



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI  
COMPLAINT NO. 275 OF 2017

STEPHEN NYAGA NJERU ..... COMPLAINANT

VERSUS

KENYA AFRICAN NATIONAL UNION ..... 1<sup>ST</sup> RESPONDENT

CHAIRMAN OF THE NATIONAL

ELECTIONS BOARD, KANU ..... 2<sup>ND</sup> RESPONDENT

DIRECTOR OF ELECTIONS, KANU ..... 3<sup>RD</sup> RESPONDENT

SECRETARY GENERAL, KANU ..... 4<sup>TH</sup> RESPONDENT

NICHOLAS WAITHANJE MBOGO ..... 5<sup>TH</sup> RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION ..... 6<sup>TH</sup> RESPONDENT

**JUDGMENT**

**Summary of the Case**

1. The Complainant moved this Tribunal on 17<sup>th</sup> May, 2017. It is his case that together with the 5<sup>th</sup> Respondent, they were candidates for nomination for the position of Member of County Assembly for Mavuria Ward, Mbeere South Constituency, Embu County in the nominations exercise that was to be conducted on 24<sup>th</sup> April, 2017. The nomination exercise was not carried out with the 1<sup>st</sup> Respondent resorting to direct nomination as a mode of identifying its candidate. It is this direct nomination that

forms the crux of this matter at both the Complainant and the 5<sup>th</sup> Respondent at one point avers to have been issued with nomination certificates.

**Submissions**

2. The Complainant submitted that on 19<sup>th</sup> April, 2017 he wrote to the 2<sup>nd</sup> Respondent, NEB, enquiring on the details of the nomination process that was scheduled for the 24<sup>th</sup> April, 2017. He was told to contact the 5<sup>th</sup> Respondent to organize for a consensus meeting with the NEB. They agreed to meet on 25<sup>th</sup> April, 2017 at the NEB office but on that day, the 5<sup>th</sup> Respondent did not show up. That the 2<sup>nd</sup> Respondent, Chairperson of the NEB, asked the Complainant to go back on 28<sup>th</sup> day of April, 2017. It is his case that thereafter; he was called to go collect his nomination certificate at the 1<sup>st</sup> Respondent's Headquarters at Hurlingham, and attaches the same to his affidavit. That on 9<sup>th</sup> May, 2017 he received a message from 3<sup>rd</sup> Respondent, Director of Elections, asking him to confirm his proposer and seconder and confirm he has sent his photo by Wednesday 10<sup>th</sup> May 2017, to which he complied.
3. The Complainant submitted that on 11<sup>th</sup> May 2017, he received a message from 3<sup>rd</sup> Respondent informing him that party nomination for Mavuria Ward would be on 13<sup>th</sup> May, 2017 as per the order of 1<sup>st</sup> Respondent's Election Tribunal. He argued that he had not appeared before the Elections Tribunal before. That later in the evening, he was called and informed that the 5<sup>th</sup> Respondent had lodged a complaint with the Elections Tribunal. He appeared before it and gave his story.
4. The Elections Tribunal said that the matter was beyond them and referred both of them to the 3<sup>rd</sup> Respondent, Director of Elections, Mr. Khan, who advised them to engage in consensus. That on 15<sup>th</sup> May, 2017 the two met before the NEB where they were informed that the nomination certificate will be issued to the 5<sup>th</sup> Respondent. It is the Complainant's case that this was done without adhering

to Article 50 of the Constitution. That he was told not to question the decision and that the decision was done late such that the Complainant could not seek independent candidature, hence he suspects foul play.

5. Aggrieved he filed this complaint seeking the following orders:

*(a) A permanent injunction to restrain the Kenya African National Union from issuing a Nomination Certificate to Nicholas Waithanje Mbogo or presenting any such certificate or name to the Independent Electoral and Boundaries Commission of Kenya as the candidate for the position of Member of County Assembly for Mavuria Ward, Mbeere South Constituency, Embu County.*

*(b) A declaration and/or order that the decision of the 1<sup>st</sup> Respondent's National Elections Board to issue the 5<sup>th</sup> Respondent a nomination certificate despite one already having been given to the Complainant/Claimant be declared null and void and the same cancelled.*

*(c) A mandatory permanent injunction directed at the 1<sup>st</sup> Respondent to issue a Nomination Certificate to the claimant.*

*(d) A declaration and/or order that the actions of the 5<sup>th</sup> Respondent amount to commission of election offences and he be barred from participating in any elections for gross violation of the Elections Act.*

*(e) An order of stay of execution of and or setting aside the decision of the 1<sup>st</sup> Respondent's National Elections Board to issue the 5<sup>th</sup> Respondent a nomination certificate despite one already having been given to the Complainant/claimant.*

6. The 1<sup>st</sup> Respondent, KANU, filed a replying affidavit deposed by Edward Kivuvani, the Chairman of its NEB. He deposed that there was no official communication that nominations were to be held on 24<sup>th</sup> April, 2017. It was his

disposition that NEB did not in any way breach the KANU constitution or any proviso therein. That article 24(9) of the KANU constitution and Part 5, Paragraph 6 of the Nomination Rules (Amended 2017) provides: *The National Executive Council shall reserve the right to nominate a candidate directly. PROVIDED direct nomination shall not be applicable where a nomination by voting has taken place.*”

