



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT NO. 28 OF 2017

BOB MICHENI NJAGI.....COMPLAINANT

-VERSUS -

KAKUTA OLE MAIMAI.....1ST RESPONDENT

THE RETURNING OFFICER KAJIADO EAST

CONSTITUENCY.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY... 3RD RESPONDENT

JUDGMENT

Pleadings

1. This matter has come to the Tribunal by way of a complaint dated and filed on 25th April 2017. Together with the complaint was filed a notice of motion application dated 25th April 2017. The complaint is supported by witness statements and supporting affidavits of Bob Micheni Njagi, Fredrick Lalier Kingangir, Lydia Ngaira Odongo and Peter Otieno Atara; all filed on 25th and 26th April 2017, respectively; and written submissions dated 28th April 2017.
2. The Complainant an aspirant for the position of Kajiado East Constituency Member of Parliament and is seeking that this tribunal grant the following orders;

- i. A declaration be made that the nomination exercise by the Orange Democratic Movement for Kajiado East Parliamentary seat conducted on the 18th April 2017 was not in compliance with the law in particular with the provisions of Article 10, 38,083 and 91 of the Constitution
 - ii. A declaration that the conduct of the Returning Officer in allowing agent of one of the candidates to participate in the custody and transportation of election material was contrary to the constitution thus illegal and irredeemably compromised the free and fair nomination in Kajiado East Constituency and thus declared the conduct of the nomination a nullity.
 - iii. A declaration that the nomination exercise was a nullity in its entirety.
 - iv. A declaration that fresh nomination exercise be ordered for the entire Kajiado East Constituency.
 - v. That the Constituency Elections Board be disbanded and a fresh one be constituted for the purpose of the conduct of fresh nominations.
 - vi. A declaration that the Returning Officer grossly misconducted himself and be disqualified to act in any electoral exercise.
 - vii. Costs be awarded to the claimant.
3. On the 25th April 2017 the claimants notice of motion application was placed before the Tribunal and upon hearing Mr. Owuor counsel for the complainant, the Tribunal certified the matter urgent; granted leave to the complainant to file a simultaneous complaint; granted the respondent time to file their responses on or before 27th April 2017; granted an interim order against a repeat of the nomination at St. Monica School within Kajiado East Constituency on the 26th April 2017; and restrained the 3rd respondent from declaring the final results of the nomination exercise within Kajiado East Constituency pending hearing and determination of the complaint on the 28th April 2017.

4. Subsequently on the 27th April 2017, the complainant moved the Tribunal by way of chamber summons dated 27th April 2017, under a certificate of urgency seeking that the interim order granted on the 25th April 2017, staying the repeat nomination exercise at St. Monica polling station be amended to include, Solinke, Kitengela Primary and Noonkopir polling stations in Kajiado East Constituency. The Tribunal granted the stay order in respect of the three polling stations.
5. The complainant is challenging the nomination exercise of the respondent in Kajiado East Constituency on grounds that it was marred by pervasive irregularities. The complainant states that the National Appeals Tribunal in a decision delivered on 24th April 2017, found that the nomination process of the Respondent in Kajiado East was flawed with irregularities and ordered a repeat of the nomination process in four polling stations namely St. Monica, Solinke, Kitengela Primary and Noonkopir.
6. The complainant submits that the nomination process was badly managed and not in accordance with the law as to elections; that the election be vitiated irrespective of whether the results is affected or not. To support his arguments the complainant relied upon the case of **Morgan v Simpson [1975] 1 Q.B 151**, **Gatirau Peter Munya V Dickson Mwenda Githinji & 2 Others**, *Supreme Court Petition No 2B of 2013* and **Rozaah Akinyi Buyu V Independent Electoral Commission & 2 Others** Kisumu Election Petition No. 3 of 2013 to urge this Tribunal to order a repeat of the entire nomination process of Orange Democratic Movement Kajiado East Constituency.
7. On the other hand, respondents filed a replying affidavit sworn on 26th April 2017 by Anthony Moturi. The crux of the reply is that this Tribunal should uphold the decision of the National Appeals Tribunal that ordered for a repeat of the nomination process at St. Monica, Noonkopir, Solinke and Kitengela primary school polling stations in accordance with the party's constitution, nomination and election rules.

