



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI  
COMPLAINT NO. 280 OF 2017

JAMES KARIUKI KARANJA alias KARIS ..... COMPLAINANT  
VERSUS  
JOHN KAMANGU NYUMU ..... 1<sup>ST</sup> RESPONDENT  
PATRICK THUKU ..... 2<sup>ND</sup> RESPONDENT  
JUBILEE PARTY ..... 3<sup>RD</sup> RESPONDENT

JUDGMENT

Case summary

1. On 8<sup>th</sup> May, 2017 this Tribunal, via *Complaint No. 59 of 2017, James Kariuki Karanja alias Karis vs John Kamangu Nyumu & others*, nullified the 3<sup>rd</sup> Respondent's, Jubilee Party, nomination exercise conducted on 26<sup>th</sup> April, 2017 for Member of County Assembly for Ruai Ward, Kasarani Constituency and ordered for a repeat of the exercise.
2. The repeat exercise was conducted on 10<sup>th</sup> May, 2017. At the conclusion of the exercise, the 1<sup>st</sup> Respondent was declared the winner by the Returning Officer. This declaration aggrieved the Complainant who alleged malpractices in the repeat exercise and lodged an appeal with the Jubilee Party National Appeals Tribunal (NAT). The appeal was heard and dismissed with the 1<sup>st</sup> Respondent being confirmed the winner.
3. The Complainant was aggrieved by the NAT decision dismissing his appeal. He filed this Complaint, in which he seeks the following orders *inter alia*:

- (a) That the Ruling of the Jubilee Party National Elections Appeals Tribunal dated 5<sup>th</sup> May 2017 be set aside.*
- (b) That the 1<sup>st</sup> Respondent be found guilty of election malpractice and be expelled from the Jubilee Party.*
- (c) That the 2<sup>nd</sup> Respondent be found guilty of engaging in party nominations in a party in which he is not a member and also be expelled from the party.*
- (d) That the nomination process be declared null and void as it did not conform to the Orders of the Political Parties Dispute Tribunal bench which required the exercise to be transparent and democratic as permitted under the constitution and rules of Jubilee Party.*

**Submission**

4. The Complainant's case is that the repeat nomination exercise was a sham. That there was blatant rigging and two people were arrested with pre-marked ballots in favour of the 1<sup>st</sup> Respondent and charged in court. He argues that the rigging was so wide spread that even blogger, Cyprian Nyakundi reported on it. It was urged that a non-party member, Patrick Thuku, the 2<sup>nd</sup> Respondent, who had officially resigned from the Jubilee Party was allowed to participate in the exercise which was irregular. He contended that his stronghold, Chokaa Catholic Hall was moved to Ruai Girls, approximately 10km away, without consent of the contestants.
5. The Complainant is aggrieved by the NAT decision which he contends is defective on its face as it alleges that the Complainant was heard on 13<sup>th</sup> May, 2017, yet on that day, he was not in Nairobi. Secondly, that the ruling is allegedly signed on the 5<sup>th</sup> day of May 2017, a day even before the appeal had been lodged.
6. The 1<sup>st</sup> Respondent, in his Replying Affidavit, depones that he was successfully nominated after garnering 2356 votes against the Complainant's 917 votes in the repeat nomination. It is his submission that the Complaint is vexatious, unwarranted

and filed to achieve an ulterior motive. He urges that elections are won at the ballot and not in courts and/or tribunals. He submits that he has won twice on the ballot, and was confirmed by the NAT in the second exercise, where the margin of win was even greater. He urges that litigation should come to an end. It is his submission that the change of Chokaa Catholic Hall polling station to Ruai Girls was agreed upon and that the change did not affect the outcome of the results. He relies on the affidavit of Joe Kinuthia, the Returning Officer and further submits that the distance between the two is around 4 km.

7. As regards the allegation of pre-marked ballot papers, he submits that they were marked on 24<sup>th</sup> April, 2017 hence could not be for use in the 10<sup>th</sup> May, 2017 repeat nomination exercise. Further that the same 'pre-marked ballots' were not cast, hence they did not affect the results. He agrees with the NAT findings on this allegation. He urged that the inclusion of the 2<sup>nd</sup> Respondent, Patrick Thuku, in the exercise was due to time limits. That this Tribunal's decision ordering for a repeat exercise was made on 8<sup>th</sup> May, 2017 and the repeat done on 10<sup>th</sup> May, 2017. Hence changing the printing plate, to exclude the 2<sup>nd</sup> Respondent who had participated in the first exercise, could have been cumbersome. The 1<sup>st</sup> Respondent supports the decision of the NAT which he urges it be affirmed. He urges that the same was erroneously dated 5<sup>th</sup> May, 2017.
8. The 3<sup>rd</sup> Respondent, Jubilee Party, filed Grounds of Opposition thus: *that the Complainant has not proved his case on a balance of probability; that the allegations relied upon are not proved; and that the Complaint is an abuse of process of court.* The 3<sup>rd</sup> Respondent submitted that the alleged malpractices have not been proved. As regards the allegations on pre-marked ballot papers, the 3<sup>rd</sup> Respondent referred to the charge sheets attached to the Complaint and submitted that the statement of offence indicated that the ballots were dated 21<sup>st</sup> April, 2017. The 3<sup>rd</sup> Respondent

