



Case Number:	Complaint 5 of 2019
Date Delivered:	30 Aug 2019
Case Class:	Civil
Court:	Political Party's Tribunal
Case Action:	Judgment
Judge:	Milly Lwanga Odongo - Presiding Member, Paul Ngotho - Member & Adelaide Mbithi - Member
Citation:	Alphonse Mbinda Musyoki v Party of National Unity (PNU) & 26 others; Registrar of Political Parties (Interested Party ) [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Tribunal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Complaint dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE POLITICAL PARTIES DISPUTES TRIBUNAL

COMPLAINT NO. 5 OF 2019

ALPHONCE MBINDA MUSYOKI.....COMPLAINANT

-VERSUS -

1. THE PARTY OF NATIONAL UNITY (PNU).....1<sup>ST</sup> RESPONDENT

2. SEINA LEKISAAT (*Sued as the Chairperson of the Party of*

*National Unity, National Election Board*).....2<sup>ND</sup> RESPONDENT

3. JOHN ANUNDA.....3<sup>RD</sup> RESPONDENT

4. PAUL RUKARIA.....4<sup>TH</sup> RESPONDENT

5. FEMINA HUSSEIN.....5<sup>TH</sup> RESPONDENT

6. DANIEL KIILI.....6<sup>TH</sup> RESPONDENT

7. YUDA IMUNYA.....7<sup>TH</sup> RESPONDENT

8. RUTH NASHIPAE MUIGAI.....8<sup>TH</sup> RESPONDENT

9. PRISCA MWITA.....9<sup>TH</sup> RESPONDENT

10. MAURINE ADENJE.....10<sup>TH</sup> RESPONDENT

11. AYUB BUNDI.....11<sup>TH</sup> RESPONDENT

12. BETH MENGO.....12<sup>TH</sup> RESPONDENT

13. FRANK WELUKWE.....13<sup>TH</sup> RESPONDENT

14. DAVID KAMAU.....14<sup>TH</sup> RESPONDENT

15. JOHN KAMAMA.....15<sup>TH</sup> RESPONDENT

16. PAUL AMENYA.....16<sup>TH</sup> RESPONDENT

17. DOMINIC KARIUKI.....17<sup>TH</sup> RESPONDENT

18. IRENE MURONJI.....18<sup>TH</sup> RESPONDENT

19. KELVIN KARIUKI.....19<sup>TH</sup> RESPONDENT

20. BISHOP GENERY WANDO.....	20 <sup>TH</sup> RESPONDENT
21. THOMAS KARIUKI.....	21 <sup>ST</sup> RESPONDENT
22. JUNE WAWERU.....	22 <sup>ND</sup> RESPONDENT
23. BERNARD NDETO.....	23 <sup>RD</sup> RESPONDENT
24. JOSEPH MURIMI.....	24 <sup>TH</sup> RESPONDENT
25. AGNES TOYA.....	25 <sup>TH</sup> RESPONDENT
26. ANNASTERCIA MUNYENDO.....	26 <sup>TH</sup> RESPONDENT
27. MWAJUMA RAJAB.....	27 <sup>TH</sup> RESPONDENT

AND

THE REGISTRAR OF POLITICAL PARTIES..... INTERESTED PARTY

**JUDGMENT**

***Background***

1. The Complaint herein was instituted by way of certificate of urgency together with a Notice of Motion application and a supporting affidavit sworn by the Complainant [hereinafter the complaint bundle 1]. This bundle was dated 30<sup>th</sup> May 2019 and filed in the Tribunal on the same date.
2. The matter was initially heard *ex parte* by the Chairman of the Tribunal who declined to certify the matter as urgent and directed that the same be served upon all parties and the matter proceed to interparty hearing on 11<sup>th</sup> June 2019.
3. However, before the interparty hearing date, on 7<sup>th</sup> June 2019, the Complainant filed yet another bundle of documents being; a certificate of urgency, a notice of motion and supporting affidavit together with a Complaint [hereinafter the complaint bundle]. This application was also heard *ex parte* by the Chairman of the Tribunal who directed that the same be duly served and canvassed before the Tribunal on 14<sup>th</sup> June 2019.
4. On 10<sup>th</sup> June 2019, before the date when the notice of motion application in the above said Complaint bundle was to be heard the Complainant sought a mention before the Tribunal so as to regularise the documentation to enable service be effected. This Tribunal adopted the Complainants' application that the earlier complaint bundle 1 [comprising certificate, notice of motion, affidavit and complaint] filed on 30<sup>th</sup> May, be disregarded and that the complaint bundle filed on 7<sup>th</sup> June 2019 [comprising certificate, notice of motion, affidavit and complaint] be deemed as the proper documentation for the Complaint to be served upon all parties and the matter proceed to interparty hearing on 14<sup>th</sup> June 2019.
5. On 14<sup>th</sup> June 2019 the matter was canvassed in open court. The Complainant was represented by counsel who confirmed that service had been effected and an affidavit of service filed. Two Advocates, Mr. Walukwe and Mr. Makolwal appeared in the matter with the former intending to come on record once properly seized of the matter and the latter confirming being on record for the Interested Party. The Tribunal directed the Complainant to serve all parties. Service was effected upon the said Walukwe Advocate in court.
6. When the matter next came up before the Tribunal on 10<sup>th</sup> July 2019 the Complainant, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as well as the Interested Party were represented by counsel. Counsel for the Complainant (who was merely holding brief for the substantive Counsel on record) was unsure whether the remaining parties had been served. Noting that the issue was quite similar to Appeal No.

