



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL PETITION NO 456 OF 2017

RAHMA ISSAK IBRAHIM.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARY COMMISSION.....1ST RESPONDENT

THE SPEAKER COUNTY ASSEMBLY

OF MANDERA.....2ND RESPONDENT

AND

RAHMA ISSACK IBRAHIM.....INTERESTED PARTY

JUDGMENT

1. **Rahma Issak Ibrahim**, the Petitioner, is the nominated member of the county assembly (MCA) of Mandera. She was nominated by Jubilee Party 2nd interested Party herein and her name was duly gazetted by the Independent Electoral and Boundaries Commission (IEBC), the 1st respondent on 28th August 2017 vide Gazette Notice No 8380 published on that day. Subsequently she was sworn in on 7th September 2017 as a member of the County Assembly.
2. According to the petition and affidavit in support thereof, on 6th September 2017, IEBC published another gazette notice no 8752, a corrigenda, deleting the petitioner's name as nominated member of the county assembly and replacing it with that of **Rahma Issack Ibrahim** the interested party herein as the nominated member of the County Assembly.
3. The petitioner states in her petition and affidavit that she has information that the speaker of the county assembly, the 2nd respondent intends to swear in the interested party as nominated member of the County Assembly to take her place.
4. The petitioner avers that the 1st respondent has violated the law and her rights by attempting to delete her name as the duly nominated member of the county assembly. She further contends that the 1st respondent cannot delete her name and that the 2nd respondent cannot swear in another member of the county assembly once her name was gazetted and she was sworn in.
5. The petitioner therefore seeks the following orders:-

- 1. A declaration that the 1st respondent lacks lawful authority to remove a duly nominated member of the county assembly without following due process of the law as set out under the constitution and the County Government Act.**
- 2. A declaration that gazette notice no 8752 published in vol. LX1X No 131 on 6th September 2017 in so far as it purports to delete the name of the petitioner and in place thereof insert the name of the interested party is irregular null and void.**
- 3. An order of mandatory injunction compelling the Independent electoral and Boundaries commission to withdraw the amendment or corrigenda to gazette Notice No.8380 in so far as it purports to delete the name of the petitioner and in place thereof insert the name of the interested party.**
- 4. An order of injunction prohibiting the 2nd respondent from swearing in the interested party as a member of country assembly of Mandera in place of the petitioner.**
- 5. Any other orders the Honourable court may deem fit and expedient in the circumstances of this case.**
- 6. Costs of this petition be provided for.**

Responses

6. This petition is opposed. The 1st respondent filed grounds of opposition dated 25th September 2017 and filed in court on 26th September 2017. The grounds which appear to oppose the motion but generally deal with issues in the petition, state that the petitioner did not produce any documents to show that she is a registered voter in Mandera West constituency, that the petitioner's names do not match, that the petitioner had not provided evidence that she was nominated and sworn in, that the 1st respondent had not violated the petitioner's rights, on equal protection of the law, that Gazette Notice Nos 8380 of 28th August 2017 and that of 6th September 2017 do not refer to the petitioner and that the petitioner does not have legitimate expectation.
7. The 2nd respondent filed a response to the petition dated 26th September 2017 and filed on the same day. The 2nd respondent took the position that the manner in which the 1st respondent tried to remove the petitioner's name is contrary to law, that once a nominated member of the country assembly is gazetted and has been sworn in can only be removed through an election petition, and that the 1st respondent acted in excess of its power and contrary to law.
8. The 1st interested party filed a replying affidavit sworn on 25th September 2017 and filed on the same day, she deposed that the petitioner never invoked the internal party dispute resolution mechanism, that she applied for nomination to the party gender top up list for Jubilee Mandera County team and the list sent to the party headquarters and later a list that was sent to the 1st respondent included her name, and that the list sent to IEBC on 30th June 2017 did not include the petitioner's name.
9. The 1st interested party states that when the 1st respondent published a list in the newspapers her name had been incorrectly captured and she reported this to Jubilee party's internal dispute resolution mechanism (IDRM) which determined that she was the person who should be on the party gender top up list for Mandera County. And again that the party wrote to IEBC asking it to correct that error.
10. The 1st interested party deposed that the 1st respondent issued a gazette notice on 6th September 2017 deleting the petitioner's name and replaced it with her name because she was the person duly nominated. She attached a number of documents including letters from Jubilee party to show that she was the one duly nominated and not the petitioner.