agrees with how the issue was dealt with in the NAT judgment, particularly, that they did not alter the results in favour of any candidate.

9. As regards the change of Chokaa Catholic Hall, reference is made to the affidavit of Joe Kinuthia, the Returning Officer, sworn on 19<sup>th</sup> May, 2017. It is submitted that Chokaa Catholic Hall is not a gazetted area and there was consensus before the change was made. Further that the Party's NEB has the discretion to decide the polling area taking into consideration the statistical and support to conduct credible elections. That the tallying sheet attached by the Complainant is for the 27<sup>th</sup> April, 2017 nomination exercise and not for the 10<sup>th</sup> May, 2017 repeat exercise. It was submitted that the NAT decision is sound and the errors there in are mere technicalities.

**Issues for determination**

10. We have isolated the following issues for determination:

- (i) *Whether the decision of the Appeals Tribunal should be set aside;*
- (ii) *Whether the repeat nominations exercise should be declared null and void;*  
*and*
- (iii) *Whether the Tribunal can expel a member from a Party.*

**Determination**

- (i) ***Whether the decision of the Appeals Tribunal should be set aside.***

11. The NAT decision is challenged by the Complainant on two major grounds. Firstly, that the decision/Ruling states that he, the Complainant, was heard on 13<sup>th</sup> May 2017 yet he was not even in Nairobi; and secondly, that the Ruling is dated 5<sup>th</sup> May, 2017, a date even before the filing of the appeal. We have perused the record and in particular the impugned NAT Ruling. Indeed, the Ruling states in part thus: “[t]he Complainant appeared before the Tribunal on 13<sup>th</sup> May 2017 together with his Advocates,

*Collins Mbanda and Geoffrey Menge.*” It then states at page 7 thus: “*DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> DAY of MAY 2017*”. Does this warrant setting aside of the NAT decision?

12. In our analysis, while the Complainant says that he was not heard on 13<sup>th</sup> May, 2017, he does not outrightly dispute that he was heard. In his Complaint, at paragraph 10, he confirms that he was heard on 12<sup>th</sup> May 2017 and in his submissions filed on 22<sup>nd</sup> May 2017, he submits that he lodged an appeal with the NAT, “*where he raised his grievances through his able and appointed Advocate Merris Lestins and Smith Advocates*”. Hence, his allegation does not quite prove breach of the right to a fair hearing.
13. As regards the signing of the Ruling, we have traced the chronology of events from when this Tribunal rendered its decision on 8<sup>th</sup> May, 2017, up to when the decision was delivered. All parties herein are in agreement that the NAT decision was rendered on the 15<sup>th</sup> May, 2017. At paragraph 11 of his Complaint, the Complainant confirms that the Ruling was delivered on the 15<sup>th</sup> May, 2017 and goes further to produce the said Ruling, which unfortunately, is dated 5<sup>th</sup> May, 2017. There is no parallel evidence that there is a separate Ruling dated 15<sup>th</sup> May, 2017. Consequently, we find that the impugned Ruling is the only decision that was rendered by the NAT on the 15<sup>th</sup> May, 2017 and the date of 5<sup>th</sup> May 2017 is but a mere error on the face of it. This error is acknowledged by the Respondents. The Complainant has also not informed this Tribunal whether he applied to the NAT for a correction or clarification on the same. Hence, we find no merit in the prayer to set aside the NAT decision.

**(ii) *Whether the repeat nominations exercise should be declared null and void.***

14. As regards the merits of the NAT decision, we find that the Complainant has not made a substantial or credible satisfactory challenge to it. It has not been shown how the NAT erred on any of the findings. Be that as it may, we have evaluated the

evidence on record and we find that all issues were interrogated by the NAT and a sound finding reached.

