



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**ELECTION PETITION APPEAL NO. 2 OF 2018**

**ANN POTISHO KAPASAR.....APPELLANT**

**-VERSUS-**

**SIALO NATANYA TASUR.....1<sup>ST</sup> RESPONDENT**

**CHRISTINE TAYIANA KOSHAN.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF NAROK.....4<sup>TH</sup> RESPONDENT**

**THE CLERK COUNTY ASSEMBLY OF NAROK.....5<sup>TH</sup> RESPONDENT**

**AND**

**MAENDELEO CHAP CHAP PARTY**

**JUBILEE PARTY**

**CHAMA CHA MASHINANI**

**ORANGE DEMOCRATIC MOVEMENT.....INTERESTED PARTIES**

**KENYA AFRICAN NATIONAL UNION (KANU)**

**NATIONAL VISION PARTY**

**CONSOLIDATED WITH**

**ELECTION PETITION APPEAL NO. 4 OF 2018**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....APPELLANT**

**VERSUS**

**SIALO NATANYA TASUR.....1<sup>ST</sup> RESPONDENT**

**CHRISTINE TAYIANA KOSHAN.....2<sup>ND</sup> RESPONDENT**

**ANN POTISHO KAPASAR.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY ASSEMBLY OF NAROK.....4<sup>TH</sup> RESPONDENT**

**THE CLERK, COUNTY ASSEMBLY OF NAROK....5<sup>TH</sup> RESPONDENT**

**AND**

**MAENDELEO CHAP CHAP PARTY**

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**ORANGE DEMOCRATIC MOVEMENT.....INTERESTED PARTIES**

**KENYA AFRICAN NATIONAL UNION (KANU)**

**NATIONAL VISION PARTY**

**[Being an appeal from the whole judgement of the Hon. W. Juma,**

**Chief Magistrate Narok delivered on 15/2/2018]**

**JUDGEMENT**

**INTRODUCTION**

1. The two appeals were consolidated on 2<sup>nd</sup> May, 2018.
2. Ann Potisho Kapasar, the appellant, has appealed against the whole judgement of the magisterial election court in which that court invalidated her nomination as a member of the County Assembly of Narok on a party list of Kenya African National Union (herein referred to as KANU). In her place, the court held that Sialo Natanya Tasur, was the duly nominated candidate on a party list of Maendeleo Chap Chap party as the member of the County Assembly of Narok.
3. In this court, the appellant raised 8 grounds in her memorandum of appeal. Her counsel filed written submissions in addition to making oral submissions in support of her appeal.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have opposed her appeal. Mr. Mutua, their counsel on record opposed the appeal through written and oral submissions.
5. The Independent Electoral and Boundaries Commission (herein referred to as IEBC), the 3<sup>rd</sup> respondent, supported the appeal. Its counsel filed written and made oral submissions in support of the appeal. Additionally, it is important to point out that IEBC filed an appeal against the whole magisterial judgement and decree vide election petition appeal No. 4 of 2018.
6. The County Assembly of Narok (the 4<sup>th</sup> respondent) and the clerk to that assembly (5<sup>th</sup> Respondent) through Ms. Saika did not make any oral submissions in these appeals.

