



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI

COMPLAINT NO. 120 OF 2017

JACKSON MUSYOKA.....CLAIMANT

VERSUS

WIPER DEMOCRATIC MOVEMENT KENYA NEB.....1ST RESPONDENT

WIPER DEMOCRATIC MOVEMENT KENYA NAT.....2ND RESPONDENT

ALBANUS PAUL MUTISYA.....3RD RESPONDENT

JUDGMENT

1. The complainant was one of the aspirants for the 1st Respondent Parliamentary nominations in Machakos Town Constituency held on 25th April, 2017. The Complainant raises issues of irregularities in the manner in which the exercise was conducted. These include use of undesignated polling stations, use of officials not duly appointed to preside over polling stations, voting without regard to registered party members among others. Accordingly, a final tally of results revealed that the claimant had won but he was not declared the winner. However, the results for Members of County Assembly were declared.

2. The Complainant lodged a complaint with the 1st Respondent on 26th April, 2017, produced his own tally of results and appeared before the 1st Respondent's Appeal Board (IDRM). There has been a delay in the delivery of the IDRM decision, a situation that the claimant believes is meant to lock out the Complainant in light of the IEBC deadlines for the Political Parties to submit nominees. In the meantime, the party Nominations Certificate was issued to the 2nd Respondent despite the pending IDRM decision. The complainant thus seeks to restrain the 1st Respondent from issuing the Nomination Certificate for the Machakos Town Constituency Parliamentary Election without taking into account his concerns. The complaint is supported by the Claimant's supporting affidavit.
3. The Respondent opposes the complaint on the grounds that the matter is *sub-judice* as the parties and issues for determination are similar and the same to complaint No. 87 of 2017 in which the Tribunal stood over generally. The 1st Respondent challenges the evidence adduced by the Claimant and in particular the letters and report from the Returning Officer, one, Salome Kamau. The Respondent also challenges the tallying process undertaken by the Claimant whilst averring that the 1st Respondent conducted the tallying process in the presence of all the aspirants except the Claimant and his agents who failed to attend. The Respondent's position is well set out in an affidavit by Dr. Jared Maaka Sosi dated 8th May, 2017.

4. We note that the 2nd Respondent did not participate in the proceedings. The 2nd Respondent was introduced in the proceedings through a Notice of Motion application together with a Replying Affidavit all dated 8th May 2017. No evidence of service was placed on record as evidence of service upon the 2nd Respondent.

Issues for determination

5. The Tribunal has identified the following issues for determination from the Amended Memorandum of Complaint as filed on 8th May, 2017:
- a) Whether or not this Tribunal has jurisdiction over the dispute arising out of the nomination exercise.*
 - b) Who should be the rightful nominee out of the nomination exercise*

Whether or not this Tribunal is properly seized of the dispute arising out of the nomination exercise.

6. From our previous decisions, and in line with Section 40(a) (b) and (fa), the Tribunal has statutory jurisdiction to determine any disputes arising out of the nomination. There is no much contention on this issue as none of the parties who participated in these

proceedings argued it. We see no reason to dwell on it. We find it necessary to state that jurisdiction of the Tribunal is not appellate from IDRМ but considers the circumstances independently. Once a member of a political party demonstrates sufficient effort towards the resolution of a dispute through IDRМ, the Tribunal has taken the position that such effort is sufficient to grant jurisdiction to the Tribunal especially when the member of the political party has no control over the course the dispute takes at the instance of the Political Party.

Who should be the rightful nominee out of the nomination exercise

7. The Claimant seeks an order to restrain the 1st Respondent from issuing the Nomination Certificate in the wake of no IDRМ decision. The Claimant on the one hand seeks to be declared the winner while also arguing that there were massive irregularities. The 3rd Respondent on his part also avers that he won and was declared as such as per the Nomination Certificate awarded to him. According to the 3rd Respondent, the current complaint is time barred and not backed by evidence. The Claimant should not be allowed to benefit from a process that he has discredited. The evidence adduced by the Claimant is in our view unsubstantiated.

8. We cannot verify the tallying process which the claimant relies upon. The report from the supposed Retuning Officer even if it was to be considered does not indicate that the Complainant was declared as the nominee. Since we are unable to determine who should be the party's nominee, we feel that it is best to leave it to the party to handle it within its structures as permitted under the party constitution and party nomination rules.

9. We have carefully considered the prayer as contained in the Memorandum of Claim. We note that the Complainant seeks a blanket order with the effect of locking out the 1st Respondent from participating in the upcoming elections. The complainant, with the knowledge of the issuance of a Provisional Certificate to the 2nd Respondent has neither sought to challenge the nomination exercise nor the issuance of the Certificate to the 2nd Respondent.

10. It is a well known legal principle that parties are bound by their pleadings. Only the Complainant through counsel sought to pursue the remedies indicated. In an adversarial legal system, it is for the Complainant to frame issues and remedies. Any determination made by the Tribunal therefore can only be from the remedies sought and not what the Tribunal feels appropriate when the Tribunal has not been called upon to exercise such

powers. The prayer sought in this respect of Article 38 of the Constitution is beyond the scope and mandate of the Tribunal.

11. Before we conclude, we note that the 1st Respondent raised the issue of *sub-judice*. Whereas there might be a pending complaint No. 87 of 2017, the same is not in issue or subject of our consideration. The 1st Respondent is at liberty to make appropriate applications in that complaint or before us for redress. We cannot make any determination over the said Complaint No. 87 of 2017 in these proceedings without having been moved appropriately.

ORDERS

12. In the end and having considered the prayers sought in the Amended Statement of claim dated 8th May, 2017, we find it appropriate to dismiss the complaint with no orders as to costs. Interim orders granted on 8th May 2017 be and are hereby vacated.

DATED AT NAIROBI THIS 10TH DAY OF MAY 2017

- 1. M. O. LWANGA (PRESIDING MEMBER).....**
- 2. DESMA NUNGO (MEMBER).....**

3. PAUL NGOTHO (MEMBER).....

4. DR. ADELAIDE MBITHI (MEMBER).....