



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI

COMPLAINT NO. 305 OF 2017

DAVID M. MBUTHI.....COMPLAINANT

VERSUS

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

PETER MAUNDU.....2<sup>ND</sup> RESPONDENT

JUDGMENT

*Summary of the Case*

1. The Complainant is disputing the decision of the 1<sup>st</sup> Respondent to issue the 2<sup>nd</sup> Respondent with the nomination certificate for the senatorial position for Makueni County on grounds that he was the only person who was nominated by the 1<sup>st</sup> Respondent. The Complainant averred that when he travelled to Nairobi to collect his nomination certificate, he learnt that the same had been issued to the 2<sup>nd</sup> Respondent whose name had also been submitted to the Independent Electoral and Boundary Commission.
2. Aggrieved by the said decision, the Complainant wrote to the 1<sup>st</sup> Respondent via a letter dated 15<sup>th</sup> May 2017 and received on 17<sup>th</sup> May 2017 requesting the 1<sup>st</sup> Respondent to immediately write to the IEBC to correct the mistake. In the same letter also, the Complainant requested the IEBC to write to the 1<sup>st</sup> Respondent to ascertain the latter's rightful nominee for the Makueni Senatorial position in order to

avert wrangles. However, the said letter was never acted upon prompting the Complainant to approach this Tribunal for following reliefs:

- (a) A declaration that the Complainant was the valid nominee for the 1<sup>st</sup> Respondent's senatorial position for Makueni.
  - (b) An order directing the 1<sup>st</sup> Respondent to forward the Complainant's name to the IEBC as 1<sup>st</sup> Respondent's valid nominee for the 1<sup>st</sup> Respondent's senatorial position for Makueni.
3. In reply, the 1<sup>st</sup> Respondent opposed the complaint for two main reasons, namely; first, that the Complainant had failed to invoke the 1<sup>st</sup> Respondent's internal disputes resolution mechanism as required by the law. Secondly, that the 1<sup>st</sup> Respondent was free to give direct nomination to the 2<sup>nd</sup> Respondent considering there was only one aspirant for the position. For these reasons, the 1<sup>st</sup> Respondent prayed for the dismissal of the Complainant's case.

#### *Issue for Determination*

4. The primary issue is whether the Tribunal had jurisdiction to entertain this matter.

#### *Analysis*

5. On this issue, we wish to emphasise that it is a trite law that a court has no business entertaining a matter once it establishes that it lacks jurisdiction. The *locus classicus* statement of Hon. Justice Nyarangi JA in *The MV "Lilian S"* case still holds good and as a Tribunal, we stand guided by it. The good Judge opined, "*Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.*"
6. Our understanding of the foregoing is that a court of law must first satisfy itself of jurisdiction before proceeding to entertain a claim placed before it, which we hereby do. *Section 40* of the *Political Parties Act, 2011 (as revised in 2016)* outlines the

jurisdiction of the Tribunal and gives it the mandate, in paragraph (fa) of the said provision, to resolve disputes arising from party primaries. This is the nature of dispute between the Complainant and the Respondents.

7. That said, we are alive to the provisions of *section 40 (2)* of the *Political Parties Act, 2011*, which requires the Tribunal to assume jurisdiction over certain disputes only after such disputes have been referred to an internal dispute resolution of a political party. With regard to party primary disputes it would be important to note that *section 13 2A* of the *Elections Act* gives political parties thirty days within which to resolve such disputes, which raises the question as to whether it is mandatory or optional for a disputant to first refer his or her complaint to the internal dispute resolution mechanism of a political party before coming to the Tribunal.
8. The High Court position on this question appears to be varied. In the case of *Erick Kyalo Mutua vs. Wiper Democratic Movement (K) & Another Election Appeal No. 4 of 2017*, Onguto J, at paragraphs 47 and 48 of the said case, held that the Tribunal had original jurisdiction and as such, could entertain a party primary dispute directly in appropriate circumstance without having to insist that such a dispute must first be referred to an internal dispute resolution mechanism of a political party.
9. The judge went further to explain that there was a concurrent jurisdiction and a disputant may either land before the Tribunal or the political party's internal dispute resolution mechanism. In effect, it was the Court's stand that it was optional for a person refer his or her complaint to the internal dispute resolution of a political party.
10. However, in the case of *Hon. Rachel Nyamai vs. Jubilee Party of Kenya & Another Election Appeal No. 58 of 2017* Muchelule J allowed the appeal on the basis that the Political Parties Disputes Tribunal did not have jurisdiction to entertain the Complainant's case since the Complainant had not exhausted the internal disputes

