



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 3 OF 2018**

**ROSE MOTURI MWENE.....APPELLANT**

**AND**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE JUBILEE PARTY .....2<sup>ND</sup> RESPONDENT**

**HARRIET KERUBO ONGERA .....3<sup>RD</sup> RESPONDENT**

**KISII COUNTY ASSEMBLY .....4<sup>TH</sup> RESPONDENT**

(Appeal from the judgment and decree of the Chief Magistrate's Court delivered at Kisii on 12<sup>th</sup> February 2018 by Hon. V. Karanja in Election Petition NO. 8 of 2018).

**JUDGMENT**

**BACKGROUND**

This is an appeal against the judgement which nullified Gazette Notice No. 8380 in relation to the Appellant's ("Rose Mwene") nomination to the Kisii County Assembly and Gazette Notice No. 8847 in relation to the 3<sup>rd</sup> Respondent's ("Harriet Ongera") nomination to the Kisii County Assembly. Both parties were nominated under the Gender Top Up list. The court also ordered the 1<sup>st</sup> Respondent, the Independent and Electoral Boundaries Commission ("the IEBC") and the 2<sup>nd</sup> Respondent, ("the Jubilee Party") to conduct fresh nomination under the Gender Top Up list to fill the vacancy.

Rose Mwene and Harriet Ongera are registered voters and members of the Jubilee Party. They each forwarded their names as nominees for the special seats in Kisii County Assembly, under the Gender Top Up Category with Ms. Ongera listed as the Number 2 in the list and Ms. Mwene listed as Number 11.

Jubilee Party was able to secure five seats under the Gender Top Up Category in the Kisii County Assembly. Ms. Ongera, who was erroneously listed as male, was bypassed in the selection with the IEBC picking numbers 1, 3, 5 and 11, including Ms. Mwene, who was gazetted on 28<sup>th</sup> August 2017 and sworn in on 7<sup>th</sup> September 2017 as a member of the Kisii County Assembly. Upon receiving notification via a letter by the Jubilee Party dated 31<sup>st</sup> July 2018 that Ms. Ongera who was female, IEBC published Corrigenda No. 8847 on 8<sup>th</sup> September 2017, deleting Ms. Mwene's name and replacing it with that of Ms. Ongera.

After considering the petition, responses to the petition and the submissions of the parties, the subordinate court concluded that IEBC and the Jubilee Party were not acting in compliance with the law in the publication of the corrigenda which deleted Ms. Mwene's name and replaced it with that of Ms. Ongera's as the mistake in the list had serious implications which could not be rectified by publishing a Corrigenda. It stated that Ms. Mwene had already assumed office and any attempt to remove her would be irregular and in breach of Section 34(10) of the Elections Act. The rightful procedure would instead be for a fresh nomination to be conducted, which the court ordered.

Ms. Mwene seeks that the decision of the subordinate court be overturned and her petition before the lower court be allowed unconditionally on the basis that the court was wrong in failing to reinstate her despite holding that the Corrigenda was illegally done and it did not have a legal basis in declaring the nomination process of the Appellant as null and void. The appellant's grounds of appeal are as stated below;

**GROUND OF APPEAL**

- i. The Learned Trial Magistrate was very wrong in holding that though Kenya Gazette No. 132 dated 8/09/2017 was illegally done, the Court cannot reinstate the Appellant who was deleted by the illegal Gazettement.
- ii. The Learned Trial Magistrate was wrong in law in disregarding Kenya Gazette Notice No. 8380.
- iii. The Learned Trial Magistrate did not have any legal basis whatsoever in declaring the nomination process of the Appellant as null and void when she had held that the final party list cannot be amended.
- iv. The Learned Trial Magistrate erred in Law in considering extraneous issue and/or importing her opinion into clear provisions of Law.
- v. The Learned Trial Magistrate erred in Law and in fact in directing the 2<sup>nd</sup> Respondent to hold fresh nomination.

