the Tribunal the Secretary General of the Respondent for the purposes of the Secretary General of the Respondent to show cause why he should not be cited for contempt for acting in breach of this Tribunal's ruling dated 10<sup>th</sup> May 2017.
- b) *THAT* this Honourable Tribunal do cite the Secretary General of the Respondent for acting in contempt of this Tribunal's order dated 10<sup>th</sup> May 2017.
- c) *THAT* this Honourable Tribunal do declare that the nomination process conducted by the Respondent on the 12<sup>th</sup> May 2017 for the Gubernatorial position in Kisii County and the Parliamentary position in Kitutu Chache North Constituency and Bonchari Constituency in Kisii County as illegal and null and void.
- d) *THAT* the costs of this Application be provided for.

3. The application is based on grounds that the Respondent had disobeyed the ruling and decision and proceeded to conduct a secret nomination process. The Respondent is accused of having violated the provisions of Article 11 of its constitution, in willful disobedience of the Tribunal's ruling, the ruling having been delivered in open court before the Respondent's Advocates. The Respondent's actions to exclude the Applicants from the fresh nominations despite the Applicants having exhibited a vested interest in the nomination process was in breach of the Nomination rules and the Respondent should be cited in contempt.

4. The Applicants seek to cite the Respondent's Secretary General for contempt as the administrative head of the Respondent and signatory to the nomination certificates issued by the Respondent.

5. The Applicants submit that the Tribunal's authority to punish the Respondent for acts of contempt of court are derived from Article 169(1)(d) of the Constitution of Kenya, Section 6(c) and 7(1) of the contempt of court Act and Section 41(3) of the Political Parties Act 2011. We note that the application is brought under the provisions of Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010 and Sections 4(1) (a), 6(c) and 7(1) of the Contempt of Court Act 2016 and Sections 40(1)(b) and 41 (1 and 3) of the Political Parties Act 2011 and all other enabling provisions.
6. The Application is supported by an affidavit of Alfred Akunga Nyangweso, the 1<sup>st</sup> Applicant, sworn on 13<sup>th</sup> May 2017. The affidavit reiterates the application and contains annexures in support of the application. These include the Respondent's Constitution, Election and Nomination Rules, Advocates letter to the Respondent's Secretary General, Newspaper article and picture of the Senatorial candidates and aspirant Governor Candidate participating in the nomination process of 12<sup>th</sup> May 2017.

**The Respondent's reply**

7. The Respondent filed a Replying Affidavit on 18<sup>th</sup> May 2017 sworn by MaryKaren Kigen Sorobit, its Deputy Executive Director and Head of Legal and Compliance Department. She avers that she confirmed the status of the applicants with the Registrar of Political Parties and it was revealed that the 2<sup>nd</sup> Applicants had been cleared as independent candidates. Having ceased to be members of the Respondent, their complaints filed on 7<sup>th</sup> May 2017 could not stand. The 2<sup>nd</sup> – 4<sup>th</sup> Applicants had to comply with Article 4(1) of the Respondent's Constitution to be members of the Respondent and their revocation letters cannot reinstate their membership to the party unilaterally.
8. In compliance with the ruling of the Tribunal, the Respondent put up a nomination notice informing the membership of the party and the public of the nomination

exercise to be held on 12<sup>th</sup> May 2017. This, she averred, was in compliance with Article 11 of the Respondent's Constitution. The notice was published on the Respondent's website which is accessible to the members of the party. The names of the Applicants were included in the ballot papers and members of the Respondent came out in numbers to participate. The Respondent therefore disputes that the nomination exercise was conducted secretly.

9. The Respondent avers that the nominations were conducted by the Respondent pursuant to the orders of this Tribunal. Further, the Respondent argues that the applicant's advocates' letter dated 12<sup>th</sup> May 2017 demonstrates that the applicants were aware that nominations were being carried out in Kisii County. The Respondent urges the Tribunal to dismiss the application with costs as it amounts to gross abuse of the process of the Tribunal.

***The Interested Party's reply***

10. The Interested parties, Hon. Jimmy Nuru Angwenyi, Hon. John Zebedeo Opore and Hon. Simon Ogare filed Replying Affidavits respectively on 18<sup>th</sup> May 2017. The affidavits are materially and substantially the same. They aver that some of the applicants are now acclaimed independents as per evidence obtained from the Registrar of Political Parties. Further, they confirm having been summoned on 11<sup>th</sup> May 2017 to the Respondent's headquarters for an urgent meeting for purposes of planning for the nominations and ground rules on nominations stated for 12<sup>th</sup> May 2017. The new nomination date of 12<sup>th</sup> May 2017 was informed by the Independent Electoral and Boundaries Commission's deadline to submit the list of nominees by 14<sup>th</sup> May 2017 and the fact that most of the members and voters worship on Saturday being predominantly Seventh Day Adventists. The Interested Parties aver that the nomination exercise was reported in the media and that they participated in the

nominations and were declared as winners. None of the Interested Parties confirm having seen the Applicants at the meeting.

