



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI  
COMPLAINT NO 86 OF 2017

SHONKO AGNES NAILENTEI.....COMPLAINANT

VERSUS

JUBILEE PARTY.....1<sup>ST</sup> RESPONDENT

ROTIKEN SIMON KAITIKEI.....2<sup>ND</sup> RESPONDENT

RULING

*Introduction*

1. The applicant had initially first contested the Narok North Constituency primaries on the 1<sup>st</sup> Respondent's ticket, held on 25<sup>th</sup> April, 2017. She was aggrieved by the conduct of those nominations and filed her grievance before this Tribunal. Her complaint was that the nominations were marred with irregularities traceable to the 2<sup>nd</sup> Respondent. We found merit in her claim and made the following orders:
  - a. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent did not conduct free or fair nominations for member of national assembly, Narok North Constituency, Narok County on 25<sup>th</sup> April, 2017
  - b. A declaration be and is hereby issued that the nomination certificate awarded to the 2<sup>nd</sup> Respondent or any other candidate who contested the nominations of 25<sup>th</sup> April, 2017 for member of national assembly, Narok North Constituency, Narok County is null and void and of no effect in law.
  - c. A mandatory injunction be and is hereby issued directing the 1<sup>st</sup> Respondent to conduct a fresh nomination exercise for member of

national assembly, Narok North Constituency, Narok County within 48 hours

- d. A mandatory injunction be and is hereby issued directing the 1<sup>st</sup> Respondent and the candidates herein to agree on their agents and the specific polling stations where the fresh nominations shall be conducted, within the next 12 hours
- e. The 1<sup>st</sup> Respondent shall bear the Claimant's costs of this complaint.

*Claimant's Case*

2. It is the manner in which those orders were implemented during the purported fresh nomination exercise that gave rise to this application. The Claimant contends that the 1<sup>st</sup> Respondent deliberately refused to organize a meeting of the candidates herein to agree on their agents and the specific polling stations where the fresh nominations would be conducted as directed by the Tribunal.
3. Instead, the 1<sup>st</sup> Respondent proceeded to call for repeat nominations with the same ballot papers which were already in circulation and which had been the cause of the dispute before the Tribunal. Those ballot papers had the particulars of candidates who had already openly indicated their resignation from the 1<sup>st</sup> Respondent intending to run as independent candidates.
4. Also, voting was interrupted by one of the candidates who insisted that her name should either be removed from the ballots or she should be allowed to participate in the nominations. Voters were confused as to the participants in the nominations because the ballots still bore the pictures and names of non-contestants in the race. This led to demonstrations within Narok North Constituency. The effect of those demonstrations was that nominations did not start until after about 5pm.

5. That apart, there were no presiding officers at the polling stations as they too were on strike because the 1<sup>st</sup> Respondent had not paid them their dues. Police officers acted as presiding officers leading to a lot of intimidation.
6. She further avers that on the day of the nominations some ballot papers were transported by the police and 2<sup>nd</sup> Respondent to the house of a pastor Kiritu in Naisoya village. The 2<sup>nd</sup> Respondents on arrival at the pastor's home pre-marked ballot papers in favour of the 2<sup>nd</sup> Respondent. She avers that the counterfoils were then dumped behind an abandoned building. She has exhibited five sets of counterfoil serial number JP/MNA/33/179 for member of National Assembly Narok North Constituency.
7. To compound the problem, there was no register for purposes of verifying the eligibility of voters. This led to ballot stuffing and multiple voting. No voting took place at Olorropil shopping center, Naituyapaki, AIC Ilmasharian, Emtpati Catholic Church, Mutenkwar, Naisoya, Olesonkoyo Shopping Center among other designated polling stations.
8. In her supplementary affidavit sworn on 23<sup>rd</sup> May, 2017, she further avers that in utter disregard of the orders of the Tribunal, the 1<sup>st</sup> Respondent refused to conduct a fresh credible election yet it had issued a nomination certificate to the 2<sup>nd</sup> Respondent as having been nominated. Instead the whole exercise was a sham rigged in favour of the 2<sup>nd</sup> Respondent in connivance with the police and officials. The same cannot amount to a fresh nomination exercise and ought to be nullified. The 2<sup>nd</sup> Respondent's nomination ought to be nullified since no fresh nominations preceded it.

***1<sup>st</sup> Respondent's Case***

9. The 1<sup>st</sup> Respondent filed an affidavit sworn on 22<sup>nd</sup> May, 2017 by Marykaren Kigen-Sorobit. She depones that the complaint is a non-starter and dead on

arrival because the 1<sup>st</sup> Respondent has already submitted the names of its candidate to the IEBC. It was further alleged that the application had been made in bad faith and constituted an abuse of the process of this court. It was an afterthought geared toward discrediting the processes, structures and systems of the 1<sup>st</sup> Respondent.

