



IN THE HIGH COURT AT KISUMU
BUSIA ELECTION PETITION NO. 5 OF 2017
IN THE MATTER OF THE ELECTION OF
NOMINATED MEMBERS OF BUSIA COUNTY ASSEMBLY

BETWEEN

BUSIA COUNTY PERSONS WITH
DISABILITY NETWORK.....1ST PETITIONER
RONALD ONYANGO OBIERO.....2ND PETITIONER
MICHAEL MAKETSO.....3RD PETITIONER
GRACE AJUNE ONG'ARIA.....4TH PETITIONER
INNOCENT ALUKU.....5TH PETITIONER

AND

THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT
THE CHAIRMAN, INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....2ND RESPONDENT
THE CLERK, COUNTY ASSEMBLY OF BUSIA.....3RD RESPONDENT

RULING

1. The 1st petitioner is a county based organization representing the interests of persons with disabilities while the 2nd, 3rd and 4th petitioners are persons with disabilities residing within Busia County. The 5th respondent is the Secretary of the Busia Branch of the Orange Democratic Party. They have brought this petition seeking the following main relief;

A Declaration that the Gazette Notice Number 8380 Vol. CXIX No. 124 published on 28th August 2017 by the 2nd respondent in so far as it is applicable to Busia County and gazetting persons named therein as validly nominated to the County Assembly of Busia to represent political parties and other marginalized interest grounds be and is hereby quashed and nullified.

2. The respondents opposed the petition on grounds that the court did not have jurisdiction and that the dispute was essentially a party dispute which ought to have been resolved by the Political Parties Tribunal established under the **Political Parties Act (Act No. 11 of 2011)** as it is essentially a dispute between the members of the party and the political party regarding nomination of its members to the County Assembly.

3. This case was initially dismissed for non-attendance but I reinstated it by my ruling of 7th December 2017. Thereafter, I directed the parties to address the court on the issue of jurisdiction of this court to entertain this petition. I note that the 3rd respondent had filed a notice of preliminary objection contesting the jurisdiction of the court.

4. In his brief submission, Mr Ateya, counsel for the petitioners, contended that this court had jurisdiction to determine the matter particularly taking into account the provisions of **Article 54(2)** of the Constitution which protects that rights of persons with disabilities and obligates the State to progressively ensure that in all elective and appointive bodies, persons with disability comprise at least 5% of the membership. On the other hand, Ms Kyamazima, counsel for the 3rd respondent, emphasized that the fact that the dispute was a political party dispute which ought to be adjudicated before the Political Parties Tribunal.

5. Neither party addressed the issue arising from the fact that the membership of the County Assembly, which is contested, arose from **Gazette Notice No. 8338**. Once these nominated members were gazetted, they became members of the County Assembly. The Court of Appeal in **Rose Wairimu Kamau & 3 others v Independent Electoral and Boundaries Commission NBI CA Civil Appeal No. 169 of 2013** observed the following in respect of nominated members of the County Assembly:

In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 971 (c) and 177 (2) respectively have been gazetted ... they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Articles 105 of the Constitution or Part VIII of the Elections Act as the case may be.

6. The Court of Appeal reiterated the same point in **Jaldesa Tuke Debalo v Independent Electoral and Boundaries Commission and Another NYR CA Civil Appeal No. 37 of 2014[2015]eKLR** where it observed that, “*We are cognizant of the principle that upon gazettelement of members of the County Assembly, they are deemed to be elected members of the County Assembly...*”

7. Under **section 75(1A)** of the **Elections Act, 2011** and **rule 6(1)(b)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2017**, a question for determination of membership can only be determined through an election petition filed in accordance therewith.

8. From the provisions I have cited, the proper court with jurisdiction to hear and determine the question of validity of a member of a County Assembly, is a Resident Magistrates Court designated by the Chief Justice. This position was emphasized by the Supreme Court in **Moses Mwicigi and 14 Others v Independent Electoral and Boundaries Commission and 5 Others SCK Petition No. 1 of 2015 [2016]eKLR** where it held that **section 75(1A)** of the **Elections Act** confers upon the Magistrates Court jurisdiction to determine the validity of the election of a member of a County Assembly and that such an election includes nomination of members County Assembly through party lists.

9. Before I conclude this decision let me discuss the application of **Article 54** of the Constitution relied on by the petitioners to buttress their case. **Article 54** is part of **Part 3** of **Chapter Four** of the Constitution which encompasses the Bill of Rights. **Article 52(1)** provides that **Part 3** elaborates certain rights to ensure greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons. In this case, the petitioners relied on the fact that they are persons with disabilities. Under **Article 54(2)** of the Constitution, the obligation to increase and ensure representation of the persons with disabilities in public bodies to the extent that they occupy 5% of membership is progressive. This provision elaborates the specific rights geared to protecting persons with disabilities, for example, the right to dignity (**Article 28**) and the right to equality (**Article 27**). Moreover, these provisions must not

be read in isolation but together with other provisions of the Constitution that provide for representation of the people in the Parliament and the County Assemblies. The mode contesting elections including the manner of filing petitions are part of the law contemplated by Constitutional imperatives governing elections hence compliance with those provisions cannot be wished away.

10. Since the declaration sought seeks to challenge the members of nominated members of the County Assembly, this petition ought to have been filed in the Magistrates Court. The primacy of jurisdiction cannot be ignored and this court cannot embark on consideration of any issue without satisfying itself that it has jurisdiction (see *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989]1 KLR 1* and *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others, SCK Application No. 2 of 2012[2012]eKLR*). As I have demonstrated, this court lacks jurisdiction to deal with the matter.

11. This petition is struck out but with no orders as to costs.

DATED and DELIVERED at KISUMU this 18th day of January 2018.

D.S. MAJANJA

JUDGE

Mr Ateya instructed by Ateya and Company Advocates for the petitioners.

Mr Kyamazima instructed by Ashioya and Company Advocates for the 3rd respondent.