



Case Number:	Election Petition Appeal 10 of 2017
Date Delivered:	10 May 2017
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Aggrey Otsyula Muchelule
Citation:	Sammy Kilukei & 300 others v Jubilee Party & another [2017] eKLR
Advocates:	Prof. Ojienda for the 2nd Appellant Mr. Amuga for the Respondent Mr. Karungo for the 3rd Respondents Mr. Nyamodi for the Interested Party
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	DISPUTE NO. 62 OF 2017
Case Outcome:	Appeal struck out with costs
History County:	Nairobi
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ELECTION PETITION APPEAL NO. 10 OF 2017**

**BETWEEN**

**SAMMY KILUKEI AND 299 OTHERS.....1<sup>ST</sup> APPELLANTS**

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

**VERSUS**

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

**JOSHUA WAKAHORA IRUNGU.....2<sup>ND</sup> RESPONDENT**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....INTERESTED PARTY**

Being an appeal against the entire decision, judgment and orders of the Political Parties Disputes Tribunal sitting in Nairobi of 8<sup>th</sup> May 2017 in

**THE POLITICAL PARTIES DISPUTES TRIBUNAL**

**DISPUTE NO. 62 OF 2017**

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

**VERSUS**

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

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

**KACHAYA WILLIAM & 96 OTHERS.....3<sup>RD</sup> RESPONDENTS**

**JUDGMENT**

1. The judgment that is being challenged by the appellant was delivered on 8<sup>th</sup> May 2017 by the Political Parties Disputes Tribunal. The Tribunal directed the Jubilee Party (which was the 1<sup>st</sup> respondent in the matter and also the 1<sup>st</sup> respondent in the appeal) to issue a final nomination certificate to Joshua Wakahora Irungu (who was the complainant and who is the 2<sup>nd</sup> respondent herein) as a duly

nominated candidate to vie for the position of governor for Laikipia County under the Jubilee Party.

2. The complaint followed the decision dated 3<sup>rd</sup> May 2017 by the Jubilee Party National Elections Appeals Tribunal that had directed the National Elections Board of the Jubilee Party to issue the certificate to Ndiritu Muriithi (who was the 2<sup>nd</sup> respondent but who is now the 2<sup>nd</sup> appellant).

3. Some background to what led to the present appeal is important. Laikipia County has three constituencies: Laikipia West, Laikipia East and Laikipia North. The Jubilee Party held its party nominations on 26<sup>th</sup> April 2017 for all elective positions, including that of governor. The contestants for the governor position were the incumbent (2<sup>nd</sup> respondent), Ndiritu Muriithi (2<sup>nd</sup> appellant), Sam Thuita Mwangi, James Mathenge, Gitonga Kabugi and Richard Mburu Kamau. The 2<sup>nd</sup> respondent was declared the winner. That aggrieved the 2<sup>nd</sup> appellant and Sam Thuita Mwangi. The two filed a complaint to the Jubilee Party National Elections Appeals Tribunal. The Tribunal found that in respect of Laikipia North the results were grossly inflated, the voter turnout was unrealistic and improbable and the tally announced for the election had a much higher variance when compared to the tallies for senate and woman representative. It was further found that the 2<sup>nd</sup> respondent had used public officers working under him in the County government to manage the nomination which contravened the **Public Officers Ethics Act**. However, instead of nullifying the entire nomination for Laikipia, the Tribunal used the doctrines of necessity and materiality and nullified only the results of Laikipia North and directed the National Elections Board to issue a certificate to the 2<sup>nd</sup> appellant who had won in Laikipia East and Laikipia West. This led the 2<sup>nd</sup> respondent to complain to the Political Parties Disputes Tribunal whose decision led to this appeal.

4. Before going to the merits of the appeal, there was a preliminary point raised by the 2<sup>nd</sup> respondent and the 3<sup>rd</sup> respondents (Kachaya William & 96 Others) that touched on the capacity of the 2<sup>nd</sup> appellant to maintain this appeal. Their case was that the 2<sup>nd</sup> appellant had since resigned from the Jubilee Party and was seeking to contest for the governor position for Laikipia County as an independent candidate. It was contended that he had so resigned by 8<sup>th</sup> May 2017 when the Political Parties Disputes Tribunal was rendering its judgment. In evidence, the 2<sup>nd</sup> respondent swore a replying affidavit in which he annexed two letters from Lucy K. Ndungu (Registrar of Political Parties) that stated that as of 8<sup>th</sup> May 2017 the 2<sup>nd</sup> appellant was not a member of a fully registered political party, he had been cleared to contest as an independent candidate and that he had been asked to forward the symbol he would use to the Independent Electoral and Boundaries Commission (IEBC) (the interested party in this appeal). The question that was being asked was whether, having resigned from the Jubilee Party, the 2<sup>nd</sup> appellant could be allowed to urge this appeal in which he was seeking that the decision of the Political Parties Disputes Tribunal be set aside and the decision of the Jubilee Party National Elections Appeals Tribunal that directed that he be given the certificate of the winner be affirmed.

