



**REPUBLIC OF KENYA**

**IN THE POLITICAL PARTIES DISPUTES TRIBUNAL**

**COMPLAINT NO. 62 OF 2017**

**HON. JOSHUA WAKAHORA IRUNGU ..... COMPLAINANT**

**VERSUS**

**JUBILEE PARTY ..... 1<sup>ST</sup> RESPONDENT**

**NDIRITU MURIITHI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SAMMY KILUKEI ..... 1<sup>ST</sup> INTERESTED PARTY**

**PAUL PERE ..... 2<sup>ND</sup> INTERESTED PARTY**

**NKAMAO LELARPEI ..... 3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

***I. SUMMARY***

1. This Complaint emanates from the Jubilee Party primaries for the various positions in Laikipia County carried out on 26<sup>th</sup> April, 2017. Laikipia County is made of 3 constituencies: Laikipia East, Laikipia West and Laikipia North. After the completion of the nomination exercise, the Complainant was declared the winner having garnered 40,983 votes. The 2<sup>nd</sup> respondent garnered 30, 586 votes while Mr. Sam Thuita (who was enjoined herein as the 3<sup>rd</sup> Respondent but applied and withdrew from these proceedings) garnered 16, 024 votes.
2. The 2<sup>nd</sup> Respondent and Mr. Sam Thuita were aggrieved by that declaration and filed Appeals with the 1<sup>st</sup> Respondent's Dispute Resolution Appeals Tribunal

(NAT). They were heard on 30<sup>th</sup> April, 2017 and the NAT reserved its decision for delivery on 2<sup>nd</sup> May, 2017. However, no decision was delivered on that day and parties were asked to go back on 3<sup>rd</sup> May, 2017. On 3<sup>rd</sup> May, 2017, in the evening, one of the NAT members, Mr. Sigei orally announced that Laikipia North results would be disregarded and a re-tally of the other votes done and on which basis a winner declared. There was no written decision then.

3. Aggrieved by that cancellation, the Complaint moved to this Tribunal. Simultaneously an application under certificate of urgency was filed seeking interim orders. The application was heard on 4<sup>th</sup> May, 2017. The matter was certified urgent and the Tribunal while making no orders pursuant to the application directed *all parties to maintain the status quo pending the hearing and determination of the Complaint.*

4. The Complainant sought the following main orders, that:

*(a) The decision, if any, made by the 1<sup>st</sup> respondent on 3<sup>rd</sup> May, 2017 be tendered to this Tribunal and served upon the parties.*

*(b) The Complainant be declared as the duly nominated candidate to vie for the position of the Governor Laikipia County under the Jubilee Party ticket.*

*(c) The 1<sup>st</sup> respondent be directed to issue a Certificate to the Complainant and the duly nominated candidate to vie for the position of governor Laikipia County under the Jubilee Party Ticket.*

## **II. SUBMISSIONS**

5. The Complainant urged that the cancellation of results from Laikipia North was unjustified and with no basis. Firstly, he argued that that decision violates, Rule 28 of party's Election Nomination Rules which provides specific orders to be

granted by NAT. They are: nullification of election subsequent to which NEB shall conduct fresh elections; or declaration of the winner if the evidence is clear, where then the loser is entitled to a second appeal. Hence, there is only one option where results are nullified: conduct fresh elections.

6. Secondly, that Article 47 of the Constitution was infringed as the people of Laikipia North were entitled to a written judgment with reasons for an administrative action that affects them. The Party is bound to uphold democratic practice and respect rights of all people to participate in the political process. That the decision of NAT disenfranchises the entire Laikipia North. Hence, it is unconstitutional as it offends Articles 38, and 81 of Constitution. Thirdly, the decision offends section 4 of the Fair Administrative Action Act which provides that a party presiding over a matter should act fairly and give reasons for its decision. Counsel Mr. Karungo, for 97 Interested Parties, enumerated various constitutional rights and freedoms for the people of Laikipia North that they alleged were violated.
7. The 1<sup>st</sup> respondent filed grounds of opposition on 6<sup>th</sup> May 2017. It defends the NAT decision submitting that electoral malpractices and irregularities were established and that they affected the results. Hence, the decision was the fairest based on the logistical challenges of organizing fresh primaries due to time constraints and the volatility of Laikipia North security wise.
8. The 2<sup>nd</sup> Respondent was represented by Mr. Muriithi. In his replying affidavit, he deponed to on 5<sup>th</sup> May 2017; he concedes to filing an appeal at the NAT based on the irregularities and malpractices, especially in Laikipia North and that a decision was made on 3<sup>rd</sup> May nullifying results of Laikipia North. Counsel submitted that the cancellation affected all the candidates. He contended that the alleged constitutional rights violations can only be challenged in the High Court

and violations of section 4 of FAA can only be addressed through Judicial Review proceedings. Mr. Genga appeared for the 3 Interested Parties who supported the 2<sup>nd</sup> Respondent. Counsel further argued that under Article 38 of the Constitution, all voters of Laikipia North are entitled to elect representative of their choice, but if the vote is tainted then that right will be infringed, hence the cancellation was justified.