Parties argued the Appeal by way of written submissions which they also highlighted in court. The appellant was represented by Mr Momanyi and Mr Nyamweya. The 1<sup>st</sup> respondent was represented by Ms Kisa, the 3<sup>rd</sup> Respondent by Mr. Ogutu and the 4<sup>th</sup> Respondent by Mr. Ondimu

### **APPELLANT'S SUBMISSIONS**

Ms. Mwene through her lawyer submits that the Court departed from that law in holding that the rightful procedure was for the Jubilee Party to conduct a fresh nomination, as this was not supported by the Constitution of Kenya nor the electoral laws. It was submit that once a list has been published in the Kenya Gazette, such publication completed the election process through nomination. This was the finding of the Supreme Court in **Moses Mwicigi & 14 Others -Versus- IEBC, Petition No. 1 of 2015**. Ms. Mwene agrees with the trial court's holding that the publication of the corrigenda was a step taken too late and without plausible explanation but fails to agree with the Court that the publication of the corrigenda, though illegally done, takes the seat away from her and the court cannot reinstate her. She seeks in this appeal the overturning of the Lower Court's Judgment as it claims it was unlawful and irregular as there was no basis either factual or legal to revoke Gazettee Notice No. 8380. She submits that the court's reasoning that if the Ms. Ongera's gender had been indicated as female she would have been nominated amounts to an attempt to amend the final party list. She labelled this as misguided and 'unlawful wishful thinking'.

### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

IEBC submits that the learned trial magistrate correctly held that the Gazette Notice No. 8847 by which Ms. Mwene was nominated could not be upheld, because if Ms. Ongera had correctly been described as "female" then Ms. Mwene would not have been nominated, as Ms. Ongera was in priority position pursuant to **Section 36(7) of the Elections Act**. It is further submitted that in upholding the Gazette Notice No. 8847 the court would have usurped IEBC's powers to draw from the party list special seat members in the order given by the Jubilee, contrary to the provisions of **Section 36(8), Elections Act**. That the statutory provisions only mandate the 1<sup>st</sup> Respondent to draw from the party list special seat members in the order given by the party. Reliance was made on the case of **Republic v Jubilee Party & another Ex parte Wanjiku Muhia & another [2017] eKLR** where the High Court held that *the unlimited jurisdiction of the high court cannot be invoked where parliament has specifically and expressly prescribed procedures for handling grievances*. The court also held that *the intention of the Elections Act was to provide a mechanism for expeditious resolution of disputes*. It further submitted that the subordinate court correctly interpreted the law in ordering for fresh nominations to be conducted. The 1<sup>st</sup> Respondent relied on the case of **Rahma Issak Ibrahim v Independent Electoral & Boundary Commission & 2 others [2017] eKLR**. In this case, the High Court held that the speaker of County Assembly of Mandera could not lawfully swear in the 1<sup>st</sup> interested party following the illegal gazette notice by which the Commission had purported to delete the petitioner's name and substitute it with another. The 1<sup>st</sup> Respondent further relied on the Supreme Court case of **Moses Mwicigi & 14 others vs Independent Electoral and Boundaries Commission (2015) eKLR** as referenced in **Aden Noor Ali v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR**, where it was held that the duty of IEBC is to ensure that the party lists submitted comply with the relevant provisions of the law. The Supreme Court further held that:

*"Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations."*

It was submitted that the Appellant did not qualify to be nominated and the court was correct in making its declaration for fresh nominations to be conducted. It seeks that the Appeal be dismissed for lack of merit with costs to itself.

### **3<sup>RD</sup> RESPONDENT'S SUBMISSIONS**

Ms. Ongera through her counsel submitted that the burden of proving that her nomination and election on 8<sup>th</sup> September 2017 was unlawful and invalid, rests on Ms. Mwene, who failed to prove the allegations alluded to in the petition before the Magistrates Court. Adding that that it is important to take cognizance of the provisions of **Section 83, Elections Act**, which is geared towards ensuring that not every irregularity and/or illegality, committed in the course of an Election Process shall invalidate an Election. It was further submitted that the subordinate court correctly held that Ms. Mwene's name, which had been gazetted in error and which error had been corrected vide Corrigenda, could not be re-instated, on the basis that Ms. Ongera was listed in priority and on the basis that such re-instatement would be in vacuum. That IEBC was legally and statutorily mandated to designate her as the duly Nominated Member of the County Assembly. It was submitted that this Court cannot dictate to IEBC the name of the person to be designated, as this would amount to limiting IEBC's mandate and thereby usurp its Constitutional Power. She relied on the case of **Lydia Mathia -vs- Naisula Lesuda & Another (2013) eKLR, page 37** thereof, where the Honourable Court held that:

