REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

ELECTION PETITION APPEAL NO. 1 OF 2019

BETWEEN

ELIZABETH JEBET KIBOR.....APPELLANT

AND

ISAAC SUARE OSEUR.....1ST RESPONDENT

ARNOLD ODIWUOR OCHIENG.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMEMENT

(ODM).....3RD RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....4TH RESPONDENT

WAFULA CHEBKATI.....5TH RESPONDENT

SPEAKER KAJIADO COUNTY ASSEMBLY.....6TH RESPONDENT

(Being an appeal against the judgment and decree (Hon. S.M. Shitubi, CM) delivered on 6th November, 2019 in Election Petition No. 1 of 2019 at Kajiado)

JUDGMENT

1. This is an appeal from the judgment and decree of the Election Court, (S. Shitubi, CM,) dated 6th November, 2019 in Election Petition No. 1 of 2019. In that election petition, the election court nullified the election of the appellant as member of the Kajiado county assembly after it found that the appellant was not properly nominated and later gazetted as member of the county assembly.

2. Aggrieved with that decision the appellant filed a memorandum of appeal dated 7th November, 2019 and amended on 21st November, 2019, raising the following grounds of appeal, namely;

> ***1. That learned magistrate erred in law and fact in nullifying the election of the appellant as a member of Kajiado County Assembly.***
>
> ***2. That the learned magistrate failed to appreciate and or misapprehended the salient provisions of the Constitution of Kenya 2010, the election Act, 2011 and the Rules of nomination by way of party lists thereby arriving at an absurd conclusion.***
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> ***3. That the learned magistrate erred in law by allowing the petition in spite of glairing evidence of non-compliance with the mandatory provisions of Section 78 of the Elections Act No. 24 and Rules 2, 7 and 8 of Elections (Parliamentary and County Elections) Petition Rules, 2017.***
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> ***4. That the learned magistrate erred in law and fact by failing to appreciate the full tenor and import of Section 78 of the Elections Act on deposit of security of costs.***

5. That the learned magistrate erred in law and fact by departing from law and precedents on the standard of proof in election petition cases in so far as it relates to the political party membership of the petitioners.

6. That the learned magistrate misdirected herself in determining the case in blatant disregard to Article 50 of the Constitution of Kenya, 2010 on right to fair hearing and as read together with Rule 11 of the Elections (Parliamentary and County Elections) Regulation, 2017.

7. That the learned magistrate erred in law by admitting the 1st respondent's response to the Election Petition in spite of glairing evidence of non-compliance with the mandatory provisions of the Elections Act NO. 24 of 2011.

8. That the learned magistrate erred in law in entertaining the 1st respondent's replying affidavit not served upon the parties in compliance with rules 11 and 12(11) of the Election Petitions (Parliamentary and County Elections) Petition Rules, 2017.

9. That the learned magistrate erred in law and fact by failing to make a determination on the issues placed before her thus arriving at a wrong conclusion.

10. That the learned magistrate erred in law by passing her decision on issues not pleaded by the parties contrary to the trite principle of law that parties are bound by their pleadings.

11. That the learned magistrate failed to appreciate the tenor and purport of all the interlocutory applications placed before her for determination thereby arriving at an absurd conclusion neither supported by facts nor the law.

12. That the learned magistrate erred in law and fact by making determinations contrary to the material evidence placed before her, which material were not controverted at the hearing.

13. That the learned magistrate erred in law and fact by failing to consider the evidence presented by the appellant before arriving at her conclusion.

14. The learned magistrate erred in law and fact by failing to consider all relevant matters pertaining to the petition thus arriving at an absurd conclusion.

15. The learned magistrate misdirected herself and /or erred in not finding and holding that election petition as filed was defective and incompetent.

16. That the decision of the learned trial magistrate is against the weight of evidence and principles of equity and natural justice.

17. That the learned magistrate failed to consider and appreciate the structures of the 3rd respondent as one whole and indivisible political party and the place of those structures in generation of party list pursuant to the 3rd respondent's Constitution And Nomination Rules.

18. That the learned magistrate erred in law and fact by failing to appreciate the full tenor and import of sections 34 and 35 of the Elections Act No. 24 of 2011.

3. The appellant prayed that the appeal be allowed; judgment and decree of the election court set aside and declare that the appellant was validly nominated and elected member of Kajiado county assembly.

