



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION APPEAL NUMBER 1 OF 2018

BETWEEN

HADIJA NGANYI JUMAAPPELLANT

AND

SCHOLASTICA NGINA SHIRAKU1ST RESPONDENT

FEISAL MUSTAFA ABDI2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 3RD RESPONDENT

IEBC 4TH RESPONDENT

LILIAN OLIYA..... 5TH RESPONDENT

(Being an appeal arising from the judgment of the Learned Senior Resident Magistrate Hon. S. B. Khapoya, delivered on 15th February, 2018 in Kakamega Chief Magistrate's court Election Petition number 9 of 2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, Hadija Nganyi Juma was enjoined as an interested party in the matter before the learned Chief Magistrate, being Election Petition number 9 of 2017. This was done vide the appellant's Notice of Motion dated 17th October, 2017. The reason upon which the appellant's application was premised was that the cause of action affected her.

Trial Court's Judgment

2. Upon careful analysis of the evidence that was placed before him, and upon consideration of the law and the submission of parties together with authorities cited, the learned trial magistrate made the following final orders:-

a. The nomination of Hadija Nganyi Juma and Changorok Kolmongole Erick vide gazette notice 8380 dated 28th August 2017 to the County Assembly of Kakamega is hereby nullified.

b. The 2nd respondent is hereby directed to gazette Scholastica Ngina Shiraku and Feisal Mustafa Abdi as the 1st respondent's party nominees under the gender top up and marginalized groups category respectively.

c. Each party to bear its own costs.

d. A certificate of results to be prepared and served upon the speaker County Assembly of Kakamega

The Appeal

3. The appellant, being aggrieved by the above stated orders, filed this appeal. The appeal is premised on 5 grounds as follows:-

1. **The learned magistrate erred in fact and in law in determining a dispute arising from party nomination.**
2. **The learned magistrate erred in law and in fact by delivering a judgment which was found neither in the petition nor the law.**
3. **The learned magistrate erred in law and in fact in failing to determine that the 1st and 2nd respondents had not exhausted all available statutory remedies prior to the filing of the petition.**
4. **The learned magistrate erred in fact and in law in making a finding against a party who was not enjoined in the petition.**
5. **The learned magistrate erred in fact [and] in law by failing to put into consideration all material facts laid before the court.**

4. The appellant thus prays that the appeal be allowed with costs and the judgment of the Resident Magistrate's court be set aside and in its place, be substituted [with]an order dismissing the 1st and 2nd respondent's petition with costs.

5. On 19th March, 2018, parties appeared before me for directions which were to the effect that the appeal be canvassed by way of written submissions. The written submissions by the appellant, the 1st and 2nd respondents as well as the 4th respondent were duly filed and exchanged in accordance with the timeliness given by the court. More about those submissions later in this judgment.

6. As this is a first appeal, and the only appeal in this case, this court is under a duty to scrupulously engage the provisions of the law as well as previous decisions in order to come to holistic conclusion in the matter.

Background

7. This case arises from a decision made by the Orange Democratic Movement (ODM) which is the 3rd Respondent in this appeal. The 1st and 2nd Respondents complained that whereas they were number 6 and 1 respectively among the nominations in the gender top-up and marginalized groups, the nomination list gazetted by the Independent and Electoral Boundaries Commission, the 4th respondent herein, and referred to as IEBC hereafter, did not reflect those positions. Aggrieved by the gazettement, which the 1st and 2nd respondents averred deprived them of their opportunity to serve as Members of County Assembly (MCA's) of Kakamega County Assembly, they filed Election Petition number 9 of 2017 before the Chief Magistrate in Kakamega. In the Petition, the petitioners sought the following reliefs:-

- a. **A declaration order that the list of nominated members of the 1st respondent to the Kakamega County assembly vide gazette Notice number 8380 dated 28th day of August, 2017 is invalid, null and void.**
- b. **A declaration that the petitioners herein be forthwith included in a new list to be gazetted as nominated members of the 1st Respondent to the Kakamega County Assembly.**
- c. **An order directing the 2nd respondent to cause a fresh gazette notice to be published nominating members of the 1st respondent to the Kakamega County Assembly.**
- d. **Costs of this petition be borne by the respondents and**
- e. **Any other orders that this Honourable Court may deem just and fit to grant**

