



REPUBLIC OF KENYA



Mogeni v Independent Electoral and Boundaries Commission & 2 others; Mogaka (Interested Party) (Petition E006 of 2023) [2024] KEHC 9487 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E006 OF 2023
WA OKWANY, J
JULY 30, 2024**

BETWEEN

DENNIS MATUNDURA MOGENI PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

THE SPEAKER, NYAMIRA COUNTY ASSEMBLY 2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 3RD RESPONDENT

AND

DICKSON MACHUNGO MOGAKA INTERESTED PARTY

RULING

1. This ruling is in respect to the Application dated 14th November 2023 wherein the Applicant seeks the following orders: -
 1. Spent
 2. That an order does issue compelling the 2nd Respondent to declare the position of the Orange Democratic Movement Party Marginalized (Youth) Category nominee in Nyamira County Assembly vacant.
 3. That failing to comply with order 2 above within 24 hours, the said position of the Marginalized Youth category representing the Orange Democratic Movement Party in Nyamira County Assembly be deemed vacant.
 4. That an order does issue compelling the 1st Respondent's Chief Executive Officer to gazette the Petitioner/Applicant as the Orange Democratic Movement Party's Nominee for Member



of Nyamira County Assembly under the Marginalized (Youth) Category as per the party list submitted.

5. That upon declaring the said position vacant in terms of orders 2 and 3 above, an order do issue compelling the 2nd Respondent to proceed and swear in the Petitioner/Applicant into office as the duly nominated Member of County Assembly of Nyamira under the Marginalized (Youth) Category representing the Orange Democratic Movement Party.
 6. That failure to comply with order 5 above within the stipulated timeline, the Petitioner/Applicant be deemed to have been duly elected, sworn in and be at liberty to take up his position as the Orange Democratic Movement Party Member of County Assembly representing the Marginalized (Youth) category in Nyamira County.
 7. That the costs of this Application and interests thereon be awarded to the Petitioner/Applicant.
 8. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.
2. The Application is brought under Articles 19, 20, 21, 22 and 23 of *the Constitution*. The Application is further supported by the Applicant's Affidavit wherein he avers, inter alia, that this Court (differently constituted) delivered a judgment in Election Petition Appeal No. E004 of 2023 wherein the nomination of one Dickson Machungo Mogaka, the current Member of County Assembly under the Marginalized (Youth) Category was revoked. He avers that this court, differently constituted, found that the said nominee did not fall within the youth age bracket and was therefore unqualified to represent the youth.
 3. The Applicant further averred that despite the valid court orders revoking the said nomination, the 1st Respondent refused and/or neglected to while the 2nd Respondent declined to swear him in as the next qualified candidate in accordance with the order of names submitted by the 3rd Respondent (ODM) under the said category, contrary to the dictates of the Constitutional. He contended that there was no requirement for his gazette to be a Member of County Assembly. He added that since the 1st Respondent's is currently not properly constituted, it was prudent for the Court to issue an Order compelling the 2nd Respondent to declare a vacancy in the said position and swear him into office.
 4. The Applicant also urged this court to find that the 2nd Respondent has breached of the provisions of Chapter 6 of *the Constitution* as it has allowed the said Dickson Machungo to draw salaries with impunity despite this Court's order revoking his nomination.
 5. The 1st Respondent opposed the application through the Replying Affidavit of its Director of Legal Services Mr. Chrispine Owiye, who averred that the 1st Respondent had not been served with a fresh party list from as directed by the Court. The 1st Respondent maintained that it could not gazette the Applicant as the nominated MCA in the face of clear court orders directing the 3rd Respondent to submit a fresh party list.
 6. The 1st Respondent's deponent stated that the instant application amounts to an abuse of the court process as it seeks to execute the decree issued on 13th July 2023 through a fresh suit.
 7. The 2nd Respondent did not file any response to the Application.
 8. The 3rd Respondent opposed the Application through the Replying Affidavit of its Legal and Parliamentary Liaison Officer, Mr. Antony Moturi, who averred that this court (differently constituted) did not grant the Applicant's prayer for orders to compel the 1st Respondent to issue a



Special Gazette Notice to gazette his name as the nominee for the said position. He averred that there was therefore no legal basis for this Court to grant the orders for the Applicant's gazette.

9. The 3rd Respondent contended that the instant Petition, as crafted, seeks constitutional reliefs that were not granted in the judgment by Chemitei J. The 3rd Respondent added that there are legal procedures for the enforcement of the said judgment such as citing the relevant entities for contempt. It was averred that the reliefs sought in the Application were in the nature of orders of mandamus which, if granted, would determine the Petition.
10. The Application was canvassed by way of written submissions which I considered.

The Applicant's Submissions

11. The Applicant submitted that the 1st Respondent had the power to supervise the nomination process in order to ensure that the nominated candidates meet the suitability and eligibility criteria set by the law. For this argument, reference was made to the decision in *Lydia Nyaguthii Githendu v IEBC & 17 Others* [2015] eKLR where the Court of Appeal held that the Commission had secondary powers to supervise political parties in their formulation of lists for nominated candidates. It was submitted that the Court could address instances of violation and infringement of fundamental rights where the Commission failed to execute its mandate. It was further submitted that once a party list was submitted, the function of the political party ended and could not be amended during the parliamentary term in accordance with Section 34 (10) of the *Elections Act*.
12. It was submitted that under Section 37 of the *Elections Act*, a closed party list would be the source of any re-allocation of special seats. The Applicant urged this Court to find that a party list contained all the various nominees and if nullified would affect all the nominees without affording them a right to be heard.
13. The Applicant further urged this court to note that he was unable to assume office due to the absence of the IEBC Commissioners and to offer a solution in the prevailing circumstances in line with the provisions of Article 259 which mandates the Court to exercise its jurisdiction in a way that promotes the fundamental freedoms and upholds the rule of law. It was submitted that gazette was not a mandatory requirement and that insisting on gazette was the 1st Respondent's way of taking advantage of the lacuna created by the absence of the 1st Respondent's Commissioners. Reference was made to the decision in *Moses Mucigi and 14 Others vs. IEBC and 5 Others* [2016] eKLR where it was held that gazette merely serves as a notice to the public but is not the ultimate determinant of a substantive legal process such as nomination. The Applicant urged the Court to allow the application and to ensure that the Orders issued on 6th July 2023 were adhered to.