11. On 29th September 2017 an affidavit done in the name of Raphael Tuju was filed in court on behalf of Jubilee party. It was deposed at paragraph 5 of the affidavit that the party called for applications for nomination which were to close on 14th June 2017 at midnight. It was further deposed at paragraph 7 that the deponent was aware that the petitioner's and 1st interested party's names are similar, that the petitioner had been duly sworn in but later degazetted without consultation. It was deposed that the petitioner's nomination was never challenged at the PPDT or IDRM. It was deposed at paragraph 8 that the name gazetted by IEBC for gender top up list for Mandera County was that of the petitioner and not the 1st interested party and was properly done.

Submissions

12. Mr Mungata, learned Counsel for the petitioner, submitted that the petitioner as a member of Jubilee party applied for nomination to the county assembly of Mandera and was successful. The party list was published on 23rd July 2017 with the petitioner's name on the list. Later on 28th August 2017, IEBC gazetted the petitioner as duly nominated MCA for Mandera County on Jubilee party gender top up list. Counsel submitted that on 6th September 2017, IEBC purported to delete the petitioners' name as the duly nominated member of Mandera county assembly.

13. Counsel submitted that the purported deletion of the petitioner's name is unlawful since IEBC has no mandate after gazetting names of nominated members of the county assembly under Article 177 and section 74 of the elections Act to degazette them. Counsel relied on the Supreme Court decision in *Moses Mucigi & 4 others v Independent Electoral & Boundaries commission* [2016]eKLR on this point. According to learned counsel, only an election court can reverse the nomination which is deemed to be an election after gazettment.

14. Mr Magero learned counsel for IEBC on his part, submitted that Article 88(4)(e) of the constitution grants the 1st respondent mandate to resolve disputes arising from nominations but excluding election petitions. He also cited Article 92 of the Constitution as allowing IEBC to deal with nomination disputes. According to counsel, the **Mucigi's case** does not bar IEBC from dealing with disputes, founded on Article 92 and 177(1)(b) and (c) of the Constitution. In his view what IEBC did was trying to comply with the law as required under the two Articles. He contended that this Court has no jurisdiction to deal with this petition since this should have gone to the election court. He referred to the case of *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* [1989] KLR 1 to support his position on jurisdiction.

15. Counsel further argued that this is not a true constitutional petition in terms of the *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, regarding preciseness of pleading in constitutional petitions. His contention was that the petition has not precisely pleaded the rights and fundamental freedoms infringed, the Articles of the constitution alleged to be violated and the jurisdictional basis for it.

16. Mr Muganda, learned counsel for 1st interested party, submitted that Jubilee party nominated persons to be considered by IEBC to the county assembly and forwarded the list to IEBC. According to counsel the 1st interested party was at no 5 on the Jubilee party list while the petitioner was at no 25. Counsel submitted that when the interested party's name was omitted in the IEBC list, she complained and that is how he name was included and that of the petitioner deleted through the corrigenda of 6th September 2017. Counsel supported the decision by IEBC to delete the petitioner's name and replace it with that of the 1st interested party.

17. Mr Ombasa learned counsel for the Jubilee party told the court that he did not wish to rely on the affidavit sworn by Raphael Tuju and left the matter for court to decide.

18. Mr Ochieng, learned counsel for the 2nd respondent, submitted briefly in support of the petitioner and relied on their replying affidavit and written submissions, In short, counsel's 'submissions were to the effect that IEBC's actions of purporting to delete the petitioner's name as the duly nominated member of

the county assembly for Mandera county was unlawful and illegal and was done without authority.

Determination

19. I have considered this petition, responses thereto, submissions by counsel for the parties and authorities cited. This petition raises only one question for determination; that is whether IEBC could lawfully revoke nomination of the petitioner to the Mandera county assembly after she had been gazetted as duly nominated MCA. However, before delving into the main question, I have a preliminary jurisdictional issue to dispose of first.

Whether the Court has Jurisdiction to deal with the Petition

20. The 1st respondent, 1st interested party and 2nd interested party have argued that this court has no jurisdiction to deal with this matter. Their contention is that the issue raised in the petition should have been dealt with by the election court being an election petition, hence this court lacks jurisdiction. Counsel for the petitioner on his part contended that the court is well seized of the matter since it challenges the legality of IEBC's action to degazette the petitioner's name after she had been lawfully gazetted and even sworn in as a member of Mandera county assembly.

21. Jurisdiction is the authority granted to a court to determine issues placed before it for resolution. The court can only deal with cases it has jurisdiction to preside over. In the famous case of the *Owners of Motor vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (supra), Nyarangi JA stated;

"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. .."

