



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 500 OF 2017

NATIONAL RAINBOW COALITION KENYA (NARC).....PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....RESPONDENT

-AND-

THARAKA-NITHI COUNTY ASSEMBLY.....1ST INTERESTED PARTY

MANDERA COUNTY ASSEMBLY.....2ND INTERESTED PARTY

GARISSA COUNTY ASSEMBLY.....3RD INTERESTED PARTY

EMBU COUNTY ASSEMBLY.....4TH INTERESTED PARTY

NAIROBI COUNTY ASSEMBLY.....5TH INTERESTED PARTY

MERU COUNTY ASSEMBLY.....6TH INTERESTED PARTY

JUDGEMENT

1. Through a petition dated 28th September, 2017 and amended on 19th November, 2018, the Petitioner, NARC Kenya, a political party duly registered in Kenya, is challenging the practice adopted by the Independent Electoral Boundaries Commission (IEBC), the Respondent herein, in nominating candidates from the party lists to various county assemblies in the country following the 8th August, 2017 general election. The Petitioner contends that the purpose of nominations based on the party lists was to take care of special groups, marginalized groups and especially women. Further, that the reservation of seats for women, special groups and the marginalized was at the core of the new constitutional dispensation and informed the affirmative action for the participation of women in the political process of the country.

2. It is the Petitioner's averment that following the promulgation of the new Constitution in 2010 and the first general election under the new Constitution, the Respondent formulated a policy and set out the criteria for the Gender Top Up Rule, which saw all political parties with two or three elected Members of the County Assembly (MCA) get at least one seat to top up and in counties where a political party had one elected MCA and had additional votes from those who had vied but did not get elected, the party with the leading number of votes would get an additional Gender Top Up Seat. According to the Petitioner, this policy and criteria for Gender Top Up has not changed and if it did, the same was done unlawfully and without any or reasonable opportunity for public participation.

3. The Petitioner's case is that Article 177 of the Constitution is worded and designed in a manner that gender top up is the overriding consideration in the IEBC nomination practice and the Petitioner harboured the reasonable expectation that following the declaration of the results of the general election, its candidates would be nominated in Tharaka-Nithi, Mandera, Garissa, Embu, Meru and Nairobi counties. However, contrary to the provisions of Article 177, the nominations were discriminatory and favoured certain political parties over others, particularly the Petitioner.

4. The Petitioner therefore seeks the following orders:-

a. A declaration that the Petitioner is entitled to access to the information upon which the names of the nominated Members of the Interested Parties' counties were selected.

b. A declaration that the Petitioner's Members on its Nomination List were discriminately and/or unjustly denied nomination to the Gender Top Up slots available.

c. A declaration do issue that the Petitioner was entitled to have its members especially women in its party lists nominated in the county assemblies of Tharaka-Nithi, Mandera, Garissa, Embu, Meru and Nairobi Counties.

d. An order of mandamus do issue consequent to the above declarations compelling the Respondent to allocate the Petitioner its rightful entitlement of gender top up seats namely-two gender top up seats in Tharaka Nithi County, one additional seat in Mandera County and one seat each in Nairobi, Garissa, Embu and Meru counties from the Petitioner's Gender Top Up Party List.

e. Costs.

f. Damages and any other relief that this court may deem fit and just to grant the Petitioner.

5. In response, the Respondent filed a Preliminary Objection dated 3rd November, 2017 challenging the jurisdiction of this court. The Respondent's position is that the petition contravenes Section 6 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 which requires an election court to be gazetted by the Chief Justice. The Respondent contends that the petition violates Section 10(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 which requires an election petition to be served within seven days from the date of its filing. Further, that the petition was filed out of time contrary to Section 77 of the Elections Act which provides that an election petition concerning an election, other than a presidential election, shall be filed within 28 days from the date of the declaration of the election results by the Respondent.

