



REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI

PETITION NO 48 OF 2017

JOHN MRUTTU.....APPLICANT

V

THOMAS LUDINDI MWADEGHU.....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

ODM NATIONAL ELECTIONS BOARD.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. This judgment relates to the 2nd Respondent's nomination of a gubernatorial candidate for Taita Taveta County. In a nutshell, the applicant by his Petition dated 2nd May, 2017 contends that ODM nominations within Taita Taveta County were neither free nor fair and the results were therefore not credible, authentic or compatible with democratic principles.

CLAIMANT'S CASE

2. Mr. Munene appearing with Mr. Okubasu contended that polling within Taita Taveta County was inconclusive as nominations for Njukini Primary School, St Joseph's Kivukoni Primary School, Challa Primary School, Mahandakini Primary School as well as Jipe Primary School were not conducted. He cites the decision of the 2nd Respondent's National Appeals Tribunal (NAT) which in its decision of 29th April, 2017 affirmed the omission, withdrew the provisional certificate issued to the 1st Respondent and directed that fresh nominations be conducted in Challa

Ward, Mahoo Ward as well as Jipe Polling Station within Taita Taveta County to determine the ODM gubernatorial candidate in accordance with the party's constitution and nomination rules. The NAT also found that taking into account the margin of 2,750 between the winner and runners up and the fact that the total number of registered voters in these polling stations was in excess of 7,000 meant that the total votes from these polling stations could overturn the margin of victory or in other words affect the result. Therefore, any declaration that did not take into account the number of votes in these polling stations was not valid.

3. However, by a letter dated 29th April, 2017 one Mr. Oduor Ongwen, the 2nd Respondent's Executive Director, wrote to the Chairperson of the NAT indicating that while the Central Committee had agreed with the NAT's decision, the IEBC timelines and the NEB's capacity did not permit repeat polls anywhere. Therefore, the party had invoked internal dispute resolution mechanism and Rule 3.3 to comply. Rule 3.3 provides as follows:

The NEB may with the written approval of the National Executive Committee (NEC) grant a candidate an automatic nomination

4. Acting on the recommendation in the letter dated 29th April, 2017 the 2nd Respondent issued the 1st Respondent with Mr. Okubasu for the Claimant however submitted that Rule 3.3 could not excuse the party from the duty to act fairly under Article 47 of the Constitution and the Fair Administrative Action Act, 2017.
5. As to whether the Claimant had exhausted internal party dispute resolution mechanism, to convert his claim into a justiciable dispute within the meaning of section 40(2) Mr. Okubasu contended that the dispute was a chain of events commencing with the nominations and ending with the direct nomination of the 1st Respondent.

1st RESPONDENT'S CASE

6. In his reply, Mr. Kajwang appearing with Mr. Okoth opposed the complaint on some five main grounds.
7. First, that the Tribunal lacked jurisdiction to determine the claim. This was because the Claimant had filed his appeal to the NAT some ten days out of time. Whereas, the results had been declared on 19th April, 2017 and a provisional nomination certificate issued the same day, the Claimant had filed his appeal to the Tribunal belatedly on 29th April, 2017 outside the 48 hours permitted by the party's Constitution. Arising from this delay, the proceedings before the NAT were a nullity and void *ab initio* hence there were no proceedings before the NAT. Though there was no evidence the issue of jurisdiction was raised or argued before the NAT, Mr. Kajwang pointed out that a jurisdictional question is a question in limine. He referred to the Supreme Court decision in *Joho v Shahbal [2014] eKLR* as to what constitutes a "declaration of election results".
8. Second, that there was no dispute before the Tribunal as what ought to have been in dispute was the grant of a direct nomination ticket to the 1st Respondent. However, the issues of direct nomination had never been referred to the NAT so section 40(2) kicked in.
9. Third, counsel submitted that according to the doctrine of *materiality* even if all the votes from the polling stations where no polling occurred, the Applicant would still trail the 1st Respondent as the extract of the 2013 IEBC register for the polling stations in question indicated a total of 2,053 votes. This would not affect the margin of 2,750 as the difference was 700 votes. The complaint was therefore misconceived.
10. Fourth, Mr Kajwang sought to distinguish our decision in the *Caroli Omondi v John Mbadi & 2 Others Complaint No 42 of 2017 Case* from the facts of this case. In *Mbadi* we held that while the NEC must provide a written approval to the

National Elections Board to grant a candidate an automatic nomination such approval had not shown to the court. In the case at bar, however, we had allowed an adjournment to enable the 2nd Respondent file the authorization which it claimed existed, but it did not think was material to this case. That authorization had since been filed through the supplementary affidavit of Oduor Ong'wen sworn on 5th May, 2017.

