



Mukabwa v Democratic Action Party of Kenya & another; Independent Electoral And Boundaries Commission (Interested Party) (Complaint E012 (KK) of 2022) [2022] KEPPDT 932 (KLR) (17 July 2022) (Judgment)

Neutral citation: [2022] KEPPDT 932 (KLR)

REPUBLIC OF KENYA
IN THE POLITICAL PARTIES DISPUTES TRIBUNAL
COMPLAINT E012 (KK) OF 2022

ML ODONGO, PRESIDING MEMBER, T K TOROREY & L WAMBUI, MEMBERS

JULY 17, 2022

BETWEEN

JOHNSTONE ALUSIOLA MUKABWA COMPLAINANT

AND

DEMOCRATIC ACTION PARTY OF KENYA 1ST RESPONDENT

LIDZANGA BONFACE 2ND RESPONDENT

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION INTERESTED PARTY**

JUDGMENT

1. The complaint herein had initially been heard ex parte by this tribunal and judgment delivered dated May 24, 2022. The parties subsequently presented themselves before the High Court which directed the re-hearing of the complaint. This final judgment is thus rendered after hearing the complainant, the 1st and 2nd respondents as well as the interested party [IP], each of whom now had opportunity to present their case before this tribunal.
2. The complainant avers that he is a member of the DAP-K Party being member No 178255. He avers that he was nominated by the party on April 19, 2022 as its Murhanda Ward nominee, for the position of Member of County Assembly in the general elections scheduled for August 2022.
3. The complaint is that the political party [party] duly forwarded the complainant's name to the interested party for verification pending his official nomination.
4. It is further submitted, that the interested party thereafter amended without any right, the 1st respondents said list removing the complainant's name. The said removal was occasioned without any



process having been undertaken by the party, or any notice issuing to the complainant and was in contravention of the DAP-K's constitution and election rules.

5. In response to the complaint, the 1st respondent filed a replying affidavit sworn on July 16, 2022 by one David Simiyu Muchele, the party National Chairman.
6. The 2nd respondent swore and filed his replying affidavit dated July 15, 2022, in response to the complaint.
7. Oral submissions were, on July 16, 2022, made by the counsels for the respective parties, including the interested party herein, in support of their varying positions.

The Complainants Submissions

8. The complainant herein states that he was validly nominated by the 1st respondent to vie as the Member of County Assembly, Murhanda Ward of Shinyalu Constituency, Kakamega County and a nomination certificate No 2022/511 thereof issued to him on April 19, 2022.
9. He submits that the 1st respondent thereafter forwarded its list of nominees, under form 11M, titled list of nominated candidates in party primaries, county assembly ward candidates, as provided for under regulation 13c, to the interested party on April 28, 2022 as per the Party Election and Nomination Rules.
10. On the aforesaid list, the complainant was the 1st respondent's Murhanda Ward nominee as shown at entry No 170.
11. Upon receipt of the said list, the complainant states that the interested party published names of all the nominees as forwarded to it by the 1st respondent, including that of the complainant, on its website,
12. The interested party, upon scrutiny of the list aforesaid, advised the 1st respondent to comply with the constitutional gender requirement and re-submit the list. Upon resubmission, the complainant avers that the 1st respondent illegally, without notice and or right removed the complainant's name and replaced it with that of the 2nd respondent as per the resubmitted list of the 9 May, 2022.
13. The complainant submits that the 2nd respondent is a stranger to him, and her addition was contrary to the party rules.
14. Upon noticing the anomaly, the complainant states that he engaged the 1st respondent who in response engaged the IP herein affirming support of the complainant as its nominee for the position in issue.
15. At the initial hearing the complainant, through his Advocate on record amended his complaint thereby seeking the following orders:
 - i. That a mandatory order do issue directing the 1st respondent - DAP-K, to forward the name of the complainant and nomination certificate to the interested party – IEBC, as the party's nominee for Murhanda Ward.
 - ii. That the interested party be duly informed by the 1st respondent that John Alusiola Mukabwa is the nominee for DAP-K to contest for Member of County Assembly Murhanda Ward, Shinyalu Constituency, Kakamega County
 - iii. Any other orders
 - iv. Costs
16. The complainant stands by his amended plaint and prays that it be allowed.