6. The Respondent also filed a further response dated 9th November, 2017 and an affidavit sworn on 13th November, 2017 by Salome Oyugi the Respondent's Manager in charge of Political Parties and Campaign Financing. Through the said pleadings, it is averred for the Respondent that Section 35 of the Elections Act, 2011 requires political parties to submit their respective party lists to the Respondent at least forty five days before the date of the general election. However, the Respondent reviewed the party lists and required parties to resubmit the amended lists which all political parties including the Petitioner did on 19th July, 2017. It is the Respondent's position that Section 36(8) of the Elections Act requires it to draw from the list four special seat members in the order given by the party. Accordingly, it published the final party lists as re-submitted by the political parties in both the Sunday Nation and Standard newspapers of Sunday 23rd July, 2017.

7. It is the Respondent's case that it has no power to make alterations to the lists submitted by the political parties and that it allocated special seats in strict adherence to the law. Further, that the Petitioner has not demonstrated any violation of the Constitution or any other law on its part.

8. On its part, the 1st Interested Party, Tharaka-Nithi County Assembly, filed a Preliminary Objection challenging the jurisdiction of this court and a Replying Affidavit by Eric Nthumbi sworn on 8th February, 2019. He contended that the nominations for the special seats under Article 177(2) of the Constitution ought to meet the requirements set out by the party rules and the Respondent upon receiving the nomination list, verification and checking for compliance gazettes the nominees and once gazetted, any challenge to the process can only be through an election petition and not by way of judicial review.

9. The 1st Interested Party asserted that the Respondent is mandated to resolve all disputes arising from nominations and the Petitioner did not exhaust all the mechanisms before coming to this court. Further, that articles 90(2) and 97 of the Constitution mandates the Respondent to allocate seats to political parties in proportion to total numbers of seats won by candidates of the political party at general elections.

10. The 4th Interested Party, Embu County Assembly, on the other hand filed Grounds of Opposition dated 7th February, 2019. It was their contention that Article 177(1)(b) & (c) of the Constitution provides that membership of the county assembly shall comprise of the number of special seats on gender to ensure that no more than two-thirds are of the same gender, inclusion of marginalized groups and persons with disabilities and the youth who shall be nominated by the respective political parties in proportion to the seats received in that county. Therefore, the Respondent is charged with the responsibility of ensuring that the nomination is done in accordance with the law and a county assembly has no role to play other than swearing in the nominated members as forwarded by the Respondent.

11. The 5th Interested Party, Nairobi County Assembly, in its response dated 22nd March, 2019 averred that they carried out their duty as laid down in the statute and that it has no mandate in allocating party lists and can only act upon publication of the lists of nominated members by swearing them in.

12. Ms. Karua holding brief for Mr. Gitobu Imanyara for the Petitioner highlighted their written submissions dated 21st May, 2018. She submitted that the present petition was not an election petition envisaged in Article 87(2) of the Constitution but rather an application for judicial review arising out of unfair administrative action by a quasi-judicial body namely the IEBC. It was counsel's submission that unlike election petitions which had strict timelines, the present petition has no restrictions. Further, that Article 165(3)(b) of the Constitution gives this court unfettered jurisdiction to determine the question whether a right or fundamental freedom has been denied, violated, infringed or threatened.

13. Counsel for the Petitioner also submitted that a perusal of the Kenya Gazette of 28th August, 2017 demonstrates that the Respondent was irrational, arbitrary and erratic in the allocation of gender top up seats and this court is simply being asked to remedy this exercise of quasi-

judicial function to accord with the well-established principles of fairness. Accordingly, counsel submitted that Rule 56 of the Election (General) Regulations, 2012 which provides for allocation of seats to political parties according to the seats won by a political party does not supersede the express provisions of Article 177 of the Constitution which demands proportionality. That, by failing to comply with the criteria set out in Article 177(1)(b) of the Constitution, the Respondent carried out a skewed allocation to the detriment of the Petitioner. The Petitioner therefore urged the court to remedy the situation by allowing the petition.

