



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI
COMPLAINT NO. 237 OF 2017

GABRIEL BUKACHI CHAPIA.....CLAIMANT
VERSUS
ORANGE DEMOCRATIC MOVEMENT.....1ST RESPONDENT
EDWIN SIFUNA.....2ND RESPONDENT

JUDGMENT

Introduction

1. This claim relates to the 1st Respondent’s nomination of a candidate for the Nairobi senatorial seat. The claimant contends that he was at all material times the nominee and that the 2nd Respondent is but a late comer to the party. He seeks appropriate relief from this Tribunal. His first case filed at the High Court in Petition No 192 of 2017 was dismissed and later refilled as 201 of 2017.

Claimant’s Case

2. According to the Claimant, he was the unopposed contender during the primaries and holds a certificate of nomination dated 3rd April, 2017. The certificate had allegedly been issued to him personally by the ODM party leader – Raila Odinga.
3. The Claimant contests the 1st Respondent’s decision of 5th May, 2017 proclaiming the 2nd Respondent as its candidate for the Nairobi County Senatorial seat. His grievance is that the 2nd Respondent had contested and lost the Kanduyi parliamentary seat and had not been a part of the political party has no right or power to substitute a duly nominated candidate.
4. The Claimant therefore contends that the 2nd Respondent’s nomination is null and void *ab initio*. He further asserts that the 1st Respondent was bound to nominate its

candidates through a process and rules that respect fundamental rights and freedoms, observes the rule of law and the code of conduct for political parties.

5. Claimant seeks to distinguish the decision of this Tribunal in Complaint o

1st Respondent's Case

6. The 1st Respondent filed an affidavit sworn by Agnes Zani, its Secretary General on 11th May, 2017. Ms Zani testified that the Claimant submitted his application for consideration by the 1st Respondent to nominate him as its candidate for the position of Senator, Nairobi County.
7. Since there was no candidate at the time, according to Ms Zani, the 1st Respondent issued the claimant with a nomination certificate dated 3rd April, 2017. However, on 5th April, 2017 the IEBC issued a directive to the effect that no party primaries could take place until the names of aspirants had been gazetted by the Commission.
8. On 7th April, 2017, on account of the directive by the IEBC the Central Committee had a meeting in which it made a resolution to reschedule all nominations that had been scheduled and to recall all nomination certificates that had already been issued.
9. Further, on 19th April, 2017, a review of the Claimant's application demonstrated that he lacked the financial and logistical ability to mount a successful campaign. He had also not surrendered the withdrawn certificate to facilitate his nomination as the party's flag bearer.

2nd Respondent Case

10. The 2nd Respondent filed a notice of preliminary objection on the grounds that the Claimant lacks standing to bring the claim while the Tribunal has no jurisdiction to hear it. He averred that the party has a number of dispute resolution mechanisms which the Claimant had not pursued. A decision was made to interview any other aspirants for the position.
11. The 2nd Respondent also filed a Replying Affidavit sworn on 12th May, 2017. He invoked this Tribunal's decision in *Complaint No 47 of 2017 Hezron J Opiyo Asudi v*

Peter Anyang Nyong'o & others for the need to promote parties internal democracy and autonomy.

12. He further disclosed that the Claimant had concealed the fact that he had earlier moved the High Court for similar reliefs in **Petition Number 192 of 2017**. That Petition was dismissed by Mativo J for failure to move this Tribunal first. We note that the Claimant has admits he has re-filed the dispute as **Petition Number 201 of 2017**.
13. The 2nd Respondent further avers that through a notice dated 5th April, 2017 IEBC directed all political parties to that they could only validly conduct nominations between 13th April, 2017 and 26th April, 2017. As a result, all nomination certificates already issued including to the Claimant, on 3rd April, 2017, were rendered null and void. In response to the IEBC notice, the 1st Respondent *re-called* all nomination certificates in order to comply with the IEBC directives.
14. On 20th April, 2017 the 1st Respondent requested the 2nd Respondent to be its candidate for the Nairobi Senate seat because it did not have a candidate.
15. There was a meeting on 5th May, 2017 between the Claimant, the 1st Respondent, the ODM party leader and Nairobi's Governor Evans Kidero where the Claimant asserted that he would not contest the Nairobi Senatorial seat. The Claimant however wanted some compensation for his campaigns which request was granted: he would be reimbursed campaign expenses, he would be given a job within the county government at a grade higher than his current position as Ward Administrator and in the event NASA formed the government, he would be given a job within the Executive. There was also a request for the 2nd Respondent to inherit the Claimant's campaign infrastructure.
16. The 2nd Respondent relies on an affidavit sworn by Mr. Bernard Shilatukha Khatechi which corroborates the meeting and the negotiations that took place. We also note

that the Claimant admits at paragraph 20 to 21 that such meetings took place, but that his requests were denied.