3/19 before this Tribunal the said Counsels present and on record sought to have this matter withdrawn. The Counsel holding brief on behalf of the Complainant was not sufficiently briefed to consent to such proposed withdrawal and as a result this Tribunal directed that the matter be stood over generally, with the rider that a date for directions be taken before the matter became time barred.

7. This complaint then came up before the Tribunal on 21<sup>st</sup> August 2019. The Complainant had filed their written submissions. Counsels for 1<sup>st</sup>, 3<sup>rd</sup>, 2<sup>nd</sup> and 13<sup>th</sup> Respondents as well as counsel for the Interested Party were in attendance. The 1<sup>st</sup> Respondent was represented by two counsels [Omogeni Advocates and Malonza Advocate]. Service upon the remaining parties was not confirmed. Parties consented to put in and serve their replies and written submissions. The highlights of these written submissions were presented before the Tribunal on 28<sup>th</sup> August 2019.

8. On the said 28<sup>th</sup> August 2019, the Complainant filed an Affidavit of Service averring service upon all Respondents. The said Affidavit of Service sworn by one Mwalimu Muthoka, a Court Process Server, stated that upon instruction from the Complainants' Advocates on record he effected service on all Respondents through the party headquarters by leaving the documents with the Security guard. The said service was effected on 11<sup>th</sup> June 2019 and contained the complaint bundle.

9. Noting that this complaint would become time barred on 30<sup>th</sup> August [two days from the date of highlights before the Tribunal], directions were issued that the parties proceed to submit on three aspects:-

(a) On the effect of service

(b) On the aspect of representation of the 1<sup>st</sup> Respondent

(c) On the substantive Complaint

#### **Service on Respondents**

10. **The Complainant** sought to amend the Complaint at this stage to remove all the other Respondents and retain only Respondents numbers 1, 2, 3 and 13. He averred that the said three Respondents had always been served and were represented. He further stated that the issue of lack of service was merely meant to scuttle the process of justice as the entire list of Respondents were all members of a WhatsApp group and were sufficiently aware of matter.

11. **Respondent numbers 4, 5, 7, 14, 15 & 19** stood up in person and addressed the Tribunal to wit that they had become aware of the proceedings but had never been served and that in deed they would like to participate in the proceedings. Respondent number 14 confirmed that he was the Administrator of the WhatsApp group referred to by counsel for the Complainant but that the Complainant and the Secretary General of the 1<sup>st</sup> Respondent had not been participating (although included) in the group. He stated that in deed on a meeting called to discuss this complaint the said two officials of the party did not attend. They had therefore never had an opportunity to see the detail of the matter present before this Tribunal. All except Respondent no. 14, objected strongly to such purported removal and submitted that they were invested in the process and had useful submissions that they could make to guide the Tribunal in dispensing justice. Respondent no. 14 submitted that he would be satisfied to await the Tribunals decision.

12. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 13<sup>th</sup> Respondents objected to such amendments and called the attention of the Tribunal to the prayers in the Complaint and in particular prayer no, (iv) which sought specific orders against the same Respondents the Complainant sought to remove.

#### **Representation of the 1<sup>st</sup> Respondent**

13. Mr. Malonza [for Wambua Kilonzo Advocates] submitted that they were properly on record for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents and submitted a letter written on the 1<sup>st</sup> Respondents' letter head and signed by the 3<sup>rd</sup> Respondent as the National Secretary General of the 1<sup>st</sup> Respondent and dated 23<sup>rd</sup> August 2019, duly instructing them to take over from the firm of Okongo Omogeni & Company Advocates. He further submitted that they had put in a Replying Affidavit and Written Submissions unlike the firm of Omogeni who had only put in a Notice of appointment. He concluded by urging the Tribunal to consider them the correct advocates on record because if not for them the said two Respondents would have not responded to the claim and its content would remain uncontroverted.