**Issues for determination**

11. The Tribunal heard from Counsel: Dr. Khaminwa, for the Applicants, Kamau Mbugua for the Respondent and Omwanza for the Interested Parties. From the application and submissions made, the Tribunal has framed the following two issues for determination:

**a) Whether the nomination exercise conducted on 12<sup>th</sup> May 2017 should be nullified.**

**b) Whether the Tribunal should cite the Secretary General of the Respondent for acting in contempt of this Tribunal's order dated 10<sup>th</sup> May 2017.**

**a. Whether the nomination exercise conducted on 12<sup>th</sup> May 2017 should be nullified.**

12. There is common ground that there was a nomination exercise on 12<sup>th</sup> May 2017, after the Tribunal's decision of 10<sup>th</sup> May 2017. The contention is whether or not the said exercise was in conformity with the decision of the Tribunal. The Applicants contend that the process was secret while the Respondent and the Interested Parties contend that that process was publicized. In addition, the Respondent and the Interested Parties argue that some of the Applicants were not members of the Respondent and therefore ineligible to file the complaint.

13. A perusal of the record including those of complaints Nos. 122, 123, 128 and 129 of 2017 as consolidated reveal that the complaints were filed on 8<sup>th</sup> May 2017. The Respondent participated in the proceedings and filed its defence culminating in the decision of 10<sup>th</sup> May 2017 by the Tribunal. At no time was the issue of the applicant's membership in issue. This is something that was well within the Respondent's knowledge. As we held in *Complaint No. 162 of 2017, Hon. Silverse*

*Lisamula Anami Vs – Justus Kizito Mugali & Another*, being an application to set aside this Tribunal's decision, the information sought is initiated after the determination of the proceedings and there is no reason why this information could not be obtained prior to the determination of the proceedings. The Applicants' names were even included in the ballot papers of the nomination exercise held on 12<sup>th</sup> May 2017; the Respondent argued that this amounted to consideration of the Applicants' interests. In our view, the Respondent was solely responsible for the conduct of the nomination exercise including the clearance of the aspirants' names to be included on the ballot papers. The information as to the party membership of the Applicants is in our view an afterthought and we do not attach much credence to it. Similarly, the Tribunal was not directed to the relevance of the Respondent's conduct of nomination interviews of the Interested Parties as averred in paragraph 3 of the Replying Affidavit sworn on behalf of the Respondent.

14. From the Replying Affidavits filed by the Respondent and the Interested Parties, it is evident that they all knew about the ruling of this Tribunal. Indeed, the Respondent avers in paragraphs 11 and 12 of the Replying Affidavit that they were aware of the ruling and sought to comply with it. The Interested Parties on the other hand concede that they were summoned to the party headquarters on 10<sup>th</sup> May 2017 and they never saw the Applicants during that meeting where the new nomination exercise was discussed and ground rules agreed upon. Apart from the inclusion of the Applicants' names in the ballot papers, there is no evidence that the Applicants were indeed notified of the impending nomination exercise or involved in formulating the ground rules for that exercise.

15. Recollecting our decision of 10<sup>th</sup> May 2017, our third order was as follows:-

**“c) The Respondent is hereby compelled to forthwith carry out a fresh, free and fair nomination for the above positions in Kisii County in**

accordance with the Party Constitution and Rules whilst taking into account the interests of all the Complainants” (emphasis ours).

We are not convinced that the Respondent took into account the interests of all the Complainants. The interested parties depone that they were summoned to the headquarters. They did not rely on the website notice on the Respondent’s website in the way the Respondent expected the Applicants to do. The fact that the applicant’s advocates wrote to the Respondent’s Secretary General on 12<sup>th</sup> May 2017 is not sufficient to demonstrate that the applicants were aware. In any event, as at the time of such writing by the advocates, the nomination exercise was already underway. The newspaper reports to the effect that the applicants had boycotted the nomination exercise only goes to demonstrate that they had not been involved in the exercise hence their protest, the turnout of the said nomination exercise notwithstanding.