**THE CASE FOR THE APPELLANT**

7. All the political parties namely Maendeleo Chap Chap, Jubilee, Chama cha Mashinani, Orange Democratic Movement and KANU, although cited as parties did not take part in these appellate proceedings.
8. I have already pointed out that the appellant raised 8 grounds in her memorandum of appeal. In ground one, the appellant has faulted the trial court for failing to consider and adequately apply all the relevant electoral laws in particular articles 90 and 177 of the 2010 Kenya Constitution, which provisions are in relation to election of members to the County Assembly through the party list. Additionally, she has faulted the trial court for failing to consider and adequately apply the provisions of sections 13, 34, 35, 36, 37 and 80 of the Elections Act of 2011 together with Regulation 54 of the Elections (General) Regulations of 2012.
9. In this regard the evidence tendered at the trial was by consent agreed to be by affidavit evidence. By virtue of the consent of the parties *viva voce* (oral evidence) was dispensed with. In her 15 paragraphs replying affidavit, the appellant deponed to the following major matters. She deponed that on 9<sup>th</sup> June, 2017 she made an application to be considered for nomination as a member of the county assembly under Gender Top Up Category. She was then advised by her counsel that under the Gender Top Up Category, there were 13 seats allocated to the County Assembly of Narok in accordance with articles 90 and 177 (1) (b) of the Constitution. She further averred that on 12<sup>th</sup> June, 2017 IEBC published notice No. 5735 of 2017, which required political parties to submit their party lists to the commission on or before 24<sup>th</sup> June,

2017 for allocation of special seats to the National assembly, Senate and County Assemblies in respect of which she has annexed annex marked “APK3”, which is the relevant gazette notice. She has further averred that all parties were mandatorily required by section 35 of the Elections Act, 2011 to submit their party lists within 45 days before the general elections of 8<sup>th</sup> August, 2017.

10. As a result KANU submitted its party list. As regards the correct formula for nomination by IEBC, she averred that it was up to IEBC to explain the correct formula of allocating seats to the participating parties. She also averred that Maendeleo Chap Chap party did not submit a party list in respect of the position of Top Gender Top Up Category for the County Assembly of Narok, contrary to the assertion by Maendeleo Chap Chap party that it did submit its list.

11. She also averred that the letter of Maendeleo Chap Chap party dated 19<sup>th</sup> July, 2017 which was addressed to IEBC stated that “*Please note where the party has not submitted a list we are satisfied*”, which letter is marked as annex APK 5. As a result of annex APK 5, Maendeleo Chap Chap party was not considered for the positions under the Gender Top Up Category. As a result of their failure, IEBC had to consider the next political party that had submitted its party list for nomination. The outcome was that the appellant was then nominated as member of the county assembly for the County Assembly of Narok on a KANU ticket.

## **THE CASE FOR THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS**

12. Sialo Natanya Tasur, filed a 17 paragraphs supporting and a verifying affidavit in opposition to the affidavit evidence of the appellant. In her affidavit, she deponed to the following major matters. She has deponed that the appellant was nominated and a member of county assembly of Narok vide gazette notice of 28<sup>th</sup> August, 2017. She has also stated that on 23<sup>rd</sup> July, 2017 IEBC published in its website and in the Daily Nation and Standard newspapers, the names of all persons who had been forwarded to IEBC by their respective parties for consideration of party list seats and special seats in accordance with article 90 of the Constitution, sections 34, 35, 36 and 37 of the Elections Act, 2011 and Regulations 54, 55 56 of the Elections (General) Regulations, 2012 together with Regulations 20 and 21 of the Elections (Party Primaries and Party Lists) Regulations, 2017.

13. As a result IEBC acknowledged receipt of only one name that was forwarded by Maendeleo Chap Chap party namely Charles Rorinke ole Kantai under the marginalized groups, in respect of which she has annexed A3 to her affidavit. Following the conclusion of the General Elections of 8<sup>th</sup> August, 2017, the interested political parties secured the following seats in the Narok County Assembly.

<b>Party</b>	<b>Number of Seats</b>
1. Jubilee	13
2. Chama cha Mashinani	6
3. Orange Democratic Movement	4
4. Maendeleo Chap Chap	2
5. KANU	1
6. National Vision Party	1

In addition to the foregoing, there were 3 independent candidates who were elected as members of that county assembly, which brought the total number of members to 30.