8. The facts in support of the petition, as set out at paragraphs 16 – 23 of the Petition are that the 1st and 2nd respondents are life members of the ODM party and by virtue of the provisions of **Article 38 of the Constitution, Section 3(2) of the Political Parties Act, Section 34 of the Elections Act** as read together with the **Election (General) Regulations 2012** and the **Election (Party Primaries and Party Lists) Regulations 2017**, they offered themselves for nomination as members of the Kakamega County Assembly representing gender top-up and marginalized groups respectively. The 1st and 2nd respondents also averred that being active members of ODM, they registered themselves as voters and thereafter participated in the 2017 General Elections. The 1st and 2nd respondents also averred that they applied for nomination as MCA's in their respective categories. They were invited for and attended interviews which were held on 14th June, 2017. They were later contacted (though it is not clear from the pleading what sort of contact was made) and in their understanding it meant that they had been successful. Subsequently, their names were submitted in order of priority in accordance with **Section 34(5) of the Elections Act, 2011**. The 1st and 2nd respondents further averred that the 1st respondent was number 6 in order of priority in gender top-up while the 2nd respondent was number 1 in the marginalized category.

9. To their utter dismay, when the IEBC published Gazette Notice number 8380 on 28th August, 2017, the content thereof, as far as the 1st and 2nd respondents were concerned, was in contravention of the law and the regulations, in particular, that the IEBC abdicated its responsibility of protecting and safeguarding the sovereign will of the members of the ODM, who were registered as voters within Kakamega County, as well as outrightly subverting the sovereign will of the people of Kenya as provided under the Constitution. The 1st and 2nd Respondents thus urged the court below to find that the gazettement of the nominated members to the Kakamega County Assembly was done irregularly, unprocedurally and indeed illegally and was thus fit for nullification.

10. While the matter was in progress before the trial court, the appellant applied to be enjoined as an interested party and was accorded the opportunity to appear as such. The appellant, alongside one Changorok Kolmongole Erick, were in the gazetted list as nominees in the

gender top-up and marginalized categories respectively.

11. The 1st and 2nd respondents supported their petition by filing affidavits both of which were dated 6th September, 2017. Since the supporting affidavits reiterated the contents of the petition, there is no need to belabor the details thereof.

Responses to the Petition

a. By ODM

12. ODM responded to the petition through an affidavit sworn by Prof Philip M. Kutima on 6th September, 2017. Prof Kutima swore the affidavit in his capacity as ODM's Kakamega County Branch Chairman. He deposed that he had the authority of the Governor, Kakamega County, to swear the affidavit. At paragraphs 4-10 of the affidavit the deponent states:-

“4. THAT as the Branch Chairman I convened a meeting on the 14th day of June 2017 to review the said applications and came up with a list of the successful candidates, which was forwarded to the 1st respondents national office for onward transmission to the 2nd respondent for action. (annexed is a copy of the final submitted list marked “PMK-1”

5. THAT on the 28th day of August 2017, the 2nd Respondent published vide gazette notice number 8380 a list of nominated members to the county assemblies representing political parties (Annexed is a copy of the Gazette Notice marked “PMK – 2”)

6. THAT upon close scrutiny of the final gazette notice published by the 2nd respondent, there exist a number of anomalies in total contradiction to the final list as submitted by Kakamega County Branch Office.

7. THAT I have noted that the name of Changorok Komolngole Eric has been included in the final gazette notice as representing ethnic minority for the 1st respondent in Kakamega County Assembly which name was not among those initially submitted by the Kakamega County Branch.

8. THAT further, the name of the 1st Petitioner was submitted as number 6 in priority vide our list submitted to the national office of the 1st respondent but the same was conspicuously missing from the final gazette notice in the gender top-up list.

9. THAT the name of the 2nd petitioner was submitted in priority as number 1 as representing marginalized group but is also conspicuously missing in the final gazette notice published by the 2nd respondent.

10. THAT I have been advised by the advocates on record, which advice I verily believe to be true that the final list as gazetted by the 2nd respondent does not reflect the true wishes of the Kakamega County Branch of the 1st respondent [of the persons] to be nominated to the Kakamega County Assembly.”