15. There is no evidence that the pre-marked ballots were cast. No witness or affidavit evidence was produced to the effect that during the counting of votes, pre-marked ballots were found cast, given that it would have been easy to detect them as they were dated 21<sup>st</sup> April, 2017 yet the repeat nominations exercise was on 10<sup>th</sup> May 2017. We agree that they did not affect the results as found by the NAT in its decision. Further, the alleged evidence of a blogger Cyprian Nyakundi is of little probative value as it borders on hearsay in the absence of an affidavit by the said blogger.
16. As regards the allegations of change of Chokaa Catholic Hall polling station, the Complainant has not adduced sufficient evidence to the impact of that change. While we observe that a change of a polling station after a repeat of a nomination is ordered is critical, it is evident that all parties were consulted. While the Complainant alleges otherwise, there is an Affidavit of Joe Kinuthia, the Returning Officer in which he deposes on the consultations involving all candidates, inclusive of the Complainant. The same is buttressed by another affidavit of Benard Nyokangh Miruka who was an aspirant in the nomination exercise. It is this Benard Nyokangh Miruka who raised the issue that Chokaa Catholic Hall was not a gazetted polling station and the same was supported by all aspirants, the Complainant included.
17. We also agree that the NEB has a prerogative to decide where a polling station will be situated. One cannot be a player and a referee at the same time. The Complainant cannot dictate to the NEB how and where to conduct the elections. We also find the submissions on the polling station being its stronghold as a mere figment, particularly in the absence of statistical backing. There are other intervening facts such as voter-turn out which might impact on the so conceived 'stronghold' concept.

18. The Complainant also contended that the 2<sup>nd</sup> Respondent, Patrick Thuku, participated in the repeat exercise despite having resigned from the party, which was irregular. Indeed, all parties agree that the 2<sup>nd</sup> Respondent participated and got a total of 5 votes. We agree with the 1<sup>st</sup> Respondent that given the time constraints, it would have been hard to change the printing template. Further, we agree that the 5 votes garnered by the 2<sup>nd</sup> Respondent did not have an impact on the overall result of the elections. Hence, applying the materiality test, we agree with the NAT that even if the Complainant had been added all the 5 votes of the 2<sup>nd</sup> Respondent, he would not have won or greatly impacted the results.
19. As regards the issue of election offences, we find that the people arrested and charged are not parties to this matter. Criminal liability is personal and the same cannot be transferred or be borne by a 3<sup>rd</sup> party. The two people charged with the possession of the pre-marked ballot papers cannot transfer their liability to any party in this matter. Be that as it may, under the Election Offences Act, this Tribunal is not clothed with the Jurisdiction to try election offences.
20. Consequently, we find that the Complainant has not satisfactorily made a case to warrant declaring the repeat nominations exercise null and void.

***(iii) Whether the Tribunal can expel a member from a Party.***

21. The Complainant prayed:

- (i) *That the 1<sup>st</sup> Respondent be found guilty of election malpractice and be expelled from the Jubilee Party.*
- (ii) *That the 2<sup>nd</sup> Respondent be found guilty of engaging in party nominations in a party in which he is not a member and also be expelled from the party.*

22. As regards the guilt of the 1<sup>st</sup> Respondent for election malpractice, we have already found that the allegations made have not been proved. We have also found that such a finding can only be made by a competent court under the Elections Offences

Act. The question for consideration is whether this Tribunal can order the expulsion of a member from a political party.

23. Joining a political party is a voluntary exercise protected by Article 38 of the Constitution. It then follows that leaving a party is also a personal decision. However, once one becomes a member, he/she is bound by the constitution, Rules and Regulations, and/or Code of conduct of that party. Breach of this legal regime always carries consequences, one of which may be expulsion from the party. Each party enforces its own Rules. Hence, we find that expulsion of a member from a political party is not a function of this Tribunal but a prerogative of each party in accordance with its own constitution and rules. Be that as it may, the Complainant is asking this Tribunal to embark on a futile sojourn. All parties agree that the 2<sup>nd</sup> Respondent has already resigned from the Jubilee Party. How then can a non-member be expelled from a party?

24. The upshot of our analysis is that we find no reason to interfere with the sound finding of the Jubilee Appeals Tribunal. We make the following orders:

- (i) *The Complaint dated 17<sup>th</sup> May, 2017 is hereby disallowed.*
- (ii) *In the interests of party unity, each party shall bear its own costs.*

25. Orders accordingly.

**DATED and DELIVERED AT NAIROBI this 23<sup>RD</sup> DAY OF MAY 2017**

**Kyalo Mbobu** ..... **Chairman**

**James Atema** ..... **Member**

**Hassan Abdi** ..... **Member**