



**REPUBLIC OF KENYA**

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

**ELECTION APPEAL NO. 10 OF 2018**

**CONSOLIDATED WITH APPEAL NO. 11 OF 2018**

MARGARET WANJIRU MBOTE ..... 1<sup>ST</sup> APPELLANT

ELIZABETH NYAMBURA KURIA ..... 2<sup>ND</sup> APPELLANT

JOYCE MUTHONI KAMAU ..... 3<sup>RD</sup> APPELLANT

KARIUKI WANJIRU ..... 4<sup>TH</sup> APPELLANT

**-VERSUS-**

BISHOP JOHN NDUATI ..... 1<sup>ST</sup> RESPONDENT

**INDEPENDENT ELECTORAL**

**& BOUNDARIES COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. G. A Mmasi (Mrs) delivered on 16<sup>th</sup> February 2018 in Milimani Election Petition No. 16 of 2017)**

**BETWEEN**

**BISHOP JOHN NDUATI ..... PETITIONER**

**-VERSUS-**

**INDEPENDENT ELECTORAL**

**& BOUNDARIES COMMISSION ..... RESPONDENT**

**AND**

**MARGARET WANJIRU MBOTE ..... 1<sup>ST</sup> APPELLANT**

**ELIZABETH NYAMBURA KURIA ..... 2<sup>ND</sup> APPELLANT**

**JOYCE MUTHONI KAMAU ..... 3<sup>RD</sup> APPELLANT**

**KARIUKI WANJIRU ..... 4<sup>TH</sup> APPELLANT**

**JUDGEMENT**

1. Bishop John Nduati (the Respondent) presented CMCC Milimani Election Petition No. 16 of 2017 against the Independent Electoral and Boundaries Commission (IEBC) challenging the Gazettement of the Nomination of four persons namely Margaret Wanjiru Mbote, Elizabeth Nyambura Kuria, Joyce Muthoni Kamau and Kariuki Wanjiru as members of the Nairobi County Assembly. This Appeal relates to the

outcome of that Petition.

2. For purposes of this Appeal this Court retains the description of the Parties at the Trial.

3. The Petitioner told the Election Court that he is a registered voter and resident of the Nairobi County. He is also a Member of Jubilee Party, one of the Parties that offered its candidates in the Presidential Parliamentary and County Elections for the year 2017.

4. That the Executive Committee of the Nairobi Branch of Jubilee Party met on 14<sup>th</sup> June 2017 and approved the Petitioner for Nomination as a Member of the Nairobi County Assembly. But to his disappointment his name was not one of those published by IEBC on 23<sup>rd</sup> July 2017 for possible nominee for the County Assembly of Nairobi. The Petitioner was aggrieved and filed a dispute before the Political Parties Dispute Tribunal (being case No. 387 of 2017).

5. In the Petition, it is averred that the Tribunal delivered its Judgment on 27<sup>th</sup> July 2017 and made the following orders;

*(a) The Respondent is hereby ordered to reconstitute the list of Nominees to the Nairobi County Assembly.*

*(b) The reconstitution of the Party List to be done in strict compliance with all relevant laws and shall as far as is reasonable reflect the ethnic diversity of the people of Nairobi County drawn from the Respondent's membership.*

*(c) That the Respondent is further directed to afford a hearing to and to supply all affected persons with the reasons for any decision made in complying with the orders in (b) above.*

*(d) There shall be no order as to costs to facilitate party unity.*

*(e) That a copy of this Judgment to be remitted to the Independent Electoral and Boundaries Commission for necessary action.*

6. On 28<sup>th</sup> August 2017 IEBC published, by way of Gazette Notice, the names of Nominees of Members to the County Assembly to the exclusion of the Petitioner. The Petition challenged the nomination of the four persons on the grounds that they were either registered as voters outside Nairobi County and/or their particulars could not be found with IEBC.

7. In addition that the list of nominees sent by IEBC was not subjected to public scrutiny and no explanation was given for the exclusion of the Petitioner from the list.

