



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**ELECTION PETITION APPEAL NO 82 OF 2017**

**JUBILEE PARTY OF KENYA .....1<sup>ST</sup> APPELLANT**

**NATIONAL ELECTION BOARD.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHRISPINUS PEGGA BARASA .....RESPONDENT**

*(Being an appeal from the judgment and the Decree of the Political Parties Dispute Tribunal of Kenya at Nairobi made on the 25<sup>th</sup> May 2017 by Hon. Kyalo Mbobu, James Atema and Hassan Abdi in complaint no. 287 of 2017)*

**BETWEEN**

**CHRISPINUS PEGGA BARASA .....COMPLAINANT**

**VERSUS**

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

**NATIONAL ELECTION BOARD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Appellants **Jubilee Party** and **National Election Board** where the Respondents in the Political Parties Dispute Tribunal No.287/2017 wherein the Respondent was the Applicant at which in his petition the respondent stated that he had filed an Appeal with the 2<sup>nd</sup> Appellant being Appeal No. 120 of 2017 challenging the nomination process in South Bukusu Ward and that the said Appeal was never heard.

2. It was stated therein that there was no voting in respect of South Bukusu Ward only for him to hear on 17<sup>th</sup> May 2017 from Sulwe FM that one **Isaiah Busolo Sudi** will be a warded the Jubilee Party Nomination certificate for the Ward whereas he was a dully registered member of the party and had duly paid nomination fee as an Aspirant. He sought the following orders:-

**i) The Honourable court to issue an order directing the first Respondent not to issue nomination certificate to one Isaiah Busolo Sudi and order fresh elections as no voting process took place in South Bukusu Ward.**

**ii) The Honourable Court do issue an order to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to carry out fresh nomination process at the South Bukusu Ward Bungoma County.**

**iii) This Honourable court be pleased to make orders as it shall deem just and fit.**

To the complaint was annexed written submissions.

3. When served the Appellants filed a replying affidavit sworn by one **Mary Karen Kigen –Sorobi**, where it was deponed that the Appellants had submitted the names of its candidate to IEBC. It was stated that the Respondent had lodged an appeal at the Appellant **Jubilee Party Appeal Tribunal** which he abandoned and failed to attend its hearing and the matter conclusively dealt with.

4. Based upon the said pleading PPDT rendered its decision thereon on 25/5/2017 in which it found that the 1<sup>st</sup> Appellant having cleared the claimant to participate in the process, was bound to act in good faith towards him by conducting the exercise, there was no proof that the Respondent had delivered the Ruling on the Respondent complaint and that there was no evidence that the Appellant had forwarded a nominee to IEBC.

5. The PPDT therefore ordered that since the Respondent had sought a prayer for the Tribunal to make orders as it shall deem just and fit, they deemed it just and fit in the circumstances of the case to award the nomination certificate for **Bukusu Ward** to the Respondent.

6. Being aggrieved by the said decision the Appellant filed this appeal and raised the following grounds of appeal:-

**1. THAT The Honourable Tribunal erred in Law and fact in nullifying and ordering cancelation of the nomination certificate issued by the 1<sup>st</sup> Appellant.**

**2. THAT The Honourable Tribunal erred in Law and in fact in failing to appreciate the provisions of the Political Parties Act No 11 of 2011 by ordering the 1<sup>st</sup> Appellant to issue a nomination certificate to the Respondent who is not a member of the 1<sup>st</sup> Appellant.**

7. The Appellants therefore sought the following orders:-

**a) Appeal be allowed**

**b) The Honourable court do say the Judgment and Decree of the Political Parties Dispute Tribunal delivered on 25<sup>th</sup> May 2017.**

**c) The Judgment and Decree of the Political Parties Dispute Tribunal be set aside.**

**d) Cost be provided for.**

8. The Appeal was supported by an affidavit sworn by one **Stephen Ombasa Oyongo** Advocate wherein he deponed that the 1<sup>st</sup> Appellant had informed the Tribunal at the Hearing that the Respondent was not its member as per the letter from the Registrar of Political Parties dated 23/5/2017 provided as

S00-1,2 and 3 respectively.

9. In response to the appeal, the Respondent who appeared in person filed a replying affidavit in which it was deponed that on 23<sup>rd</sup> January 2017, he applied to the Appellant for registration as an aspirant for the position of a member of the County Assembly for South Bukusu Ward and paid the registration fee of ksh 20,000 and that at the time of receiving the said fee the Appellant did not bother to verify with the Registrar of Political Parties whether he was a member.

10. It was further deponed that on 3<sup>rd</sup> March 2017 he received Aspirant application and requisite fee forms from the 1<sup>st</sup> Appellant and on 8/3/2017 paid the requisite fee of ksh 30,000 receipts whereof he annexed. It was stated that the 1<sup>st</sup> Appellant had been dealing With the Respondent who was initially a member of URP on whose ticket he contested the 2013 election before it merged with others to form the 1<sup>st</sup> Appellant and therefore it was only equitable that their dealing remain as a party and a member.