14. She has also deponed that: “*The results as published in a special issue of the Kenya Gazette Vol.CXIX-No.121 dated 22<sup>nd</sup> August, 2017 erroneously provided that the 5<sup>th</sup> Interested Party (KANU) had won the seat for Ilkerin Ward in Emurua Dikirr Constituency. This anomaly was corrected through a degazette by a corrigenda dated 25<sup>th</sup> August, 2017. After the correction KANU remained with only one seat in the Assembly annexed and marked A4 (from page 35 but in particular page 56 and 57) and A5 (from page 72 and in particular page 73) are true copies of the gazette notice of 22<sup>nd</sup> August, 2017 and the corrigenda dated 25<sup>th</sup> July, 2017 respectively.*”

15. Furthermore, she has deponed that the formula for the allocation of seats is provided for under article 90 of the Constitution which directs that seats in the county assembly shall be allocated to political parties in proportion to the number of seats won by candidates of the political party at the general elections. Article 177 (1) of the Constitution has similar provisions in requiring that nomination by political parties must be in proportion to the seats they have won in a county assembly.

16. The provisions of sections 36(4) of the Elections Act, 2011 also embody the principles of proportional representation and requires IEBC to take into account the principle of proportionality in terms of article 177 (1) (b) of the Constitution. More importantly she has deponed that the provisions of Regulation 56 (2) of the Elections (General) Regulations, 2012, are the implementing regulations in respect of the formula to be used. Those provisions provide that: “*The formula for allocation of seats to the respective political parties from the party lists shall be the number of seats won by a political party divided by the total number of seats multiplied by available seats for allocation in the respective House.*”

## **THE CASE FOR THE 3<sup>RD</sup> RESPONDENT (IEBC)**

17. In addition to the affidavit evidence of the appellant and that of the 1<sup>st</sup> respondent, there is the affidavit of Salome Oyugi, who filed a 28

paragraphs replying affidavit in support of the appeal. In her affidavit she has described herself as a manager in charge of political and campaign financing at IEBC. It was her evidence that the county assembly of Narok was allocated 13 seats under the Gender Top Up Category in terms of articles 90 and 177 (1) (b) of the Constitution. Under the marginalized group category, the said assembly was allocated 4 seats in compliance with article 137 (1) (c) of the Constitution and in terms of section 36 (8) of the Elections Act, 2011. She has denied that the 13 seats were not apportioned according to law. Additionally, she has averred that pursuant to section 35 of the Elections Act, 2011, it is mandatory for a party list to be submitted to IEBC 45 days before the general elections of 8<sup>th</sup> August, 2017.

18. She has also averred that Maendeleo Chap Chap did not submit its party list for the Gender Top Up Category. It is by virtue of its failure to submit a party list for the Gender Top Up category in terms of Regulation 26 (4) of the Elections (party Primaries and Parties) Regulations, 2017 that forced IEBC not to consider the issue of allocation of seats to Maendeleo Chap Chap Party.

19. Furthermore, it was her affidavit evidence that IEBC only received a party list under the marginalized group from Maendeleo Chap Chap, in which the only candidate forwarded to them was one Charles Rorinke ole Kantai. Additionally, she has averred in paragraph 18, that IEBC published in its website and in the Nation and Standard newspapers the names of all persons who had been forwarded to it by all political parties. She has pointed out that Maendeleo Chap Chap did not forward a candidate under the Gender Top Up Category for nomination. She has confirmed as did the appellant the number of seats garnered by each political party as indicated in paragraph 13 above. She has also confirmed that there were 3 independent candidates, who were elected to that assembly, which brought the total number of seats to 30.

20. Furthermore, she has averred that a total of 13 seats were allocated to women under the Gender Top Up Category in compliance with articles 90 and 177 (1) (b) of the Constitution. She has also averred that the allocation formula set out in paragraph 11 of the 1<sup>st</sup> respondent's supporting affidavit is defective and misleading in that party lists are submitted by political parties to facilitate the representation of special interests groups. And it is for that reason that the 3 independent candidates were not factored in the allocation of seats in the Gender Top Up Category, hence the usage of 27 seats as opposed to 30 seats for the entire assembly. Finally, she has averred that IEBC received a letter from the 1<sup>st</sup> respondent too late in the day because the final party list had already been submitted to IEBC by 19/7/2017, which then published the party lists on 23/7/2017. As a result the gazettelement was done on 28/8/2017.