14. Ms. Kendi for the firm of Okongo Omogeni submitted that they were properly on record and in deed the proceedings will confirm that in addition to their notice of appointment, they have been present at each proceedings and have submitted on behalf of their client. They submitted minutes of a meeting held by the party officials where their firm was among the three confirmed as law firms to represent the 1<sup>st</sup> Respondent. She further submitted that the 3<sup>rd</sup> Respondent had clearly shown that he was in support of the Complainant and as he was sued independently of the 1<sup>st</sup> Respondent he could not act to protect the interest of the said 1<sup>st</sup> Respondent. She concluded by reminding the Tribunal that the crux of the contention in this case was the alleged action by the 1<sup>st</sup> Respondent.

15. Counsels for the 2<sup>nd</sup> and 13<sup>th</sup> Respondents and for the Interested Party objected to the firm of Wambua Kilonzo representing the interests of both the 1<sup>st</sup> and 3<sup>rd</sup> Respondent as the 3<sup>rd</sup> Respondent was in support of the Complainant who was dissatisfied with action taken by the 1<sup>st</sup> Respondent. The 14<sup>th</sup> Respondent strongly objected to the representation of the 1<sup>st</sup> Respondent by any firm other than that of Omogeni Advocates stating that the party officials had clearly indicated which firms they wanted and believed should protect their interest.

### **Submissions on the Complaint.**

#### ***Complainant's submissions***

16. The Complainant alleges that the National Elections Board of the 1<sup>st</sup> Respondent was not procedurally and/ or properly constituted in the process of conducting a party election conducted in execution of this Tribunal's orders and as a result the impugned election should be declared null and void and all officials purported to have been elected through such impugned process be declared unlawfully in office.

#### ***3<sup>rd</sup> Respondent's Submissions***

17. The 3<sup>rd</sup> Respondents filed a Replying Affidavit sworn by one John Okemwa Anunda together with written submissions on 26<sup>th</sup> August 2019. It was his contention that the crux of the dispute giving rise to this complaint, was the failure by the Interested Party to act within the limits of its jurisdiction as guided by law.

18. The 3<sup>rd</sup> Respondent averred that the irregularities and illegalities that were allowed by the Interested Party in the process of the 1<sup>st</sup> Respondent's elections led to the wrong officials being gazetted as national officials and as such that the entire process need be conducted afresh and more time be allocated to the 1<sup>st</sup> Respondent to try and build consensus in the appointees to be nominated by the two disagreeing factions to participate in the said election.

19. The counsel made this presentation on behalf of the 1<sup>st</sup> Respondent as well.

#### ***1<sup>st</sup> Respondent's Submissions***

20. The 1<sup>st</sup> Respondent, through the firm of Senior Counsel Omogeni, further stated that the complaint was premature as disputes within the party are subject to the Arbitration Act and the process of initiating arbitration is clearly outlined. The Complainant had not followed this and as such the IDRMs have not been applied as required by law. The complaint need be dismissed and the process allowed to proceed according to the party laws and rules.

#### ***Interested Party's submissions***

21. The Advocate for the Interested Party, Mr. Makolwal emphatically objected to this complaint. It was the Interested Party's position that the matter in issue was actually an act conducted not only in compliance to this Tribunal order made in Complaint No. 13 of 2018 but was also a process that they merely oversaw but was actually executed by the political party in issue [the 1<sup>st</sup> Respondent]. It was his contention that the complaint was actually an application for contempt of this Tribunal's orders but was coached in a manner yet unknown in law.

22. The Interested Party submitted that this Tribunal not only lacked the jurisdiction to hear and determine this complaint but that the complaint was also bad in law and thus should be rejected in its entirety.

### *2<sup>nd</sup> and 13<sup>th</sup> Respondents submissions*

23. The 2<sup>nd</sup> and 13<sup>th</sup> Respondents, through counsel, filed a Replying Affidavit, List of Authorities and Written Submissions. Their response was a strong and protracted submission that the party election process, subject matter of this case, was conducted in a prudent, transparent and lawful manner.

24. They further submitted that this Tribunal has no jurisdiction over this matter as the Complainant had not evoked the IDRMM [internal dispute resolution mechanism] as required by law. They submitted that the complaint be dismissed.