Appellant's submissions

4. The appeal was disposed of by way of written submissions and oral highlights. During the hearing of the appeal, Mr. Ayieko, learned counsel for the appellant, submitted highlighting their written submissions dated 14th February 2020 and filed on 17th February, 2017, that the 1st and 2nd respondents did not comply with section 78(1) of the Elections Act on the deposit of security for costs. According to counsel, the section is couched in mandatory terms and that section 78(2) (c) provides for security for costs of Kshs. 100,000 for the member of the County Assembly. He further argued that section 78(3) is clear that if an objection is raised on none compliance with section 78(2) (c), no further proceedings should be taken on the petition and that the election court may, on application, dismiss the petition and order payment of costs.

5. Mr. Ayieko submitted that the petitioners did not pay full security for costs as required by law. He argued that although the appellant invited the election court to make a determination on that issue, and even filed an application seeking dismissal of the election petition for that reason, the trial court reserved its ruling to be delivered together with the judgment but failed to resolve the issue in its judgment.

6. Counsel relied on ***Said Buya Helibae v Hasan Lakicha Abdi & another*** [2013] eKLR***; Evans Nyambaso Zedikiah & another v Independent Electoral and Boundaries Commission & 2 others*** [2013]eKLR and ***Christopher Odhiambo Karan v David Ouma Ochieng & 2 Others*** [2018] eKLR (SCOK).

7. Relying on the above decisions, counsel argued that the issue of security for costs is fundamental to an election petition. In counsel's view, failure to comply with the law meant the election court could not entertain that petition.

8. Counsel further argued that the 1st and 2nd respondents did not pay court fees in full. According to counsel, they paid Kshs. 8,155 instead of Kshs. 15,000/- as required by rule 32 of the Rules as read with the Second Schedule to the Act. He relied on ***Mombasa Cement Ltd v Speaker National Assembly & Another*** [2018] eKLR for the submissions that failure to pay court fees goes to the substance of the matter.

9. Counsel argued, therefore, that failure by the 1st and 2nd respondents to comply with the law rendered the petition incompetent. He submitted that no application was made for extension of time to comply with the legal requirements and that the 1st and 2nd respondents had not complied even at the time the appeal was being heard.

10. Mr. Ayieko again submitted that the appellant's right to fair hearing was violated. According to counsel, the 3rd respondent filed its replying affidavit on the date of the hearing of the petition and served the appellant's counsel in court which denied the appellant an opportunity to respond to that affidavit. Counsel argued that responses to an election petition should be filed and served within 7 days as required by rule 13(1) (2) of the Rules. That being the case, counsel argued, Rule 19 barred the 3rd respondent from participating in petition.

11. Mr. Ayieko further argued that the 1st and 2nd respondents did not prove their case to the required standard. According to counsel, proof should be above the balance of probability but below proof beyond reasonable doubt. He relied on the Supreme Court decision in ***Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others*** [2017] eKLR (par. 53)

12. Counsel argued that the appellant is a member of the 3rd respondent who submitted an application which was submitted to the 4th respondent through the 3rd respondent's organs. He submitted that the appellant was qualified for nomination and was finally nominated and gazetted as member of the county assembly.

13. Mr. Ayieko urged that the petition as filed, did not comply with rule 8 of the rules by not mentioning the date of election and results. He also urged that the 1st and 2nd respondents did not show that they were members of the 3rd respondent to qualify to impeach the appellant's election as required by law. On that basis, he argued, the petition before the election court was defective and that the person whose election had been impugned was named as interested party instead of respondent as required by law. He urged that the appeal be allowed with costs.

4th and 5th respondent's submissions

14. Mr. Mungai, learned counsel for 4th and 5th respondents supported the appeal through written submissions dated 17th February, 2020 which were essentially similar to those of the appellant. He fully associated himself with the submissions made on behalf of the appellant. He however added that where security for costs had not been paid, the issued went to the jurisdiction of the trial court. According to counsel, where that fact is established, the court would have no jurisdiction to take further proceedings or steps in the matter until the party complies or seeks extension of time to comply. Counsel relied on ***Lorna Chemutai & 4 others v Independent Electoral and Boundaries Commission & 2 others*** [2018] eKLR on payment of security for costs.

15. Learned counsel argued that failure to pay security for costs rendered the petition incompetent. He also relied on ***Evans Nyambaso Zedikiah & another v Independent Electoral and Boundaries Commission & 2 others*** (supra)**.**

6th respondent's submissions

Mr. Ochuka, learned counsel for the 6th respondent neither supported nor opposed the petition. He therefore left the matter to court.