21. In the light of the foregoing affidavit evidence of the parties, and the applicable law, I find the following to be the issues for determination in the instant appeal.

- 1) Whether or not IEBC erred in law in rejecting the party list submitted by Maendeleo Chap Chap party.
- 2) Whether or not IEBC used the correct formula in computing and allocating the 13 seats to the six political parties, by excluding the three seats of the independent candidates.
- 3) Whether or not the letter dated 19/7/2017 from Maendeleo Chap Chap was admissible in evidence.
- 4) Who should bear the costs of this appeal?
- 5) What are the appropriate final orders to be issued by this court?

## ISSUE 1

22. I have considered the entire affidavit evidence of the parties. I have also considered the submissions of all counsel including the cited authorities. As a result, I find that the provisions of section 35 of the Elections Act, 2011 are coached in mandatory terms. They require all political parties to submit their party lists to IEBC 45 days before the general elections. In the instant appeal all political parties were required to submit their party lists before 8/8/2017.

23. Furthermore, I find from the affidavit evidence that Maendeleo Chap Chap party submitted, within the prescribed time in terms of section 35 of the Elections Act, 2011, a party list in respect of the marginalized group category in which there was only one candidate, namely Charles Rorinke Ole Kantai. They did not submit a party list in respect of the Gender Top Up Category. I therefore do not find merit in Mr. Mutua's submission that the submission by Maendeleo Chap Chap of its party list on 28/8/2017 in respect of the Gender Top Up Category was authorized by law. This was outside the mandatory prescribed time as required by section 35 of the Elections Act, 2011. In this regard, I find the authorities cited by Ms. Ngetich for IEBC to be instructive. One such authority is the decision of the Supreme Court in *Moses Mwicigi and 14 others v. Independent Electoral and Boundaries Commission and 5 others* [2016] eKLR, in which that court stressed that in matters of election time frames should mandatorily be complied with.

24. Furthermore, the High Court in the *Council of County Governors v. Attorney General & another* [2017] eKLR arrived at the same conclusion in terms of time frames as did the Supreme Court in the preceding case.

25. The submission by Mr. Mutua that his clients submitted the party list under section 37 (2) of the Elections Act of 2011 is inapplicable in the instant appeal. I find that Maendeleo Chap Chap was all along aware of the time frames and that is why it submitted the candidature of Charles Rorinke Ole Kantai within the permitted time, but failed to do so in respect of the Gender Top Up Category. Sections 35 and 37 (2) of the Elections Act, 2011 must be read as a whole and not in isolation. In the circumstances after re-evaluating the evidence tendered at trial as a 1<sup>st</sup> appeal court, I find as a matter of law that the trial magisterial election court erred in failing to find that Maendeleo Chap Chap party did not submit its party list within 45 days before the general elections of 8/8/2017 as required by section 35 of the Elections Act, 2011.

26. The upshot of the foregoing is that I find there is merit in this ground of appeal and I hereby uphold it with the result that the finding of the trial court to the contrary is hereby set aside.

## ISSUE 2

27. The constitutional provisions in articles 90 and 177 and section 36 (9) of the Elections Act read together with Regulation 56 (2) of the Elections (General) Regulations, 2012 require the commission to allocate seats in proportion to the number of seats won by the party. Regulation 56 (2) of the Elections (General) Regulations, 2012 categorically provides as follows: *“The formula for allocation of seats to the respective political parties from the party list shall be the number of seats won by a political party divided by the total number of seats multiplied by available seats for allocation in the respective House.*

28. I agree with Mr. Mutua that in allocating seats to the parties, IEBC must comply with the principle of proportionality in terms of the total seats garnered by each party. Furthermore, I find IEBC is also bound to take into account the total number of seats won by each party in the county assembly in its responsibility of allocating seats to each political party. In other words, it is bound to follow the formula set out in Regulation 56 (2) of the Elections (General) Regulations, 2012. The argument by IEBC that it was necessary to exclude the 3 seats held by independent candidates in the allocation of seats is proper. The reason being that IEBC is only allowed to nominate members to the county assembly from the party lists that are submitted by political parties. The independent candidates are excluded. It seems that the legislature formula of allocation of seats favours political parties and not independent candidates.