### **III. ISSUES FOR DETERMINATION**

9. Three issues for determination arise in this matter:
  - (i) *Whether the cancellation of the results of Laikipia North Constituency was proper and in accordance with the law.*
  - (ii) *Whether the Complainant should be declared the winner of the nomination for the position of Governor Laikipia County.*
  - (iii) *What reliefs ought to be issued?*

### **IV. ANALYSIS**

10. The 2<sup>nd</sup> Respondent argued that the Complaint had not exhausted the internal dispute resolution mechanism since Rule 28.4 provides for a second appeal from the decision of the NAT. Rule 28.4 provides: *should any Appeal Tribunal hearing an appeal conclusively arrive at a decision where it makes a conclusive determination as regards who the winner of the nomination election is/was, the National Elections Board shall have the mandate to declare such a candidate the winner, subject to the right provided under these Rules a party in the appeal who was a candidate in the nomination election to lodge a second appeal.*
11. While we agree that Rule 28 accords the loser in an appeal a second appeal, the conduct of NAT in this matter leaves this Tribunal baffled. We are under no

illusion that it acted contrary to Rule 28. It cannot be said to have conclusively determine the winner so as to bind the Complainant to a second appeal. You cannot conclusively determine a winner for a County comprised of three constituencies by disenfranchising one full constituency. In excluding the results of an entire constituency, it cannot be said that the winner has been conclusively determined.

12. Secondly, with no written decision, the Complainant was not able to tell that the winner has been conclusively determined. While we appreciate the pressure that comes with work load for these NATs during electioneering periods, the judicial practice is that where there are constraints of time, a decision maker gives a written determination and reserve reasons for a later date. We observe that the NAT's conduct was irregular. The fact that even upon service of this Complaint, the 1<sup>st</sup> Respondent could file grounds of objection and not attach the purported decision which he insisted that it exist, then proceed to make reference to it in Court further demonstrates this bad faith. Hence, we find that this Complaint is rightly before us.
13. At this juncture, it is imperative to state that after the hearing of this Complaint and while pending delivery of judgement, an application was made by the 1<sup>st</sup> respondent seeking to introduce the decision of the NAT. By consent of all the parties, the same was allowed on 8<sup>th</sup> May 2017. We finally had a chance to peruse the ruling of the NAT. We have already said that the chain of events from the oral announcement by Mr. Sigei on 3<sup>rd</sup> May, 2017 to when this decision was finally put on record today leave a lot to be desired. Be that as it may, we have read the decision in its entirety and noted the content especially the reasons for cancellation of the results of Laikipia North.

14. However, we find that this matter turns not on the content of that decision. The decision is marred with irregularity and to the extent that it contravenes Article 38 of the Constitution by disenfranchising voters of Laikipia North, and having been rendered in contravention of section 4 of the FAA and the Party's own Elections and Nomination Rules, it is a nullity. This Tribunal cannot uphold a nullity by the NAT.
15. To buttress this, where results are cancelled, a remedy has to be given on how people will determine their representative(s). The NAT decision itself states: "*In the event that this Tribunal is to nullify the results of the election in one of the constituencies what should automatically follow is a fresh nomination in the said constituency*". Having made such an observation, one wonders why it had to invoke the 'doctrine of necessity' so as not to order fresh nominations.
16. This Tribunal finds that the cancellation of the results of Laikipia North and failure to order a fresh nomination exercise was irregular and unjustified. It amounted to nothing but a disenfranchisement of the people of Laikipia North. No novel pronouncements like invocation of the doctrine of necessity can be used to disenfranchise a people. Time constraints can also not be used to contravene the express provisions of Article 38 of the Constitution.

#### **V. RELIEFS**

17. As a consequence, we make the following orders;
- (1) The Complaint dated 4<sup>th</sup> May, 2017 is allowed.*
  - (2) The decision of the 1<sup>st</sup> Respondent's, National Elections Appeals Tribunal dated 3<sup>rd</sup> May, 2017, particularly directing the National Election Board to issue a Certificate to the winner from the results declared in Laikipia West and Laikipia East*

*constituencies only to the exclusion of Laikipia North, is hereby declared illegal, null and void and is consequently set aside.*

*(3) The announcement and declaration of results by the Laikipia County Returning Officer on the 27<sup>th</sup> April, 2017 of Hon. Joshua Wakahora Irungu as the winner is hereby affirmed by this Tribunal.*

*(4) The 1<sup>st</sup> Respondent, Jubilee Party, is hereby directed to issue a final Nomination Certificate to the Complainant as the duly nominated candidate to vie for the position of Governor Laikipia County under the Jubilee Party ticket within the next 12 hours of this Judgment.*

*(5) The 1<sup>st</sup> Respondent shall bear the costs of the Complainant.*

*(6) In the interest of the Party unity, other parties shall bear their own costs.*

18. Orders accordingly.

**DATED and DELIVERED AT NAIROBI this 8<sup>TH</sup> DAY OF MAY 2017**

**1. Kyalo Mbobu .....**  
**Chairman**

**2. James Atema .....**  
**Member**

**3. Hassan Abdi .....**  
**Member**