1st and 2nd Respondent's submissions

16. Mr. Ambala, learned counsel for the 1st and 2nd respondents opposed the appeal, highlighting their written submissions dated 14th February 2020 and filed on 17th February, 2020. He submitted first, that; the appeal as drawn, does not meet the requirements of section 75 (4) of the Elections Act. He argued that an appeal to this court lies on matters of law only but the memorandum of appeal contains issues of law and fact. He gave the example of ground 1 of appeal which includes matter of fact and ground 7 which states that the trial court erred in law by acting contrary to material place before it and ground 12 where the appellant invited this court to look at the structures of the 3rd respondent which is a question of fact.

17. Second, counsel submitted that section 78 as drafted is procedural and, therefore, non-compliance with the section does not render a petition defective. According to counsel, section 78(3) gives leeway to a petitioner to show cause why a petition should not be dismissed on grounds of default to pay security for costs. He argued that the 1st respondent applied for an adjournment to make a formal response to the appellant's application dated 4th November, 2019 which was seeking dismissal of the petition for non-compliance with section 78(2), and that the court granted an adjournment and directed that preliminary applications be determined with the petition.

18. Relying on ***Falima Zainabu Mohamed v Ghati Dennitah & 10 others*** [2013] eKLR, counsel submitted that the court was of the view that section 78 is a procedural law and therefore the trial magistrate had jurisdiction to extend the time for compliance.

19. Third, Mr. Ambala submitted that the petition filed before the trial court complied with rules 2, 7 and 8 of the Rules. According to counsel, rule 2 provides who a respondent should be, and that it includes the person whose election is challenged. According to counsel, the person whose election was challenged was named as an interested party against the rules. That notwithstanding, counsel argued, the appellant was given an opportunity to participate, filed a response to the petition and was heard. In his view, section 80 of the Act demands that the election court decide matters before it without undue regard to procedural technicalities.

20. Learned counsel also relied on rule 4 of the Rules which requires that disputes be decided based on substantive justice. He contended, that naming the appellant as interested party was a mere technicality which did not occasion injustice.

21. Regarding rule 8, counsel submitted that the rule requires the petition to contain the date of declaration of results. He argued that the 1st and 2nd respondents listed and attached the gazette notices to the supporting affidavit thus complied with the law. He relied on ***Samuel Kazungu Kambi & another v Independent Electoral and Boundaries Commission & 3 others*** [2018] eKLR.

22. Lastly, Mr. Ambala submitted that the election court properly evaluated the evidence, applied relevant law and arrived at the correct decision. He however argued that section 12 of the political parties Act prohibits a public officer from holding office in a political party and relied on Article 260 on the definition of **"public officer"**

23. Counsel contended that as at 14th March, 2019, Olga Karani who nominated the appellant was a public officer. He submitted that the said Olga Karani was a board member of Cultural Centre Council appointed under Gazette Notice No 1214 dated 8th February, 2019. In counsel's view, the list forwarded to the 4th respondent was done on 14h March, 2019 and received by the 4th respondent on 18th March, 2019.

24. In that regard, counsel argued, the said Olga Karani could not hold office in a political party and, therefore, the appellant's nomination was properly challenged. He also argued that the move to challenge the appellant's nomination was supported by the 3rd respondent through a replying affidavit sworn by the 3rd respondent's Secretary General. The 3rd respondent, he submitted, argued that Olga Karani did not act on its behalf.

3rd respondent's submissions

25. Mr. Oriku learned counsel for the 3rd respondent, opposed the appeal and associated himself with the submissions made on behalf of the 1st and 2nd respondents. Counsel argued orally that due to time exigencies, they filed a notice of change of advocate on 4th November, 2019 and asked the trial court to allow their response to the petition to be on record which was accepted by all parties. This, he submitted, was reflected in the court's decision at page 314 where the court appreciated that time was extremely short and agreed to deal with all issues in the judgment before expiry of the timeline set by the Constitution. he urged that the appeal be dismissed with costs.

Determination

26. I have considered the appeal, submissions by counsel for the parties and the authorities relied on. I have also perused the record of the trial court and the impugned judgment. This being a first appeal, it is the duty of this court to reconsider, reevaluate, and reanalyze the evidence that was before the trial court and make its own conclusion on it.