resolution as required by the law. In the case, 1<sup>st</sup> Respondent directly nominated the 2<sup>nd</sup> Respondent despite there being more than one candidate for nominations.

11. The learned judge characterised the dispute as one involving a member of a political party and a political party, which according to *section 40 (2)* of the *Political Parties Act, 2011* requires the Tribunal to assume jurisdiction only after such disputes have been referred to an internal dispute resolution of a political party. According to this decision, therefore, it was mandatory upon the aggrieved party to first lodge his or her dispute with a political party's internal disputes resolution mechanism in order to gain standing before the Tribunal.
12. In light of the foregoing, it is significant pointing out that there is an overlap among some of the disputes outlined in *section 40 (1)* of the *Political Parties Act*. For instance, it is our interpretation of the law that a party primary dispute can be characterised as a dispute between a member of a political party and a political party or as a dispute between members of a political party. Meaning, despite being a distinct dispute according to the *Act*, a party primary dispute ordinarily ought to be referred first to a political party's internal disputes resolution mechanism.
13. To augment this view, we seek recourse from *section 13 2A* of the *Elections Act*, which gives political parties thirty days within which to resolve such disputes. This Tribunal is persuaded to take the view that it is not in vain that the law requires a party primary dispute to be resolved internally by a political party's dispute resolution mechanism.
14. Having said so, we wish to point out that this Tribunal has always taken the position that even a complaint letter would suffice as evidence that a party has invoked *section 40 (2)* of the *Political Parties Act* or attempted an internal dispute resolution mechanism. This, in our view, is in appreciation of the short timelines within which the nomination process must be concluded as the country gears up for the forthcoming general elections.

15. A close examination of the Complainant's letter to the 1<sup>st</sup> Respondent, we noted that the Complainant requested the 1<sup>st</sup> Respondent to immediately write to the IEBC to correct the mistake and at the same time asked the IEBC to write to the 1<sup>st</sup> Respondent to ascertain the latter's rightful nominee for the Makueni Senatorial position in order to avert wrangles. We find this to be not only contradictory but also ambiguous if not uncertain.
16. The said letter was contradictory in the sense that on one hand, the Complainant is asking the 1<sup>st</sup> Respondent to write to IEBC to rectify the mistake while at the same time asking the IEBC to write to the 1<sup>st</sup> Respondent to ascertain its rightful nominee for Makueni County. The ambiguity and uncertainty comes in at the point where one would be left wondering after reading the Complainant's letter as to who the complaint was directed. In other words, the Complainant fell short of requesting the 1<sup>st</sup> Respondent to resolve the issue.
17. For these reasons, we hold that the Complainant failed to invoke internal disputes resolution mechanism of the 1<sup>st</sup> Respondent as demanded by *section 40 (2)* of the *Political Parties Act, 2011*. Consequently, we are persuaded by the 1<sup>st</sup> Respondent's arguments that this Tribunal did not have the jurisdiction to entertain the instant complaint.

**Orders**

18. In the premises, this Tribunal orders as follows:

*(a) That the Complainant's case be and is hereby dismissed.*

*(b) No Order as to cost in order to foster party unity, growth and democracy.*

*Orders accordingly.*

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JUNE 2017**

**Kyalo Mbobu (Chairman) .....**

**James Atema (Member).....**

Hassan Abdi (Member).....