



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI
COMPLAINT NO. 189 OF 2017

ALWIN CHEPYAGAN SASIA.....COMPLAINANT/APPLICANT

VERSUS

PUKOSE ROBERT 1ST RESPONDENT

NATIONAL ELECTIONS BOARD JUBILEE PARTY 2ND RESPONDENT

JUBILEE PARTY 3RD RESPONDENT

THE DIRECTOR OF GENERAL ELECTIONS,

JUBILEE PARTY 4TH RESPONDENT

RULING

Background of the case

1. Through a Memorandum of Complaint dated 9th May, 2017, the Applicant, Alwin Chepyagan Sasia, moved this Tribunal challenging the declaration of the 1st Respondent as the winner of the Jubilee Party nomination exercise held on 26th April, 2017 for Member of Parliament, Endebes Constituency. He contended that the process was marred by irregularities and that he was the rightful winner having garnered 8,166 votes against the 1st Respondent's 7,921 votes. He sought the following substantive orders:

(a) *That there be a scrutiny of the raw election materials, re-opening of ballot boxes and verification of votes cast, and a scrutiny of the register used in voting and the votes in the entire constituency be re-tallied.*

(b) That the 1st Respondent, Pukose Robert, be disqualified from vying for elections for being involved in an election malpractice.

(c) That the Complainant, Alwin Chepyagan Sasia, be declared the winner.

2. The matter was heard and in a judgment delivered on 16th May 2017, this Tribunal found that the evidence adduced by all parties did not conclusively support the evidence of either party as to who won the nominations exercise. As a consequence, the Complaint was allowed with an order that there be a re-tally of the votes cast to determine the winner with the alternative that if the re-tally was not possible, the 3rd Respondent, Jubilee Party, was to undertake a repeat nomination exercise.
3. On 22nd May 2017 the Applicant filed a Notice of Motion application under certificate of urgency seeking the following substantive orders:

(a) Summons to be issued to, the Director of Elections, to appear before this Honourable Tribunal and show cause why he should not be committed to jail for such term as the [Tribunal] may deem fit.

(b) That the Director of Elections be cited for contempt of this Honourable Tribunal and be committed to jail for six months for being flagrantly contemptuous, and willfully disobedient of the orders of this Honourable Tribunal given on 16th May, 2017.

(c) An order committing the 3rd Respondent to civil jail for a period not exceeding six (6) month for contempt of this Honourable Tribunal.

(d) An order to issue nullifying any nomination certificate issued to any other person, other than the applicant herein and the applicant's name be reflected on the party list.

Submissions

4. The Applicant's case is that the Respondents have made mischief of this Tribunal's orders of 16th May, 2017. That they have shown contempt and disrespect for the

valid orders of this Tribunal. He submitted that after the Judgment, the Party did not communicate to him. That when he visited the Party's headquarters on 18th May, 2017 he met the 1st Respondent, Robert Pukose, in a meeting with people who claimed to be coordinating nominations in Trans Nzoia. On further inquiry, he was told that they want to re-tally.

5. That at first, his agents were not allowed in the tallying centre. When they were finally allowed, one of them, Mr. Tolbert Kipkemboi, was chased away when he noted and questioned falsified and forged Form 3D. They refused him to take photos. New evidence was discovered: that the Forms 3D had been forged, original ones destroyed and results falsified. He cited Kokwo, Suam Custom, Testerborne and Cheptikit polling stations which the Applicant had won. When concerns were raised, the party official retreated, reserving giving directions on the claims later. They finally concluded the re-tally on 19th May 2017 and declared the 1st Respondent winner. He contends that since Forms 3D had been falsified, no credible re-tally could take place. Consequently, it was only prudent then a repeat of the nomination exercise should have been done.
6. The 1st Respondent filed a Replying Affidavit in which he deposes that on 17th May 2017, he was called to attend at the Party's headquarters at around 3.30 p.m. That he found the applicant already there. The applicant requested that the re-tally be done in the presence of his lawyer and they were given 30 minutes to conduct their lawyers. However, the Applicant's lawyer did not show up. He gives the quorum of all members who attended the Board Room meeting when they were recalled and a re-tally done. That the meeting concluded and the 2nd Respondent communicated that decision will be communicated the following day. He denies all the allegations of the applicant. It is his case that the re-tally was in accordance with the order of this Tribunal.

