



REPUBLIC OF KENYA  
IN THE POLITICAL PARTIES DISPUTE TRIBUNAL AT NAIROBI

COMPLAINT NO. 315 OF 2017

HON MARGARET WANJIRU KIIRU.....PETITIONER

VERSUS

JUBILEE PARTY.....RESPONDENT

SUSAN WAKARURA KIHKA.....INTERESTED PARTY

JUDGMENT

**Introduction**

1. This matter brought by the Petitioner acting on her own behalf and on behalf of the voters in Nakuru County raises a novel issue for determination by the Tribunal. The Petitioner is an independent candidate for the Nakuru Senatorial, position. She contends that the Respondent has violated the law by presenting an ineligible candidate for the same seat. She seeks appropriate relief from the Tribunal.

**Claimant's Case**

2. In a nutshell, the Interested Part herein, is ineligible under Article 99(2)(a) and (d) which disqualifies a person from being elected as a member of Parliament either if that person is a State officer or other officer, other than a member of Parliament or is a member of a county assembly. Accordingly, as the Interested Party still holds the office of Speaker of the Nakuru County Assembly she is ineligible under both limbs of Article 99(2)(a) and (d) of the Constitution.

3. The complainant contends that it would be a waste of public funds for the Respondent to present the name of the Interested Party for elections when she is clearly ineligible.
4. The complainant further contends that the right of the people of Nakuru to elect a candidate of their choice is threatened with violation if the Interested Party's name is presented as a candidate as she is disqualified.

#### **Respondent's Case**

5. The Respondents through an affidavit sworn by Mary Karen Kigen Sorobit on 7<sup>th</sup> June, 2017 contends that the petition is without merit, scandalous, vexatious and an abuse of court process. She further asserts that the petitioner's interpretation of Article 99(2)(a) and (d) is erroneous. It is submitted that section 43(6) of the Elections Act, 2011 exempts the Interested Party from the constitutional mandatory requirement to resign before the date of the election.
6. The Tribunal was urged to dismiss the complaint for being abuse of process

#### **Interested Party's Case**

7. The Interested Party objected to this Tribunal's jurisdiction, but the issue was dispensed of through the Tribunal's ruling of 9<sup>th</sup> June, 2017. The Interested Party contended that the petitioner had used the terms "election" and "nomination" interchangeably, while Article 99(2)(a) and (d) disqualified one from "election" as opposed to participation in the nomination process. As the Interested Party had not been "elected", but had only been "nominated" for the position of Senator, Nakuru County, the provisions of Article 99(2) and (b) did not apply to her.
8. While admitting that the Interested Party is the current speaker of Nakuru County Assembly, she had been elected for a term of five years expiring at the

end of the term of the assembly. Reference was made to Article 177(4) and 194(f) of the Constitution.

9. The Interested Party cited the two judge bench decision in *Andrew Kiplimo Sang v Independent Electoral and Boundaries Commission [2017] eKLR* that had addressed the issue of term of County Assembly members for the purposes of their remuneration for the unexpired portion of their term. Further reference was made to the decision of Njagi J in *Eric Cheruiyot v Independent Electoral and Boundaries Commission [2017] eKLR* where section 43(5) of the Elections Act, 2011 requiring resignation six months to the elections was *unjustifiable, irrational, unreasonable and oppressive*.

### **Analysis**

#### **(a) Whether there is a cognizable dispute before the Tribunal**

10. Section 40 of the Political Parties Act, 2011 is in the following terms:

- 40. Jurisdiction of Tribunal**
- (1) The Tribunal shall determine—**
- (a) disputes between the members of a political party;**
  - (b) disputes between a member of a political party and a political party;**
  - (c) disputes between political parties;**
  - (d) disputes between an independent candidate and a political party;**
  - (e) disputes between coalition partners; and**
  - (f) appeals from decisions of the Registrar under this Act;**
  - (fa) disputes arising out of party primaries.**

11. In the petition presented to this Tribunal, the Petitioner contends that the respondent has violated the law by presenting an unqualified person as its

candidate for the Nakuru Senatorial seat. On the other hand the Respondent and the Interested Party argue that this is not the case. There has arisen a situation in which a position asserted by one party is opposed by the other party. We hold that there is a cognizable dispute before us.

12. B A Garner's *Black's Law Dictionary* (1999) defines a "dispute" to mean "a conflict or controversy especially one that has given rise to a particular lawsuit". Similarly, in the *Mavrommatis Palestine Concessions Case (Greece v Britain) 1924 PCIJ (Ser. A) No 2 at 11*, the Permanent Court of International Justice circumscribed the term "dispute" as denoting "a disagreement on a point of view of law or fact, a conflict of legal views or of interests between two persons".
13. In this regard, the petitioner's claim concerning the Respondent's conduct or omission in its presentation of an ineligible candidate for the Nakuru Senatorial position is positively opposed by the Respondent and the Interested Party. The petitioner's claim is not a mere assertion and there is more than mere conflict of the interests of the parties herein.
14. Accordingly, we are satisfied that there is a cognizable dispute between an independent candidate, the Petitioner, and a political party, Jubilee Party, relating to the Respondent's candidate for the Nakuru Senatorial position in the forthcoming elections. That dispute also touches on the Respondent's conduct of its party primaries for that position and therefore falls within this Tribunal's jurisdiction under section 40(1)(fa).

