



THE REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI  
COMPLAINT NO. 323 OF 2017

BENSON NYAICHORO MAISORI.....APPELLANT  
VERSUS  
KABURU BUSUNKWI.....1<sup>ST</sup> RESPONDENT  
KENYA AFRICAN NATIONAL UNION (KANU) NATIONAL ELECTIONS  
BOARD.....2<sup>ND</sup> RESPONDENT  
INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSSION.....INTERESTED  
PARTY

JUDGMENT

1. The present dispute relates to the 2<sup>nd</sup> Respondent's nomination for Member of the National Assembly, Kuria East Constituency. The matter was first brought to the Tribunal vide *Complaint 169 of 2017* where the 1<sup>st</sup> Respondent challenged the 2<sup>nd</sup> Respondent's conduct of nominations. He contended that the 2<sup>nd</sup> Respondent had issued him with a nomination certificate after indicating that no nomination exercise would be conducted in respect of the said seat as he was the only candidate. Later on, however, he was notified that another nomination certificate had been issued to the Claimant. Being aggrieved with the issuance of the second certificate, he attempted to resolve the matter within the 2<sup>nd</sup> Respondent's internal dispute resolution mechanism, and when the matter was not addressed speedily, he approached the Tribunal for relief.
2. The Tribunal, by a decision dated 13 May 2017 directed that the 2<sup>nd</sup> Respondent set up a mechanism for arriving at the party nominee for Kuria East in line with the party constitution and the election and nomination rules.

3. It is the Claimant's contention that the party had notified him that he was the only candidate for the said seat who had complied with the rules and who had been cleared to take part in the nomination exercise and as such, was issued with a certificate of nomination on 9 May 2017. He further contended that his name was forwarded to the Independent Electoral and Boundaries Commission (IEBC), the Interested Party herein, but when he appeared for clearance, he was notified that the 1<sup>st</sup> Respondent's name had been forwarded to the Interested Party as its nominee for the said seat. In support of this averment, he relied on a list purportedly prepared by the party with his name indicated as the nominee for KANU for the said electoral seat.
4. He further averred that on several occasions between 6 June and 15 June 2017, he attempted to have the matter resolved by the KANU Dispute Resolution Committee, which body contended that it had already adjudicated over the matter and a decision reached. It was the Claimant's contention that the said decision was never communicated to him and therefore the party's decision to substitute his name with that of the 1<sup>st</sup> Respondent was reached without his being given an opportunity to be heard. Nevertheless, he discovered through social media that the party, by a letter dated 19 May 2017 and prepared by the chairperson of the 2<sup>nd</sup> Respondent to the Interested Party, had substituted his name with that of the 1<sup>st</sup> Respondent without his knowledge and without his being given a right to be heard.
5. He therefore prayed that the Tribunal restrain the Interested Party from including the 1<sup>st</sup> Respondent's name from as the KANU nominee from the gazette notice, that the decision of KANU to present the 1<sup>st</sup> Respondent's name as its nominee be declared null and void, that the 2<sup>nd</sup> Respondent be compelled to forward the Claimant's name to the Interested Party, that the Interested Party be

compelled to gazette the Claimant as the KANU nominee for the Kuria East seat and for costs.

6. The 1<sup>st</sup> Respondent, in his Replying Affidavit dated 19 June 2017, contended that his nomination was as a consequence of the decision of the Tribunal issued on 13 May 2017. It is the 1<sup>st</sup> Respondent's position that following that decision, the party proceeded to nominate him for the said position in its discretion and taking into account all relevant factors. In support of this averment, he relied on a letter prepared by the Chairperson of the 2<sup>nd</sup> Respondent directing the IEBC to substitute the Claimant's name with that of the 1<sup>st</sup> Respondent.
7. The 1<sup>st</sup> Respondent also contended that the matter was *res judicata* as the dispute had already formed the subject of the Tribunal's decision in **Complaint 169 of 2017**. He asserted that rather than bring the present complaint, the Claimant ought to have gone on appeal of Tribunal decision to the High Court. He therefore urged that the application be dismissed for not revealing a cause of action and for being overtaken by events.
8. The 2<sup>nd</sup> Respondent in a Replying Affidavit sworn by the Chairperson, denied the assertion that the Claimant was the only candidate for the said electoral seat. While conceding that no nomination exercise had taken place, he maintained that the party was within its constitution to directly nominate the 1<sup>st</sup> Respondent as provided for in Article 24(9) of its constitution and paragraph 6 of its Nomination Rules which reserve the right to nominate a candidate so long as no voting has taken place. It was also their assertion that even where there were two candidates who had been cleared, the rules gave the party the mandate to directly nominate a candidate.