14. Mr. Lesaigor appearing for the Respondent highlighted his written submissions dated 17th October, 2018. He submitted that although the petition is couched as a constitutional petition, the same seeks orders that can only be granted by an election court. This special jurisdiction, he asserted, can only be donated by the Constitution and a constitutional court cannot arrogate itself jurisdiction. Further, that once members of the county assemblies for the interested parties were nominated and gazetted, that marked the close of elections and this court is thus not properly constituted to handle any dispute arising therefrom. He relied on the case of **Jaldesa Tuke Debalo v IEBC & another, Nyeri CA [2015] eKLR** where the court observed that upon gazettement of members of a county assembly, they are deemed to be elected members of the county assembly.

15. Still relying on the **Jaldesa Tuke Debalo** (supra), counsel submitted that judicial review cannot be allowed to circumvent the statutory procedure of instituting an election petition to determine membership of a county assembly. He further relied on the case of **Claudia Chebet Koskei & 2 others v Jubilee Party & 2 others [2017] eKLR** where it was held that a constitutional court has no jurisdiction in an election dispute. He also relied on the Supreme Court case **Moses Mwicigi & 14 others v IEBC & 5 Others [2016] eKLR**, where the Court observed that publication of the Gazette Notice marks the end of the mandate of IEBC regarding nomination of party representatives and shifts any consequential dispute to the election courts.

16. On whether the Petitioner's constitutional rights were violated, counsel submitted that the petition does not state with clarity and precision the provision allegedly infringed neither does it disclose the manner of infringement as required by the case of **Anarita Karimi v Attorney General [1979] KLR 154**.

17. Counsel further submitted that Article 88(1)(4) of the Constitution spells out the mandate of IEBC. Further, it is obliged in accepting party lists to ensure that the provisions of the statutes are adhered to. Accordingly, he submitted that the Respondent performed its functions to the letter and no evidence has been provided to show non-compliance. To buttress this argument, he relied on the case of **Moses Mwicigi** (supra) where the Supreme Court held that special seats shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election. He therefore urged the court to find the petition frivolous and dismiss it with costs.

18. Mr. Mahugu holding brief for the 1st Interested Party highlighted his written submission dated 8th February, 2019. Counsel submitted that Section 75(1A) of the Elections Act provides that a question as to the validity of the election of a member of a county assembly shall be heard and determined by a Resident Magistrate's Court designated by the Chief Justice. Accordingly, the present petition was wrongly before this court. To buttress this argument, he relied on the case of **National Gender & Equality Commission v IEBC & others [2013] eKLR** where the Court held that any challenge after gazettement of nominees as to the composition of membership of the county assembly can only be before an election court and in this case, a Resident Magistrate's Court designated by the Chief Justice. He also relied on the decision of Lenaola, J (as he then was) in the case **Isaiah Gichu Ndirangu & 2 others v IEBC & 4 others [2016] eKLR** as reiterating the same position. It is therefore the 1st Interested Party's submission that this court is not clothed with the jurisdiction to hear and determine the dispute before it.

19. Counsel further submitted that by camouflaging and labeling this petition as a judicial review matter, the Petitioner is in breach of the Civil Procedure Rules, the Constitution as well as the Elections Act as election matters must be litigated through an election petition as was held in the **Mwicigi** case and **Susan Washuka v IEBC & another [2018] eKLR**. For that reason, counsel submitted that the petition is incurably defective as judicial review cannot be allowed to circumvent the statutory procedures of instituting an election petition to determine the question of membership of a county assembly. It was further the 1st Interested Party's submission that the nomination process was done in a fair and justifiable manner and all categories of persons required to be nominated were factored in and the nomination process was an inclusive affair where all special interest groups and necessary categories were considered and nominated.

