



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI

COMPLAINT NO. 306 OF 2017

ERIC KYALO MUTUA.....CLAIMANT

-VERSUS-

WIPER DEMOCRATIC MOVEMENT.....1ST RESPONDENT

GIDEON MUTEMI MULYUNGI.....2ND RESPONDENT

JUDGMENT

Summary of the Complaint

1. The present complaint concerns the 1st Respondent's repeat nominations for position of Member of the National Assembly for Mwingi Central Constituency held on 11th May 2017.
2. Dissatisfied with the initial nomination exercise conducted by the 1st Respondent on 24th May 2017, the Complainant lodged an appeal before this Tribunal in **Complaint/Cause No. 43 of 2017**, which directed the party to conduct a fresh nomination exercise in nineteen (19) of the polling stations. Unhappy with this order, the Claimant filed an appeal **Election Petition Appeal No. 4 of 2017** at the High Court. In its judgment delivered on 9th May 2017, the High Court determined that a repeat nomination exercise be conducted within the entire Mwingi Constituency within 72 hours.

3. In preparation for this repeat exercise, it is the Claimant's contention that the Chairperson of the 1st Respondent's National Elections Board (NEB) convened a meeting between the Claimant and the 2nd Respondent on 10th May 2017 where it was agreed *inter alia*:
 - a. Fresh ballot papers would be printed bearing the names of the Claimant and the 2nd Respondent,
 - b. Each candidate would have an agent at each polling station and;
 - c. Persons who perpetuate violence would be disqualified by the 1st Respondent's NEB.
4. The Claimant however averred that the nomination exercise conducted on 11th May 2017 was irregular, flawed, undemocratic and unfair. In his Supporting Affidavit dated 25th May 2017, the Claimant averred to nine particulars of irregularity which include *inter alia*: violence allegedly perpetrated by the 2nd Respondent and his supporters; voting without a voters' register or party membership list; voting by non-registered members; use of irregular ballot papers; transportation of voters by the 2nd Respondent, double voting and stuffing of ballot boxes.
5. It is also the Claimant's contention that the Returning Officer did not duly complete an Election Return Form and a Certificate of Return as per Rule 23.7 of the 1st Respondent's Election and Nomination Rules and he and his agents have not seen the official election results to date. Here the Claimant adduced a copy of the Presiding Officer's handwritten results which showed the 2nd Respondent had garnered 15,912 votes against the Complainant's 7,025 votes
6. Aggrieved with the outcome of the exercise, the Claimant lodged an appeal with the 1st Respondent's National Appeals Tribunal (IDRM) allegedly within the requisite 48 hours but at the time of filing this complaint, he was yet to receive

communication on the same despite paying a fee of KES 10,000 to facilitate its delivery.

7. The Claimant is now before this Tribunal seeking the following summarized orders:
- a. A Permanent injunction restraining the 1st Respondent from issuing a nomination certificate to the 2nd Respondent or presenting the name of the 2nd Respondent to the Independent Electoral Boundaries Commission (IEBC) as its nominee for the position of Member of National Assembly, Mwingi Constituency;
 - b. A declaration/order that the nomination exercise held on 11th May 2017 is null and void and the results be cancelled;
 - c. An order setting aside the 1st Respondent's decision to issue a nomination certificate to the 2nd Respondent for the aforementioned position;
 - d. An order that any action by the 1st Respondent forwarding the name of the 2nd Respondent to the IEBC as nominee or candidate for the aforementioned position is illegal, irregular, null and void; and that the 2nd Respondent's name should be struck out from the 1st Respondent's list of candidates for Mwingi Central Constituency and/or the 2nd Respondent's name should not be gazetted by the IEBC for the aforementioned position;
 - e. A declaration that the 1st Respondent is unable and or unwilling to conduct a free and fair nomination exercise for the position of Member of National Assembly for Mwingi Constituency;
 - f. A mandatory permanent injunction directed at the 1st Respondent to issue a nomination certificate to the Claimant;
 - g. Any other or further relief;
 - h. Costs of the suit.