9. The 2<sup>nd</sup> Respondent controverted the Claimant's assertions that he had attempted to resolve the dispute with the party on several occasions, asserting that no evidence was adduced in this regard.
10. It was the 2<sup>nd</sup> Respondent's position that the Claimant, having submitted himself to the 2<sup>nd</sup> Respondent, could not turn around and plead a violation of his rights. The 2<sup>nd</sup> Respondent maintained that they acted in accordance with the constitution and party rules in forwarding the 1<sup>st</sup> Respondent's name to the Interested Party and therefore prayed that the Application and Claim be dismissed with costs.

**Issues for Determination**

11. It is not disputed that two candidates, the Claimant and the 1<sup>st</sup> Respondent, were cleared to participate in the KANU nominations for the Kuria East constituency nominations. It is also not in dispute there was no nomination exercise and that the 2<sup>nd</sup> Respondent was directed by the Tribunal to use a fresh process to arrive at a nominee.
12. What is in dispute is whether the process used to arrive at the 1<sup>st</sup> Respondent as the nominee for the said electoral seat can be upheld for being in accordance with the party constitution and election and nomination rules as directed by this Tribunal on 13 May 2017 as well as the Constitution.
13. It is also asserted by the 1<sup>st</sup> Respondent that the matter is *res judicata*, since the parties to this Complaint are the same ones in **Complaint 169 of 2017**.

**Analysis**

**Whether the present complaint is *res judicata***

14. In order to determine whether this matter is *res judicata*, we are guided by section 7 of the Civil Procedure Act, which provides as follows:

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been finally heard and determined by such court.*

15. We note that the parties in the present matter are the same ones in *Complaint 169 of 2017*. However, we disagree with the assertion by the 1<sup>st</sup> Respondent that the matter has already been heard and determined. The matter directly and substantially in issue in the present complaint is not the issuance of two nomination certificates, which was the subject of *Complaint 169 of 2017*, but the decision of the 2<sup>nd</sup> Respondent to directly nominate the 1<sup>st</sup> Respondent following the directive of this Tribunal that the 2<sup>nd</sup> Respondent arrive at a nominee in accordance with the Party constitution and the Election and Nomination Rules. We therefore find that this matter is properly before us.

#### **Whether the decision of the 2<sup>nd</sup> Respondent ought to be upheld**

16. It is clear that the Claimant, having been cleared by his party and having had his name forwarded to the Interested Party, had a legitimate expectation that he would be cleared by the Interested Party to participate in the general elections.
17. While the party constitution reserves the right for the party to directly nominate candidates to participate in the general elections, this power does not give the party a *carte blanche* to violate the constitutional dictates of natural justice. Compliance with the letter of the party constitution and nomination and election rules does not exempt the 2<sup>nd</sup> Respondent from complying with constitutional principles. Indeed, Article 91 of the Constitution requires all political parties to abide by the principles of good governance and democracy, to respect the rights of all persons to participate in the political process and to respect and promote human rights and fundamental freedoms. This would include the right to a fair

hearing and fair administrative action before adverse action is taken against a party member. It is therefore not sufficient for the 2<sup>nd</sup> Respondent to claim compliance with the letter of its constitution where this results in a violation of constitutional principles.

18. We agree with the Claimant that these constitutional principles preclude unilateral and arbitrary decisions by political parties. We are guided in this respect by our earlier dicta in *Elijah Omondi v Orange Democratic Movement & Another Complaint 251 of 2017* at paras 9 and 10:

*We note that Article 91 of the Constitution, which establishes political parties as agencies of the democratic process, requires political parties to abide by the principles of good governance and democracy. They must also promote the principles and objects of the Constitution including the national values and principles of governance. We agree with the Claimant and hold that the current Constitution engenders a culture of justification in which every decision by a political party must be justified. The culture of justification demands that a political party must supply an affected person with the reasons for the party's decision. It is only by supplying reasons that it can be ascertained whether or not the decision is reasonable and justifiable in an open and democratic society.*

19. The 2<sup>nd</sup> Respondent never controverted the Claimant's assertion that he was neither notified of the decision, nor was he given reasons for the same. The 2<sup>nd</sup> Respondent's decision can therefore not be justified in an open and democratic society. We decline to uphold the same.

## **ORDERS**

20. In light of the foregoing, we order as follows:

- a. The nomination of the 1<sup>st</sup> Respondent as the nominee for the Kuria East National Assembly seat be and is hereby nullified.
- b. That the 2<sup>nd</sup> Respondent organize, and the Claimant and the 1<sup>st</sup> Respondent attend, a meeting at the party headquarters to determine the

nominee for the Kuria East Member of the National Assembly seat within 48 hours.

- c. That notification issue to the IEBC.
- d. That each party bears its own costs.

**Dated at NAIROBI this 20<sup>th</sup> DAY of JUNE 2017**

- 1. Kyalo Mbobu (Chairperson) .....**
- 2. James Atema (Member) .....**
- 3. Hassan Abdi (Member).....**