20. Counsel further submitted that the role of the Respondent is clearly laid down under Articles 88 and 90(1) (2) (b) of the Constitution and Section 34 of the Elections Act. Secondly, that the legal qualifications for nomination as a member of a county assembly and the law guiding preparation of party lists under the gender top up category are provided for under the Constitution and Section 34 (4), (6A) and (6B) of the Elections Act, Rule 54(5) of the Election (General) Regulations, 2012, and Gazette Notice No. 5735. The 1st Interested Party's counsel asserted that in any event, the Petitioner ought to have enjoined the parties allegedly affected by the non-allocation of special seats who otherwise stand to benefit from the fruits of any judgement in the Petitioner's favour. The 1st Interested Party therefore urged this court to dismiss the petition.

21. Appearing for the 4th Interested Party, Mr. Njoroge relied on the 4th Interested Party's grounds of opposition and associated himself with the submissions of the Respondent and the 1st Interested Party. He proceeded to submit that although there is no maximum limit of the number of members of a given county assembly, the number is determined once the Respondent gazettes the members. He submitted that once gazettement is done, any dispute arising belongs to an election court hence his support of the Respondent's preliminary objection. He thus urged the court to disallow the Petitioner's case.

22. Mr. Onyango and Miss Ngetich appearing for the 5th Interested Party highlighted their written submissions dated 28th March, 2019. They submitted that the present dispute is an election related dispute framed as a constitutional petition which dispute encompasses among other things, a claim for violation of rights. However, that does not translate them into constitutional petitions. They further submitted that Section 75(1A) of the Elections Act is couched in mandatory terms and confers magistrates' courts with jurisdiction to hear and determine the validity of election of a member of a county assembly including nomination of members of the county assembly through party lists as was held in the **Mwicigi** (supra).

23. Counsel relied on the case of **Rose Wairimu Kamau & 3 others v IEBC, Nai CA Civil Appeal No. 169 of 2013** where the Court held that once nominated to the county assembly via a gazette notice, a person is deemed to be an elected member of the county assembly and any challenge to the membership has to be by way of an election petition. It was their contention that the present petition challenges the membership, composition and validity of the members elected by way of nomination and urged the court not to arrogate itself jurisdiction to deal with the matter.

24. On whether the Petitioner's rights have been violated by the 5th Interested Party, counsel submitted that Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules, 2013 commonly referred to as the Mutunga Rules require that a constitutional petition shall contain facts relied upon, the constitutional provision violated, the nature of injury caused and the reliefs sought. They were of the view that the petition does not expressly state the constitutional provision violated or injuries caused by the 5th Interested Party, neither does it disclose the remedies sought therefrom. Accordingly, they submitted that the 5th Interested Party was wrongly enjoined to the suit as it had no power to influence the composition of party lists. This court is therefore urged to dismiss the petition.

25. I have carefully considered the substance of the petition, the parties' rival affidavits and submissions and the issue that first requires determination is whether this court has jurisdiction to hear and determine the dispute before it.

26. Where a party to the suit raises an issue touching on the jurisdiction of the court, the court must first interrogate the issue and determine it first before taking any other step. If the court or tribunal lacks jurisdiction it must down its tools and should not proceed with the matter in the hope that it may find certain facts which may clothe it with jurisdiction. This principle was enunciated in the case of **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, where Nyarangi, JA stated that:-

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

27. Article 177 of the Constitution states as follows:-

"Membership of county assembly.

177. (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)

(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.

(3) The filing of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward."

28. Article 90 of the Constitution provides for allocation of party list seats as follows:-

"Allocation of party list seats.

90. (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) except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and Constitution of Kenya, 2010

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.”

29. Section 75 (1A) of the Election Act provides that:-

“A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.”

30. Section 75 (4) of the Elections Act also provides that:-

“An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—

(a) filed within thirty days of the decision of the Magistrate’s Court; and

(b) heard and determined within six months from the date of filing of the appeal.”

31. Section 80 (3) of the Elections Act further provides that:-

“(3) Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court.”