The 3rd Respondent's Submissions

14. The 3rd Respondent submitted that this court's orders for fresh nominations did not mean that the Applicant was automatically nominated since candidates other than the Petitioner could be nominated and elected to the subject position. The 3rd Respondent faulted the Applicant seeking to enforce the earlier judgment through this petition.

Analysis and Determination

15. I have considered the pleadings filed herein together with the parties' respective submissions. I find that the main issue for determination is whether the Applicant has made out a case for the granting of the orders sought in the Application.



16. A perusal of the decree issued by Chemitei J. in on 6th July 2023 shows that the orders issued were as follows: -

1. The process that led to the gazettelement of the 3rd Respondent as a nominee in Gazette Notice Number 10712 under the category of Marginalized (Youth) representing the 2nd Respondent in Nyamira County Assembly was irregular, null and void.
2. The 3rd Respondent was unqualified to be nominated as a nominee under the category of marginalized (Youth) representing the 2nd Respondent in Nyamira County Assembly
3. The 3rd Respondent Dickson Machungo Mogaka is hereby revoked as the ODM nominee in the category of Marginalized (Youth) in Nyamira County Assembly.
4. The 1st and 2nd Respondents to conduct fresh nominations and elections for the position of Marginalized (Youth) in Nyamira County Assembly.

17. Nomination and election of candidates in the County Assembly is provided for under Article 177 of *the Constitution* which states that: -

177. Membership of County Assembly

1. A county assembly consists of—
 - a. members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
 - b. the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
 - c. the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
 - d. the Speaker, who is an ex officio member.
2. The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90."

18. Article 90 of *the Constitution* provides thus: -

90. Allocation of party list seats.

1. Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.
2. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—



- a. each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;
- b.

19. My understanding of the above Articles of *the Constitution* is that the issue of nomination of candidates, under the special categories, is a political party's internal affair.
20. In the instant case, it was not disputed that the nomination of one Dickson Machugo Mogaka was nullified by this Court and that the court expressly ordered the 3rd Respondent to conduct fresh nominations and submit a fresh party list to the 1st Respondent for gazette. I therefore find that the Applicant's assertions/contention that he automatically became the nominated candidate eligible to assume the office of the MCA was unfounded and not in tandem with the courts decree that I have highlighted hereinabove.
21. This Court agrees with the Respondents' position that the court order did not automatically place the Applicant in a position of preference over all other party members who would have wished to contest for the seat following the nullification of the previous office holder. This court is of the view that even assuming that the 1st Respondent was properly constituted; it would still not be expected to gazette the Applicant in the absence of a fresh party list from the 3rd Respondent. I find that following the delivery of the judgment in the earlier suit, the dice rolled back to the Applicant's party (the 3rd Respondent) to prepare a fresh party list and submit it to the 1st Respondent. I find guidance in the Supreme Court's decision in *Moses Mwicigi & 14 Another v Independent Electoral and Boundaries & 5 Other* [2016] eKLR where it was held thus: -

“(95) The effect is that the process of preparation of the party list is an internal affair of the political party, which ought to proceed in accordance with the national constitution, the political party constitution, and the nomination rules as prescribed under regulation 55.

(96) A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the “elections” for these special seats. In the event of non-compliance by political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh list or by amending the list already submitted.” [Emphasis added].

22. Similarly, in *National Gender Commission v IEBC & Another*. Petition Number 147 of 2013 [2013] eKLR, the court stated as follows at paragraph 45: -

“...how the election of persons on the list is carried out is a matter entirely within the mandate of the respective political parties. It is for this reason that regulation 55(1) of the general regulation provides that, “the party list contemplated under regulation 54 the lists under Article 90(1) of *the constitution* shall be prepared in accordance with the rules of the political party.” Furthermore, paragraph 19 of the second schedule to the *political parties Act (Act No. 11 of 2011)* requires every party to have, “nomination rules governing the preparation of party lists.” [Emphasis added].



23. My further finding is that in view of the clear orders for fresh nominations, the Applicant cannot move this Court to enforce orders that are non-existent. It is apparent that the only recourse for the Applicant is to implore the 3rd Respondent to conduct fresh nominations or move the Court to compel the 3rd Respondent to conduct the said nominations. My take is that the Applicant's insistence, that he is candidate next in line for gazettelement when the Court had already ordered for fresh nominations, is untenable as allowing his claim would be tantamount to overturning a decision made by a court of concurrent jurisdiction.
24. My further finding is that the Applicant's claim that the current MCA, under the Category of Marginalized (Youth) representing ODM, is still drawing salaries and benefiting from a position despite the court orders nullifying his nomination, is a matter that cannot addressed in this application as it borders on contempt of the said court orders.
25. Having regard to the findings and observations that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with no orders as to costs.
26. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 30TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