11. At the hearing hereof **Miss Mboce** for the Appellant submitted that the Tribunal erred in ordering the Respondent to be given certificate since he was not a member of the party and as such a person who is not a party member cannot be nominated and in support therefore the following decisions were submitted:-

**I) Sammy Kilukei & 299 Others and Ndiritu Muriithi Vs Jubilee Party & 2 Others Election Petition Appeal No. 10 Of 2017 Nairobi.**

**II) Geoffrey King'ang'i Mutiri Vs Peter Kamau Nyutu and Another Election Petition Appeal No 49/2017.**

In which it was held:

**“that it is on the basis of membership that one can participate in the nominations called by the party and if he is aggrieved he can appeal to the political parties Dispute Tribunal for a remedy. Once he ceases to be a member of the party, he cannot seek to be nominated or to be declared a nominee on a party ticket once he ceases to be a member of a party he cannot have locus to complain about the nominations of the party and cannot appeal either to the Political parties Dispute Tribunal or this court seeking a determination on the nomination”**

12. The Respondent in his submissions restated the content of his affidavit in support and submitted that he was a member of URP before the merger with TNA to form Jubilee Party and as such he was a Jubilee member. He submitted that the 1<sup>st</sup> Respondent took his money in respect of the said nomination in his capacity as a party member and as such should be treated as a member.

### **ANALYSIS AND DETERMINATION**

13. The following facts are undisputed from the records of proceedings before the Political Parties Dispute Tribunal, that there was no nomination by voting in respect of South Bukusu Ward which the Respondent had applied for and paid the requisite fee as per the annexed receipts. There was placed before PPDT and before this court a letter from the Register of Political Parties dated 23<sup>rd</sup> May 2017 wherein the Respondent is declared as party less as at that date.

14. The issue therefore for determination is whether the PPDT was right in awarding the Respondent nomination certificate in the face of the said letter and from the pleadings herein. Whereas the Respondent has produced before me copies of receipts issued to him by the 1<sup>st</sup> Appellant in respect of

his application for nomination and the sums of money paid thereon, before the court is an official letter from the Registrar of political parties confirming that the Respondent is not a member of the 1<sup>st</sup> Appellant but is party less.

15. Section 17(l) of Political Parties Act states that:-

**A political party shall maintain at its head office and at each of its county offices in prescribed form an accurate and authentic records of:**

**a) A register of its members in a form prescribed in the second schedule.**

**Section 18(l) The Registrar may, issue a written notice in the prescribed form to the Chairperson or Secretary General of a Political Party to furnish for inspection by the Registrar, the records required to be maintained under section 17, while section 30(l) provides that A political Party shall, at least ninety days before the general elections submit to the Registrar a register of its members.**

16. The registrar of Political Parties who is the custodian of the Register of Political parties had given a letter to the 1<sup>st</sup> Appellant which letter was placed before the Political Parties Dispute Tribunal and which has not been rebutted by the Respondent to the effect that he is not a member of the 1<sup>st</sup> Appellant and as such could not lawfully take part in the 1<sup>st</sup> Appellants nomination process. I take the view that receipt of nomination fee from the Respondent is not evidence that the same is a member of the Appellant.

17. It is therefore clear to my mind and in view of the holding in Nairobi EPA No. 10 of 2017 supra that once it is proved that the Respondent was not a member of the Appellant, The PPDT fell into error in awarding him the certificate herein as under section 25(l) of the Elections Act one is qualified for nomination as a member of County Assembly

**l) Unless disqualified under sub section (2) if the person**

**a) Is a Registered voter**

**b) Satisfies any educational moral and Ethical requirements.**

**c) Is either**

**i) Nominated by a political party or**

**ii) An independent candidate.**

18. It is therefore clear that the Tribunal in awarding a certificate to the Respondent who was not a member of the 1<sup>st</sup> Appellant fell into error for which its Judgment is hereby set aside.

19. It is further clear that the Respondent only sought for an order for the 1<sup>st</sup> Appellant not to issue nomination certificate to one **Isaiah Busolo Sudi** and having confirmed that no elections had been held, the Tribunal exceeding its powers by awarding the Respondent nomination certificate in what they considered fit and just, that power belonged to the 1<sup>st</sup> Appellant under its Rules and to that extent the Judgment is set aside.

20. Having set aside the Judgment herein and noting that the 1<sup>st</sup> Appellant took money from the

Respondent on the basis that they were going to subject him to a nomination exercise and having confirmed that the said legitimate expectations was not met I am of the considered view that it will not be just for the 1<sup>st</sup> Appellant to continue holding the Respondent's money in respect of an exercise which was not conducted or which if was conducted He did not take part in. There is no rationale to permit the 1<sup>st</sup> Appellant to hold onto the Respondent's money once it failed to live to its commitment to conduct nomination exercise which they did not.

21. In the final analysis I will make the following orders:-

**a) The Judgment of the Tribunal issued herein and the consequential order thereon be and hereby set aside.**

**b) The 1<sup>st</sup> Appellant to refund to the Respondent a sum of ksh 30,000 being part of the monies paid in respect of the nomination exercise herein.**

**c) Each party to meet their own cost.**

**DATED, SIGNED and DELIVERED at Nairobi this 31<sup>st</sup> day of May, 2017.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mr. Ombasa for Miss Mboce for the Appellant*

*Joel Simiyu for the Respondent*

*Tabitha court clerk*



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