



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 134 OF 2017**

**IN THE MATTER OF SENATORIAL PARTY NOMINEE SEAT**

**CECILIA NG'ENDO.....APPELLANT**

**VERSUS**

**KANU.....RESPONDENT**

**JUDGMENT**

1. The appeal before me emanates from a judgment of the political parties disputes tribunal (hereinafter referred to as PPDT) delivered on 27<sup>th</sup> July, 2017 in which the appellant's claim dated 22<sup>nd</sup> July, 2017 was dismissed.
2. Before the tribunal (PPDT), the appellant had sought to challenge the respondent's nomination party list submitted to Independent Electoral and Boundaries Commission (hereinafter referred to as IEBC) for nomination of senator pursuant to Articles 98(1) (b) and 90 of the Constitution and Sections 34 of the Elections Act.
3. It was her contention that, on 21<sup>st</sup> July, 2017, she came to learn that IEBC had published party list of nominated candidates by individual parties and that her party (KANU) had ranked her in position 4. She further asserted that the respondent had submitted a party list which included non party members contrary to the party constitution, Section 34 of the Elections Act and Articles 90 and 98 (1) (b) of the constitution.
4. Upon hearing both parties, PPDT held that, the appellant had failed to prove that a slot for her nomination in position one had been reserved by the party and that those in the party list were not KANU (respondent) party members. The tribunal further held that, nomination of candidates to the party's party list was a matter of discretion within the party which was properly exercised and therefore saw no need to interfere with the same.
5. In her memorandum of appeal dated 28<sup>th</sup> July, 2017 but filed in court on 2<sup>nd</sup> August, 2017, the appellant alleged that PPDT failed to consider evidence placed before them being print outs from the Registrar Political Parties showing that nine out of the sixteen nominees were not party members; that PPDT failed to make a finding that, the appellant being the oldest and a loyal party member vis a vis the other nominees, she ranked 1<sup>st</sup> in priority hence ought to have been given position one in the list instead of position four; that the nomination by the respondent was done without competitive interview being held nor public participation and that PPDT members misdirected themselves in holding that only the registrar political parties was the final authority in determining bonafide party members.
6. Simultaneously filed with memorandum of appeal is a notice of motionseeking stay of PPDT's orders

but same was compromised due to exigency of time in favour of the hearing of the main appeal.

7. During the hearing, Mr. Kihanga for the appellant referred the court to a print out purportedly uploaded from the website of Registrar Political Parties showing that some of the contested nominees were not KANU party members. Among those listed in the print out were:

1. Halake Abshiro Soka – Peoples Trust Party from 2<sup>nd</sup> February, 2016.
2. Gathiaka Rukia – FORD Kenya from 13<sup>th</sup> February, 2010.
3. Lotodo Dibora Chepkisich – KANU from 7<sup>th</sup> March, 2017.
4. Lukosi Diana Phanice – KANU from 7<sup>th</sup> March, 2017.
5. Krop Ednah Cheptoo – Jubilee from 7<sup>th</sup> July, 2017.
6. Chesire Alice Chepchumba – KANU from 3<sup>rd</sup> December, 2012.
7. Thwana Anita – KANU from 31<sup>st</sup> March, 2017..

8. Learned counsel further submitted that, even if the court were to find that some of the nominees were KANU members, equity will demand that the 1<sup>st</sup> in rank or oldest member in party membership be given priority first. Lastly, Mr. Kihanga urged the court to find that the print out from the Registrar Political Parties was not controverted and that a letter from the Executive Director Elections KANU addressed to the Registrar Political Parties confirming that the nominees were KANU members was an afterthought.

9. Mr. Makau opposed the appeal arguing that the party list nomination was procedurally done and in compliance with Article 98 (1) (b) and 90 of the Constitution, Section 34 of the Elections Act and the Party Constitution.

10. Counsel asserted that the purported print out from the website of Registrar Political Parties is not verifiable nor authenticated as the Registrar did not certify the same nor confirm. Counsel argued that, the print out is not conclusive evidence. Mr. Makau further submitted that the period that one has served as a party member is not a ground for consideration and that the respondent's executive director elections had written to the Registrar Political Parties on 24<sup>th</sup> July, 2017 confirming that Abshiro Soka Halake, Alice Jepchumba Chesire, Sintoyia Kasaine and Rukia Rashid Gathyaka were party members.