29. The upshot of the foregoing is that the allocation formula under the Gender Top Up Category for the 13 seats will be as follows, using the 27 seats for the County Assembly of Narok:

1) Jubilee party

$13 \text{ seats won} \div 27 \text{ seats} \times 13 \text{ seats}$

for allocation = 6.25 (Round off to 6 seats)

2) Chama cha Mashinani

$6 \text{ seats won} \div 27 \text{ seats} \times 13 \text{ seats}$

for allocation = 2.88 (Round off to 3 seats)

3) Orange Democratic Movement

$4 \text{ seats won} \div 27 \text{ seats} \times 13 \text{ seats}$

for allocation = 1.925 (Round off to 2 seats)

4) Maendeleo Chap Chap party

$2 \text{ seats won} \div 27 \text{ seats} \times 13 \text{ seats}$

for allocation = 0.96 (Round off to 1 seat)

5) Kenya African National Union (KANU)

$1 \text{ seat won} \div 27 \text{ seats} \times 13 \text{ seats}$

for allocation = 0.481 (Zero seat)

6) National Vision Party

$1 \text{ seat won} \div 27 \text{ seats} \times 13 \text{ seats allocation}$

for allocation = 0.481 (Zero seat)

Even if one were to use the entire 30 elective posts in the county assembly in the allocation formula, the seats to be allocated to each political party will remain the same as shown in paragraph 29 above.

30. In view of the above computation, I agree with Mr. Mutua that: *“Based on proportionality and given that there cannot be a half seat, the remaining one seat was rightly allocated to Jubilee party so that it gets a total of 7 seats.”* This computation of rounding off to one seat in respect of Maendeleo Chap Chap party and two in respect of the Orange Democratic Party as shown above is common in federal states such as Nigeria and United States of America (USA). For example, in the USA the formula used in requiring approval of the 1787 constitution produced 8 states and a fraction of the 9<sup>th</sup> state, which was rounded off to 9 states out of the then 13 states. As a result the constitution became operational in 1789.

31. In view of the foregoing, it is clear that the IEBC used the proper formula in allocating seats to the political parties, who are the

interested parties in the instant appeal.

32. In view of the foregoing finding, I find that ground 3 in which the appellant has faulted the trial court in failing to find that she was eligible to be nominated as Member of County Assembly on a KANU ticket for Narok County lacks merit and is hereby dismissed, since the formula used did not produce a single seat for KANU.

33. In grounds 4 and 5, the appellant has faulted the trial court for extending the scope of its jurisdiction by entertaining issues that had not been pleaded in the petition and in granting an order for gazettelement, which similarly was not pleaded by the 1<sup>st</sup> respondent. I find there is merit in the complaint, in view of the fact that the trial court made a finding that the 1<sup>st</sup> respondent was eligible to be nominated as a member of the County Assembly of Narok and was therefore entitled to be sworn in as such. In this regard the provisions of section 86 (1) of the Elections Act, directs the election court to determine the validity of the questions raised in the petition. Thereafter, the court is required to certify its determination to IEBC and to the speaker of the concerned county assembly, who in the instant appeal is the speaker of the County Assembly of Narok. The trial magisterial election court exceeded its jurisdiction in requiring gazettelement.