13. Effectively Prof. Kutima's affidavit was in support of the petition.

14. The ODM also filed answer to the petition dated 23rd October, 2017 and stated therein at paragraph 2 that “the 2nd respondent vide gazette notice no. 8380 printed a list of nominated members to the County Assembly, which list had gross anomalies and that as a result thereof, the 1st respondent wrote to the 2nd respondent to have the errors corrected by having the names of HADIJA NGANYI JUMA replaced with that of the 1st Petitioner and the name of CHANGOROK KOLMONGOLE ERICK replaced with the name of the 2nd petitioner. The ODM urged the trial court to allow the petition and to make orders in line with the reliefs sought by the 1st and 2nd respondents in their petition. Hon. Wycliffe Ambetsa Oparanya, Governor Kakamega County also swore an affidavit in support of the answer to the petition.

b) By IEBC

15. The IEBC opposed the petition vide a Notice of Preliminary Objection dated 11th December, 2017 on grounds THAT:-

a. The Petitioners' petition is incompetent and legally untenable in view of the provisions of Article 88(4)(e), Section 74(1) of the Election Act and Regulation 99(2) of the Elections (General) Regulations 2012 which vests the 1st respondent [with the jurisdiction] to settle nomination disputes.

b. The petition is incompetent for lack of deposit of security for costs contemplated in section 78(1) of the Elections Act 2011 and Rule 11 of the Election Petition Rules 2017.

16. The IEBC also filed a response to the petition. The response was dated 2nd October, 2017. There was also filed together with the response a replying affidavit complete with annexures in which the IEBC prayed for orders that:-

a. The MCA nominees in respect of the ODM party to the County Assembly of Kakamega County were properly and validly

nominated in accordance with the law.

b. The gazette notice no. 8380 published on 28th August 2017 containing names of the said nominees is valid.

c. The petition lacks merit and should be dismissed.

d. Costs to the petition.

17. The ODM and the IEBC filed another joint response dated 23rd October, 2017 in response to the petition.

18. It is to be noted that the preliminary objections raised against the petition, including the preliminary objection by the IEBC dated 11th December, 2017 were dismissed by the learned trial magistrate through his ruling dated 22nd December, 2017 thereby paving the way for full hearing of the petition

The Submissions

a. Appellants' Submissions

19. As agreed by parties and directed by the court, the appellant filed her written submissions through her counsel, M/S Abok Odhiambo & Co. Advocates. The submissions are dated 23rd March, 2018. In the submissions, it is contended that:-

- The learned trial magistrate failed to determine whether the parties to the dispute had explored and exhausted the existing options of resolving the dispute before proceeding to court, and in particular the jurisdiction of the IEBC as provided under Article 88(4)(e) of the Constitution and section 74 of the Elections Act

- Generation of party lists is a matter for political parties and not the courts. Reference was made to the provisions of the Elections Act 2011 and the Elections (General) Regulations.

- The matter in controversy before the trial court should have been resolved by the political parties in accordance with section 40 of the Political Parties Act.

- The findings by the learned trial magistrate were not based on the pleadings and the reliefs sought by the 1st and 2nd respondents.

- It was wrong for the learned trial magistrate to make a finding against one Changorok Komolngole Erick when it was obvious the said person was not a party to the petition

b. The 1st and 2nd Respondent's Submissions

20. The gist of the combined submissions dated 2nd April, 2018 is on jurisdiction of the trial court. The argument put forward in the submissions is that the dispute before court was not a dispute on the party list, but was an election petition dispute. It was submitted that once IEBC gazetted the list of nominees to the County Assemblies the jurisdiction for determining the dispute immediately shifted from the IEBC or any other tribunal to the court. Reliance for this proposition was placed on the Supreme Court of Kenya decision in *Moses Mucigi and 14 others versus IEBC and 5 others [2016] eKLR* where the Court stated the following at paragraphs 106 and 107 of the judgment:-

“[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 issuance of form 38, which terminates the Returning officers mandate, and shifts any issue as to 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 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.”

21. Reference was also made to *Section 75(1A) of the Elections Act* in making the point 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.”** It was the 1st and 2nd respondents submissions that once the trial court determined that the names of nominees for the County Assembly of Kakamega had been gazetted there was nothing to stop the court from hearing and determining the dispute as an election petition. It was also submitted that in light of the gazette notice, and it becoming apparent that election for members of The County Assembly of Kakamega County was finalized through gazettelement, no other body, such as IEBC or tribunal had the jurisdiction/mandate to hear and determine any dispute arising therefrom. Only the court could do that, while IEBC had the mandate to deal with the dispute before the date of gazettelement, and in compliance with *section 34(6) of the Elections Act, 2011*. The above sub-section requires parties to ensure that party lists submitted to the IEBC under the section comply with the Constitution or nomination rules of the concerned political party. The party in this case was ODM. It was for these reasons that the 1st and 2nd respondents submitted that if the IEBC did not ensure compliance with the law and the rules, as it apparently did in this case, by ignoring irregularities, then it had to be held accountable for denying the 1st and 2nd respondents their rightful nomination as MCA’s of County Assembly of Kakamega. The 1st and 2nd respondents maintained that ODM and IEBC did not

explain how the anomaly of gazetting the appellant and one Changorok Komolngole Erick as nominees of the County Assembly of Kakamega had arisen when the submitted party did not have their names and when Changorok Kolmongole Erick did not attend the interview on 14th June, 2017. This, they submitted, was a clear breach of the rule of law. According to the 1st and 2nd respondents, the breach by IEBC was made worse by the fact that Changorok was not a resident of Kakamega County.