11. I have considered memorandum of appeal herein, materials placed before me and submissions by both counsels. There is no dispute that pursuant to Article 98(1) (b) and 90 of the Constitution, Section 34 of the Elections Act, the respondent (KANU) submitted its party list for nomination constituting of the following candidates in the order of priority

1. Abshiro Soka Halake – Borana
2. Sintoyia Kasaine – Maasai
3. Alice Chepchumba Chepkisich – Turgen
4. Cecilia Ng'endo – Kikuyu
5. Rukia Rashid Gathyaka – Arab
6. Diborah Chepkisich – West Pokot Sabaot

7. Dianah Phanice Musyoka Lukosi – Luhya

8. Krop Cheptoo Ednah – West Pokot Pokot

9. Anita Karimi - Meru

12. According to the appellant, Harake Abshiro who is in position 1, is a member of Peoples Trust Party, Gathyaka Rukia who is in position 5 is A Ford Kenya member, Alice Chesire Jepchumba who is ranked in position 3 is a KANU member but junior in membership, and Sintoiya Kasaine ranked at No. 2 is a KANU member but also junior to her in membership.

13. The law on qualification for party list nomination in respect of women for the position of senator is enshrined in Article 90 and 98 (1) (b) of the Constitution. The two articles provide for election of nominated members to represent special interests including youth, persons with disabilities and workers. Article 90 specifically makes it mandatory for parties to submit a list of all persons who would stand elected if the party were to be entitled to all the sixteen seats provided for under Articles 98 (1) (b) of the Constitution. However, the list must constitute appropriate number of qualified candidates.

14. Section 34 (6) of the elections Act goes further to require that nomination for party list must be done in accordance with the party constitution and nomination rules.

15. Issues for determination therefore are:

**(a) Are the nominees in the respondent's proposed party list qualified for nomination?**

**(b) Is the age of membership in a party a criterior for priority ranking;**

**(c) Alternatively, was Halake Soka ranked in position 1a KANU member as at the date of submission of the party list.**

16. Regarding qualification, one must be a woman and a member of a party as at the nomination period and one who would stand elected if the party were to be entitled to all positions (See Article 90 and 98(1) (b) of the Constitution and Section 34 of the Elections Act.

17. There is no requirement for the duration of membership or period one would have served in a party. If a party were to look at the period one has served, that will be for the party to decide. PPDT was not bound to uphold that as a ground nor was the promise by the applicant's party to nominate her.

18. Article 25 of the respondent's constitution bestows powers of processing party list to National Executive Council upon inviting applications from members. This is in conformity with Section 34(6) of the Elections Act. In her letter dated 27<sup>th</sup> June, 2017 attached to her affidavit in support of her claim sworn on 22<sup>nd</sup> July, 2017, the appellant sought to know as an applicant for nomination in the party list, why it had taken too long to release the results. This letter is proof enough that the party followed the right procedure and its constitution in inviting applications for nomination and also in picking nominees for purposes of Article 98 (1) (b).

19. From her claim, the appellant is seeking to know why she was ranked position 4 and yet a non member was given position one. The applicant relied on a computer print out from Registrar Political Parties website yet the respondent insisted in writing to the Registrar Political Parties that all the nominees were members. Who between the Registrar of Political Parties and a party is supposed to know members of a party?

20. Ultimately, both parties have a role to play. Before the registrar gets the list for party membership, the party will be in the knowing. It is not a surprise to have party members missing from the members party list held by the Registrar or non members being registered as members of certain parties. The party therefore has a role to know and confirm its membership.

21. It is true that the appellant submitted a computer printout showing that Halake Soka who is ranked first is not a KANU member. It is also correct that the tribunal did not make any reference to this evidence before arriving at its decision hence an error on their part.

22. However, as admitted by the appellant, she did not seek the Registrar Political Parties to verify the position by writing a letter to PPDT, the appellant or even the party. As it is now, the computer printout which is not confirmed by the office of the Registrar nor a certification by the Registrar to authenticate the source, the same is not conclusive. The Registrar Political Parties should have owned the document. Anybody can print any document from the website. Internet information can be manipulated to suit the manipulators' interest. Alternatively, the appellant should have sought for leave of the court to admit additional evidence thereby calling Registrar to confirm the print out.

23. Nothing would have been easier than calling upon the Registrar Political Parties to verify and confirm the printout. We cannot assume that the Registrar's website is tamper proof hence the need to authenticate the source from the office the information is deemed to have been generated. Accordingly, there is no proof that some of the nominees are not KANU members. To that extent, I do agree with the finding of PPDT that the appellant failed to present sufficient proof to support her allegation.

24. As to who should come number one in the order of priority, it is within the discretion of the party subject to minimum statutory and constitutional requirements. The period one has served and loyalty to the party is a party issue particulars of which the court does not have. In any event, candidates No. 2 and 3 being KANU members are still ranked ahead of the appellant in priority.

25. For the reasons above stated, the appeal herein fails and the same is dismissed with no order as to costs in the interest of party unity.

DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST, 2017.

J.N. ONYIEGO

ITCFE

In the presence of:

..... Counsel for the appellant

.....Counsel for the respondent

Edwin – Court Assistant