The 1st Respondents Submissions

17. Vide his sworn affidavit, the National Chairperson of the 1st respondent states, on behalf of the party [the 1st respondent herein], that the party concedes the complaint in its entirety.
18. The further submission is made, on behalf of the 1st respondent, that the allegations by the 2nd respondent, that he was the correct party nominee, as supported by the affidavit of the Director of Elections, are strange to the party.

The 2nd Respondents Submissions

19. The 2nd respondent vide his sworn affidavit raises objection to the jurisdiction of this tribunal on the basis of non-compliance with section 40 (2) of the PPA [*Political Parties Act*].
20. In addition, the 2nd respondent objects to some of the evidence tendered by the complainant, in particular the alleged inclusion in a list presented to the interested party herein. The objection is on the ground that the alleged screenshot of the interested party's site was not submitted in line with the requirements of the *Evidence Act*.
21. In addition, it is his submission that the complainant does not present before this tribunal with clean hands, as he stated in his application requesting this tribunal to re-hear the complaint, that he had already served the complaint, an averment that was not true.
22. The 2nd respondent submits that he was the properly and procedurally nominated candidate of the party and has submitted an affidavit sworn by the Director of the party stating as much.
23. The 2nd respondent also objects to some of the content of the 1st respondents replying affidavit, in particular, as to allegations of disciplinary proceedings against the said Director of Elections and also requested the production of the letter of mandate to sign/execute documents that was lodged with the IP herein.
24. He submits that the complaint is merely an attempt to supplant him after the fact, and should be dismissed with costs and in support has submitted a list and digest of authorities dated July 15, 2022.

Issues for determination

- a. Is this tribunal properly seized of jurisdiction?
- b. Should this tribunal rely on sections of the 1st respondents replying affidavit which were objected to by the 2nd respondent?
- c. Who is the party nominee for the position in issue?
- d. What orders should issue?

Analysis

Whether PPDT has jurisdiction

25. Whereas it is not contested that the parties before this tribunal have right of audience having properly been identified as persons over whom this tribunal can exercise jurisdiction, all being members of a political party, and the political party, the question of jurisdiction turns on section 40(2) of the *Political Parties Act* [PPA].



26. The current wording of section 40 (2) PPA states as follows:

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless a party to the dispute adduces evidence of an attempt to subject to the internal political party dispute resolution mechanisms."

27. In effect what is in question is whether first available remedy was exhausted or even applied. The doctrine of exhaustion of remedies was first embodied by the Court of Appeal in *Speaker of National Assembly vs Karume* (1992) KLR 21. The said court went on and clarified the doctrine under the current constitutional dispensation in *Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others* (2015) eKLR as follows: It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the *Constitution* which commands courts to encourage alternative means of dispute resolution.

28. While the exceptions to the exhaustion requirement are not clearly delimited, the Court of Appeal gave guidelines when they would apply in *Republic vs National Environment Management Authority*, Civil Appeal No 84 of 2010, as follows:...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute.

29. The complainant has stated that when he noted his name was oddly and unlawfully removed, after it had been included, he approached the party and the party did respond and or react to his complaint by re-confirming and affirming his nomination by the party. The party, in reaction to the concern raised by the complainant, wrote the interested party. Copies of the letters by the party in response to the complainants complaint before them, have been produced before this tribunal and are not controverted by any party.

30. It is thus our consideration, that the complainant first raised his concern with the party, as anticipated under section 40 (2) of the *PPA*, before presenting this complaint before us and thus we are properly seized of jurisdiction. Should this tribunal rely on sections of the 1st respondents replying affidavit which were objected to by the 2nd respondent?

31. The 2nd respondent objects to the averments made on behalf of the 1st respondent that the party's Director of Elections, who has sworn an affidavit in support of the 2nd respondent, was subject of a party disciplinary process.

32. The objection is based on the fact that there was no evidence attached to show that such internal process was ongoing.



33. There is indeed, no evidence of proceedings of such internal disciplinary process and as such the 2nd respondents objection to reference to the same is upheld.

Who is the party nominee for the position in issue?

34. Both the complainant and the 2nd respondent aver that they are the party nominee for the position in issue.

35. The 2nd respondent objected to the alleged screenshot of list in the IP site as it was not submitted in line with the laws of production of evidence. We uphold this objection.

36. Our focus thus shifts to determining who the party nominee for the position in issue is. It is a political party that submits its list of names of persons the party membership desires should represent in an election. The list should be a result of a lawful nomination process. It is submitted that the party undertook this process in line with its laws under the direction of the NEB.