**(b) Whether the Respondent violated the law by presenting an ineligible candidate for its Nakuru Senatorial position**

15. Concerning the duty of this Tribunal to enforce the Constitution in matters within its jurisdiction, in *Complaint No 200 of 2017 Orange Democratic Movement Party v Jekconia Okungu Ogutu* where we held:

We note that this Tribunal is the first port of call for all political party disputes and that invariably all disputes brought before it are for the enforcement of Articles 38, 47 and 91 of the Constitution. It would be an empty exercise of jurisdiction for us to hold that we can sever disputes before us and determine all aspects of the dispute except denials, violations or infringements of, or threats to, rights or fundamental freedoms in the Bill of Rights. The 3<sup>rd</sup> Respondent did not tell us how a petitioner would surmount the doctrine of *res judicata* in having the severed or residual part of his dispute, relating to the enforcement of the Bill of Rights, heard by the High Court. We were not informed how such twin-pronged litigation of political party disputes would be financed by the Kenyan tax payers.

16. On appeal in *Cornel Rasanga Amoth v Jeckonia Okungu Ogotu & 6 others Election Petition Appeal No 92 of 2017* Chacha Mwita J of the High Court confirmed this Tribunal's remit to apply the Constitution in so far as disputes before it are concerned.

17. Similarly, Odunga J in *Charles Otieno Opiyo v Orange Democratic Movement Party [2017] eKLR at para 38* held as follows:

38. It may be argued that the existence of alternative remedies does not oust the jurisdiction of the Court under Article 165(3)(a) and that that jurisdiction cannot be restricted or limited. On that issue, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited

jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However, sovereign power under the Constitution is delegated to inter alia the Judiciary and independent tribunals. The Constitution therefore clearly recognizes the role of independent tribunals in dispute resolution scheme. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly, I agree with the decision in *Pasmore vs. Oswaldtwistle Urban District Council* [1988] A C 887 that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement.

18. It is on record that as late as 18<sup>th</sup> May, 2017 the Interested Party was still a member of the County Assembly of Nakuru and the speaker thereof. It is uncontroverted that she presided over the business of proposed amendments to the Nakuru County Urban Agricultural and Promotion Regulation Bill, 2015. This Tribunal is entitled to take judicial notice of the extract from the Hansard annexed to the petition. However, political parties had up to 26<sup>th</sup> April, 2017 to conduct party primaries. The parties also had up to 8<sup>th</sup> of May, 2017 to present the names of their candidates to the IEBC. The Respondent took the Interested

Party through all these processes while she was ineligible under Article 99(2)(a) and (d) of the Constitution.

19. Under Article 177(1)(d) of the Constitution the County Assembly comprises among others the speaker who serves as an ex officio member. The Interested Party herein not only participated in party primaries, but was also presented as a candidate for the Nakuru Senatorial position while she was still a member of the Nakuru County Assembly and therefore ineligible for election.
20. We do not accept Prof. Ojienda's submission that the Interested Party would only be barred once she were elected. If we took that position to be correct, could it similarly be argued that a political party can present an undischarged bankrupt or a person of unsound mind? We note that Article 91 of the Constitution, which establishes political parties as agencies of the democratic process, requires political parties to abide by the principles of good governance and democracy. They must also promote the principles and objects of the Constitution including the national values and principles of governance. They must discharge that duty by presenting for election candidates who are duly qualified.
21. The decision of Njagi J in *Eric Cheruiyot v Independent Electoral and Boundaries Commission [2017] eKLR* where he held section 43(5) of the Elections Act, 2011 requiring resignation six months to the elections to be *unjustifiable, irrational, unreasonable* and *oppressive* has no application to the facts of this case. This dispute has been filed well into the electoral cycle commencing with the Independent Electoral and Boundaries Commission's publication of the Gazette Notice Number 26923 of 2017 published on 13<sup>th</sup> March, 2017.
22. We accordingly hold that the Respondent violated the law by presenting the Interested Party, an ineligible candidate, as its candidate for the Nakuru County Senatorial position. We however do not have sufficient material at this stage to issue an order injuncting the IEBC from processing the interested party's

candidature. The complaint was brought to uphold the Constitution there will be no order as to costs.

**Reliefs**

23. In *Complaint No 48 John Mruttu v Thomas Ludindi Mwacheghu & 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.

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

**(a) A declaration be and is hereby issued that the Interested Party's candidature for the Nakuru County Senatorial seat on the Respondent's ticket is unconstitutional under Article 99(2)(a) and (d) of the Constitution.**

**(b) There is no order as to costs.**

DATED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE 2017

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**Kyalo Mbobu (Chairperson)**

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**James Atema (Member)**

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**Hassan Abdi (Member)**