



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTE TRIBUNAL AT NAIROBI
COMPLAINT NO. 315 OF 2017

HON MARGARET WANJIRU KIIRU.....COMPLAINANT
VERSUS

JUBILEE PARTY.....RESPONDENT
SUSAN WAKARURA KIHKA.....INTERESTED PARTY

RULING

1. This matter came up for case conferencing on 8th June, 2017 to confirm compliance with the Tribunal's orders of 2nd June, 2017 and schedule the matter for hearing. Prof. Ojienda Senior Counsel leading Mr. Karanja for the Interested Party raised a point of preliminary objection to the Tribunal's jurisdiction to hear and determine this complaint.
2. Prof. Ojienda's preliminary objection was grounded on the basis that the Tribunal has no jurisdiction to hear this complaint since jurisdiction under section 40(1)(2) of the Political Parties Act arises where there is a dispute between an independent candidate and a political party with respect to matters pertaining to their status. Senior counsel submitted that this argument is supported by section 14(1)(2) of the Act which governs resignation from a political party as well as sections 33 and 34 of the Elections Act, 2011 which governs the status of independent candidate.
3. Consequently, Senior Counsel submitted that the Tribunal has no jurisdiction where the dispute is between an independent candidate and a party sponsored candidate where the party has no dispute with its member.
4. Mr. Omuganda for the Respondent associated himself with the Interested Party's submissions. He submitted that there was another aspect to the preliminary objection which refers to Article 165(3) of the Constitution. That article, according to

counsel, gives exclusive jurisdiction to the where it involves matters of construction of the Constitution. In that regard, as the application before the Tribunal involves the interpretation of the Constitution, the complaint violated the jurisdiction of the High Court. It was therefore argued that the Tribunal had no jurisdiction under Article 165(3).

5. Mr. Sore for the petitioner argued that section 40(1)(d) gives the Tribunal jurisdiction between an independent candidate and a political party. He cited the decision of the High Court in *Wiper Democratic Movement of Kenya v Bernard Muia Tom Kiala & another Election Petition Appeal Number 31 of 2017*.
6. The petitioner further argued that such a dispute could arise because the Respondent is engaged in illegalities. In this particular case, it was submitted that it is unlawful for a Member of the County Assembly, such as the Interested Party, who also doubles up as the Chair of the Nakuru County Public Service Board to vie for Member of the National Assembly or the Senate.
7. In reply, Prof Ojienda submitted that the petitioner had not attempted to answer the question where there's a dispute between the independent candidate and the political party.

Analysis

8. It is trite that a preliminary objection arises on a pure point of law which if successfully argued can dispose of the entire claim. See *Mukisa Biscuit Manufacturing v West End Distributors [1969] EA 696*. In this case, the preliminary objection relates to the Tribunal's jurisdiction to hear and determine the present complaint.
9. Jurisdiction is what legitimizes a court or Tribunal's adjudicatory powers over any political party dispute before it. It is what breathes life, not just into the disputes before the Tribunal turning them into justiciable claims, but also validates the orders issued by the Tribunal in the final determination of the rights and interests of the

parties to the dispute before the Tribunal. Accordingly, we must first satisfy ourselves that we have the jurisdiction to this complaint or we would be bound to down our tools. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1.

10. The preliminary objection is grounded on the fact that the Tribunal's jurisdiction under section 40(1)(2) of the Political Parties Act arises only where there is a dispute between an independent candidate and a political party relating to that independent candidate's status.

11. Section 40 on which the preliminary objection is grounded is in the following terms:

40. Jurisdiction of Tribunal

(1) The Tribunal shall determine—

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and a political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners; and

(f) appeals from decisions of the Registrar under this Act;

(fa) disputes arising out of party primaries.

12. Contrary to Prof Ojienda's submissions, there is no limitation or delineation of the precise form the dispute under section 40 must take. The example given by Prof Ojienda concerning the status of independent candidates is not the only instance. Other disputes may relate to the use of symbols by independent candidates and political parties. A dispute under section 40(1)(d) may as well arise from infraction of the Political Parties Act, other electoral laws or the Constitution by an independent candidate or a political party. It would be unwise and *ultra vires* for this Tribunal to delineate the categories disputes under section 40(1) must take to be admissible. This is more the case where the relevant statute has no such delineation. A dispute is defined to mean,

13. We are fortified in this finding by the decision of the High Court in *Wiper Democratic Movement of Kenya v Bernard Muia Tom Kiala & another Election Petition Appeal Number 31 of 2017 (2017 eKLR)* at para 30 where Onguto J held as follows:

Section 40(1)(d) of the Act is in my view relatively clear. The PPDT has the power to adjudicate over disputes between political parties and independent candidates. The Respondent is admittedly an independent candidate. He has recourse under section 40(1)(d) of the Act against a political party if he is aggrieved. His recourse is before the PPDT...In my view it inappropriate to start pigeon-holing types and nature of disputes which ought to fall under section 40(1)(d). It may be a foolhardy exercise because one may never stop. What is important is to ascertain the parties as being an independent candidate and a political party. The next step is to reflect on whether there exists a genuine grievance which warrants the PPDT's interrogation and ultimate intervention. Effectively thus, the exercise of indexation of the disputes which may come in all forms is best left to the PPDT to handle and sieve through.

14. We are satisfied that there is a cognizable dispute between an independent candidate and a political party, Jubilee Party, relating to the Nakuru Senatorial candidature in the forthcoming elections. That dispute also relates to the Respondent's conduct of the party primaries for that position and therefore falls within this Tribunal's jurisdiction under section 40(1)(fa).

15. Concerning the submission by Mr. Omuganda that since the petition involves matters of construction of the Constitution and violates the jurisdiction of the High Court under Article 165(3), we can do no more than cite our decision in *Complaint No 200 of 2017 Orange Democratic Movement Party v Jekconia Okungu Ogutu* where we held:

We note that this Tribunal is the first port of call for all political party disputes and that invariably all disputes brought before it are for the enforcement of Articles 38, 47 and 91 of the Constitution. It would be an empty exercise of jurisdiction for us to hold that we can sever disputes before us and determine all aspects of the dispute except denials, violations or infringements of, or threats to, rights or fundamental freedoms in the Bill of Rights. The 3rd Respondent did not tell us how a petitioner would surmount the doctrine of *res judicata* in having the severed or residual part of his dispute, relating to the enforcement of the Bill of Rights, heard by the High Court. We were not informed how such twin-pronged litigation of political party disputes would be financed by the Kenyan tax payers.

16. We are similarly bound by the decision of Odunga J in *Charles Otieno Opiyo v Orange Democratic Movement Party [2017] eKLR at para 38* where he held:

38. It may be argued that the existence of alternative remedies does not oust the jurisdiction of the Court under Article 165(3)(a) and that that jurisdiction cannot be restricted or limited. On that issue, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and

165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However, sovereign power under the Constitution is delegated to inter alia the Judiciary and independent tribunals. The Constitution therefore clearly recognizes the role of independent tribunals in dispute resolution scheme. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in *Pasmore vs. Oswaldtwistle Urban District Council* [1988] A C 887 that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement.

17. We have said enough to lead us to the conclusion that the preliminary objection is for dismissal. It is dismissed, but with no order as to costs which shall be in the main cause.

DATED AT NAIROBI THIS 9TH DAY OF JUNE 2017

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Kyalo Mbobu (Chairperson)

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James Atema (Member)

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Hassan Abdi (Member)