



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI

COMPLAINT NO. 258 OF 2017

IBRAHIM ABDI ALI.....COMPLAINANT

VERSUS

NATIONAL ELECTION BOARD, ODM.....1ST RESPONDENT

ABDIRIZAK ISMAIL SHEIKH.....2ND RESPONDENT

RULING

Summary of the Case

1. The application before the Tribunal is the amended Notice of Motion dated 29th May 2017. It sought for the following prayers:
 - (a) The certification of this application as agent.
 - (b) An order enjoining the proposed 2nd Respondent as a party to these proceedings.
 - (c) An order setting aside the Tribunal’s judgment dated 17th May 2017.
 - (d) An order to stay the execution of the said Tribunal’s judgment pending the determination of this application.

- (e) An order restraining the Independent Electoral and Boundaries Commission from gazetting the name of the Complainant as the 1st Respondent's nominee for Galbet Ward.
 - (f) An order barring the 1st Respondent from submitting the Complainant's name to the Independent Electoral and Boundaries Commission for the position of the Member of County Assembly for Galbet Ward.
2. The application was placed before the Tribunal on 31st May 2017 when the same was certified urgent and directions on service, filing of response and submissions duly granted. Importantly, the matter was placed before the Tribunal on 2nd June 2017 by which date the proposed 2nd Respondent/Applicant had filed and served an amended Notice of Motion dated the 31st May 2017 in he prays as follows:
- (a) The certification of this application as agent.
 - (b) An order enjoining the proposed 2nd Respondent as a party to these proceedings.
 - (c) An order setting aside the Tribunal's judgment dated 17th May 2017.
 - (d) An order to stay the execution of the said Tribunal's judgment pending the determination of this application.
3. In the said application, the 2nd Respondent explained that the Complainant had concealed material fact and misled the Tribunal when he failed to enjoin the 2nd Respondent as a party to the proceedings while in fact the Complainant knew that the 2nd Respondent was the person nominated by the 1st Respondent for the position

of the County Assembly Member, Galbet Ward, Garissa Township Constituency, Garissa County.

4. In reply, the 1st Respondent opposed the 2nd Respondent application herein arguing that the complaint was against the 1st Respondent and not any other person. The 1st Respondent therefore termed the 2nd Respondent's application as an attempt to ventilate his grievance through backdoor and as such, was not merited for review.

Issue for Determination

5. The primary issue for determining in this application is whether the 2nd Respondent's case is merited.

Analysis

6. The law on review of judgment is underpinned in the *Civil Procedure Act, Cap 21* and *Civil Procedure Rules* in *section 80* and *Order 45*, respectively, which set out three grounds upon which a court may consider an application for review. These are, first, the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by such applicant at the time when the decree was passed or the order made. Second, the existence of a mistake or an error apparent on the face of the record and third, any other sufficient reason.

7. The three grounds are what ordinarily would define the boundaries of triable issues whenever a defendant approaches a court for a review of its own judgment as was held in the case of *Ndungu Njau vs. National Bank of Kenya*. However, the relevant one for our purpose in this matter is the third ground; that is any other sufficient reason. In this regard, *Rule 24 (1) and (2) of the Political Parties Dispute Tribunal (Procedure) Regulations, 2017* provides as follows:

24 (1) "A party against whom a decision has been made under regulations 20 and 21 may apply to the Tribunal to set aside the decision."

24 (2) "The Tribunal shall not set aside any decision unless it is satisfied that the party has given sufficient cause for non-appearance."

8. The 2nd Respondent has averred that he was the person nominated by the 1st Respondent and whose name was forwarded to the IEBC as the valid nominee for the position of the County Assembly Member, Galbet Ward, Garissa Township Constituency, Garissa County on the 1st Respondent's ticket. We are aware that the Complainant in his memorandum of claim simply alluded to a stranger whose name was forwarded by the 1st Respondent to the IEBC as the 1st Respondent's nominee for Galbet Ward.

