



REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL AT NAIROBI
COMPLAINT NO. 298B OF 2017

ROBINSON OTUKE NYOUGO.....COMPLAINANT

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

JOHN ONTITA ONSONGO.....2ND RESPONDENT

JUDGMENT

Summary of the Case

1. The Complainant is disputing the decision of the 1st Respondent to issue the 2nd Respondent with the nomination certificate for Marani Ward Kitutu Chache North Constituency. The Complainant claimed that he was the only person who was gazetted by the Independent Electoral and Boundaries Commission to the for the said Ward his name having been submitted by the 1st Respondent in accordance the Independent Electoral and Boundaries Commission's gazette notice of 17th March 2017.
2. The Complainant's attempts to lodge his complaint with the 1st Respondent proved futile after it emerged that the latter's National Appeals Tribunal had been wound up and no cases were being filed. Consequently, the Complainant approached this Tribunal for the following reliefs:

- (a) An order declaring the Complainant as the valid nominee for the 1st Respondent for the position of the County Assembly Member for Marani Ward Kitutu Chache North Constituency.
- (b) An order directing the 1st Respondent to issue the Complainant with the nomination certificate as the valid nominee for the 1st Respondent for the position of the County Assembly Member for Marani Ward Kitutu Chache North Constituency.
3. In reply, the Respondents termed the complaint here as a nonstarter since the 1st Respondent had already submitted the names of the candidates to the Independent Electoral and Boundaries Commission. The Respondent also averred that the Complainant allegations that he was the only candidate for Marani Ward was unfounded and false.
4. In any case, the Respondent further asserted, the Complainant had not exhausted the internal disputes resolution as obligated by the law. For these reasons, the Respondent prayed for the dismissal of the complaint.

Issues for Determination

5. There are two principal issues for determination, first is whether this Tribunal had jurisdiction to entertain this complaint. The second one is whether the Complainant had legitimate expectation in being issued with the direct nomination considering that he was the only one gazetted by the Independent Electoral and Boundaries Commission to vie for the Marani Ward come the August 8th General Elections.

(a) Whether this Tribunal had jurisdiction to entertain this complaint.

6. Regarding the issue of this Tribunal's jurisdiction, we hasten to point out that it is a trite law that a court has no business entertaining a matter once it establishes that it lacks jurisdiction. The *locus classicus* statement of Hon. Justice Nyarangi JA in *The MV*

“Lilian S” case still holds good and as a Tribunal, we stand guided by it. The good Judge opined, *“Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

7. Our understanding of the foregoing is that a court of law must first satisfy itself of jurisdiction before proceeding to entertain a claim placed before it, which we hereby do. *Section 40* of the *Political Parties Act, 2011 (as revised in 2016)* outlines the jurisdiction of the Tribunal and gives it the mandate, in paragraph (fa) of the said provision, to resolve disputes arising from party primaries. This is the nature of dispute between the Complainant and the Respondents.
8. In this case, the Complainant was the only person who was gazetted by the IEBC to vie for the position of Member of County Assembly the Marani Ward come the August 8th general elections on the 1st Respondent party ticket. However, the 1st Respondent elected to give the 2nd Respondent the nomination certificate instead and this was despite the 2nd Respondent not being gazetted as required by *section 31 2B* and *2C* of the *Elections Act, 2011*.
9. The said *section 31 2B* and *2C* of the *Elections Act, 2011* stipulates:

2B “A political party shall, at least twenty-one days before the nomination day, submit to the Commission the names of the persons contesting in its party primary and the date of its party primary.”

2C “The Commission shall publish, in the Gazette the names of the persons contesting in a party primary under subsection (1) and the date of the party primary within seven days of receipt of the names of party candidates.”
10. That said, we are alive to the provisions of *section 40 (2)* of the *Political Parties Act, 2011*, which requires the Tribunal to assume jurisdiction over certain disputes only after such disputes have been referred to an internal dispute resolution of a political

party. The disputes include disputes between members of a political party; between a member of a political party and a political party; between political parties and between coalition partners. However, according to this law, there seem to be no such requirement for disputes arising from party primaries, decision of the Registrar of Political Parties, independent candidate and a political party.

11. With regard to party primary disputes it would be important to note that *section 13 2A* of the *Elections Act* gives political parties thirty days within which to resolve such disputes, which raises the question as to whether it is mandatory or optional for a disputant to first refer his or her complaint to the internal dispute resolution mechanism of a political party before coming to the Tribunal. The High Court position on this question appears to be varied.
12. In the case of *Erick Kyalo Mutua vs. Wiper Democratic Movement (K) & Another Election Appeal No. 4 of 2017*, Onguto J, at paragraphs 47 and 48 of the said case, held that the Tribunal had original jurisdiction and as such, could entertain a party primary dispute directly in appropriate circumstance without having to insist that such a dispute must first be referred to an internal dispute resolution mechanism of a political party. The judge went further to explain that there was a concurrent jurisdiction and a disputant may either land before the Tribunal or the political party's internal dispute resolution mechanism. In effect, it was the Court's stand that it was optional for a person refer his or her complaint to the internal dispute resolution of a political party.
13. However, in the case of *Hon. Rachel Nyamai vs. Jubilee Party of Kenya & Another Election Appeal No. 58 of 2017* Muchelule J allowed the appeal on the basis that the Political Parties Disputes Tribunal did not have jurisdiction to entertain the Complainant's case since the Complainant had not exhausted the internal disputes resolution as required by the law. In the case, 1st Respondent directly nominated the 2nd Respondent despite there being more than one candidate for nominations.