*“I conclude by saying that the Petitioner has failed to prove that the 2<sup>nd</sup> Respondent did not have the mandate or discretion, pursuant to the provisions of the Constitution, 2010 and the Election Act, 2011, to substitute the names of the Petitioner with that of the 1<sup>st</sup> Respondent in the list of Women Members nominated to the Senate by the National Alliance (TNA) imposed by the Constitution, 2010.”*

In response to Ms. Mwene’s claim of amendment of the party list, Ms. Ongera submitted that the Court’s holding did not amount to amendment of the party list, as she was already contained in the Party list, which was submitted and tendered to IEBC in line with the provisions of **Section 34 and 36** of the **Election Act**. She further submitted that following the decision of the subordinate court, the 1<sup>st</sup> Respondent proceeded to gazette her as the duly Nominated Member of the County Assembly, in terms of the Gazette Notice published on the 6<sup>th</sup> April 2018. She submits that the decision of the Magistrates Court has consummated and hence the instant Appeal is overtaken by events. Any decision to the contrary shall amount to impeaching the validity of the Gazette Notice which has not been challenged and for which the timeline provided under the provisions of **Article 87(2)** has lapsed

She relies in the case of **Jaldesa Tuke Debalo –vs- IEBC & Another (2015) eKLR**, where the Honourable Court held as hereunder;

*“We are cognizant of the principle that upon Gazettement of Members of the County Assembly, they are deemed to be elected members of the County Assembly”*

#### **DETERMINATION**

Having considered the submissions, the law and the authorities relied on, in my view these issues for the determination are: -

- i. Whether IEBC had the mandate to publish the Corrigenda Gazette Notice;**
- ii. Whether the subordinate court had legal basis in nullifying Ms. Mwene’s nomination and ordering for a fresh election;**
- i. Whether IEBC had the mandate to publish the Corrigenda Gazette Notice;**

This dispute stems from the mistake of the Jubilee party in the preparation and submission of the Gender Top Up List for Kisii County Assembly, where it erroneously stated the gender of Ms. Ongera as ‘male’ rather than ‘female’. Due to this mistake, Ms. Ongera was bypassed in the allocation of the 5 seats allotted to Jubilee to the benefit of Ms. Were, who was thereafter gazetted and assumed office. IEBC thereafter published a corrigenda deleting the name of Ms. Mwene’s and replacing it with that of Ms. Ongera. In its judgement, the trial court nullified both gazette notices and ordered a fresh nomination be conducted. The trial magistrate held as follows, “ I hold the nomination process in relation to the Petitioner and the 3<sup>rd</sup> Respondent null and void and revoke Gazette Notice No. 8380 in relation to the Petitioner’s nomination and 8847 in relation to the 3<sup>rd</sup> Respondent’s nomination.

The legal framework on party list petitions does not give guidance or direction where an error in gazette arises. With respect to whether IEBC had the mandate to publish the corrigenda, the Supreme Court in **Moses Mwicigi & 14 Others -Versus- IEBC, Petition No. 1 of 2015** settled the issue on the effect of publication of party list nominees in a Gazette Notice in the following words: -

*“... 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 gazette of the nominees’ names by the IEBC, as an integral part 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.”*

This court in **Lydia Mathia v Naisula Lesuuda & another [2013] eKLR, Election Petition 13 of 2013** found that IEBC had the mandate to step in and ensure compliance with the Constitution and election laws, resulting in the substitution of the Petitioner’s name with that of the 1<sup>st</sup> Respondent. The facts in this case however differ from the matter at hand as in the above case, IEBC substituted the names of nominees in the party list *before* their gazette, pursuant to its mandate to ensure that the submitted party list complied with the Constitution and the Elections.

In the case herein, the facts indicate that the Jubilee Party notified IEBC of the error in the party list on **31<sup>st</sup> July 2017**, before IEBC gazetted **Rose Mwene** as a member of County Assembly on 28<sup>th</sup> August 2017. If IEBC had acted within this window, it would have been well within the IEBC’s mandate to take steps resulting in correction of the submitted party list. There would indeed have been no need for a substitution. No reason has been tendered for IEBC’s delay in addressing the error reported by Jubilee.