2ND RESPONDENT'S CASE

11. Mr. Oluoch urged the dismissal of the complaint and emphasized that since the claimant had not complied with the timelines in the party's Rule 19.2.5 nothing turned on his complaint because it is a nullity. He referred us to the Court of Appeal decision in *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited [1998] eKLR* for the proposition that nothing turns on a nullity.

ISSUES FOR DETERMINATION

12. From the rival submissions by the parties the issues for determination are:
 - (a) **Does this Tribunal have jurisdiction to hear and determine this complaint?**
 - (b) **Did the 2nd Respondent conduct free and fair nominations for the position of Governor of Taita Taveta County?**
 - (c) **Was the 2nd Respondent's decision to give the 1st Respondent a direct nomination reasonable, lawful and procedurally fair?**
 - (d) **What are the appropriate reliefs in this complaint?**

DETERMINATION OF ISSUES

- (a) **Does this Tribunal have jurisdiction over this complaint?**
13. We must first satisfy ourselves that we have jurisdiction in accordance with the dicta in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*

[1989] KLR 1. If we find that we lack jurisdiction, there would be no basis for a continuation of these proceedings and we would be bound to down our tools.

14. Mr. Kajwang argued that as the proceedings before the NAT were premised on an appeal filed out of time on 29th April, 2017, they were null and void *ab initio*. On the other hand, since the question of jurisdiction was never raised before the NAT and was being canvassed before us for the first time, Mr. Okubasu submitted in reply that the jurisdictional point was an afterthought and a ploy to dislodge the Claimant from this Tribunal's seat of justice.
15. We agree with Mr. Kajwang that the question of jurisdiction is so fundamental to our adjudication, that it can be raised at any time, in any manner, and indeed, by the Tribunal itself - provided that where the Tribunal raises it *suo motu*, parties must be accorded an opportunity to be heard.
16. Our determination is that we have both original and appellate jurisdiction over the decisions of the NAT and are not bound by any lack of jurisdiction on the part of the NAT due to non-compliance with Rule 19.2.5 of the party's Rules. In this regard, a finding that the NAT lacks jurisdiction may in fact mean that the party has no internal dispute resolution mechanism left for him to exhaust thus triggering the jurisdiction of this Tribunal. None of the Respondents was ever prejudiced by the failure to file the appeal before the NAT within 48 hours from the declaration of the results of the election.
17. Even so, this dispute is distinguishable from the *Joho Case* in that in *Joho* the Supreme Court had invalidated section Section 76(1)(a) of the Elections Act for its extension of time beyond 28 days following the declaration of the election result. What is before us is Rule 19.2.5 of the party's Rules which does not have the same effect as a statute. We would be hoisting procedural technicalities above the need to do substantive justice if we held that failure to comply with the party's procedural rules automatically ousts this Tribunal's jurisdiction. Party

primaries and other elections in a multi-ethnic nation such as Kenya are highly contested and it would be remiss of us to resolve a dispute arising from a party primary on a procedural point.

18. That apart, in light of the Claimant's right to access justice under Article 48, and our duty under Article 159(2)(d) to do justice without undue regard to procedural technicalities, we are not prepared to hold that non-compliance with a party's internal procedural rules can deprive this Tribunal of the jurisdiction to do substantive justice between the litigants. If anything turns on it, there is no way the results could have been declared on 19th April, 2017, as argued by Mr. Kajwang, while polling had not been completed in some polling stations in terms of Rule 18.7 of the party's Election and Nomination Rules.

19. All in all, from the evidence and submissions on record, we find that the Claimant exhausted the party's internal dispute resolution mechanism by pursuing his claim all the way to the National Appeals Tribunal thus turning his cause into a justiciable claim before this Tribunal. As we held in the *Mbadi Case* the argument that the 1st Respondent's direct nominations is a new nomination process which ought to be subjected to fresh internal dispute resolution mechanisms cannot hold.

