



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI

COMPLAINT NO. 316 OF 2017

ABDULSALAM KASSIM.....APPLICANT/APPELLANT

-VERSUS-

HAZEL NYAMOKI KATANA..... 1ST RESPONDENT

JUBILEE PARTY OF KENYA.....2ND RESPONDENT

AS CONSOLIDATED WITH

COMPLAINT NO. 274 OF 2017

HAZEL NYAMOKI KATANA.....COMPLAINANT/RESPONDENT

-VERSUS-

JUBILEE PARTY NATIONAL ELECTIONS BOARD.....1ST RESPONDENT

JUBILEE PARTY NATIONAL APPEALS TRIBUNAL.....2ND RESPONDENT

JUBILEE PARTY.....3RD RESPONDENT

ABDUL SALAM KASSIM.....4TH RESPONDENT/APPLICANT

RULING

Summary of the Application

1. The present complaint, **Complaint No. 316 of 2017**, concerns the Jubilee party's nomination exercise for the position of Senator, Mombasa County held on 26th April

2017. The Applicant/Appellant avers that he was declared the winner of the said exercise with 10,785 votes against the 1st Respondent's 9,924 votes in 6 constituencies. Aggrieved with the outcome, the 1st Respondent filed an appeal with the 2nd Respondent's internal dispute resolution mechanism (IDRM) on 28th April 2017, which was dismissed for non-attendance of both parties. Further aggrieved, the 1st Respondent moved this Tribunal in **Complaint No. 274 of 2017** seeking to set aside the IDRM decision.

2. Based on the foregoing, a consent dated 22nd April 2017 was adopted by this Tribunal on 25th May 2017 in **Complaint No. 274 of 2017** by Counsels of all the parties in that case. The parties agreed that the 1st Respondent had not been given sufficient notice and opportunity to be heard by the party's IDRM on 28th April 2017 and the same was referred back to the party for determination within 48 hours.
3. The matter was re-heard. In a ruling delivered on 27th May 2017, the party's IDRM nullified the results of two wards in Likoni Constituency, declared Hazel Katana as the legitimate winner of the nomination exercise and directed the party's National Elections Board (NEB) to issue the nomination certificate to her.
4. Acting in person in **Complaint No. 274 of 2017**, the 4th Respondent/Applicant filed a Notice of Motion application dated 8th June 2017 seeking a review and for setting aside of the consent orders adopted by the Tribunal on 25th May 2017. It is the Applicant's contention that the consent orders were recorded and adopted by the 1st, 2nd and 3rd Respondents without his consent, knowledge or authority.
5. The Applicant/Appellant also filed the present complaint before us dated 2nd June 2017 (**Complaint No. 316 of 2017**) challenging the IDRM proceedings that were a consequence of the consent orders adopted by this Tribunal on 25th May 2017. It is the Appellant's contention that he was unable to attend the party's IDRM proceedings and despite sending his representatives, they declined to extend time for his appearance. In his Supporting Affidavit dated 2nd June 2017, the Appellant

avers that before the party's IDRMM ruling was delivered, he was invited by IEBC to present his papers and was subsequently cleared as the Jubilee nominee for the Mombasa Senatorial seat. He further contends that the cancellation of the results of two wards was not legal or valid as votes for other seats in Mombasa County have not been nullified or affected. It is the Appellant's prayer that the IDRMM ruling of 27th May 2017 be set aside; that the 1st Respondent's nomination certificate be revoked and the 2nd Respondent be restrained from submitting the name of the 1st Respondent to IEBC.

6. The Application and Complaint were heard before this Tribunal concurrently.

Complainant/Respondent's submissions

7. It is the Complainant/Respondent's contention that the Applicant's advocates, M/S Lumallas, Achieng and Kavere Advocates were on record for the Applicant at the time the consent was adopted by this Tribunal on 25th May 2017. Further, that the Applicant only challenged the consent 15 days after it was adopted by the Tribunal and has failed to prove any fraud, mistake or misrepresentation that would warrant the setting aside of the consent order. Counsel for the Complainant in his submissions relied on **Civil Appeal No. 293/2014 The Board of Trustees National Social Security Fund v. Michael Mwalo eKLR** which reiterated the position as set out in **Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982) KLR 485** by Harris J where he held *inter alia* that –

'1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself or any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side'

8. In response to the main complaint, the 1st Respondent avers that the Applicant was duly served with the notice to attend the IDRМ proceedings and he was represented by Counsel during the IDRМ proceedings. The Appellant was also represented by his personal assistant and agent during the said proceedings.
9. The Complainant disputed that the Appellant had submitted his papers to IEBC as the nomination certificate that had been issued to him was suspended by this Tribunal in **Complaint No, 274 of 2017** pending the outcome of the IDRМ proceedings.
10. It is also the Complainant's contention that the Appellant has failed to demonstrate how he was denied time to lodge his defense before the IDRМ and how its decision erred in law and fact. It is the Complainant's prayer therefore that the application and complaint be dismissed with costs to the Complainant/Respondent.