27. In ***Josphat Mailu Ndolo (Suing on behalf of the state of Antony Ndolo Mailu) v Director of Public Prosecutions & another*** [2020] eKLR, the Court of Appeal observed:

> ***"Essentially, the appellant is asking this Court to interfere with the exercise of the trial Judge's discretion. Generally, the Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice"***

28. In ***Selle and another v Associated Motor Boat Company Limited and others*** [1968] EA 123, the East African Court of Appeal held that:

> ***"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appear either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."***

29. In ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the same court held that:

> ***"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.***

30. From the submissions made and authorities cited, the issues, I have distilled for determination are; first whether the petition before the trial court was competent, second; whether the 1st and 2nd respondents had capacity to mount the petition, and third, whether the petition was proved as required and, depending on the answers to the above issues, what orders to grant.

Whether the petition was competent

31. The appellant has argued that the petition before the election trial court was incompetent. She argued, first; that the respondents did not deposit security for costs as required by law and, second, that they never paid court filing fees in full as required. They relied on section 78 of the Act and the rules regarding payments of security for costs and court filing fees. In the appellant's view, without complying with the legal provisions, the petition was incompetent. The appellant blamed the trial court for not allowing their application to dismiss the petition and relied on various decisions to buttress her arguments.

32. The respondents countered that although they did not pay security for costs and full court fees; the trial court heard the petition and allowed them to pay after the judgment was delivered. In their view, the application to dismiss the petition was to be determined together with the petition due to shortage of time and therefore the trial court acted properly.

33. Section 78 of the Election Act provides:

> ***"(1) A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part.***
>
> ***(2) A person who presents a petition to challenge an election shall deposit—***
>
> > ***(a) one million shillings, in the case of a petition against a presidential candidate;***
> >
> > ***(b) five hundred thousand shillings, in the case of petition against a member of Parliament or a county governor; or***
> >
> > ***(c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.***
>
> ***(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs.***
>
> ***(4) The costs of hearing and deciding an application under subsection (3) shall be paid as ordered by the election court, or if no order is made, shall form part of the general costs of the petition.***
>
> ***(5) An election court that releases the security for costs deposited under this section shall release the security after hearing all the parties before the release of the security"***

34. It is a legal requirement that a petitioner must deposit security for costs. In the case of the respondents, they were required to deposit Kenya shillings one hundred thousand as security for costs which they did not do. The appellant took up the issue under section 78 (3) to have the petition dismissed. However, due to shortage of time, the trial court directed that the application be heard together with the petition. It however did not make a significant finding on that application.

35. The law provides payment of security for costs as a matter of compulsion but the 1st and 2nd respondents did not comply thus violated a mandatory legal provision. In ***Fatuma zainabu Mohamed v Ghati Dennitah & 10 others***, (supra) the court held with regard to payment of security for costs:

> ***"[S]ecurity for costs, whether it is required by statutory provision or order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceeding though validly lodged before the court in accordance with the applicable procedural rules, cannot proceed to hearing and determination as further proceedings are prohibited. As such, the provision for security for costs is, in my view, a substantive requirement underpinning the jurisdiction of the court to deal with the dispute in the proceeding in which the security for costs is required, and is based on the sound principle for the protection of the defendant from unrecoverable costs."***

36. In ***Patrick Ngeta Kimanzi, Marcus Mutual Muluvi & 2 others***[2013] eKLR the court dealt with the rationale for the deposit of security for costs stating:

> ***"Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (see Harit Sheth Advocate –vs- Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] e KLR."***

37. And in ***Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 Others*** [2017] eKLR, the court was of the view that with cogent reasons, a court may extend time for payment of security for costs, stating:

> ***"My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition."***

38. The above decisions support the position that payment of security for costs is a condition precedent to a viable and competent petition. Section 78(3) makes it plain that in the event of non-compliance and where the issue is raised, if the party is not removed, there should be no further proceedings. That in itself suggests that the election court cannot proceed with the petition and where the respondent challenges that petition, the court may dismiss it and order payment of costs.

39. The court may however exercise its discretion and extend time within which the petitioner my deposit security for costs if on application

by the petitioner, sufficient reason or cause is shown. What is clear from section 78(3) is that the petition cannot be heard if security for costs has not been paid.

40. The 1st and 2nd respondents did not deposit security for costs. They did not even apply for extension of time to comply with the law. The trial court heard the petition due to shortage of time but did not make a definitive determination on whether the petition was properly before it or it could hear and determine it before payment of security for costs. Although it was not possible to determine that application before hearing the petition due to shortage of time, it was not proper to allow the petition without determining the issue of payment of security for costs.