10. She further depones that the 1<sup>st</sup> Respondent had fully complied with the Tribunal's orders of 11<sup>th</sup> May, 2017.
11. It was further submitted that the complainant had failed to exhaust internal dispute resolution mechanism after the repeat nominations were done and concluded.
12. That apart, the 1<sup>st</sup> Respondent averred that no evidence had been adduced to show that the process was flawed and the assertions by the Claimant are false. The Tribunal had ordered for a fresh nomination exercise and not nomination exclusively between the Claimant and 2<sup>nd</sup> Respondent. Litigation must come to an end; the complaint should be dismissed with costs.

#### *2<sup>nd</sup> Respondent's Case*

13. On 19<sup>th</sup> May, 2017 the 2<sup>nd</sup> Respondent filed a preliminary objection on the grounds that the application was incompetent, misconceived, bad in law and does not lie since the Tribunal having delivered its judgment on 10<sup>th</sup> May, 2017 was *functus officio*. It was also asserted that the application was incurably defective for seeking orders against non-parties. Further, it was, submitted that the Tribunal had no jurisdiction to entertain the application, it not being an application to review the earlier judgment. Lastly, that the interim order of injunction obtained by the Complainant on 16<sup>th</sup> May, 2017 had been overtaken by events, the nomination certificate having already been issued to the 2<sup>nd</sup> Respondent on 14<sup>th</sup> May, 2017.

14. The 2<sup>nd</sup> Respondent filed also filed a further preliminary objection dated 22<sup>nd</sup> May, 2017 to the suit on the ground that the Claimant lacks locus to file the dispute because she has been cleared to contest the election as a candidate under the Chama Mwangaza Daima Party.
15. The 2<sup>nd</sup> Respondent also filed an affidavit sworn by its counsel Ms Kamau on 22<sup>nd</sup> May, 2017 in which she deponed that the Tribunal was *functus officio* having pronounced itself on 10<sup>th</sup> May, 2017. It was further submitted that the complaint is misguided as the Complainant is trying new issues in respect of which the Tribunal is *functus officio*. The appropriate thing would have been to file contempt proceedings.
16. It was further alleged that a Mr. Jared Juma who represented the complainant in the proceedings before Tribunal was not an advocate hence the proceedings are a nullity. A confirmation letter dated 15<sup>th</sup> May, 2017 from the Law Society of Kenya is annexed. The letter confirms that there is no advocate called Jared Juma and that the purported practice of law by him should be subjected to criminal proceedings.

*Issues for determination*

- (a) Does this Tribunal have jurisdiction over the complaint?
- (b) Were the proceedings before us conducted by a non-advocate?
- (c) Did the 1<sup>st</sup> Respondent conduct a free and fair fresh nomination for Narok North Constituency?
- (d) What are the appropriate reliefs in the circumstances of this case?

*Determination of Issues*

- (a) Does this Tribunal have jurisdiction over the complaint?

17. The Respondents submit that this Tribunal lacks jurisdiction over the application since the Claimant has since become affiliated to another political party. We reiterate that the primary dispute relates to a political party primary conducted by the 1<sup>st</sup> Respondent and in which the Claimant and 2<sup>nd</sup> Respondents participated on 25<sup>th</sup> April, 2017 and again on 12<sup>th</sup> May, 2017. This specific application is in respect of the 1<sup>st</sup> Respondent's party primaries conducted on 12<sup>th</sup> May, 2017 under the orders of this Tribunal. The jurisdictional argument is a ploy to dislodge the Claimant from this Tribunal's seat of justice.
18. We similarly dismiss the plea that failure to exhaust internal dispute resolution mechanisms deprives this Tribunal of its jurisdiction under section 40(1)(fa) of the Political Parties Act, 2017. In *Complaint No 250 of 2017 Jamleck Kamau & 4 others v Jubilee Party & 3 others* we held as follows:

**We assert that this Tribunal has both original and appellate jurisdiction over disputes from party primaries. Consequently, the Tribunal's jurisdiction is not in any way affected, by the validity or invalidity of any proceedings before the party's internal dispute resolution mechanism. We further hold that the proviso in section 40(2) of the Act only covers the classes of disputes in section 40(1)(a), (b), (c) or (e). The proviso does not extend to disputes between independent candidates and political parties, appeals from decisions of the Registrar and disputes over party primaries.**

19. In relation to party primaries, such failure to exhaust internal dispute resolution mechanism would in our view be a technical point in respect of which we held as follows in *Complaint No 48 of 2017 John Mruttu v Thomas Mwadeghu*

**We would be hoisting procedural technicalities above the need to do substantive justice if we held that failure to comply with the party's procedural rules automatically ousts this Tribunal's jurisdiction. Party primaries and other elections in a multi-ethnic nation such as Kenya are highly contested and it would be remiss**

**of us to resolve a dispute arising from a party primary on a procedural point.**

20. We therefore hold that we have jurisdiction to determine this dispute arising from the repeat primaries held by the 1<sup>st</sup> Respondent on 12<sup>th</sup> May, 2017 as directed by the Tribunal on 10<sup>th</sup> May, 2017.

**(b) Were the proceedings before us conducted by a non-advocate?**

21. The record shows that on 8<sup>th</sup> May, 2017 a Mr. Juma held brief for Mr. Munaawa for the Claimant. There is no evidence beyond that pointing to the fact that Mr. Juma was not an advocate. The record does not have any appearance by a Mr. Jared Juma.