(b) Did the 2nd Respondent conduct free and fair nominations for the position of Governor of Taita Taveta County?

20. In resolving this issue we determine (i) whether there were irregularities and the (ii) the effect of those irregularities on the outcome of the nominations conducted on 18th April, 2017.

(i) Was there substantial non-compliance with the party's rules and applicable laws?

21. It was conceded by Mr. Kajwang and Mr. Oluoch that no polling was ever conducted in Njukini Primary School, St Joseph's Kivukoni, Challa Primary,

Mahandakini and Jipe polling station. Ironically, purported results were declared and a provisional certificate dated 19th April, 2017 issued to the 1st Respondent as having been validly elected.

22. In contrast, the party's own rules forbid such a course of action. Rule 18.7 of the party's Elections and Nomination Rules is in the following salient terms:

The Constituency Returning Officer shall submit forthwith vote tally to the County Returning Officer who shall make the final tally with respect to nomination for Members of Senate, Governor and County Women Representatives before making public the result of party nominations for county elections

23. It was therefore highly irregular for the County Returning Officer to purport to declare the 1st Respondent as having been elected in the full knowledge that no polling had taken place at Njukini Primary School, St Joseph's Kivukoni Primary School, Challa Primary School, Mahandakini Primary School as well as Jipe Primary School. It is not surprising that the parties own NAT found as follows:

The parties both agree that the margin of victory between the declared winner and the first runners-up in the Taita Taveta party nominations was approximately 3,000 votes. We are satisfied that taking into account the total number of eligible and registered voters on the agreed polling stations, the total votes from these polling stations could affect and possibly overturn the margin of victory. Any declaration made that does not take into account votes from these polling stations should not hold.

In light of the above and taking into account the submissions by the parties and the evidence adduced

before us, we are not satisfied that the electoral process in respect of Taita Taveta County ODM gubernatorial elections could be said to have been conclusively determined at the time the declaration of results were made.

24. We are persuaded by that decision and we adopt it as our own. Mr. Kajwang suggested that even if all the votes in these polling stations where no voting took place were awarded to the claimant, he would still trail the 1st Respondent as the 2013 IEBC register showed a total of 2,053 registered voters. This would not affect the margin of 2,750 as there would be a difference of (697) votes.
25. We are bound by the verdict of the Court of Appeal in *Moses Masika Wetang'ula v Musikari Nazi Kombo [2014] eKLR at 33* where it was held that:

It is an accepted fact that no human activity can be perfect. The conduct of an election is therefore no exception. That notwithstanding, however, for an election to be valid, substantial compliance with the law governing that election is mandatory. For instance no election can be valid if it is not based on the principle of universal suffrage; if it is not by secret ballot; if it is not transparent and free from violence, intimidation, improper influence or corruption; and if it is not conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. No election can be valid if, whatever method of voting is employed, it is not "simple, accurate, verifiable, secure, accountable and transparent"; as well as if "appropriate structures and mechanisms to eliminate electoral malpractice are [not] put in place"; and

the counting and collation of votes and announcement of the results are not open and accurate. What Section 83 of the Elections Act excuses are minor infractions of these principles or requirements that arise from inadvertent, not deliberate or negligent, human activities in the effectuation of these principles but do not affect the result of the election.

26. Accordingly, we do not think that the declaration of the 1st Respondent as having been elected while no voting had taken place at all, in the five polling stations is a minor infraction of electoral laws arising from inadvertent human error and one which does not affect the result of the election. We find that this declaration was either grossly negligent or a deliberate design to disenfranchise voters and deny them the chance to vote for their preferred candidate for the position of Governor Taita Taveta County.

(ii) Did the non-compliance affect the outcome of the nomination exercise conducted on 18th April, 2017

27. It is common ground and all parties conceded before us that polling stations had been clustered and voting for the entire ward only took place at the selected polling stations. Voting was not limited to the voters registered in particular polling stations which acted as tributaries for the selected polling station. Noelina Chao the Secretary to the County Election Committee confirms this when she depones at paragraph 17 of her Replying Affidavit sworn on 5th May, 2017 that “voters from Ziwani Primary School could vote either at Challa Primary School or Mahandakini Primary School”.

