



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES TRIBUNAL AT NAIROBI
COMPLAINT NO. 151 OF 2017

DENNIS KARIUKI WAWERU COMPLAINANT

VERSUS

JOHN KIARIE WAWERU 1ST RESPONDENT

JUBILEE PARTY 2ND RESPONDENT

JUDGMENT

Case summary

1. The Complainant is the incumbent Member of Parliament for Dagoretti South Constituency. Together with the 1st Respondent, they vied to be nominated as the 2nd Respondent's, Jubilee Party, candidate for the position of Member of Parliament, Dagoretti South Constituency. The 1st Respondent was declared the winner, a declaration that aggrieved the Complainant. He moved the Party's Appeals Tribunal to challenge that decision, but his appeal was dismissed. Further aggrieved, he filed this Complaint with this Tribunal.
2. On 9th May, 2017 we certified this matter urgent and issued interim orders restraining the 2nd Respondent from issuing the final nomination certificate to the 1st Respondent and/or presenting the name of the 1st Respondent as the nominee of the 2nd respondent for the position of Member of Parliament, Dagoretti South.

Submissions

3. The Complainant argues that the decisions of the 2nd Respondent including its Appeals Tribunal, denied him his victory in the nomination exercise. He contends that he garnered 13, 101 votes in 23 polling stations while the 1st Respondent garnered 9,976 votes as indicated in the County Tallying Sheet. However, that the Returning Officer declared that he received 9454 against the 1st Respondent's 9,976 which was erroneous. He submits that at no time was the 1st Respondent ever declared the winner and contends that whoever declared the 1st Respondent winner was not the Returning Officer or a Jubilee Party Official.
4. He argues that his appeal filed with the Jubilee Appeals Tribunal on 27th April, 2017 was not heard and determined on its merit, but dismissed without reasons in contravention of rules of natural justice. That he has never been given a copy of the decision to date.
5. He submits that the nomination exercise was flawed as the 2nd Respondent's NEB introduced the use of National Identity cards instead of the party register, which gave room to non-party members to participate in the election. That there was voter importation of non-voters., and cases of pre-marked ballot papers in favour of the 1st Respondent. His case is further supported by an affidavit of John Kavera Kimani, a voter who describes himself as an observer.
6. Despite being served, the 1st Respondent did not enter appearance or file a response.
7. The 2nd Respondent filed a Complaint dated 10th May, 2017 sworn by Stephen Ombasa, its Legal Counsel. He urges that the Complaint be struck out for lack of specific remedies being sought; hence, it is fatally defective and should be struck out with costs. That there is no evidence adduced to help this Tribunal reach a verdict as the allegations are mere hearsay. That his appeal before the Appeals Tribunal was dismissed for he did not adduce evidence to indicate the electoral malpractices. He argued that the complaint was on a fishing expedition.

Determination

8. We note that despite being served, the 1st Respondent chose not to enter an appearance or file a response in this matter. A court of law, or a Judicial Tribunal like this one, will always be hesitant to make orders that might impact on a party

where that party is not before it. This is the embodiment of the tenet of natural justice as expressed in the phrase, *Audi alteram partem*. However, where a party, even after being given the opportunity to be heard, chooses not to appear, then such a party waives his right to rely on the doctrine of *Audi alteram partem*. He/she cannot cry foul when orders are made that impact him. Consequently, as a Tribunal we disapprove the 1st Respondent's decision not to participate in this proceedings despite having notice.

9. The Complainant has submitted that the NAT decision was not reasoned and that his appeal was dismissed not on merit. The 2nd Respondent attached the decision, dated 4th April 2017 and this Tribunal has had a chance to read it. The issues for determination therein where:

“(i) Whether the irregularities (if any) were committed by the 1st respondent as alleged by the Complainants.

(ii) Whether the complainants were disadvantaged by the above mentioned irregularities as to justify the nullification of the nomination results and conduct fresh ones.

10. The NAT found that no enough evidence had been adduced to prove that the 2nd Respondent was involved in irregularities; and that it had not been proved that those irregularities if any, affected the results. As a result, the NAT dismissed the appeal and confirmed that results announced by the Returning Officer.
11. We have evaluated the record before us and the submissions of the parties and we find no basis for interfering with the NAT decision. Despite the allegations of the Complainant, we find the decision well-reasoned. While the Complainant alleges that the declaration of results was not done by a designated Returning Officer, the Complainant does not say who the person he alleges erroneously declared the results is. As regards the use of Identity Cards, the allegation that they were used instead of the party register is not clear. Ordinarily, an Identity Card is meant for identification of the person presenting himself. The Complainant has not demonstrated how its use was contrary to the Party's Constitution and Rules. As regards the other alleged irregularities of massive voters' importation and the pre-marked votes, we have not been directed to any evidence.

12. While the Complainant may be rightfully aggrieved with the delay in the delivery of the NAT ruling, we find no basis to interfere with its findings. We urge political parties to appreciate that in election matters, time is of the essence and as a consequence, there is need for timeous determination of disputes of this nature.

13. We find no merit in this Complaint and make the following orders:

- (i) Complaint dated 8th May 2017 is dismissed.*
- (ii) The decision of the Jubilee Party National Elections Appeals Tribunal delivered on 4th May 2017 is hereby affirmed.*
- (iii) The declaration of the 1st Respondent, John Kiarie Waweru, as the duly nominated Jubilee Party candidate for member of Parliament, Dagoretti South Constituency, Nairobi County is hereby affirmed.*
- (iv) In the interests of party unity, each party shall bear its costs.*

14. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2017

Kyalo Mbobu

Chairman

James Atema

Member

Hassan Abdi

Member