



**REPUBLIC OF KENYA**

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

**ELECTION APPEAL NO. 4 OF 2018**

**PERPETUAL MPONJIWA .....APPELLANT/APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC) .....1<sup>ST</sup> RESPONDENT**

**EVE MALENYA .....2<sup>ND</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY .....3<sup>RD</sup> RESPONDENT**

**THE SPEAKER OF NAIROBI CITY COUNTY ASSEMBLY....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Appellant (herein “the Applicant”) commenced this matter vide a Petition dated 4<sup>th</sup> September 2017, seeking for orders as here below reproduced;-

- i. That swearing in of the 2<sup>nd</sup> Respondent be stopped;
- ii. Declaration that the process that led to the gazettelement of the 2<sup>nd</sup> Respondent was irregular and illegal;
- iii. Revoke the gazettelement of the 2<sup>nd</sup> Respondent as a member of the Nairobi City County Assembly;
- iv. Gazette the Petitioner Perpetual Mponjiwa as the nominated member of the Nairobi City County Assembly under the gender top up category and consequently swear her in;
- v. Recommend investigation and prosecution of the IEBC officers who were involved in this fraud;
- vi. Any other relief that this Honourable court may deem fit;
- vii. That it is in the interest of justice that the prayers sought herein be granted.

2. The Petition was determined by the Learned Magistrate Hon. Elizabeth Usui, Senior Principal Magistrate and dismissed with costs (not to exceed Kenya shillings two hundred thousand (Kshs. 200,000), to the Respondent.

3. Being aggrieved with the decision, the Applicant filed an Appeal against that decision to the High Court and upon hearing the same, the court allowed the Appeal with orders that each party meets its own costs.

4. The court in particular made the following orders:

- a. the Judgment of the Honourable Magistrates Court delivered on 12<sup>th</sup> January 2018, be and is hereby set aside;
- b. a declaration that the Appellant – Perpetual Mponjiwa was the valid nominee for Orange Democratic Movement party for the position of Members of Nairobi City County Assembly under the Gender Top Up category and therefore should be gazette with immediate effect;

c. an order revoking the gazettelement of the 2<sup>nd</sup> Respondent – Eve Malenya as a nominated member of the Nairobi City County Assembly under the Top Up category on account of illegality and irregularities.

5. The Orange Democratic Movement Party should comply with the consent order issued by the court of Appeal and the orders issued in relation to the nomination of Members of Nairobi City County Assembly, in particular, the Appellant under the Gender Top Up category Appellant court within seven (7) days of the order.

6. It is averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being aggrieved with the decision on the Appeal, filed an application dated 15<sup>th</sup> August 2018, in the Court of Appeal Election Petition Appeal No. 31 of 2018, seeking for stay of execution of the judgment and decree of the Honourable court. The orders sought were not granted.

7. Be that as it were, on 4<sup>th</sup> September 2018, the Applicant filed a notice of motion application, seeking for orders that the 1<sup>st</sup> and 4<sup>th</sup> Respondents be cited for contempt of court for deliberately disobeying the court orders issued on 17<sup>th</sup> July 2018. However, this application was subsequently withdrawn by consent of the parties on 19<sup>th</sup> February 2019, to pave way for the parties to address the court on the main issue herein, being as to who between the 1<sup>st</sup> and 4<sup>th</sup> Respondent should first act and/or deal with the court's orders to facilitate the Gazettelement of the Applicant as a member of the Nairobi City County Assembly. In considering this issue the Court adopted the relevant content from the submissions which were filed to support and oppose the Application for contempt which was withdrawn.

8. In that regard the Learned Counsel, Ms. Ngetich for the 1<sup>st</sup> Respondent argued that, pursuant to the provisions of Section 86(1) of the Elections Act (herein "the Act"), it is the duty of the Speaker of Nairobi City County Assembly, to give directions or issue a notifying the 1<sup>st</sup> Respondent that the seat has been declared vacant, so as to enable the 1<sup>st</sup> Respondent to commence the process of de-gazettelement of the 2<sup>nd</sup> Respondent and Gazement of the Applicant.