28. As a result, the correct number of votes at stake is not really the number of voters in the particular polling stations, but the total number of voters in the wards served by the polling stations where no voting took place. We disagree with Mr.

Kajwang that the number of votes at stake is 2,053 from the registered voters at the polling stations where voting never occurred. Our finding from the register before us is that Chala Ward (5,855), Mata Ward (3,590) and Mahoo Ward (3,904), have some 13,349 voters between them, assuming a 100% turnout as Mr. Kajwang urged us to. We therefore concur with the NAT that “the total number of votes from these polling stations could affect and possibly overturn the margin of victory. Any declaration made that does not take into account”.

29. We have said enough to lead us to the conclusion that the failure to conduct polls in the agreed polling station amounts to substantial non-compliance with Kenya’s electoral laws as well as the party’s constitution and that this non-compliance affected the result of the election.

30. We remain at a loss as to why the 2nd Respondent did not comply with its own recommendation that polling should be conducted in Chala Ward, Mahoo Ward and Jipe polling stations.

(c) Was the 2nd Respondent’s decision to give the 1st Respondent a “direct nomination” reasonable, lawful and procedurally fair?

31. We acknowledge that a candidate may be nominated directly or by consensus of the National Executive Council in accordance with a party’s nomination rules. Indeed, the 2nd Respondent’s Nomination rules provide that the National Elections Board may with the written approval of the National Executive Committee (NEC) grant a candidate direct nomination.

32. We also perceive that the discretion to award direct nominations, if properly deployed, can *inter alia* be a formidable tool to promote the representation, in legislative assemblies, of marginalized groups and communities such as women, persons with disabilities, youth, as well as ethnic and other minorities. Political parties would then be in a position to fulfill their obligations under Article 91 of the Constitution *inter alia* to respect and promote human rights and fundamental

freedoms, and *gender equality* and *equity* and to promote the objects and principles of the Constitution and the rule of law.

33. 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.
34. We note that the sole reason given by the 2nd Respondent's Executive Officer for the award of a direct nomination to the 1st Respondent as per the letter dated 29th April, 2017 was that IEBC deadlines and the requisite capacity of the NEB could not permit repeat polls anywhere. Such a reason is not justifiable in an open and democratic society and neither was it reasonable, lawful or procedurally fair. We agree with Mr. Okubasu that the discretion to award nominations does not override the duty to act fairly.
35. In *Complaint No 53 of 2017 Hon Salah Yakub Farah v Kanu National Elections Board* we recently held as follows:

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.

36. We adopt that decision and hold that the justification for direct nomination given by the 2nd Respondent's Executive Officer does not suffice. Political parties not only enjoy a constitutional status, but also get funds from the public purse and their members. They owe it to their members to invest in proper systems and employ competent personnel who can conduct primaries efficiently and fairly while allowing adequate time for the party to resolve any disputes arising from those primaries.

(d) What are the appropriate reliefs in this complaint?

37. In his submissions, Mr. Kajwang wondered whether this Tribunal could tell political parties what to do. We understood him to be saying that the Tribunal can only make declaratory orders or issue non-binding advisory opinions for optional consideration by the political parties.

38. To the contrary, in every matter over which it has 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.

39. We therefore make the following orders

(a) A declaration be and is hereby issued that the 2nd Respondent did not conduct free and fair nominations for the position of Governor of Taita Taveta County

(b) A declaration be and is hereby issued that the provisional nomination certificate dated 19th April, 2017, as well as the nomination certificate dated 29th April, 2017 issued by the 2nd Respondent to the 1st Respondent is null, void and of no effect in law

- (c) An order be and is hereby issued compelling the 2nd Respondent to organize and conduct a nomination for the position of Governor, Taita Taveta County within the next 48 hours in Chala Ward, Mahoo Ward and Jipe polling station.
- (d) The 2nd Respondent shall bear the Claimant's costs of this complaint

Orders accordingly.

DATED and DELIVERED at Nairobi this 7th day of May 2017.

KyaloMbobu

Chairperson

James Atema

Member

Hassan Abdi

Member