41. I must add that payment of security for costs is provided for in the principle law and not the rules. It goes to the root of the petition and the jurisdiction of the court to hear the petition. Failure to comply with the law, and making no effort to apply for extension of time to comply with the law, disentitled the 1st and 2nd respondents the pedestal on which to stand and litigate thus rendered the petition incompetent.

42. In arriving at this conclusion, this court takes the view that an election petition is not normal criminal or civil proceedings. It is a statutory proceeding guided by its own statute and procedural rules. This was appreciated by the Supreme Court in ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 others*** [2015] eKLR, when it stated:

> ***"[157] …it is now an indelible principle of law that the proceedings before an election Court are sui generis. They are neither criminal nor civil. The parameters of this jurisdiction are set in statute (the Election Act). As such, while determining an election matter, a Court accts only within the terms of the statute , as guided by the Constitution…"***
>
> (See also ***Christopher Odhiambo Karan v David Ouma Ochieng & 2 others*** (supra) para [78])

43. The appellant also argued that the 1st and 2nd respondents did not pay court-filing fees in full which the 1st and 2nd respondents have admitted. The 1st and 2nd respondents did not give reasons why they did not pay court fees in full. They did not seek leave of court to file the petition as paupers and they did not allege to be paupers. That, in my view, disentitled them the right to be heard. Allowing the 1st and 2nd respondents to proceed before filing full court fees gave them a differential treatment that is never accorded to other litigants in similar situations and was therefore discriminatory. The petition before the trial court was to that extent also incompetent.

44. The above view gains in the decision in ***Mombasa Cement Ltd v Speaker National Assembly & another*** (supra) where the court stated that:

> ***"[22] Payment of Court filing fees is a jurisdictional prerequisite to the commencement of an action. While on the face value it appears that such a jurisdictional prerequisite or defect cannot be waived, the court in its inherent jurisdiction may make such orders as may be reasonable and necessary to ensure payment and also give the affected party an opportunity to remedy the situation."***

45. The court went on to hold that failure to pay court filing fees rendered the petition incompetent and struck it out.

46. The election court ordered the 1st and 2nd respondents to pay the balance of the court filing fees before the decree was extracted and signed. This was understandable given the short time the court had to deal with the petition. had that not been the case, the proper cause to take would have been not to proceed with the petition until court filing fees had been paid in full.

Whether the 1st and 2nd respondents had capacity to file the petition

47. The second attack directed at the impugned decision was that the 1st and 2nd respondents were not members of the 3rd respondent and, therefore, had no right to file and prosecute a petition challenging the appellant's election of member of the county assembly elected through the party ticket. According to the appellant, the 1st and 2nd respondents did not show that they were members of the 3rd respondent, a fact that was ignored by the election court.

48. The 1st and 2nd respondents argued that they were members of the 3rd respondent party and had given their constituencies as proof. They also argued that the 3rd respondent, as the party, supported their petition.

49. The impugned election was of a member of the 3rd respondent, through party lists. The election was necessitated by the nullification of the earlier election by this court which ordered fresh election.

50. It is a general Principle of law, that in the case of election through party lists, only members of the party concerned may challenge that election. This is so because being a party affair, only members of the party have the right to challenge actions of their party such as an election, the same way only voters in an electoral area can challenge the election in that area.

51. I have perused the record of the trial court and in particular the petition and supporting affidavits filed before the election court. As correctly submitted by the appellant, there was no evidence before election court that the 1st and 2nd respondents were members of the 3rd respondent. The 1st respondent described himself in the petition as a member of the 3rd respondent from Loodokilani Ward in Kajiado west Constituency.

52. The 2nd respondent on the other hand stated that he was the ***"1st Petitioner party's Deputy Youth Leader, Ongata Rongai Ward, Kajiado North, Kajiado county."*** Whether this meant the 1st respondent before the election court is not clear, but the 2nd respondent could certainly not be a youth leader of the 1st respondent who was the 1st petitioner before the election court.

53. The 1st and 2nd respondents argued that this ground of appeal violated the law namely; section 75 which requires that an appeal to this court should be on matters of law only. I do not entirely agree with them. Whereas it is true that an appeal from the election court in the case of member of the county assembly lies to this court on matters of law only, in a matter of this nature, it is difficulty to isolate factual issues that also fall within the realm of the law. Whether one is a member of a party is both factual and legal. Without evidence of membership, the law would not allow the 1st and 2nd respondents to challenge the appellant's election. For that reason, the court must look at the factual aspect in order to determine the legal part of the issue.