2nd Respondent's submissions

11. In reply, the Jubilee party through a Replying Affidavit dated 9th June 2017 sworn by a Mary Karen-Kigen Sorobit, avers that the consent was adopted by Counsels of all parties and the matter was subsequently transferred back to the party's IDRМ. It was her contention that the Applicant adopted the consent through his counsel and therefore he cannot now state that it was entered into without his authority.
12. With respect to the main complaint in **Complaint No. 316 of 2017**, the Jubilee party averred in a Replying Affidavit also dated 9th June 2017, that all parties were duly informed of the IDRМ hearing on 26th May 2017 at 5:30pm. Further,

that due to the strict IEBC timelines the party's IDRM did not have the luxury of delaying the determination of the matter. It is also the party's contention that the IDRM properly considered the matter before it in reaching its determination in favour of the 1st Respondent, Hazel Katana.

Issues for determination

13. In consideration of the foregoing, the following issues emerge for determination:
- a) whether the consent orders adopted by the Tribunal on 25th May 2017 should be set aside;**
 - b) whether the IDRM ruling of 27th May 2017 should be set aside;**
 - c) whether the Complainant/Respondent or Applicant/Appellant is the due nominee for the position of Senator for Mombasa County**

Analysis

a) Application to set aside the Consent Orders

14. It is undisputed that the consent adopted by the Tribunal on 25th of May 2017 was reached and executed by Counsels for all the parties involved. However, the Appellant/Applicant's contention is that his advocate had no authority to act on his behalf in the said consent orders and that the consent orders were reached and adopted without his knowledge, authority and consent.
15. From the record before us, it is clear that M/S Lumallas, Achieng and Kavere Advocates were on record for the Applicant at the time the consent was adopted by this Tribunal on 25th May 2017. As advocates on record for the Appellant/Applicant, it is assumed that they have the general authority to act on behalf of their client.
16. In view of the foregoing, the Appellant/Applicant must demonstrate that his advocate on record had no authority to enter into the consent that was recorded.

He must further demonstrate the existence of fraud, mistake or misrepresentation that would warrant the setting aside of the consent order. He has failed to do so. It is therefore assumed that his Advocate had the authority to act in every single thing that pertains to a matter, even enter into consents on his behalf (we refer to **Kafuma v Kimbowa Contractors 1974 EA (u) 91.**). His application is therefore dismissed accordingly.

b) Whether the IDRМ ruling of 27th May 2017 should be set aside

17. The Applicant/Appellant avers that he was not given an opportunity to be heard and present his defense and further that no sufficient evidence was presented before the IDRМ to warrant its decision.
18. We have perused the decision of the IDRМ. The ruling indicates that the Applicant/Appellant was aware of the Tribunal's orders directing the party's IDRМ to rehear the matter within 48 hours of its orders. It further indicates that he was notified of the IDRМ hearing date and his advocates and agent were also informed accordingly. On the day of hearing, the 1st Respondent indicated that he was not feeling well and that he had instructed the two advocates to represent him in the matter. The IDRМ further adjourned to later in the day to allow him to testify. However, the Applicant/Appellant still did not appear before it. In order to comply with the 48-hours deadline, the IDRМ ruled that it would proceed in the absence of the Applicant/Appellant. It is the Tribunal's view that his allegations are unfounded and that he was afforded every opportunity possible within the 48-hour deadline to appear before it.
19. It is also clear from the IDRМ decision that it considered the allegations presented before it and analysed it based on the evidence adduced. The nullification of the results of the two wards was based on alterations and cancellations evident on the face of the documents whereby it determined that

these irregularities sufficiently affected the outcome of the nomination exercise. The IDRМ therefore excluded these votes and found in favour of the Complainant/Respondent. Based on the foregoing, it is clear that the IDRМ decision was made in proper consideration of the evidence before it and therefore we uphold the IDRМ decision that declared the Complainant, Hazel Katana, is the legitimate winner for the Jubilee Party Nominations for Senator Mombasa County.

Orders

20. Consequently, the Notice of Motion application dated 8th June 2017 in PPDT Complaint No. 274 of 2017 and the Notice of Motion application dated 2nd June 2017 in PPDT Complaint No. 316 of 2017 are hereby dismissed with no orders as to costs.

DATED at NAIROBI this 12TH DAY of JUNE 2017

- 1. M.O. Lwanga (Presiding Member)**
- 2. Desma Nungo (Member)**
- 3. Paul Ngotho (Member)**