7. As regards the prayers for contempt, he submits that a re-tally was done within the stipulated 48 hours and all parties were present hence, there is no case for contempt. He cites the case of *Duncan Manuel Murigi vs Kenya Railways Corporation (2008) eKLR*, in submitting that contempt of court is an offence of a criminal character, hence must be satisfactorily proved. He urges that the Applicant is trying to force a fresh nomination through the guise of contempt proceedings. It is also submitted that this matter is *res judicata* as it was finalised and an order made that if re-tally was not possible, then a fresh nomination was to be undertaken. Consequently, it is submitted that as re-tally was done, the matter concluded and the application is an abuse of judicial system.
8. The 2nd, 3rd and 4th Respondents (the Party) filed a Replying Affidavit deposed by Peter Mwangi Kahara, the Director of Elections. He states that the application for contempt is baseless as the order for re-tally was complied with as a re-tally was done within less than 72 hours and the outcome declared. Secondly, that this Tribunal lacks jurisdiction to determine the application for contempt. It is submitted that all parties were called on 17th May 2017 and attended a meeting. The meeting ended at 8p.m., and the minutes of the re-tally were prepared the same night and signed. He prays that the application be dismissed.

Determination

9. We have perused the record before us. It is clear that the Applicant's case is that the Respondents did not implement the orders of this Tribunal as ordered on 16th May, 2017 and as such they should be held in contempt. As regards the 1st Respondent, the Applicant's case is that the process leading to his declaration a winner having been contemptuous, he should not be allowed to benefit from the same hence his nomination certificate should be nullified. In response, the Respondents are unanimous that everything was done in accordance with the order of this Tribunal.

10. First, the Applicant urges that the Director of Elections be held in contempt. Upon evaluation of the case before us, we find that this matter is not one for contempt. The Respondents did not outrightly disobey this Tribunal's decision. All parties agree that it was 'implemented'. The point of departure is if what was done was in accordance with our directions or contra.
11. Upon evaluation of the parties' submissions, we find that in an attempt at implementing this Tribunal's decision, there was a meeting held on 17th May, 2017 at the Party's headquarters at Pangani. The Complainant raises concerns that when the tallying process began, they noted some anomalies and cases of forgery of Forms 3D, but when he tried to raise the same, he was shut down. That the meeting adjourned and directed that a verdict on the same was to be made later. It would appear this verdict was not given on the same day.
12. The 3rd Respondent submits that the outcome of the re-tally was announced on the same day at 8pm, being 17th May, 2017. On the contrary, the 1st Respondent being the person declared winner, says that the decision was made the following day. Why the conflict in the date of declaration of the re-tally? The Applicant says that when the decision was made, he did not know. A re-tally need be concluded and announced in the presence of all parties or their agents. Taken holistically, we find the Applicant's allegations are uncontroverted, especially as regards the legality of the Forms 3D used. The 3rd Respondent does not satisfactorily rebut this but only dismisses them.
13. The Tribunal has also noted the explanation given and captured in the 'minutes' on the use of 'scenarios' and fails to fathom the implication of such a concept in re-tallying of results.
14. We also find that the plea for *res judicata* does not arise as what the Applicant is simply asking is the enforcement of this Tribunal's orders and not a re-opening of the case on litigated issues.

15. The upshot is that we find that in an attempt to implement this Tribunal's Judgment of 16th May 2017, the 2nd to 4th Respondents have failed. They merely engaged in circumvention of the same. As a consequence, we make the following orders:

(i) The Notice of Motion application dated 22nd May, 2017 is hereby allowed in the following specific orders:

(a) The Nomination Certificate issued to Robert Pukose by the 3rd Respondent, Jubilee Party, is hereby revoked.

(b) The 3rd Respondent, Jubilee Party is hereby directed to conduct a fresh nomination exercise to determine its nominee for Member of National Assembly, Endebes Constituency, Trans Nzoia County with the next 96 hours of this Judgment

(ii) The 3rd Respondent shall bear the costs of the Applicant.

(iii) Other parties to bear their own costs.

16. Orders accordingly.

DATED and DELIVERED AT NAIROBI this 26TH DAY OF MAY 2017

Kyalo Mbobu

Chairman

James Atema

Member

Hassan Abdi

Member