8. The Orders sought by the Petitioner were the following:-

*a) A declaration that the List of Nominees gazetted on the 28<sup>th</sup> August 2017 by the Respondent is a nullity as it consist of names of people not qualified to be nominated to the Nairobi County Assembly and/or a declaration that the names of:-*

*i) Margaret Wanjiru Mbote*

*ii) Elizabeth Nyambura Kuria*

*iii) Joyce Muthoni Kamau and*

*iv) Kariuki Wanjiru;*

*Be nullified and/or revoked as Members of the Nairobi County Assembly; and*

*b) The name of the Petitioner Bishop John Nduati be gazetted (sic) as the Nominee to the Nairobi County Assembly; and*

*c) Costs of this Petition.*

9. In response IEBC averred that Jubilee Party submitted its Party List in pursuance to Section 35 of The Elections Act 2011(The Act). IEBC reviewed that list as required under Section 34 (6A) of the Act as read with Regulations 55 (2) of the Elections (General) Regulations, 2012 as amended by The Elections (General) (Amendment) Regulations 2017 and required Jubilee to resubmit an amended List. Jubilee Party resubmitted its final amended list by 19<sup>th</sup> July 2017 and IEBC published this re-submitted list on Sunday 23<sup>rd</sup> July 2017 in both the Sunday Nation and Standard Newspapers.

10. As regards the Dispute before the Political Parties Dispute Tribunal, IEBC asserts that it was neither a Party nor were any Orders made against or directed at it. However, pursuant to the Order in those proceedings the Party submitted a reconstituted list to IEBC on 17<sup>th</sup> August 2017. This was the list that was Gazetted by IEBC on 28<sup>th</sup> August 2017.

11. IEBC further avers that there is no legal requirement for a Nominee to be a registered voter within the County to which the Nomination relates.

12. As to public scrutiny, it was IEBC's position that the published list was subjected to public scrutiny by virtue of the publications in the two newspapers.

13. As is quickly discernable none of the 4 persons whose nomination was challenged was named as a Respondent to the Petition. And so there was a development in the proceedings, prior to the hearing of the Petition, which is of some significance to the matters taken up in the Appeal.

14. Through a Notice of Motion dated 29<sup>th</sup> November 2018, the Petitioner sought the leave of Court to serve the 4 persons by way of advertisement in a Daily Newspaper and to have the 4 joined as Interested Parties. Those Orders were granted by Court on 30<sup>th</sup> November 2017 and service effected through the Star Newspaper of 1<sup>st</sup> December 2017. The Interested Parties did not appear in the proceedings.

15. Hearing commenced and ended on 18<sup>th</sup> December 2017 with only the Petitioner testifying. IEBC chose not to call any evidence.

16. In a Judgment delivered on 16<sup>th</sup> February 2018, the Election Court framed four issues for determination:-

**a) Is the petitioner a registered voter and does he belong to the Jubilee Party?**

**b) Was the nominations included in the proper legal manner?**

**c) Is the Petitioner entitled to the reliefs he is seeking?**

**d) Who is to bear costs?**

17. The Court found in favour of the Petitioner in all the four issues. As to the legality of the process, Election Court held that the process of nomination was marred by illegality from the beginning. The Court observed;

***“In the instant Petition, the process of Nomination was marred from the word go. This is because the Respondent openly admitted in the letter dated 26<sup>th</sup> September 2017 that the names of Joyce Muthoni Kamau and Kariuki Wanjiru their particulars could not be found hence they were not Registered Voter, yet the Respondent went ahead to gazette them as nominees for Members of County Assembly of Nairobi. The whole process was void abninitio. This cannot be said to be a technicality as the same goes to the core of the petition.”***

18. The final outcome of the Judgment was somewhat an anticlimax for the Petitioner. After holding that the Petition had succeeded the Learned Trial Magistrate ordered;

***“The list of nominees gazetted on 28<sup>th</sup> August 2017 is herewith nullified. Petitioner's name to be included as a nominee to Nairobi County Assembly”***

This was an anticlimax because in the Petition, the Petitioner had only sought the nullification of the nomination of the 4 Interested Parties yet the order nullified the nomination of all persons Gazetted on 28<sup>th</sup> August 2017!

19. In an attempt to have this error corrected, the Petitioner filed an Application for Review on 21<sup>st</sup> February 2018 but which was disallowed on 28<sup>th</sup> June 2018. The petitioner preferred an Appeal against the said order (*being Nairobi High Court Election Appeal No. 14 of 2018 Bishop John Nduati –vs- IEBC & 4 Others*) (*hereinafter Appeal No 14 of 2018*) whose determination is yet to be made. But as will be apparent shortly the outcome of that Appeal, one way or the other, does not affect the fate of the matter at hand.