9. The Counsel argued that the Applicant has electively chosen to rely on the provisions of the Act. That the provisions of Section 86(1) and (2) of the Act should be read with Section 19 thereof. Therefore, if the Applicant argues, that she was not an elected but nominated candidate, she should not rely on provisions of Section 86(1) and (2). Finally it was submitted that Section 19 of the Act relates to election of a member of the County Assembly and that there are no provisions for in relation to nomination of a member thereof. Furthermore, the Certificate issued herein was to both the 1<sup>st</sup> and 4<sup>th</sup> Respondents.

11. The Learned Counsel Ms. Ngetich submitted that, the norm for the Speaker to issue a writ or notice to the Commission. As for such the Independent Electoral and Boundaries Commission has no role until the Speaker moves first, and as the 4<sup>th</sup> Respondent has not given directions as required, the 1<sup>st</sup> Respondent does not have powers to compel or interfere with the office and functioning of the 4<sup>th</sup> Respondent.

12. However, the Learned Counsel Mr. Majao, for the 4<sup>th</sup> Respondent supported the position of the Applicant and submitted that, Section 19(3) of the Election Act, talks about a vacancy. In this situation, there is no vacancy. He referred the Court to Section 34 of the Elections Act 2011 which deals with the nomination vide party list members and states:

“34 (1) The election of members for the National Assembly, Senate and County assemblies for party list seats specified under Articles 97(1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(4) A political party which nominates a candidate for election under Article 177 (1) (a) shall submit to the Commission a party list in accordance with Article 177 (1) (b) and (c) of the Constitution.”

14. He argued that pursuant to these above provisions, the 4<sup>th</sup> Respondent cannot act by declaring the seat vacant unless and until the 1<sup>st</sup> Respondent de-gazettes the name of the 2<sup>nd</sup> Respondent herein and gazettes the name of the Applicant as the nominated member of the Nairobi City County Assembly under the Orange Democratic Party ticket. The 4<sup>th</sup> Respondent relied on the Supreme Court case of; Moses Mwicigi & 14 others vs Independent Electoral & Boundaries Commission & 5 Others (2016) eKLR.

15. Finally, the learned counsel reiterated that, the mandate of gazetting falls under the remit of the 1<sup>st</sup> Respondent, and that as the court appreciated the same in the final orders in the judgment dated 17<sup>th</sup> July 2018 where it ordered that:-

“(3). That a declaration is made that the Petitioner/Appellant Perpetua Mponjiwa was the valid nominee for the Orange Democratic Party for the position of the member of the Nairobi City County Assembly, under the Gender Top Up category and therefore should be gazetted with immediate effect.

16. However the learned counsel Mr. Oduor, appearing for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents opposed the application and submitted that, the court cannot grant the orders sought for without reviewing the order given in the judgment which required the Orange Democratic Movement Party to comply with the consent order of the court of Appeal which has not been done. As such thus the role of the 3<sup>rd</sup> Respondent is integral to the order the court will make.

17. The Learned Counsel argued that, the issue herein is whether; the process of bringing the Appellant to the Nairobi city County Assembly by way of party list is an election. The nomination process requires the 3<sup>rd</sup> Respondent forward her name, and any orders that exclude the 3<sup>rd</sup> Respondent would be unconstitutional. The issue is not whether it is section 86 or 19 of the Act that applies or not, but the role of the 3<sup>rd</sup> Respondent which cannot be ignored.

18. The learned counsel Mr. Ogado for the Applicant in support of the application and response to the opposition thereto, submitted that the 3<sup>rd</sup> Respondent was to comply with the court order within seven (7) days. They did not comply and therefore they cannot be beneficiaries of their own default. They cannot say they must go first. It is a formality for them to acknowledge the Appellant as the lawfully nominated member.