9. This begs the question: did the Complainant know of this stranger? We are inclined to answer in the affirmative. This is because in the Complainant's documents there was a reply letter dated 11th April 2017, which letter was responding to another letter

dated 7th April 2017 addressed to the 1st Respondent's Secretary General by the Counsel for Complainant in which the Counsel had complained to the 1st Respondent for having issued a direct nomination certificate yet there were two persons who had shown interest in the Galbet Ward. In the said reply letter, the two persons were indicated as being the Complainant and the 2nd Respondent herein.

10. Clearly, the Complainant knew who the stranger was but for reason or reasons only known to him, he elected not to enjoin the stranger as a respondent in the complaint even though the respondent was affected by the proceedings in this case. We held in *Complaint No 188 of 2017 Maliki Masudi Mwangema vs. Orange Democratic Movement & others* at para 14 that "*As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against him. As a result, a person affected by a matter before this Tribunal ought to be served in person, through his authorized agent or through an advocate with instructions to accept service and to enter an appearance to the summons.*"

11. For these reasons, this Tribunal takes the view that a judgment can be set aside if a proper party to the dispute and in respect of whom an adverse order has been made was not made a party to the dispute. In this regard, we find the Supreme Court's decision in the case of *Mumo Matemo vs. Trusted Society for Human Rights Civil Application No. 4 of 2014* quite instrumental. In the case, the Court, in constructing the provisions of *Article 159 (2) of the Constitution*, held that a person has the right

to be enjoined in a case at any stage of the proceedings where the interest of such a person is affected.

12. We are convinced that the 2nd Respondent is affected by the complaint herein and as such, ought to have been a party. Therefore, this Tribunal, convinced by the 2nd Respondent's arguments, allows the 2nd Respondent application to be enjoined as a respondent in the instant case. Having held so, this Tribunal now proceeds to furnish orders in the circumstances. To begin, we noted that indeed, the 2nd Respondent attached a copy of the final nomination certificate to confirm his position to this Tribunal. The 2nd Respondent's certificate is dated 3rd April 2017.

13. Be that as it may, we also noted that the Complainant too had a final nomination certificate indicating the date of issue as 29th April 2017. Apparently, the issuance of the nomination certificate to the Complainant was in line with the 1st Respondent's Appeal Tribunal finding that it was not fair for the 1st Respondent National Election Board to have failed to conduct party primaries for Galbet Ward despite there being more than one person who had shown interest in participating in the nomination process.

14. Nonetheless, this Tribunal observed that there was a problem with the 2nd Respondent's final nomination certificate due chronological inconsistencies. As observed, the certificate is shown to have been issued on 3rd April 2017 yet according to the IEBC gazette notice of 17th March 2017, party primaries officially kicked off as

from 13th April 2017 onwards and not before. As such, it would have been only possible and practical for the 2nd Respondent's final nomination certificate to bear a date after 13th April 2017; not 3rd April 2017 or earlier.

15. However, the fact that the 2nd Respondent's final nomination certificate had a problem did make the Complainant's case any better for the simple reason that issuing more than one person the final nomination certificates for the same position only served to deprive the nomination process of the much desired credibility as outlined in *Article 81* of the *Constitution of Kenya, 2010*.

16. For the reasons advanced above, this Tribunal is persuaded by the 2nd Respondent's application for review of the Tribunal's judgment dated 17th May 2017.

Orders

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

- a) *That the 2nd Respondent's application dated 31st May 2017 be and is hereby allowed.*
- b) *That the 1st Respondent be and is hereby ordered to initiate a fresh process of determining its nominee for the position of Member of County Assembly for Galbet Ward, Garissa Township Constituency, Garissa County and forward the same to the Independent Electoral and Boundaries Commission within 72 hours of this ruling.*

c) That the final nomination certificates already issued to the Complainant and the 2nd Respondent be and is hereby declared null and void.

d) No order will be made as to costs in order to foster party unity and growth of party democracy. Orders accordingly.

DATED AT NAIROBI THIS 6TH DAY OF JUNE 2017

Kyalo Mbobu (Chairman)

James Atema (Member).....

Hassan Abdi (Member).....