20. This Appeal consolidates two Appeals (Election Appeal No.10 of 2018 *Margaret Wanjiru Mbote & 3 Others –vs- Bishop John Nduati and Independent Electoral and Boundaries Commission* (IEBC) and Election Appeal No. 11 of 2018, *Independent Electoral and Boundaries Commission (IEBC)*).

21. In Election Appeal No. 10 of 2018 the grounds of Appeal are as follows;

**a) The Learned Trial Magistrate erred both in law and fact in allowing the petition to proceed to full hearing when the same had abated by 23<sup>rd</sup> September 2017, for lack of service under Rule 10 of the Elections (Parliament and County Elections) Petition Rules, 2017.**

**b) The Learned Trial Magistrate erred both in law and fact in holding that the Petitioner was validly nominated to the Nairobi City County Assembly yet his name was not in the list of Jubilee party nominees present to the Independent Electoral and Boundaries Commission in tandem with Sections 34 and 35 of the Elections Act and Elections Act and Elections (General) Regulations 2012.**

**c) The Learned Trial Magistrate erred both in law and fact in nullifying Gazette Notice Number 8380 dated 28<sup>th</sup> July 2017 yet the Gazette Notice comprises of all the political parties nominees to Nairobi City Council Assembly.**

**d) The Learned Trail Magistrate erred both in law and fact in making orders adverse to the Appellant who were not parties to the Petition contrary to the provisions of the Elections Act and the Elections (*Parliamentary and County Elections*) petition**

## Rules 2017

**e) The Learned Trial Magistrate erred both in law and fact in condemning the Appellants unheard in contravention of the provisions of Article 50 (1) of the Constitution of Kenya 2010.**

22. In Election Appeal No. 11 of 2018 they are:-

- a) The Learned Trial Magistrate erred in both law and fact by nullifying a non-existent Gazette Notice dated 28th July 2017.**
- b) The Learned Trial Magistrate erred in both law and fact by nullifying the entire Gazette Notice of 28th August 2017, which was not pleaded or in issue in the petition.**
- c) The learned Trial Magistrate erred in law and fact as her decision affects all the Nominated Members of the County Assemblies in the Counties in Kenya.**
- d) The Learned Trial Magistrate failed to consider judiciously why the Jubilee Party which nominate the Interested Parties to the Nairobi County Assembly was not enjoined as a Party to the Petition.**
- e) The Learned Trial Magistrate erred in law and fact in basing her decision on assumptions rather than the material when the petitioner had not demonstrated and met the requirements Under Article 177 (1) (c) of the Constitution of Kenya 2010 thus arriving at an erroneous and wrong decision.**
- f) The Learned Trial Magistrate erred in law and fact in granting the Petitioner leave to serve the Interested parties with the petition by way of newspaper advertisement on 1st December 2017, which was a contravention of Rule 10 of the Elections (Parliamentary and County Elections) petition Rules, 2017.**

23. This Court has considered the oral and written arguments of Counsel and proposes to start by considering two issues that go to the heart of the matter before Court;

*i) Can a decision which purports to nullify the nomination of persons who were neither named nor made Parties to the Petition stand?*

*ii) Can a decision which purports to nullify the nomination of the 4 persons joined merely as Interested Parties as opposed to Respondents be upheld?*

24. In Order to achieve Gender parity and to cater for marginalized groups in Membership of County Assembly Articles 177 (1) and (2) of the Constitution provides:-

### **177. Membership of county assembly**

**(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) the Speaker, who is an ex officio member.**

**(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.**

25. A Political Party that is eligible to nominate a candidate for Election under Article 177 submits a Party List to the Commission in accordance with Article 90(1) of the Constitution which reads:-

### **90. Allocation of party list seats**

**(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 article 177(1) (b) and (c), shall be on the basis of proportional representation by use of party lists.**

It is in purported exercise of this right that Jubilee Party submitted a Party List that excluded the Petitioner.