22. Counsel for the 1st and 2nd respondents further submitted that they could still have moved the Court directly by dint of the provisions of **section 9(4) of the Fair Administrative Actions Act**. The section provides for the procedure for Judicial Review as follows:-

“9. (1) Subject.....

(2)The High court

(3) The High court

(4) Notwithstanding subsection (3), The High Court or a subordinate court may, in exceptional circumstances and on application by the applicant , exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person”

23. It was submitted that in spite of letters written by ODM’s party leader Kakamega Branch to the Executive Director of ODM to deal with the irregularities in the published party list, the matter was not dealt with, thus forcing the 1st and 2nd respondents to go to court in order to salvage their legitimate expectations which ODM and IEBC had thwarted. Reliance was placed on **Article 290(c) of the Constitution** to the effect that **“except in the case of County Assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.”**

24. Regarding the reliefs granted by the trial court, the 1st and 2nd respondents submitted that the trial court was not necessarily bound by the reliefs sought in the petition and that in any event the court could grant any other orders in line with the last prayer in the petition asking for **“any other orders that this Honourable court may deem just and fit to grant.”** Reliance was placed on **section 75(3) of the Elections Act** which provides as follows:-

“In any proceeding brought under this section, a court may grant appropriate relief, including –

- i. a declaration of whether or not the candidate whose election is questioned was validly elected.**
- ii. a declaration of which candidate was validly elected; or**
- iii. an order as to whether a fresh election will be held or not”**

25. Regarding the orders made against Changorok Kolmongole Erick, it was submitted that if the said party was keen on participating in the petition, he would have done so and if the trial court was of the view that the said Changorok Kolmongole Erick was a necessary party, it would have exercised the power donated to it by **Order 1 Rule 10(2) of the Civil Procedure Rules 2010** to enjoin the party, and further that, the judgment of the learned trial court is against ODM and IEBC and not against the person who was not enjoined in the petition.

Submissions of the 3rd and 5th Respondents

26. The 3rd respondent did not file any written submissions. The 3rd respondent was represented by M/s Orego & Odhiambo Advocates. The said advocates appeared only once on 11th April 2018 for taking of directions. The 5th respondent did not also file any written submissions. Her counsel, Mr. D. G. Mango informed the court on 2nd May, 2018, that since the role of the 5th respondent in this matter was only peripheral, she had chosen not to file any submissions.

Submissions of IEBC – 4th Respondent

27. The view held by IEBC is that the learned trial court had no jurisdiction to hear and determine the matter before it and that in the same vein, this court has no jurisdiction to hear and determine this appeal, arguing that since the dispute concerned a nomination party list, the same should have been handled through internal mechanisms first at party level, then at Political Parties Disputes Tribunal if there was need for that step. It was IEBC’s position that the 1st and 2nd respondents did not exhaust those internal mechanisms before rushing to court, and only then by way of Judicial Review at the High Court and not by petition to the Resident Magistrate.

28. It was also submitted that if the 1st and 2nd respondents had followed the right procedure, then the IEBC would have ensured compliance with the provisions of section 40(2) of the Political Parties Act. The IEBC faulted the learned trial magistrate for allegedly altering a party list, which duty fell on ODM and not the court. The IEBC wants the appeal allowed with costs to the 1st and 2nd respondents with an order dismissing the 4th respondent’s petition.

Issues for Determination

29. Although the appellant in this appeal has raised several issues for determination, the one issue that runs through the appeal, and on which issue parties have extensively submitted is one of jurisdiction: Whether the learned trial court had jurisdiction to hear and determine the dispute. Secondary to the main issue is the issue of the role of IEBC after gazette of the nomination party lists, and whether the trial court was right in holding that gazette notice number 8380 of 28th August, 2017 was invalid, and in proceeding to cancel the nomination of the appellant and calling upon the IEBC to gazette the 1st and 2nd respondents as ODM's party nominees under the gender top-up and marginalized categories respectively.