32. Section 2 of the Election Act defines a “county election” to mean the election of a county governor or a member of a county assembly and an “election court” to mean the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution and the Resident Magistrate’s Court designated by the Chief Justice in accordance with Section 75 of the Act.

33. From the above excerpts of the law, it is clear that once a member of a county assembly is elected or nominated and gazetted, he/she is deemed an elected member of that assembly and any challenge regarding his/her election or nomination ought to be dealt with by the election court being a Resident Magistrate’s Court designated by the Chief Justice and only on appeal, does such disputes come to the High Court.

34. The Petitioner is challenging the practice adopted by IEBC in nominating candidates for members of county assemblies following the 8th August, 2017 general election and is seeking judicial review orders. However, the question as to whether or not a court exercising judicial review jurisdiction or constitutional or human rights jurisdiction can hear and determine disputes arising from political party lists and nomination processes leading to gazettement and assumption of office of a member of a county assembly whether as gender top up member or marginalized is now settled.

35. In the case of **Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR**, the Supreme Court stated as follows:-

“[105] It is clear from the foregoing provisions that the allocation of nomination- seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’ or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettement of the nominees’ name by the IEBC, as an integral part of the of the election process.

[106] The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in 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 terminate the returning officer’s mandate, and shifts any issue as the validity of results from the IEBC to the Election Court.

[107] 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 Elections Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.”

36. The Supreme Court went further to hold that:-

“[118] It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to any election, whatever its manifestation, is to be by way of ‘election

petition.

[119]

[120] To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165 (3) of the Constitution, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the *sui generis* character of electoral disputes-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.”

37. A close look at Sections 34(4), 35 and 36 of the Elections Act as read with Regulation 54 of the Elections (General) Regulations places a duty on the Respondent to ensure that the party lists submitted to it comply with the relevant provisions of the law and the Constitution, and, in particular Article 177 of the Constitution, and under Article 88(4)(e), the Respondent is mandated to resolve all disputes relating to or arising from nominations. I am therefore of the view that once nominees are gazetted, any challenge to the process can only be through an election petition and not through a constitutional petition or a judicial review application as submitted by the Petitioner.

38. Based on the cited provisions of the Constitution and the electoral law, and taking into account the decision of the Supreme Court in the **Mwigi** Case, I am inclined to agree with the Respondent and interested parties’ submissions that this court is not the appropriate forum for addressing the issues raised in the petition. My reasoning is firmly grounded on the nature of the case and the matters raised herein because it is not disputed that the core issue in this petition is in regard to nominations to county assemblies. The Petitioner’s main concern is that the law was not observed by the Respondent in regard to the selection of the nominees for the top up seats. This, to me, is a dispute about members of county assemblies elected through nomination. Such a dispute falls into the province of the special legislation elected for resolving electoral disputes.

39. The approach the Petitioner ought to have taken, which I believe is the correct one, in addressing disputes in regard to nominations pertaining to election matters would have been to file election petitions against the Respondent challenging nominations to each and every County Assembly it had complaints about. I therefore do not agree with the Petitioner’s submission that this Court should characterize the instant petition as a constitutional dispute instead of an election dispute. In my view, such characterization would go against the electoral laws and the Constitution which are tailored in such a manner that they provide a special dispute resolution mechanism for electoral disputes, nominations being one of them. Having said so, the only conclusion is that this court has no jurisdiction to handle this matter. The Respondent’s Preliminary Objection to the effect that this court lacks jurisdiction to hear and determine this petition therefore succeeds. Consequently, the petition is dismissed.

40. As regards costs, I find that the Petitioner was trying to introduce a fresh perspective into our constitutional jurisprudence. For that effort, the Petitioner shall not be saddled with the costs of the petition. Each party is therefore ordered to meet own costs of the litigation.

Dated, signed and delivered at Nairobi this 20th day of June, 2019.

W. Korir,

Judge of the High Court