16. The orders of this Tribunal are not made in vain and are meant for compliance. (See *Kenya Union of Savings Credit Co-operatives (Kusco) Vs. Nairobi City Council [2015] e KLR*). The Tribunal remains at a loss why the Respondent while purporting to comply with our orders decided to do it selectively to defeat the very essence of the orders. What is even more shocking is the brazen attempt by the Respondent to justify its actions. We do not need to say more but rather ask ourselves whether the Respondent was attempting to delude everyone and get the Tribunal to sanctify a process which undermines the Constitution of Kenya and the values enshrined therein and its own constitution and democratic principles. Accordingly, we reiterate as we did in *Complaint No. 40 of 2017 Benard Muia Tom Kiala Vs. Wiper Democratic Movement –Kenya and Another* and find that the nomination exercise conducted on 12<sup>th</sup> May 2017 having been undertaken in defiance of the order of this Tribunal is null and void.

**b) Whether the Tribunal should cite the Secretary General of the Respondent.**

17. The Applicants' prayers in this regard are twofold. First, the Applicants seek the Tribunal to issue a warrant of arrest directing the Inspector General of the National Police Service or any officer under his control to bring before the Tribunal the Secretary General of the Respondent for purposes of showing cause why he should not be cited for contempt for acting in breach of this Tribunal's ruling dated 10<sup>th</sup> May 2017. Secondly, the Applicants seek the Tribunal to cite the Secretary General of the Respondent for acting in contempt of this Tribunal's order dated 10<sup>th</sup> May 2017. Having made the finding that the Respondent's actions were not in accordance with the Tribunal's decision of 10<sup>th</sup> May 2017, and therefore amounts to contempt of court; the first limb of the prayers stated above does not arise.
18. The issue remaining for us to determine is whether or not we should punish the Respondent's Secretary General for contempt. In dealing with this, the question to be we asked ourselves is whether the Tribunal has jurisdiction to punish for contempt. The Respondent brought to our attention the High Court decision in *Election Petition Appeal No. 13 of 2017 The Secretary General KANU & Another vs. Hon. Salah Yakub Farah* which we were nevertheless appraised. In essence, the Respondent submits that we have no jurisdiction to punish for contempt of court. The Interested Party referred us to the High Court decision in *Katsuri Limited Vs. Kapurchand Depar Shah [2016] eKLR* in which the elements of civil contempt were stated to wit – the terms of the order; knowledge by the defendant or proper notice of the terms of order; the defendant had acted in breach of the terms of the order and that the defendant's conduct was deliberate. In addition, the standard of proof is higher than the standard in civil cases considering that the Respondent's liberty could be at stake.
19. Unlike in the situation envisaged in the *Katsuri Limited* case (*supra*), we now have the Contempt of Court Act and recourse is no longer to the High Court of England.

The decision in Election Petition Appeal No. 13 of 2017 in our view specifically ousts the jurisdiction of the Tribunal to punish for contempt in the face of the court or any other form of contempt save contempt on the face of the court. In light of this, we need say no more on the Tribunal's power to punish for contempt in these circumstances, bearing in mind the binding nature of the decisions of the High Court on the Tribunal.

20. Having said so, we noted that the application was also founded on the provision of section 41(3) of the Political Parties Act which provides that a decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrate's court. Since regulation 39 of the Political Parties Disputes Tribunal (*Procedure*) Regulations 2017 allows recourse to the Civil Procedure Rules where an issue is not provided for, the Applicants can make the appropriate applications in this regard if they deem so and seek to punish the Respondent's Officers. Such procedures can however only be invoked upon a finding that indeed the Respondent's actions amount to contempt of court.

### Orders

21. Apart from the Tribunal's powers to punish for contempt which were challenged, the Tribunal finds it appropriate in light of the foregoing to make the following orders:-

- a) **The nomination process conducted by the Respondent on the 12<sup>th</sup> May 2017 for the Gubernatorial position in Kisii County and the Parliamentary position in Kitutu Chache North Constituency and Bonchari Constituency in Kisii County be and is hereby declared as null and void.**
- b) **Any certificate of nomination issued to any candidate, arising from the purported nominations of 12<sup>th</sup> May 2017 for the Gubernatorial position in Kisii County and the Parliamentary positions in Kitutu Chache North**

Constituency and Bonchari Constituency in Kisii County be and is hereby declared as null and void.

- c) The Respondent shall conduct fresh nomination elections for the Gubernatorial position in Kisii County and the Parliamentary positions in Kitutu Chache North Constituency and Bonchari Constituency in Kisii County in good time taking into account the Independent Electoral and Boundaries Commission's deadline.
- d) The Respondent and the candidates herein being the Applicants and the Interested Parties shall agree on the ground rules by noon, 26<sup>th</sup> May 2017.
- e) The Respondent shall bear the costs of this application.

Orders accordingly.

**DATED and DELIVERED AT NAIROBI this 25<sup>th</sup> DAY of MAY 2017**

- 1. M. O. Lwanga..... (Presiding Member)
  
- 2. Paul Ngotho .....(Member)
  
- 3. Dr. Adelaide Mbithi.....(Member)