### **Analysis**

25. In proceeding with this matter, the key thing to first determine is that we are properly situated to proceed to final submissions. The Complaint has been brought against 27 Respondents and one (1) Interested Party. This Tribunal did on multiple occasions, when the matter came up before it, direct that all parties be served. The Affidavit of Service on record filed on 14<sup>th</sup> June 2019 and sworn by one Mwalimu Muthoka clearly states that instruction for service was in respect of The Party of National Unity, Seina Lekisaat and The Registrar of Political Parties. No reference is made to all the other Respondents party to this suit. A second Affidavit of Service filed on 28<sup>th</sup> August 2019 in reference to service effected in June 2019 states that the court process server was directed by the instructing law firm that the Respondents were scattered all over the country and thus service at the party headquarters would suffice. In addition the said process server avers that he served a security guard at the gate! This is contrary to the Regulations under the PPA. No affidavit of service was filed to show that service of the written submissions and the further written submissions was effected upon all Respondents listed in the complaint.

26. The Respondents who availed themselves in court and addressed the Tribunal either directly or through counsel offered information that definitely directly relates to the issue at hand. For example one respondent [no. 14] confirmed that he was the originator and Administrator of the WhatsApp group that the Complainant had referred to and relied on to support his averment that the parties were always aware of the proceedings before this Tribunal.

27. In *Mahr v. Norwich Union Fire Ins. Co.* 127 N.Y. 452, 28 N.E. 391 (1891) a party to the proceedings was not served with process. The trial court granted the relief asked for, but the court of appeal reversed the decision, holding that failure to serve all parties exposed the Respondent to the possibility of double liability.

28. In the case of *M.B. Automobiles Vs Kampala Bus Service (1966) EA 480*, it was held that the failure to file a return of service is tantamount to no service. The same was held in the case of *Laban Kariuki Wambugu & 68 others Vs Hon. Kihika civil case No. 161 of 2002*. No affidavit of service has been filed in respect to the 4<sup>th</sup> to 12<sup>th</sup> as well as 14<sup>th</sup> to 27<sup>th</sup> Respondents.

29. In our view, the overriding objective of our statutory framework on civil procedure is to achieve substantive justice to litigants. This cannot be done in light of the fact that a number of the parties have not been served and cannot be said to have had opportunity to present their case thus this is outstanding. *Mbaki & Others V. Macharia & Another (2005) 2 EA 206*, at page 210, states as follows: “*The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.*” In the circumstances of this case, there was no reason grave enough that would warrant the locking out of some of the Respondents from pursuing their response and allowing the trial to proceed to its logical conclusion. The interest of justice warrants this Court’s intervention.

30. The need to have national officials of the PNU in place is a fact that this Tribunal has stated before, including in the instance of the dispute that led to the election process that is currently subject matter of this complaint. This will enable the party laws work as anticipated. Currently the Chairman of the political party in minutes of a meeting held together with other officials is clear that the interest of the party is represented by the firm of Okongo Omogeni. He reiterated this during the proceedings and supported the copy of signed minutes submitted by Ms. Kendi of the said firm. The said minutes are signed by himself, the Deputy Secretary General and the Organizing Secretary. The Secretary General of the political party on the other hand has executed a letter signed solely by him instructing Wambua Kilonzo Advocates.

31. The firm of Kilonzo object to the minutes on the ground that the meeting was not properly convened but do not dispute the signatories. It is already on record and supported by all parties that there was a WhatsApp group established to facilitate communication in regard to the dispute in issue. Counsel for the Complainant submitted that the parties who were on opposing side

were unlikely to willingly participate in any processes convened under the Chairman through the WhatsApp group.

32. The 3<sup>rd</sup> Respondent has clearly exercised his right to representation by an Advocate of his choice. The only contention would be in regard to the 1<sup>st</sup> Respondent whose interest, though not by way of written submissions or replying affidavit have been located on law and adequately presented throughout the term of the complaint by the firm of Omogeni [Senior Counsel]. Their stand has been somewhat supported by the firm of Kilonzo who came on record at the tail end of proceedings and put in an elaborate response and written submissions. This representation by the two counsel has not prevented the 1<sup>st</sup> Respondent from participating in the proceedings and there was no miscarriage of justice.

33. Consequently, we make the following orders in disposing Complaint bundle:-

- a) **The Complaint filed on 7<sup>th</sup> June 2019 is dismissed.**
- b) **Costs be awarded to the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> 15<sup>th</sup> & 19<sup>th</sup> Respondents and to the Interested Party**

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF AUGUST 2019**

**1. Milly Lwanga Odongo.....**

**Presiding Member**

**2. Paul Ngotho.....**

**Member**

**3. Dr. Adelaide Mbithi.....**

**Member**



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