Analysis and Determination

30. Under the provisions of *section 75(4) of the Elections Act, 2011*

“an appeal under subsection (1A) shall be 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. The question of law in this appeal, namely the jurisdiction of the court as well as the validity or otherwise of gazette notice number 8380 of 28th August 2017 must be considered in light of the provisions of *Articles 90 and 177(1)(b) and (c) and 177(2) of the Constitution*. It is only by carefully considering the above provisions that the court will be able to determine whether the reliefs granted by the trial court were well founded. For clarity, the relevant sections of the Constitution are reproduced hereunder:

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.

177. (1) A county assembly consists of—

(b) the number of special seat members necessary to ensure no more than two-thirds of the membership of the assembly are of the same gender;

(c) the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;

(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.

32. *Article 90* of the Constitution is to be read together with *Article 177(1)(c) and 177(2)* concerning inclusion of marginalized groups into the membership of the County Assembly and nomination of such members by political parties in proportion to the seats received in that election in that county by each political party. Case law is also of paramount importance.

33. In the case of *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR* the court had the following to say concerning the centrality of the issue of jurisdiction: -

“So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cul-de-sac. Courts, like nature, must not sit in vain.”

34. There is no over-emphasizing the point that once a court establishes that it has no jurisdiction, it has no option but to down its tools and deal no further with a matter that has been placed before it.

35. In the case of *Claudia Chebet Kosgei & 2 others v Jubilee Party & 2 others [2017] eKLR* the court held as follows:-

“It is therefore settled that once IEBC publishes the Gazette Notice of the names of the nominees to the County Assembly then that marks the end of the nomination process and the people whose names so appear in the notice stand ‘elected’ into the County Assembly. It is also settled that any challenge to that ‘election by nomination’ can only be entertained by way of an election petition and not otherwise.”

36. On the other hand, *Section 13(2A) of the Elections Act 2011* stipulates as follows.

“2A. A political party shall hear and determine all intra party disputes arising from political party nominations within thirty

days”

37. From the chronology of events, the 1st and 2nd respondents only became aware of the dispute they presented before the magistrate’s court after gazette notice number 8380 on 28th August, 2017. From the authorities cited above, and in particular the *Kosgei Case*, the dispute that arose after the publication of gazette notice number 8380 was no longer a party list dispute but an election petition dispute which could only be filed before the Resident magistrate’s court. It is therefore the finding of this court that the learned trial court had the jurisdiction to hear and determine the dispute that was before it. By extension this court also has the necessary jurisdiction to entertain this appeal on matters of law.

38. Secondly, it is also clear from the *Kosgei Case* (above) that once IEBC publishes the nomination party lists in the Kenya Gazette as it did vide Gazette Notice number 8380 on 28th August, 2017, its mandate to deal with any dispute arising out of party lists ceases. This was the Supreme Court holding at paragraph 107 of its judgment in the *Moses Mucigi Case* (Supra). The Supreme Court, at paragraph 106 of the same judgment in the *Moses Mucigi case* stated in no uncertain terms that the gazette notice brings to an end the process of “**election through nomination**” and also brings to a close the process of constituting the assembly in question as provided under **Article 177(1) of the Constitution**.

39. For the above reasons, IEBC had no business in the dispute that arose after issuance of Gazette Notice number 8380 on 28th August, 2017, except that of becoming a respondent in the ensuing election petition before the court. That, indeed is what happened.

40. The second critical issue that has been raised by the appellant and supported by IEBC is that the learned trial magistrate made orders not sought in the petition in addition to making an order against a person who was not a party to the petition. Regarding the issue of making orders against a non-party, it is my considered view that the appellant’s complaint does not hold. If the affected party saw it fit to contest the orders, nothing would have stopped him from doing so. This court does not understand why the appellant should labour so hard to carry a cross that belongs to another. I accordingly find no merit in such complaint and dismiss it altogether.

41. Regarding the issue of the orders made by the learned trial court, my considered view is that the said orders were well within the sought prayers in the petition. I have already set out the prayers in the petition in earlier paragraphs of this judgment. I have done the same for the orders granted by the trial court. A clear reading of the prayers sought and the orders issued leaves no doubt in the mind of this court that the orders are in tandem with the prayers sought.

Conclusion

42. In light of all the foregoing, I find and hold that the appellant’s appeal has no merit and the same is accordingly dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega this 30th day of July, 2018.

WILLIAM M. MUSYOKA

JUDGE