5. The 2<sup>nd</sup> appellant did not swear any further affidavit to challenge the factual position that was contained in the replying affidavit of the 2<sup>nd</sup> respondent, and the annexures. Prof. Ojienda (SC) for the 2<sup>nd</sup> appellant took the position that the allegations that his client has resigned from Jubilee Party or that he intended to contest as an independent candidate had not been materially substantiated. The kind of substantiation expected, he argued, was in the form of affidavits sworn by the Jubilee Party and the Registrar of Political Parties.

6. My view of the matter is that, the sworn statement by the 2<sup>nd</sup> respondent as supported by the letters from the Registrar of Political Parties, and especially when considered that the letter dated 8<sup>th</sup> May 2017 was addressed to the 2<sup>nd</sup> appellant, provided sufficient factual basis for this court to find that the 2<sup>nd</sup> appellant was no longer a member of the Jubilee Party, and that he had been cleared by the Registrar of Political Parties to contest the governor's position in Laikipia County as an independent candidate.

7. Under **section 33 of the Political Parties Act (No. 24 of 2011)** a person can only qualify to be nominated as an independent candidate for a county election if he does not belong to any political party. The 2<sup>nd</sup> appellant is not a member of any fully registered political party.

8. Further, the basis upon which one can complain about a decision of a political party and its dispute resolution mechanism is if he is a member of the party. It is on the basis of that membership that he can participate in the nominations called by the party, and, if aggrieved, he can appeal to the Political Parties Disputes 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 the party ticket. Once he ceases to be a member of the party he cannot have the locus to complain about the nominations of the party, and cannot appeal either to the Political Parties Disputes Tribunal or to this court seeking a determination on the nominations.

9. In short, the 2<sup>nd</sup> appellant did not have the capacity and locus to file this appeal. His appeal is consequently incompetent and this

court has no jurisdiction to hear or determine it.

10. The second issue raised by the 2<sup>nd</sup> respondent was that the 1<sup>st</sup> appellants had no locus to maintain the appeal. The point was not substantiated, but when Mr. Amuga for the respondent addressed the court he stated that whereas Sammy Kilukei participated in the proceedings of the Political Parties Disputes Tribunal the other 299 had not, and therefore that these 299 individuals could not appeal a decision whose proceedings they had not participated in. Counsel had legitimate complaint. However, the more important issue was that the appeal Sammy Kilukei and the 299 others sought to argue was intended to have set aside the decision of the Political Parties Disputes Tribunal, and to have affirmed the decision of the Jubilee Party National Elections Appeals Tribunal. The decision was to have the 2<sup>nd</sup> appellant declared as the nominee for the Laikipia County governor position for the Jubilee Party, and to be given a certificate to that effect. In my view, it would be an exercise in futility to delve into the merits of the appeal as sought by the 1<sup>st</sup> appellants. This is because the candidate they support, and whom they want to be given a certificate to contest for the governor seat for Laikipia County, is no longer a member of their party, the Jubilee Party. He cannot, even if the appeal were to succeed on merits, be legally permitted to contest on Jubilee Party or to participate in any repeat nomination by the Jubilee Party. To that extent, therefore, the appeal by Sammy Kilukei and the 299 individuals (all 1<sup>st</sup> appellants) is incompetent as they are, as Jubilee members, pushing the agenda of a candidate who has resigned from the party and seeks to contest as an independent.

11. The 3<sup>rd</sup> respondents, represented by Mr. Karungo, supported the decision by the Political Parties Disputes Tribunal. They also supported the contention that since the 2<sup>nd</sup> appellant was no longer a member of the Jubilee Party he could not bring the appeal. They asked that the appeal be struck out with costs.

12. The last preliminary issue was raised by the Independent Electoral and Boundaries Commission (the interested party): that they had been wrongly joined in the appeal as they had not participated in the proceedings before the Jubilee Party National Elections Appeals Tribunal or at the Political Parties Disputes Tribunal. The court was addressed on this point by Mr. Nyamodi. It is true from the record that IEBC did not take part in the proceedings at the Jubilee Party National Elections Appeals Tribunal and at the Political Parties Disputes Tribunal. It was dragged into the appeal because of the fear by the appellants, as shown in the supporting affidavits, that if the appeal is not allowed the orders of the Political Parties Disputes Tribunal will be complied with, leading to the 1<sup>st</sup> respondent issuing a certificate of nomination to the 2<sup>nd</sup> respondent who will in turn present the certificate to it (IEBC). Beyond this, IEBC had no role at all in the appeal. Strictly, IEBC was wrongly joined. But because they were going to be affected had the appeal succeeded, I would not strike out the appeal on that score.

13. In summary, therefore the appeal by the appellants is found to be incompetent and is struck out with costs.

**DATED, DELIVERED and SIGNED at NAIROBI this 10<sup>TH</sup> day of MAY 2017.**

**A.O. MUCHELULE**

**JUDGE**



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