26. The legal framework for nomination of party list is set out in Section 34 of the Elections Act which reads:-

#### **34. Nomination of party lists members**

**(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) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.**

**(2) A political party which nominates a candidate for election under Article 97(1) (a) and (b) shall submit to the Commission a party list in accordance with Article 97(1)(c) of the Constitution.**

**(3) A political party which nominates a candidate for election under Article 98(1) (a) shall submit to the Commission a party list in accordance with Article 98(1) (b) and (c) 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.**

**(4A) In the case of a person nominated pursuant to Article 177(1) (c) of the Constitution, the party list shall include a certification in the manner prescribed by the Commission.**

**(5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.**

**(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.**

**(6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and—**

**(a) issue the political party with a certificate of compliance; or**

**(b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.**

**(6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.**

**(7) The party lists submitted to the Commission shall be valid for the term of Parliament.**

**(8) A person who is nominated by a political party under subsections (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.**

**(9) The party list shall not contain a name of a candidate nominated for an election.**

**(10) A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.**

27. The submission of the Party List should be at least 45 days before the date of the General Election (Section 35). Within 30 days after declaration of the election results, the Commission shall designate, from each qualifying list, the party representation on the basis of proportional representation. Because it may not be possible to tell the number of seats that a Political Party will be eligible to take up until the election results are declared, each Party List that is submitted is required to contain alternates between male and female candidates in the priority in which they are listed (Section 36 (2) of the Act).

28. The Gazette Notice of 28<sup>th</sup> August 2017 (annexure No. JN 5 to Petitioner's Affidavit of 8<sup>th</sup> September 2017) was published after the General Elections of 2017 in accordance to Regulation 56 of The Election (General) Regulations 2012 which provides:-

#### **56. Commission to publish formula for allocation of seats**

**1) The commission shall before the election to which a party list applies, publish in the Gazette and publicize through electronic and print media of national circulation and other easily accessible medium, the formula for allocating the seats to the respective political parties**

**2) The formula for allocating of seats to the respective political parties from the party lists shall be the number of seats won by political party divided by the total number of seats multiplied by available seats for allocation in the respective House.**

29. It is common ground that the Gazette Notice contains names of persons who were said to be validly nominated to County Assemblies Countrywide. It is neither restricted to Nairobi County Assembly nor to nominees by Jubilee Party. This is the Gazette Notice which the decision (not corrected by the Application for Review) purported to nullify. In so far as the decision affects hundreds of other persons not

party to the Petition, the decision was obviously erroneous and cannot be allowed to stand. That would have been enough to dispose of this Appeal but it is possible that the Petitioner may succeed in Appeal No 14 of 2018 and so the Court must consider the other grievances raised by this Appeal.

30. The other concern was non-joinder of the Interested Parties as Respondents herein. The Interested Parties were Gazetted by IEBC as validly nominated to the County Assembly of Nairobi. While it is unclear from the proceedings at Trial whether the Interested Parties had been sworn to their office, gazettment as validly nominated Members of the County Assembly of Nairobi confers certain rights upon them. The Gazettment is akin to the Declaration of Results and subsequent issuance of a Certificate of a person elected to the County Assembly by the Constituency Returning Officer provided for in Section 83 of the Elections Act. In this sense the Nominated Member stands in the same shoes as the Elected Member.

31. Having been so gazetted the Interested Parties were both essential and necessary Parties to any proceedings seeking to nullify their nominations and a judicial pronouncement which would prejudice or affect their rights could not be made without their proper joinder to the Petition. On this I am persuaded by the decision of Mativo J. in High Court of Kenya Petition No. 409 of 2017 **National Gender & Equality Commission –vs- Independent Electoral and Boundaries Commission & Other** cited to me by Counsel for IEBC in which the Judge held;

**50. It is common knowledge that the successful candidates, having been duly sworn and assumed their respective offices, certain rights have accrued in their favour and a determination that invalidates their nomination will deprive them their positions without giving them an opportunity of being heard or without being afforded a fair process or being afforded the right to contest the decision or to apply for various forms of relief from this court. Also, the Political Parties having gotten their slots depending on their numerical strength in the respective houses stand to lose the slots courtesy of the reliefs sought in this Petition in which they are not parties.**

**51. In my view, the Political Parties and the persons who were nominated, Gazetted and sworn to their respective positions and are now members of the various houses and they are necessary parties to these proceedings. They ought to have been enjoined in this Petition. Certain rights recognized by the law have already accrued to the Political Parties and the nominated persons. Accrued rights cannot be taken away [37] even by a judicial pronouncement without affording the affected persons the opportunity of being heard. Such a decision will have been arrived at in total breach of the rules of natural justice, and it would be unconstitutional and a mockery of justice.**

32. It is common ground that the Petition was brought under the provisions of the Elections (Parliamentary and County Elections) Petition Rules 2017 (herein after the Election Petition Rules). Under the interpretation Section, a Respondent is assigned the following meaning;

*“...In relation to a Petition,...*

*a) **The person whose election is complained of;***

*b) **The Returning officer;***

*c) **The commission; and***

*d) **Any other person whose conduct is complained of in relation to an Election.***

*(My emphasis)*

In this matter the persons whose Election (read Nomination) is complained of are the Interested Parties. Because of this they were mandatory Respondents.