19. The Learned Counsel argued that the 4<sup>th</sup> Respondent does not have the power to gazette. It is the responsibility of the 1<sup>st</sup> Respondent to gazette the Applicant. In that regard the provisions of Section 86 of the Act will override Section 19(2) (3) and (4). The Counsel submitted that, Section 86(1) requires the 1<sup>st</sup> Respondent to communicate to the 4<sup>th</sup> Respondent the decision of the court, with a view of implementing it and yet there is no evidence provided of such communiqué; instead the Respondents ignored the Applicant's demand letter and have now resorted to blame games. He argued that, it is noteworthy that, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents used the same creativity to ensure that the constant judgment of the court of Appeal No. 176 of 2017 was not complied with.

20. It was submitted that the 1<sup>st</sup> Respondent is a public body, headed by a chairperson and guided by objects found under Article 249 of the Constitution of Kenya, which includes protection of the sovereignty of the people and securing observance by all state organs of the democratic values and principles and promoting constitutionalism. That the 4<sup>th</sup> Respondent being a holder of a public office is equally governed by the same principles.

21. I have considered the arguments advanced by the respective parties herein and I find that, the relevant sections of the Act for consideration are Sections 86 and 19. The provisions of; Section 86(1) of the Act states:

“An election court shall, at the conclusion of the hearing of an election petition determine the validity of any question raised in the petition, and shall certify its determination to the Commission and notify the relevant speaker.” (emphasis mine).

22. Similarly, Section 19 of the Act stipulates that:-

“19 (1) whenever a county assembly election is to be held, the Commission shall publish a notice of the holding of the election in the Gazette and in the electronic and print media of national circulation—

a. in the case of a general election, at least sixty days before the date of general election; or

b. in any other case, upon the office of a member of a county assembly becoming vacant.

c. The notice referred to under subsection (1) shall be in the prescribed form and shall specify—

a. the day upon which political parties shall submit a party list in accordance with Article 90 of the Constitution;

b. the day for the nomination of candidates for county elections; and

c. the day or days on which the poll shall be taken for the county election, which shall not be less than twenty one days after the day specified for the nomination under paragraph (b).

c. Whenever a vacancy occurs in a county assembly, the speaker of the county assembly shall within twenty one days after the occurrence of the vacancy issue a notice to the Commission in the prescribed form.

d. The Commission shall within twenty one days of receipt of the notice issued under subsection (3), transmit the notice to the relevant returning officer.”

23. However before I deal with the main issues herein, an issue was raised by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents as to whether the Court should hear this matter or not, in view of the fact that an Appeal that has been filed against the decision in the Court of Appeal. However, I find that the court of Appeal in Nairobi in the matter of; Garissa High Court Election Petition Appeal No. 6 of 2018 Mohammed Ali Sheikh vs Abdiwahab Sheikh & Others, held that; there is no second appeal in election petitions concerning membership to the County Assembly. In that regard, the judgment delivered by this court stands. Therefore, this deals with the issue raised by the 1<sup>st</sup> Respondent that it will be prejudiced if they were to act as claimed bearing in mind that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have filed an Appeal in the Court of Appeal against the decision of this court.

24. To revert back to the issue at hand, it suffices to note that, Section 36 (7) (8) and (9) of the Act, provides that:

“(7) For purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

“(8) For purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

“(9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of the Constitution shall be proportional to the

number of seats won by the party under Article 177 (1) (a) of the Constitution.”

25. These provisions above, were considered by the Supreme Court in the case of; Moses Mwicigi & 14 others vs Independent Electoral & Boundaries Commission & 5 Others (2016) eKLR, where the court stated that;

“.....it is plain to us that the Constitution and the electoral law envisages the entire process of nomination for the special seats, including the act of gazettelement of the nominees’ namely by the IEBC, is an integral part of the election process. The Gazette notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly question. On the other hand, an “election by registered voters”, as was held in the Joho case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election court.