7. It was submitted that it remains the reserve of the Party to directly nominate candidates to a position. That the Complainant was given notice that the certificate will be given to the 5<sup>th</sup> Respondent and it was regularly and properly issued. That the Complainant has not demonstrated how his fundamental rights have been violated by Respondents who exercised a power and mandate prescribed by its constitutional provisions and nomination rules.
8. The 5<sup>th</sup> Respondent filed a Replying affidavit on 23<sup>rd</sup> May, 2017. He deposes that KANU decided not to conduct nomination in Mavuria Ward and the decision was communicated to all its members including the applicant. He submits that he only contacted the applicant after being informed by a member of the NEB that they, him and complainant, need to reach consensus. That subsequently, they agreed to meet on 25<sup>th</sup> May 2017 at 11.30 a.m but he waited until 12.30 and was advised by NEB to leave. That finally, all met on 13<sup>th</sup> May 2017, where the Election Tribunal told them to appear before NEB which they did.
9. He submits that before the NEB, the Chairman Mr. Edward Kivuvani and Mr. Khan Director of Elections, whereby it was agreed by all parties present including the Claimant unanimously that they will abide by the decision of the NEB. That was on 15<sup>th</sup> May, 2017 and NEB ruled that he be given a nomination certificate. That the Nomination Rules allows NEB to directly nominate a candidate. That Article 24(9) of the Party’s constitution is clear that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have liberty to issue a direct nomination where it deems fit. Hence, they acted within the powers.

10. He urged that it was agreed that where consensus was not to be reached, the matter was to be left to the 2<sup>nd</sup> Respondent to make a decision which all parties were to abide by.

**Issue for determination**

11. The single issue for determination is:

- (i) *Who is entitled to the nomination certificate for KANU Party, Member County Assembly, Mavuria Ward, Mbeere South Constituency?*

**Determination**

12. It is common ground that there were no nomination primaries that were done for the position of Member of County Assembly, Mavuria Ward, Mbeere South Constituency. Hence in this matter we are not called upon to determine whether or not an election was free or fair or marred by irregularities. All parties also agree that under the Party's constitution and Nomination Rules, the NEB has the power to directly nominate a candidate. The point of departure is how that power of directly nominated was exercised. While the Complainant is aggrieved that the same was exercised capriciously so as to deny him the nomination certificate, the 5<sup>th</sup> Respondent and the other parties are in agreement that the discretion was exercised in accordance with the Party's constitution and Rules.

13. We have severally stated that this Tribunal will not interfere with the internal operations of political parties especially where they are done in accordance with the Rules of the particular party. Hence, to the extent that direct nomination is provided for in the Party rules, the same cannot be illegal. However it is the mandate of this Tribunal to ensure cohesion within political parties and aid promote internal democracy.

14. The Complainant has narrated how he was apparently granted a nomination certificate. On the other hand, the 5<sup>th</sup> Respondent also laid claim to being the duly direct nominee of the Party and his plea was supported by all the other Respondents.
15. All parties agree that at one point there was a consensus meeting to which they attended. What they do not agree with is the outcome of the meeting. The Complainant says the outcome was that he was granted certificate. The 5<sup>th</sup> Respondent says that the outcome was that in case of failure to reach agreement, NEB was to decide, which decision was to be binding. No party has produced any minutes of any of these meetings hence; the Tribunal is unable to clearly discern what happened. Hence we are left with two parties who prima facie appear to be presenting a legitimate case.
16. Where this Tribunal is faced with a challenge of a nomination exercise conducted through universal suffrage, there is usually the election results on record and a process of tallying upto the issuance of a provisional nomination certificate by the Returning Officer. However where a candidate is determined through direct nomination, this Tribunal has to strike a balance between deference to the Parties' organ powers on one hand and the interests of members of these parties on the other hand. We find that for direct nomination, where the same is provided for by the constitution and rules and all members (candidates) have notice of the same, this Tribunal cannot dictate to a party who its direct nominee should be. There is no general procedure for a direct nomination. The Party's constitution does not provide for the considerations to be followed. Hence, it is a discretionary power.
17. The exercise of a discretionary power cannot be impugned on the ground that a wrong outcome was reached, but on the ground that it was exercised whimsically and there was no due process. Evaluating the matter before us, to

the extent that two candidates could be nominated by the same NEB, there was some breakdown in due process. As the identification of the candidate was set as a consensus process, it is only in the interests of justice that the outcome is set aside and a fresh process be ordered.

18. Consequently, we make the following orders:

*(i) The Statement of Claim dated 17<sup>th</sup> May, 2017 is allowed in the following specific terms:*

*(a) The Nomination Certificate issued to the 5<sup>th</sup> Respondent, Nicholas Waithanje Mbogo, is hereby revoked.*

*(b) The Nomination Certificate issued to the Complainant, Stephen Nyaga Njeru, is also hereby revoked.*

*(c) The 1<sup>st</sup> Respondent's National Elections Board is hereby directed to commence a fresh process for determining the Party's candidate Member of County Assembly for Mavuria Ward, Mbeere South Constituency, Embu County in accordance with its Constitution and Elections and Nominations Rules with the next 24 hours of this Judgement*

*(ii) In the interests of party unity, each party shall bear its own costs.*

19. Orders accordingly.

**DATED and DELIVERED AT NAIROBI this 25<sup>TH</sup> DAY OF MAY 2017**

**Kyalo Mbobu** .....

**Chairman**

**James Atema** .....

**Member**

**Hassan Abdi** .....

**Member**