33. As correctly submitted by Mr. Kinyanjui for the Interested Parties the Election Petition Rules do not provide for an Interested Party. The Rules provide for only Petitioners and Respondents!

34. And there would be another fundamental issue. In its response to the Petition, IEBC averred;

*“If The Petition has failed to enjoin Jubilee Party or the duly nominated Members of the Nairobi County Assembly as Respondents in this suit thus preventing the Honourable Court from establishing the truth as to whether his name was justifiably left out of the Party List.”*

This assertion may have prompted the Petitioner to seek the inclusion of the 4 Nominated members as Interested Parties. A bid to patch up the Petition.

35. The Petitioner obtained leave of Court on 30<sup>th</sup> November 2017 to join the 4 nominated Members as Interested Parties and served them by advertisement in the Star Newspaper on 1<sup>st</sup> December 2017. These 4, it is reiterated, were persons whose nomination was complained of and therefore necessary Parties as Respondents. Now, by virtue of Rule 10 (1) of the Election Petition Rules, a Petition ought to be served on a Respondent within 15 days after filing of a Petition. The Petition herein was filed on 8<sup>th</sup> September 2017 and even if the description of the 4 as Interested Parties can be excused, the Petition was served upon them many days after the 15 days prescribed by law. There is therefore merit in ground 6 of the Appeal filed by IEBC that there was infraction of Rule 10 of the Election Petition Rules. Because of late service the Petition had abated against the 4.

36. Pivotal to the outcome in the Election Court was the finding by the Learned Magistrate that Joyce Muthoni Kamau and Kariuki Wanjiru (3<sup>rd</sup> and 4<sup>th</sup> Interested Parties respectively) were not registered voters. With respect this is a conclusion that could not be fairly reached (against the two) without affording them an opportunity to be heard.

37. The exclusion of the 4 Nominated Members was a fatal omission which cannot be cured by the provisions of Rule 9 and 10 of the Election Petition Rules as implored by Counsel for Petitioner. Those Rules (whose relevance I have struggled to see) are in respect to making IEBC a Respondent to every Petition and the contents, manner or service of a Response to a Petition. The breach by the Petitioner was on the much cherished Right to Fair Hearing. Rules of procedure cannot be a panacea to this fatal oversight by the Petitioner.

38. Clearly therefore the decision of the Election Court cannot stand. This Court need not, and is not inclined, to consider the other grounds.

39. The two Appeals are allowed and the decision of the Learned Trial Magistrate of 16<sup>th</sup> February 2018 is hereby quashed and set aside and substituted with an order that the petition dated 8<sup>th</sup> September 2017 is dismissed with costs to IEBC. Costs in the Petition are to IEBC only as the Interested Parties, though joined to the proceedings, did not participate. In the Petition the Learned Magistrate had capped instruction fees at Ksh 100,000/=. IEBC did not complain about those costs, I shall also cap instruction fees for IEBC at Ksh 100,000/=.

40. In respect to costs for the Appeal, both the IEBC and the Interested Parties shall have costs. Noting that the 4 Interested Parties filed a joint Memorandum of Appeal and prosecuted the Appeal together, Instruction Fees for the 4 on the one part and IEBC on the other is capped at Ksh 200,000/=. In other words Instruction Fees for each side is capped at Ksh 200,000/=.

**Dated, Signed and Delivered in Court at Nairobi this, 17<sup>th</sup> day of August, 2018.**

**F. TUIYOTT**

**JUDGE**

**IN THE PRESENCE OF:**

Kinyanjui for Appellants (Election Appeal No. 10 of 2018)

Anyoka for Independent Electoral and Boundaries Commission (IEBC)

Nyaberi for Respondent

Dennis Court Assistant