It is therefore clear that the publication of the Gazette notice marks the end of the mandate of IEBC regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of the County Assembly”. ( emphasis added)

26. Therefore, the process of nomination and the Gazettelement of nominated members to the County Assembly is the role of IEBC. Similarly, the provisions of Section 86 of the Act require that, an election court shall, at the conclusion of the hearing of an election petition, certify its determination to the Commission and notify the relevant speaker. It therefore follows that, under these provisions, the results of election are addressed to the IEBC. The Speaker is merely notified and therefore the institution with first responsibility to act on the determination of the election court is the Commission, (in this case the 1<sup>st</sup> Respondent). I therefore respectively disagree with the submissions of the 1<sup>st</sup> Respondent that under section 86(1), it is the duty of the Speaker of the County Assembly to notify it that the seat has been declared vacant to enable the 1<sup>st</sup> Respondent to commence the process of de-gazettelement.

27. Indeed the provisions of Section 19, deal with elections of a member in the County Assembly but, in case of a general election and in any other case where the office of a member of a County Assembly becomes vacant. Sub Section (3) thereof, requires that, the Speaker of the County Assembly shall issue a notice within twenty one (21) days of the occurrence of the vacancy to the Commission in the prescribed form. It suffices to note that, under Sub Section (4), the Commission shall within twenty one (21) days of receipt of the notice under Sub section (3) transmit the same to the relevant returning officer. This presupposes that there will be a by-election and not a nomination of a member to the County Assembly.

28. Therefore, these provisions of section 19, relates to a member of the County Assembly who became such a member through an election other than nomination process. There seems to be no equivalent provisions under the Act in relation to a nominated member.

29. The key issue herein however rests on the orders given in the judgment. In that regard, the 3<sup>rd</sup> Respondent was directed to notify the 1<sup>st</sup> Respondent, that the name of the 2<sup>nd</sup> Respondent forwarded for gazettelement as a member of the Nairobi County Assembly had been revoked. This was to be done within seven (7) days. It was not done. That order has not been set aside and neither is there any pending application for setting it aside. Therefore it remains a court order which the 3<sup>rd</sup> Respondent is legally bound to obey. However the 3<sup>rd</sup> Respondent has chosen not to. In my considered opinion, that amounts to nothing less than contempt of the court order. The 3<sup>rd</sup> Respondent cannot therefore, seek to have audience of the court without purging the contempt. The principles of equity are clear, that he who goes to equity must go with clean hands.

30. The argument that they had appealed against the decision of the court, is no longer tenable in the light of the decision of the court of Appeal cited herein. Taking into account the fact that, the period within which the court gave the 3<sup>rd</sup> Respondent has expired; it will not be in the interest of justice to allow them to continue flouting that order. In that regard, they shall be deemed to have waived their right to participate in the nomination of the relevant member to the Nairobi City County Assembly.

30. The order for the de-gazettelement of the 2<sup>nd</sup> Respondent and Gazettelement of the 3<sup>rd</sup> Respondent respectively as a member of the Nairobi City County Assembly related to the 1<sup>st</sup> Respondent. As already stated herein, the responsibility of the Gazettelement rests with the 1<sup>st</sup> Respondent and not the 4<sup>th</sup> Respondent. It is not an issue of declaring a by-election whereby the 4<sup>th</sup> Respondent comes into play. It therefore follows that, the party that should take the first step in implementing the court order of de-gazettelement and gazettelement is the 1<sup>st</sup> Respondent. That order was supposed to take effect immediately. It should therefore be obeyed with immediate effect and in any case, not more than seven (7) days from the date of this order, the 4<sup>th</sup> Respondent shall then act accordingly.

31. Those then are the orders of the court.

**Dated, delivered and signed in an open court this 29<sup>th</sup> day of March 2019.**

**G.L. NZIOKA**

**JUDGE**

In the presence of;

Mr.Ogado for the Applicant

Ms. Ngetich for the 1<sup>st</sup> Respondent

Mr. Oduor for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Ms. Ngetich for Mr. Nyachiro for the 4<sup>th</sup> Respondent

Dennis .....Court Assistant.