37. In looking at the party laws, we note that the party election and nomination rules provides that the National Election Board shall be constituted by National Executive Committee (NEC) and it shall consist of nine (9) persons of integrity appointed by NEC. The Director of Elections and his deputy shall be ex-officio members of NEB - National Elections Board] whose powers include:

Powers of NEB

- a. NEB may from time to time make rules, regulations, orders or notice for ensuring conduct of regular, free, fair and transparent elections and nominations.
- b. NEB in consultation with the National Management Committee shall organize, coordinate and supervise all party Elections and nominations in accordance with the Party Nominations and Elections Rules and procedures.
- c. NEB, on recommendation of the NMC shall make, amend or party Nomination and elections Rules and procedures.
- d. NEB shall appoint appropriate officers to conduct elections or nominations at the National Branch, Sub Branch, Ward and polling center levels.
- e. NEB shall vet party nominees for appointment by the requisite party organs to any position that the party by law nominate to in consultation with the National management Committee. The national chairperson and National Secretary General shall sign under seal the certificates of nominations.
- f. NEB shall consist of a chair person and eight other persons all of whom shall be of good standing and integrity and who shall not be seeking nominations as party candidates in the Elections
- g. In appointing the National Elections Board members the National Executive Committee shall have regard and ensure on third (1/3) representation of either gender in accordance with the party constitution and the country's constitution.
- h. NEB may establish dispute resolution panels at the Branch, sub Branch, ward and polling station levels. The panels are adhoc in nature.
- i. Provided that where NEB has for any reason been unable to perform all or any of the duties specified herein above, the NEC shall assume all the powers and duties of NEB.



- j. NEB shall be independent and act in accordance with rules of natural justice, and in consultation with NEC.
- k. NEB shall be independent and act in accordance with rules of natural justice, and in consultation with NEC
- l. NEB may carry out any other functions assigned to it by NEC, NMC, GM or NDC

38. The said party rules at “Part 21.1; Announcement of results and issuance of nomination certificates” provides that; “The NEB shall accordingly enter the name of the winner on the Party list and the same shall not be removed except by a decision of the Independent Electoral and Boundaries Commission Complaints and Dispute Resolution Committee or a High Court order.”

39. The name of the nominee once submitted must then be relayed. Our analysis shifts to how the list generated through the party process need to relayed to third parties or other relevant bodies.

40. The party constitution at article 7 establishes the governing body {NEC} which consists of 64 officials and included therein are at number 5, the National Chairperson, number 8 the Secretary General and at number 18 the Director of Elections.

41. Article 15 of the party constitution on ‘authorized officials of a political party who shall sign behalf of the political party’ states that (a) correspondence to the office of the Registrar and any other office on all matters of the party shall be done by the SG and/or the National Chairperson and at part (e) states that the national Chairperson and SG shall be signatories to the nomination certificates for any nomination of a member of the party.

42. Our reading of the rules and provisions cited herein above is that a consultative process within NEC is anticipated so that the final list communicated by the SG to the IP will be the party list.

43. The pleadings before us show that the complainant and the 1st Respondent (the party) lodged objection with the interested party, on May 16, 2022 and May 18, 2022, for reinstatement of the complainants name in said party nomination list in support of their contention that the complainant is the party nominee for the position in issue.

This communication was made by the authorized person as per the party laws.

44. The complainant’s name is thus the official name submitted by the party to the IP.

45. The IP party presented before this tribunal and their main submission was for expeditious resolution of the matter to enable them complete the printing of ballots for the coming general elections scheduled for August 2022.

Disposition

1. In light of our analysis, we order as follows.
 - a. That the complainant Johnstone Alusiola Mukabwa is the nominee of Democratic Action Party of Kenya (DAP-K) as the party candidate for the position of Member of County Assembly Murhanda Ward, Shinyalu, Kakamega County in the August 2022 general elections.
 - b. That the costs of this complaint are awarded to the complainant as against the 2nd respondent .

DATED THE 17TH DAY OF JULY 2022

M. L. ODONGO (PRESIDING MEMBER)



TOROREY TIMOTHY KIPCHIRCHIR (MEMBER)

DR. LYDIAH WAMBUI (MEMBER)



<https://new.kenyalaw.org/akn/ke/judgment/keppdt/2022/932/eng@2022-07-17>