8. The respondent submits that this Tribunal should be guided by the findings of the National Appeals Tribunal decision dated 24th April 2017 as it had the advantage for the hearing and determining the dispute based on the evidence adduced by the complainant and his witness in an *ex parte* hearing.
9. The respondent alleges that at the hearing of the dispute before the National Appeals Tribunal the claimant was specific in his submission and submitted on irregularities affecting the four polling centers namely St. Monica, Solinke, Kitengela Primary and Noonkopir and that they are not objecting to a repeat of the nomination exercise in these four polling stations.
10. In addition, the respondent submits that the National Appeals Tribunal had the opportunity to analyze the unchallenged and specific evidence adduced by the complainant. He urged the Tribunal to take into account the fact that the claimant failed to show that the irregularities affected the entire results of Kajiado East Constituency and the time left for organizing a fresh nomination process in Kajiado East Constituency.
11. He concluded by reiterating that the Tribunal should uphold the finding of the National Appeals Tribunal for the reason that the decision was based on evidence presented before it whereas the Tribunal did not have the advantage of considering the said substantive evidence.

Issue for determination

12. Upon hearing of the parties' submission the main issue for determination is whether the claimant has made a case to warrant a repeat of the nomination process for Member of Parliament of Kajiado East Constituency.

Analysis

13. It is the complainant, submission that the nomination process was marred with pervasive irregularities namely that; the Returning Officer failed to keep custody of and to ensure integrity of the elections materials thus compromising the accountability and verifiability of the elections; that there was official cancellation and suspension of the nomination exercise upon consultations with all candidates; the Returning Officers and the National Elections Board and despite this voting continued in certain areas; there was breach of Articles 38 and 81 of the Constitution by zoning polling station in collusion with security officers; mis-match of voters registers in various polling stations and lack of accuracy, accountability and verifiability of the elections results.
14. The complainant alleges that a meeting of the County Elections Board and all aspirants was held on 18th April 2017, and that it was agreed that the County Elections Board cancels the nomination process of Kajiado East Constituency an argument refuted by the respondent.
15. Looking at the importance of elections and the crucial role they play in a democratic society it is improper for cancellation of an event of such magnitude to be so casually cancelled as alleged to have been done in this instance. It ought to be done in a more structured and open way where all stakeholders are fully involved. An election process is not a one off of event, it is a culmination of processes and events aimed at ensuring the participants exercise their democratic right leading to the declaration of a winner. It involves many stakeholders who include the voters, the aspirants, and the election officials.
16. We note that such a weighty allegation ought to have been supported by sufficient evidence and or a declaration of cancellation of the nomination process or a notice to that effect. Suffice to say, that a mere allegation of cancellation of a nomination process should not be a ground for nullifying the elections proof of cancellation must be provided.

17. In reference to the other allegations by the complainant we find that the complainant has failed to specifically prove to this Tribunal how the irregularities affected the entire results of the polling stations within Kajiado East Constituency to warrant the nullification of the nomination exercise within the entire constituency. We find that the complainants statements are more geared towards general statements which fail to fail to explain how the irregularities affected the results. We are guided by the Supreme Court decision in the *Raila Odinga v. Independent Electoral Boundaries Commission & Others*, Supreme Court Election Petition No. 5 of 2013, which enjoins that

a Court is to consider the effect of the alleged irregularities on the election result, before nullifying an election. It is only upon a finding that the irregularities proven affected the declared election results, that a Court will nullify an election

18. We also wish to note that the complainant appeared before the National Appeals Tribunal, he presented his evidence and submissions without opposition from the respondent technically, this evidence was not subjected to cross examination to verify its veracity. It is his evidence and submission that informed the decision of the NAT that ordered for a repeat in the four polling station by stating that;

'taking into account the submissions of the appellant and the Returning Officer the tribunal find that in four polling stations St. Monica, Solinke, Kitengela Primary and Noonkopir no results were recorded and the electoral process was never concluded.

19. In addition, we also note that the respondents urge the tribunal to uphold the finding of the National Appeals Tribunal for the reason that the National Appeals Tribunal based its findings on the evidence presented before it and it would only be fair for the parties if the Tribunal ordered so. We agree with the respondents. We

also note that due deference must be accorded to the internal dispute resolution mechanism of the political parties and the decisions in order to promote and enhance intra-party democracy in their operations.

Orders

- i. The claimant has failed to demonstrate that the nomination exercise by the Orange Democratic Movement for Kajiado East Parliamentary Seat conducted on the 18th April 2017 failed to comply with the provisions of the Article 10, 38, 83, and 91 of the Constitution.
- ii. The decision is that the judgment and consequential orders of the Orange Democratic Movement National Appeals Tribunal in NAT Appeal No. 11 of 2017 is upheld in its totality

It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF APRIL 2017.

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