Upon gazette, however, IEBC is *functus officio* and cannot purport to amend a gazette notice, especially in this case, where such amendment purported to change the substantive results of an election by nomination. Further Section 34(10) of the Elections Act expressly states that a party list submitted under said section shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected. To interpret **Section 34(10)** rigidly would however deny a party a right to appeal under **Section 75(4)** and **85A** to remedy a clerical error. It should thus be considered alongside the Supreme Court’s decision in **Moses Mwicigi & 14 Others -Versus- IEBC, Petition No. 1 of 2015**, to the end that any dispute to the substantive contents of publication of nominees in the Kenya Gazette should be submitted to an election court via an election petition, with a right of appeal lying in accordance with the Election

Act and Rules. In this regard, the court upholds the trial court's finding to the extent that it found that the 1<sup>st</sup> Respondent lacked the mandate to publish the corrigenda.

**ii. Whether the subordinate court had legal basis in nullifying the nomination of the Appellant and ordering for a fresh election;**

In determination of this issue, the court must consider the role of an election court in a party list dispute. The trial court was to determine whether the nomination was conducted in accordance with the Constitution and the electoral laws. In the case of **Lydia Nyaguthi Githendu vs Independent Electoral and Boundaries Commission & 17 others, [2015] eKLR** the Court held;

*“We must express the view that the constitutional scheme vests, to some extent an unregulated power to the political parties to regulate and formulate the list of candidates, and a secondary power to the Commission to supervise, with the Court retaining the ultimate and final authority to address and determine instances of violation or infringement of fundamental rights”.(emphasis added)*

In the case of **Lydia Mathia vs Naisula Lesuuda & another, [2013] eKLR** this Court observed that;

*“The definition of “party lists” under section 2 of the Elections Act suggested ownership of the list by the political party that has prepared it. The practice, indeed the law is that the power over who gets the reserved seats resides with the parties themselves and no other authority.”*

The question before the lower court was thus whether IEBC and the Jubilee Party carried out their mandate lawfully. In accordance with **Sections 34, 35 and 36 (1),(2) and (3) of the Elections Act**, as well as **Regulations 54, 55 and 56 of the Elections (General) regulations, 2012**. It was the responsibility of the Jubilee Party to submit a compliant party list as was held in **Aden Noor Ali v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR, Civil Appeal No. 12 of 2018**, the choice of nominees in the list is the sole prerogative of the political party. The trial court considered the process of submission of the party list to IEBC, who did not reject the list. IEBC based on this list, lawfully designated members to the County Assembly, as it picked out in priority the names of female nominee, which were listed alternating with male names. The court found that the process was conducted in accordance with the law. The trial court further found that IEBC and Jubilee did not follow the right procedure in publishing the corrigenda and declared the process null and void. The trial court however declined to reinstate Ms. Mwene and nullified her nomination on grounds that had Ms. Ongera's gender been correctly stated, on a basis of priority, Ms. Mwene would not have been gazetted. This was for the court to determine and correct any errors in the election.

In this case the issue regarding the list was a misdescription of the nominee Harriet as *male* instead of *female*. All parties have agreed that the 3<sup>rd</sup> respondent was a female and a person entitled to be on the Gender Top up list for Jubilee party. Having held that the IEBC could not correct the error by publishing a corrigenda, this court holds that this is the kind of error that the court in an election petition is entitled to correct. This court therefore sets aside the trial court order directing the 1<sup>st</sup> and 2<sup>nd</sup> respondent to conduct fresh nominations for the Gender Top up list to fill the vacancy. Consequently, Gazette Notice No. 8847 is hereby declared null and void and Gazette Notice No. 8380 is hereby re-instated with the an amendment to reflect the proper gender of the 3<sup>rd</sup> respondent, Harriet Kerubo Ongera as number 2 on the list as female .

The court makes orders as to costs let each party bear its own costs.

In summary, I allow the appeal on the following terms;

- (1) Gazette Notice No. **8847** be and is hereby declared null and void.
- (2) Gazette Notice No. **8380** be and is hereby re-instated with the an amendment to reflect the proper gender of the 3<sup>rd</sup> respondent, Harriet Kerubo Ongera as female and number 2 on the Jubilee Gender Top Up Party list for Kisii County Assembly and the said notice to be published with within fourteen (14) days from the date hereof.
- (3) Each party to bear its own costs.

Dated signed and delivered this **10<sup>th</sup>** day of August **2018**

**R.E OUGO**

**JUDGE**

In the presence of;

Mr. Onyancha h/b for Mr. Momanyi & Mr. Nyamweya For the Appellant

2<sup>nd</sup> Respondent Absent

Mr. Ochwang'i For the 3<sup>rd</sup> Respondent

Mr. Onyancha h/b for Mr. Ondimu For the 4<sup>th</sup> Respondent Rael Court/ clerk