**(c) Did the 1<sup>st</sup> Respondent conduct a free and fair fresh nomination for Narok North Constituency?**

22. From the evidence on record, which was not rebutted by the Respondents, we are persuaded that the nominations of 12<sup>th</sup> May, 2017 were marred with irregularities which affected the outcome of the nominations.
23. We had also ordered for a fresh nomination exercise. The adjective **fresh** means “new or different”, according to the Cambridge Dictionary of English. As a result, the nominations conducted on 12<sup>th</sup> May, 2017 using the polling material which had widely circulated and involved non-contestants was neither “new or different”, and could not possibly amount to the fresh nomination exercise ordered by this Tribunal.
24. No meeting was ever held in terms of order (d) for the 1<sup>st</sup> Respondent and the candidates herein to agree on their agents and the specific polling stations where the fresh nominations would be conducted. There is no evidence that the

supposed fresh nominations were conducted after the candidates had submitted their lists of agreed agents and polling stations.

25. The Respondents do not for instance deny that some polling stations did not open at all, that some opened at 5:00pm and the rest were manned by police officers. The averment of pre-marked ballots was not controverted at all.
26. The nomination exercise conducted on 11<sup>th</sup> May, 2017 was conducted in defiance of the orders of this Tribunal. Such a farce cannot be what we meant when we directed the Respondent to conduct a fresh nomination exercise for member of national assembly, Narok North Constituency. We are satisfied that there was a deliberate design not to fully comply with the orders of this Tribunal. We hold that the nomination exercise held on 1<sup>st</sup> May, 2017 was nothing, but a red herring to delude this Tribunal and Narok North constituents about the Respondents' intention not to comply with the orders of this Tribunal.
27. In *Complaint No 40 of 2017 Benard Muia Tom Kiala v Wiper Democratic Movement – Kenya* the Tribunal nullified Machakos gubernatorial nominations that had been conducted in violation of the Tribunal's orders. We held as follows:

**We wish to reiterate that the people of Kenya have delegated their sovereign authority under Article 3(c) of the Constitution to this Tribunal and that it would be a misuse of that sovereign authority for this Tribunal to spend scant public resources presiding over political party disputes only to issue orders in vain. Once a dispute has been submitted to this Tribunal, political parties and their members should have the confidence that this Tribunal shall decide that dispute impartially, independently and according to the law. Political parties and their members would not bring their disputes before this Tribunal if they learnt that parties are free to either obey or disobey Tribunal orders at will...We hold that it is the plain and unqualified obligation of every person against, or in respect of whom an order is**

made by this Tribunal to obey it unless and until it is discharged. We also cite the decision of the High Court in *Kenya Union of Savings Credit Cooperatives (KUSCO) v Nairobi City Council [2015] eKLR* as authority for our holding that the orders of this Tribunal are not made in vain and are meant for compliance. As a result, if for any reason any party has any difficulty in complying with the orders of this Tribunal, the honourable thing to do is to come back to the Tribunal and explain the difficulties faced in complying with that order.

28. In *Complaint No 53 of 2017 Hon Salah Yakub Farah v Secretary General KANU & another* we held that party primaries in a multi-ethnic society such as Kenya are highly contested and open contempt of court orders in relation to party primaries is a recipe for chaos. Accordingly, we are duty bound to declare that the nominations of 12<sup>th</sup> May, 2017 which were conducted in violation of the Tribunal's orders of 10<sup>th</sup> May, 2017 are a nullity and are of no effect in law.
29. We have said enough to lead us to the conclusion that the 1<sup>st</sup> Respondent's purported nomination exercise of 12<sup>th</sup> May, 2017, having been undertaken contrary to the positive orders of this Tribunal, is null and void and of no effect in law. Having so held, we note that no proper application has been made by the Claimant to personally punish either Respondent for contempt. Accordingly, we shall not say anything at this juncture that might jeopardize any subsequent proceedings to that end.

**(d) What are the appropriate reliefs in this complaint?**

30. 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.

31. Accordingly, the justice of this case requires us to make the following orders:
- (a) A declaration be and is hereby issued to the effect that the 1<sup>st</sup> Respondent's nomination for member of national assembly Narok North Constituency, held on 12<sup>th</sup> May, 2017, having been undertaken contrary to the orders of this Tribunal issued on 10<sup>th</sup> May, 2017 is null and void and of no effect in law.
  - (b) A declaration be and is hereby issued that the nomination certificate issued by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent on 14<sup>th</sup> May, 2017 as a result of the impugned nominations is null and void and of no effect in law
  - (c) The 1<sup>st</sup> Respondent be and is hereby directed to conduct a fresh nomination exercise for Member of National Assembly, Narok North Constituency, Narok County, within 72 hours of this order/ruling. The nomination exercise shall be conducted in accordance with the Party Constitution and Election and Nomination Rules.
  - (d) The 1<sup>st</sup> Respondent shall bear the Claimant's costs of this application.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY, 2017**

**Kyalo Mbobu .....**

**Chairperson**

**James Atema .....**

**Member**

**Hassan Abdi .....**

**Member**