14. The learned judge characterised the dispute as one involving a member of a political party and a political party, which according to *section 40 (2)* of the *Political Parties Act, 2011* requires the Tribunal to assume jurisdiction only after such disputes have been referred to an internal dispute resolution of a political party. According to this decision, therefore, it was mandatory upon the aggrieved party to first lodge his or her dispute with a political party's internal disputes resolution mechanism in order to gain standing before the Tribunal.
15. In light of the foregoing, it is significant pointing out that there is an overlap among some of the disputes outlined in *section 40 (1)* of the *Political Parties Act*. For instance, it is our interpretation of the law that a party primary dispute can be characterised as a dispute between a member of a political party and a political party or as a dispute between members of a political party. Meaning, despite being a distinct dispute according to the *Act*, a party primary dispute ordinarily ought to be referred first to a political party's internal disputes resolution mechanism.
16. To augment this view, we wish to rely on *section 13 2A* of the *Elections Act*, which gives political parties thirty days within which to resolve such disputes. This Tribunal is persuaded to think it is not in vain that the law requires a party primary dispute to be resolved internally by a political party's dispute resolution mechanism.
17. Having said so, we wish to point out that this Tribunal has always taken the position that even a complaint letter would suffice as evidence that a party has invoked *section 40 (2)* of the *Political Parties Act* or attempted an internal dispute resolution mechanism. This, in our view, is in appreciation of the short timelines within which the nomination process must be concluded as the country gears up for the forthcoming general elections. To this end, we are satisfied that this Tribunal has the jurisdiction to entertain the instant dispute.
18. The second issue for determination draws our attention to the provisions of *Article 38* of the *Constitution of Kenya, 2010*, which guarantees the right of every citizen to

make political choices, which includes the rights to form and participate in the activities of a political party. This implies that one has the right to take part in a free, fair and regular elections based on universal suffrage and the free expression of will to vie for any office of any political party to which such a person is a member.

19. *Article 91 (1) (d)* of the *Constitution*, to this extent, specifically obligates political parties in Kenya to abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party. To fulfil these constitutional requirements, *section 9* of the *Political Parties Act, 2011* read together with the second schedule of the same sets out the key issues that must be contained in the constitutions of all duly registered political parties in Kenya.

20. The most important point for our purposes in this case is the rule that a political party constitution must establish guidelines for, among other things, the nomination of candidates for elections. The nomination procedures for the 1st Respondent's in Chapter XV contemplates direct nomination where only one candidate has applied and is cleared for the nominations. It provides "*The party shall in areas of special interest where nominations cannot be conducted to issue direct nomination certificate to such candidate, or where there is more than one aspirant, by consensus or any other appropriate means agreed select one among them to be nominated.*"

21. Indeed, the evidence on record indicates that the Complainant complied with the 1st Respondent's nomination requirements, which in fact was the basis upon which the 1st Respondent forwarded the Complainant's name to the Independent Electoral and Boundaries Commission for gazettelement. According to the said record of evidence, the Complainant was the only one who was gazetted for the position of Member of County Assembly, Marani Ward.

22. In this regard, we wish to state that legitimate expectation, as a matter of one's right or entitlement, is said to arise, according to the famous case of *HWR Wade*, where a

person expects that another having the duty to carry out certain obligations not to do that, which is contrary to the established cause of events in a manner that is not permitted by the law. That being so, we hold that the Complainant had legitimate expectation in being issued directly with the nomination certificate since he was the only one who was gazetted as such.

23. For the reasons advanced above, this Tribunal is persuaded by the Complainant's arguments that the 1st Respondent went against its own rules when it nominated the 2nd Respondent for the position of Member of County Assembly, Marani Ward, which should be not be allowed to happen.

Orders

24. *In the premises, this Tribunal orders as follows:*

- a) That the Complainant's case be and is hereby allowed.*
 - b) That the nomination certificate given to the 2nd Respondent be and is hereby declared null and void.*
 - c) That the 1st Respondent be and is hereby directed to forward the Complainant's name to the Independent Electoral and Boundaries Commission as the 1st Respondent's valid nominee for the position of Member of County Assembly, Marani Ward, Kitutu Chache North Constituency, Kisii County.*
 - d) No order as to costs in order to foster party unity, growth and democracy.*
- Orders accordingly.*

DATED AT NAIROBI THIS 26TH DAY OF MAY 2017

Kyalo Mbobu (Chairman)

James Atema (Member).....

Hassan Abdi (Member).....