34. In ground 6, the appellant has faulted the trial court both in law and fact in finding that the 1<sup>st</sup> respondent had proved her case as required. This ground of appeal is a moot point in view of my finding in ground one that the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents were submitted outside the prescribed period in terms of section 35 of the Elections Act.

35. In ground 7, the appellant has faulted the trial court both in law and fact by ignoring the submissions, affidavits and documentary evidence of the appellant which led that court to arrive at an erroneous decision. Again I find this ground to be moot in view of my findings in relation to grounds 1, 2 and 3.

36. In ground 8, the appellant has faulted the trial court both in law and fact for disregarding the principles applicable in respect of the burden and standard of proof in election petitions. In this regard, the trial court found that the 2 respondents had proved their case beyond a balance of probabilities. In the circumstances I find that this ground of appeal is lacking in merit and is hereby dismissed.

37. I note from the appellant's grounds of appeal that she faulted the trial court both in law and fact. It should be borne in mind that this approach is not proper. The reason being that appeals from the election magisterial courts to the High Court lie only in respect of matters of law in terms of section 75 (4) of the Elections Act of 2011.

38. I have re-assessed the evidence tendered by both parties at trial as I am required to do as a 1<sup>st</sup> appeal court. Having done so, I find that the judgement and decree of the trial court is not supported by evidence. I therefore find that the appeal succeeds only to the extent that Maendeleo Chap Chap did not submit a party list to the IEBC, which is contrary to section 35 of the Elections Act. Furthermore, I find that Ann Potisho Kapasar, the appellant was not validly nominated by IEBC in respect to the one seat allocated to KANU in the County Assembly of Narok. I therefore declare her nomination to be unconstitutional, null and void.

### **ISSUE 3**

39. The letter dated 19/7/2017 purportedly written on Maendeleo Chap Chap and addressed to IEBC was not signed. It was therefore not admissible in evidence. The reason being that it was difficult to verify its authenticity. Admissibility of a document such as the letter is issue is a matter of law and was properly raised by counsel for the two respondents in the instant appeal. Counsel invited the court to compare the letter of 19/7/2017 and that of 28/8/2017. I declined the invitation to use the letter of 28/8/2017 as being a genuine letter from Maendeleo Chap Chap, in order to find that the letter of 19/7/2017 was not genuine. The basis for this rejection is that the court lacks the expertise in comparing the writings and typing on those two letters.

### **ISSUE 4**

40. It is trite law that costs follow the event. The appellant has succeeded and failed in some grounds of the appeal. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have similarly succeeded and failed in some grounds of the appeal. In the circumstances, I find that it is only fair that each party is to bear its own costs.

### **ISSUE 5**

### **FINAL AND DISPOSAL ORDERS**

41. The upshot of the foregoing is that the court makes the following orders:

- 1) The two appeals are hereby allowed with the result that the magisterial judgement and decree together with the consequential orders dated 15<sup>th</sup> February, 2018 are hereby set aside.
- 2) The nomination of Ann Potisho Kapasar, the appellant, as a Member of County Assembly of Narok is hereby declared null and void.
- 3) In terms of section 86 (1) of the Elections Act No. 24 of 2011 notice of this determination is hereby ordered to be served upon the speaker of the County Assembly of Narok County.
- 4) Pursuant to section 86 of the Elections Act of 2011, Independent Electoral and Boundaries Commission is hereby ordered to proceed with nomination of a member for the seat of the County Assembly of Narok from the party list of the Jubilee party.

5) There will be no order as to costs.

6) The security for costs, if any, deposited in this court to be released to the appellant/ depositor.

**Judgement Delivered** in open court at **Narok** this **14th** day of **August, 2018** in the presence of Mr. Kambo holding brief for Ms. Ngetich for the appellant and also holding brief for Ms. Rotich for the 3<sup>rd</sup> and 4<sup>th</sup> respondents with Mr. Langat holding brief for Mr. Mutua for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

**J. M. BWONWONGA**

**JUDGE**

**14/8/2018**