The 1st Respondent's Submissions

8. From the onset, the 1st Respondent via a Replying Affidavit dated 31st May 2017, challenged the Tribunal's jurisdiction in this matter. Agatha Solitei, the Chairperson of the 1st Respondent's National Elections Board (NEB) argued against the Tribunal's jurisdiction in this matter claiming that the Complainant ceased to be a member of the 1st Respondent on 8th May 2017 and his resignation was subsequently confirmed by the Office of the Registrar of Political Parties. The Tribunal can therefore not entertain a dispute between an individual and a political party as per section 40(1) of the Political Parties Act and the claim should be dismissed forthwith.
9. It is also the 1st Respondent's contention that indeed a meeting was held with both the Claimant and the 2nd Respondent on the conduct of the repeat nominations to be held on 11th May 2017 in compliance with the orders of the High Court in **Election Petition Appeal No. 4 of 2017**. The 1st Respondent averred that the meeting was successful and that all the parties in attendance agreed to comply and support the winner of the nomination exercise.
10. It is also the 1st Respondent's contention that the repeat nominations held on 11th May 2017 in all the polling stations in Mwingi Constituency were both free and fair and the 2nd Respondent got 15,912 votes against the Complainants 7,025 votes.
11. With respect to the Complainant's assertions of voting irregularities during the nomination exercise, the 1st Respondent disputed the same and urged the Tribunal to put him to strict proof.

The 2nd Respondent's Submissions

12. The 2nd Respondent in his submissions before this Tribunal also challenged the jurisdiction of this Tribunal on two grounds:
 - a. that the Complainant had not lodged his appeal within the requisite 48 hours as provided for under Rule 6.2.5 of the 1st Respondent's Election

and Nomination Rules and therefore the Complainant had not exhausted IDRMs;

b. that the Complainant ceased being a member of the 1st Respondent and therefore lacks the capacity, locus and competence to institute these proceedings.

13. In his Supplementary Affidavit dated 31st May 2017, he also contended that the repeat nomination exercise held on 11th May 2017 was free and fair and that the present complaint is mischievous. The 2nd Respondent further argued that the allegations of electoral offences levelled against him by the Claimant are false and the complaint should be struck out accordingly.

Issues for determination

14. In our consideration, there are three main issues for determination:

- a. *whether the Tribunal has jurisdiction to hear the complaint before it;*
- b. *whether the 1st Respondent complied with the Constitution of Kenya, the Elections Act and the party election and nomination rules in conducting the repeat nomination exercise of 11th May 2017*
- c. *whether the repeat nomination exercise as conducted was representative of the membership of the party within Mwingi Constituency*
- d. *what reliefs, if any, should be granted.*

Analysis

- a. *whether the Tribunal has jurisdiction to hear the complaint before it;*

15. It is not in dispute that the Claimant attempted to resolve his dispute with the political party. The contention is whether the Complainant lodged his appeal before the party's IDRMs within the requisite 48 hours and whether he paid the necessary fees. This Tribunal notes that the Claimant attempted IDRMs within reasonable time after the declaration of results on 12th May 2017 and that there is

no evidence of any undue delay. The Claimant has further adduced a copy of a receipt dated 26th May 2017 as proof of payment of the appeals fee. This Tribunal is therefore satisfied with the Claimant's narrative of events and we find that this Tribunal has jurisdiction in this matter.

16. On the second issue of jurisdiction, the 1st and 2nd Respondents have submitted before this Tribunal that the Claimant ceased to be a member of the 1st Respondent from 8th May 2017 and therefore the Tribunal has no jurisdiction in this matter. The Respondents have adduced correspondence from the Office of the Registrar of Political Parties (ORPP) dated 8th May 2017 addressed to the 1st Respondent's advocates allegedly confirming that the Claimant was not a member of the party as at 8th May 2017. The 1st Respondent further adduced correspondence from the ORPP dated 26th May 2017 confirming that the Complainant was not a member of the party as of 26th May 2017.
17. The Claimant in his submissions adduced a copy of the correspondence dated 8th May 2017 sent to the ORPP purportedly written by him seeking to deregister from the party. He contended that he is not the author of the said letter and that the signature on the letter is also not his. He further argued that the two letters from the ORPP adduced by the Respondents are suspect and irregular and should be disregarded by the Tribunal.
18. From the record before this Tribunal, we note that the dispute pertaining to the Complainant's membership of the 1st Respondent was previously a subject of adjudication before the High Court in **Election Petition Appeal No. 4 of 2017** where Onguto J held:

"I am ready to extend the benefit of the doubt to the Appellant when he insists that he has never resigned from the 1st Respondent party. I must hasten to add that this will not prohibit the 1st Respondent from seeking any damages by way of

indemnity from the Appellant if it ultimately turns out that the Appellant had indeed resigned voluntarily from the 1st Respondent."