54. In ***Cornel Rasanga Amoth v Jeckonia Okungu Ogutu & 6 others*** [2017] eKLR where the court dealt with a dispute of nomination of the appellant to stand for election of governor of Siaya county, the court stated:

> ***"[28]. First and for most, the 1st and 2nd respondents do not identify when they registered as party members nor did they adduce evidence to show that they were indeed party members….but speak generally without specifics. When one claims to be a member of a particular party, it is his duty to show to the satisfaction of the court that he is indeed a party member.***
>
> ***[29]. There are no annextures to affidavit(s) as evidence or proof that indeed the two are party members of the 3rd respondent, when they joined the party or their membership numbers which is important in establishing a claim against a party based on membership and rights accruing to party members."***

45. The court then went on to state:

> ***"30. This was not national general election but a party nomination affair limited to party members. Where one claims that his party did not use its party register, like it was claimed…that person is under duty to show that he has a right as a member of the party to question that failure. Just like a general election where a voter has the right to challenge an election, the voter must be a citizen because only citizens can vote and therefore have a right to question irregularities. In the same vain, only party members can challenge party nominations and proof of membership is the first test if one is to be entitled to challenge the party process. I say so because party matters may be full of intrigues where non-members may engage a party in endless litigation even when they have no locus."***(Emphasis)

46. The court concluded that only genuine party members, proof of which is on them can successfully lodge a complaint over party activities such as nomination irregularities.

47. I agree with the position in the above decision and conclude that the 1st and 2nd respondents did not prove that they were members of the 3rd respondent and therefore had no right to challenge the appellant's election as member of Kajiado county assembly through the 3rd respondent's party list.

48. The 1st and 2nd respondents also argued that the 3rd respondent did not disown them and that in any case, it supported the petition before the election court. I have perused the petition that was filed before the election court. The petition blamed the 3rd respondent for nominating the appellant and forwarding her name to the 4th respondent which gazetted her thus completing the election process. I have not seen anywhere in the pleadings where the 3rd respondent supported the 1st and 2nd respondents as its members.

49. The issue, as I understand it, is not whether the 3rd respondent supported the 1st and 2nd respondent's petition before the election court, but whether they proved that they were members of the 3rd respondent and, therefore, could file an election petition challenging that election as they did. This argument lacks merit.

50. The 1st and 2nd respondents further argued that Olga Karani, the person who nominated the appellant was a public servant and was not supposed to hold a position in a political party. They attached gazette notices to that effect.

51. The appellant and the 4th and 5th respondents opposed this argument as of little persuasion. According to the 4th and 5th respondents, the record held by the 4th respondent showed that Olga Karani was still an official of the 3rd respondent and was authorized to sign the 3rd respondent's documents sent to the 4th respondent, including persons nominated through party lists.

52. In my respectful view, this argument by the 1st and 3nd respondents as supported by the 3rd respondent is a dispute between members of a political party and a political party and its member or official. Such a dispute falls at first within the mandate of the Registrar of Political Parties and the Political Parties Dispute Tribunal. It can only come to this court by way of appeal after a decision by those entities. I therefore decline to deal with that this issue through this appeal as the 1st and 2nd respondents did not exhaust the mechanism for resolving the issue.

53. The only other issue that remains for determination is whether the 1st and 2nd respondents proved the petition before the trial court. Given the court's finding on the issues already determined, I do not think it is worth attempting to address this issue. The court has determined that the 1st and 2nd respondents had no capacity to present the petition and that the petition was incompetent for failure to comply with section 78(1) of the Elections Act on payment of deposit for costs. That being the case, there was no way an incompetent petition could be proved.

54. Having therefore considered the appeal, submissions, the law and relevant decisions, I am satisfied that this appeal has merit and

succeeds.

55. Consequently, the appeal dated 7th November 2019 is allowed. The judgment and decree of the election court dated 6th November 2019 is set aside. In place therefor, an order is hereby issued dismissing the petition before the trial court with costs against the 1st and 2nd respondents.

56. Costs to be assessed but are hereby capped at not more that Kshs, 200, 000.

57. Each party shall however bear own costs of this appeal.

Dated, signed and delivered at Kajiado this 23rd day of April, 2020.

E.C. MWITA

JUDGE