



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI
COMPLAINT NO. 298 OF 2017

THOMAS OMONDI AKUNGO.....COMPLAINANT
VERSUS
ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT
SAMMY JURA ONYURO..... 2ND RESPONDENT
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Claimant participated in the 2nd Respondent’s nominations for Member of County Assembly, Kaler Ward, Nyatike Constituency. He contends that he won those nominations and was subsequently issued with both the provisional and final certificates. However, the 1st Respondent has irregularly and without due process substituted the Claimant’s name with that of the Claimant’s opponent Sammy Jura Onyuro in the party list submitted to the IEBC. He seeks appropriate relief.

Claimant’s Case

2. The Claimant avers that he won the nominations for Member of County Assembly, Kaler Ward, Nyatike Constituency and was duly issued with the certificates. He contends that the issuance of the provisional certificate to him on 24th April, 2017 followed by the nomination certificate on 29th April, 2017 demonstrates his categorical victory. Further the party’s rule 18.8 requires the certificate to be withheld until any dispute filed has been determined. There was no dispute concerning his win. None of his opponents, including the 2nd Respondent, herein challenged his win.

3. The Claimant avers that the 1st Respondent's omission to submit his name to the IEBC is fundamentally detrimental to him. It puts him at great risk of being unjustly excluded from participating in the elections. It is submitted that the substitution of the Claimant's name with that of the 2nd Respondent violates the principles of good governance in the party constitution and under Article 10 of the 2010 Constitution.
4. Upon realizing that his name had been omitted from the list presented to the IEBC, he rushed to the 1st Respondent's County office to lodge a complaint about the omission. He was informed that the 1st Respondent had no authority to amend the party list after its submission to the IEBC and that the County Appeals Tribunal had since been disbanded. The same position obtained at the party headquarters. He had no recourse, than to move this Tribunal.
5. The Claimant submits that nothing bars the Tribunal from issuing an order directed at a person who is not a party to a dispute under section 40 of the Act, but whose role is central to the implementation of that order.

1st Respondent's Case

6. The 1st Respondents filed an affidavit sworn by Anthony Moturi on 25th May, 2017. He deponed that the results relied on by the Claimant had been declared unreliable and lacked all integrity according to the 1st Respondent's National Appeals Tribunal. That in taking the decision, the National Appeals Tribunal had considered all antecedents relating to the nominations, including by taking representations from delegates from the Constituency.
7. The 1st Respondent further submitted that the controversy in this case had been occasioned by the decision of the NAT in claiming that Mr. Thomas Omondi Akungo had been illegally issued with the nomination certificate due irregularities in tallying. We note that a copy of the decision was not supplied to us. There is also no evidence that the Claimant was ever made aware of those proceedings.

8. Nevertheless, it was submitted that the 1st Respondent should be allowed to proceed and nominate a candidate in accordance with its Constitution and Election and Nomination Rules.

Analysis

9. Article 47(1) and section 4 of the Fair Administrative Action, 2015 entitles party members to administrative action which is lawful, expeditious, efficient, reasonable and procedurally fair within the political party.
10. The gist of the Claimant's grievance in this complaint is the 1st Respondent's omission to submit his name to the IEBC in the party list in a manner that is fundamentally detrimental to him. At the minimum, procedural fairness requires a party member to be furnished with evidence against him, be afforded a chance to cross examine his accuser, be allowed to give rebutting evidence, and have the chance to address the party organ. He was not heard before the decision to substitute his name was made. There is no evidence that he was a party to the proceedings before the National Appeals Tribunal deponed to in the 1st Respondent's affidavit.
11. Natural justice as a concept forbids one from being a judge in his own cause and demands that one be heard fairly on his defence. The first limb of natural justice forbids a political party from being biased 'no man shall be a judge in his own cause' expressed in Latin as 'nemo judex in causa sua'. The second limb entitles party members to notice of the charge and an adequate and fair hearing 'no man shall be condemned unheard' expressed in Latin as 'audi alteram partem'. A violation of either limb of the rule voids the administrative decision by the party.
12. The rule of natural justice is a constitutional value protected by Articles 47 and 50 as well as the Act. In *Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR* it was held that Articles 47 and 50(1) had elevated the rules of natural justice and duty

to act fairly in administratively, judicially or quasi-judicially into a constitutional entitlement capable of enforcement.

13. We hold that the 1st Respondent's decision to substitute the Claimant's name in the list submitted to the IEBC was undertaken without giving the complainant a fair hearing and in violation of his legitimate expectation. The same is null and void and of no effect in law.

Reliefs

14. 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.

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

- (a) An order be and is hereby issued directing the 1st Respondent to submit the name of the Claimant to the Interested Party as the 1st Respondent's nominee for member of national assembly, Kaler Ward, Nyatike Constituency.**
- (b) There is no order as to costs.**

DATED AT NAIROBI THIS 26TH DAY OF MAY 2017

Kyalo Mbobu
Chairperson

James Atema
Member

Hassan Abdi

Member