19. The 1st Respondent has again raised this issue before us arguing that the Claimant has no *locus standi* before this Tribunal as he ceased to be a member of the party as at 8th May 2017. We however note that despite this contention, the 1st Respondent proceeded to conduct a repeat nomination exercise on 11th May 2017 in consultation with the Claimant and conducted the said nomination exercise with the Claimant's name on the ballot papers. In consideration of the Claimant's submissions and the 1st Respondent's behaviour towards the Claimant, this Tribunal is not convinced that the Claimant resigned from the party of his own volition and finds that the 1st Respondent's behaviour towards the Claimant is not reflective of this resignation. This Tribunal therefore holds that it is properly seized of the matter and will proceed to interrogate the remaining two issues for determination.

b) whether the 1st Respondent complied with the Constitution of Kenya, the Elections Act, the party election and nomination rules in conducting the repeat nomination exercise of 11th May 2017

16. As previously indicated, the Claimant has submitted several particulars of voting irregularities of the repeat nomination exercise held on 11th May 2017 which have been disputed by both the 1st and 2nd Respondents.

17. The Claimant submitted Occurrence Book (OB) numbers in support of the three instances of violence including ballot stuffing allegedly perpetrated by the 2nd Respondent and his supporters. He further averred to incidences of double voting by the 2nd Respondent and his supporters.

18. The Tribunal considered the above submissions and the evidence adduced in support. The Tribunal is of the considered view that in the absence of any

additional tangible evidence in support of that submission, the Tribunal cannot find that the Claimant has adequately proven that the 2nd Respondent committed the said acts of violence and that these acts sufficiently affected the outcome of the election. We refer to **Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others [2014] eKLR** where the Court held the view that:

*As is clear from Section 83 quoted verbatim above, not every irregularity, particularly an inadvertent minor irregularity, will void an election. To void an election, the alleged irregularity or irregularities must impeach the integrity of that election and thus affect its result. So if the irregularity concerned or the cumulative effect of the many irregularities or malpractices shown to have been committed in the conduct of an election are so pervasive and/or so widespread that the integrity of the electoral process is put to question, and there is serious doubt cast on the validity of the numerical magic number and/or the same is indeterminate as was the case in **Richard Kalembe Ndile v. Patrick Musimba Mweu, [28]** that also affects the result of an election.*

19. The sample ballot paper adduced by the Claimant is dated 8th May 2017 and not 11th May 2017 which is the date of the repeat nomination exercise. It is therefore not clear whether the ballot paper adduced was the one used during the nomination exercise and therefore this piece of evidence does not conclusively support his allegation that irregular ballot papers were used during the repeat nomination exercise.
20. The Claimant further alleged that the Returning Officer did not complete the requisite Election Return Forms and Certificate of Return and that he and his agents are yet to see the official results. The handwritten tally of results of the Presiding Officer adduced by the Claimant does not prove that the requisite forms were not filled by the Returning Officer. We also note from the record

before us, that no declaration of results or election return forms have been adduced in order to conclusively determine whether the same were signed by the Complainant's agents.

21. Based on the foregoing, this Tribunal finds that the Claimant has not submitted sufficient evidence that the repeat nomination exercise was conducted in violation of the Constitution of Kenya, the Elections Act, and the party election and nomination rules as alleged in the Complaint before it.

c) whether the repeat nomination exercise as conducted was representative of the membership of the party within Mwingi Constituency

22. The Claimant averred that no party membership or voters register was used during the repeat nomination exercise. Further, that the number of voters who participated in the exercise were more than the registered members within Mwingi Central Constituency.

23. These allegations have been disputed by both the 1st and 2nd Respondents. The 2nd Respondent submitted that the repeat nomination exercise was conducted using the 1st Respondent's party membership list which has over 25,000 registered members in respect of Mwingi Central Constituency.

24. The party membership list in contention has not been adduced before this Tribunal by either party and therefore the Tribunal cannot conclusively determine whether the votes of the repeat nomination exercise is reflective of the number of registered members with respect to Mwingi Central Constituency.

25. Further, the copy of a booklet adduced by the Claimant is not sufficient proof that it was indeed used in place of a voters register as alleged by the Claimant.

Orders

26. The upshot of the foregoing analysis is that this Tribunal finds that no sufficient evidence has been adduced to prove the complaint to warrant the grant of orders

sought. The Complaint dated 25th May 2017 is accordingly dismissed with no orders as to costs.

DATED at NAIROBI this 2ND DAY of JUNE 2017

1. **Kyalo Mbobu (Chairman)**
2. **Paul Ngotho (Member)**.....
3. **Desma Nungo (Member)**