Analysis

17. As we see it, the only issue for determination in this dispute is whether the 1st Respondent could directly nominate the 2nd Respondent as it did in the circumstances of this case.
18. We were referred to the definition of party primaries in the Political Parties Act, 2011 which extends to the process political party elects or selects its candidates for a forthcoming general election or for a forthcoming by-election. The 1st Respondent therefore contended that it had selected the 1st Respondent as its candidate for the Nairobi Senatorial seat.
19. We agree that a party can elect or select its candidates in accordance with its party constitution, but hasten to add that this discretion is not absolute. Indeed, in *Complaint No 48 John Mruttu v Thomas Ludindi Mwadeghu & 2 others at para 33* we held as follows:

Be that as it may, the power to grant direct nominations is not in our view an absolute power or a blank cheque to reward party stalwarts and cronies at the expense of ordinary party members. Instead, such a decision must adhere to the rules of natural justice and comply with the Constitution and all relevant statutes including the Political Parties Act and the Fair Administrative Action Act, 2015. The discretion is therefore not a panacea or magic cure for badly conducted party primaries.

20. In *Complaint No 192 of 2017 Charles O Okwemba v United Democratic Party & another* we held that this Tribunal will not, absent justifiable reasons, excuse a direct nomination where two or more candidates have been cleared to contest a party primary. Similarly, in *Complaint No 53 of 2017 Salah Yakub Farah v KANU National Elections Board & 2 others* we held that:

In view of the above, we hold that the Claimant having been cleared by the party had a legitimate expectation that the party would conduct primaries where he would get a fair chance to compete. We find that the 3rd Respondent violated the Claimant's legitimate expectation that nominations would be conducted when it purported to undertake a direct nomination while there were at least two candidates for the position of Member of National Assembly, Fafi Constituency. Moreover, under Article 47(2) of the Constitution and section 4 of the Fair Administrative Action Act, 2015 the party was expected to inform the Claimant of the party's decision not to conduct any nomination exercise in Fafi Constituency.

21. In the circumstances of this case, however, we are satisfied that the Claimant has been involved in negotiations with the party leader, the 1st Respondent and the 2nd Respondent to have the 2nd Respondent be the party's nominee for the Nairobi Senatorial seat.

22. The justification given by the 1st Respondent for this is first that the NASA coalition agreement compels it to front a candidate supported by Mr. Wetangula a leader to the 1st Respondent's coalition partner. This Tribunal in *Benard Muia Tom Kiala v Wiper Democratic Movement – Kenya & another* we commented on the value this Tribunal gives to coalition agreements in the following terms:

We are persuaded by the 2nd Respondent's submission that once a Coalition Agreement is registered with the Registrar of Political Parties (RPP) the parties are bound by the terms of that coalition agreement and that political parties are free to bargain and enter into coalitions subject only to the Constitution, the Act and that party's Constitution. This Tribunal recognizes coalitions as an essential driver of political togetherness and a means of bringing together different political parties and harmonizing competing entities, ideologies, diversities and other interests.

23. Another reason given to us was that averred that the 1st Respondent upon reviewing the Claimant's application established that he lacked the financial and logistical ability to mount a successful campaign. We were also informed that the Claimant had agreed to the proposal and had accepted to take up a leadership position within the party. The Claimant is asking us to pick him as the party's flag bearer instead of the 2nd Respondent.

24. We note that this dispute was never brought subjected to any kind of internal dispute resolution mechanism, to give the party a good faith chance to resolve it in the first instance. In those circumstances, we find that this dispute was filed prematurely before us. We borrow our verdict in *Complaint No 47 of 2017 Hezron J Opiyo v Peter Anyang Nyong'o & others*:

The requirement for invocation of parties' IDRM has its rationale. Article 4(2) of the Constitution declares in no uncertain terms that Kenya shall be a multi-party democratic state founded on the national values and principles of governance referred to in Article 10. Hence there is need for everyone, this Tribunal included, to

promote and protect the multi-party system in our country.
This is the rationale of section 40 of the Political Parties Act, 2011; promotion of internal parties internal democracy and autonomy.

Reliefs

25. In *Complaint No 40 John Mruttu v Thomas LudindiMwadeghu & 2 others* we held that in every matter over which we have jurisdiction, this Tribunal can grant any order that is just and equitable in accordance with section 11(1) of the Fair Administrative Action Act, 2015. The proper discharge of this Tribunal's mandate requires it to grant effective remedies, which means the most appropriate remedy in the circumstances of the case.

26. Accordingly, the justice of this case requires us to make the following orders:

(a) An order be and is hereby issued that the dispute between the Claimant and the 2nd Respondent over the position of Member of the Senate, Nairobi County is referred back to the 1st Respondent's National Elections Board to nominate its Senator candidate in Nairobi County.

(b) In the interest of party unity, let each party bear its costs of this petition

DATED and DELIVERED at Nairobi this 16th day of May 2017

Kyalo Mbobu

Chairperson

James Atema

Member

Hassan Abdi

Member