22. In the case of *Samuel Kamau Macharia v Kenya Commercial Bank Ltd and Another*, [2012] eKLR the supreme court stated-

" A Court's jurisdiction flows from either the constitution, or legislation or both. Thus a court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where the constitution exhaustively provides for the jurisdiction of a court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...."

23. The jurisdiction of this court is granted by **Article 165 (3)** of the Constitution which provides-

3) "Subject to clause (5), the High Court shall have—

a) unlimited original jurisdiction in criminal and civil matters;

b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of

any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and a question relating to conflict of laws under Article 191; and

e. e) any other jurisdiction, original or appellate, conferred on it by legislation.

4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.(emphasis).

24. Article 165(3) (d) (ii) gives this Court jurisdiction to determine whether anything said to have been done under authority of the law is done in accordance with this constitution or the law. The issue in this petition relates to cancellation of the petitioner's name as the duly nominated member of Mandera county assembly. The petitioner argues that IEBC has no mandate to do so after the petitioner's name was gazetted, while the 1st respondent and the interested party contend that IEBC has power in exercising its authority under Articles 88(4)(e) of the constitution and section 74 of the Elections Act, 2011.

25. The issue before this court therefore, is whether the decision by the 1st respondent to remove or degazette the petitioner's name on 6th September 2017 was done in accordance with the constitution and the law. That being the sole issue for determination, I am satisfied that this court has jurisdiction to deal with that question.

Whether IEBC had authority to degazette the petitioner's name.

26. The gravamen of the petition before Court is whether IEBC could legally change the name of a duly nominated member of the county assembly after the name had been gazetted confirming such nomination. The petitioner has contended that it cannot while the 1st respondent and the 2nd interested parties have maintained that it could.

27. Article 90 of the constitution on party lists provides as follows-

“(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

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—

(a) each political party participating in a general election nominates and submits a list of all

the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(b) except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

28. Article 177 provides for the composition of the county assembly and how its members are elected; (a) those directly elected from the wards, (b) those nominated based on special seats for gender top up, (c) those from the marginalised groups and (d) the speaker. Those in (b) and (c) are nominated by political parties proportionate to the number of seats garnered in (a). Those to fill the special seats are determined after election results have been declared.

29. Section 34(4) of the Elections Act, 2011 requires political parties that nominate persons to participate in elections to the county assembly to submit party lists under Article 177(1) (b) and (c) which should be on priority. Section 36 provides how party lists are to be submitted to IEBC and how it should select those to be gazetted. Section 36 (4) provides that Within thirty days after the declaration of the election results, the Commission should designate, from each qualifying list, the party representatives on the basis of proportional representation.

30. It is clear from both the Constitution and the Elections Act that IEBC is responsible for the conduct and supervision of elections in the party lists under Articles 97(1) (c) and 98 (1) (b) as well as those of the members of the County Assembly under Article 177 (1) (b) and (c). Since the issue before Court relates to elections by way of nominations to the county assembly, focus is on Article 177(1) (b) and (c) of the constitution and sections 34 and 36 of the Elections Act which provide for party list. Looking at the pleadings and submissions by counsel there is no doubt that the law was followed since the Jubilee party list was submitted to IEBC which formed the basis of the nomination leading to the dispute before court.

31. After the declaration of results, IEBC conducted election for the party top up lists and gazetted them as required by the Elections Act. In the petitioner's case, her name was in the list published on 23rd July 2017 and she was gazetted as duly nominated on 28th August 2017. She was subsequently sworn in as a member of the county assembly on 7th September 2017.

32. In law, once IEBC concludes elections for the party top up lists and gazettes names of those who have been nominated to the national assembly, Senate and the county assembly, that nomination becomes an election and can only be challenged through an election petition. Article 88(4) of the constitution is clear that IEBC has mandate to conduct or supervise referenda and elections to any elective office and body under the constitution and other elections prescribed by an Act of parliament. Article 88(4) (e) in particular gives IEBC mandate to settle election disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to declaration of election results.

33. Just like Article 88(4) (e) of the constitution, Section 74 of the Elections Act 2011, mandates IEBC to resolve disputes arising from nominations but not election disputes. The section provides as follows-

“(1) Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable” (emphasis)

34. The constitution bars IEBC from handling disputes relating to elections or disputes subsequent to an election. Section 74 of the Election Act also makes it clear that electoral disputes under section 74(1) should be determined within a period of 7 days after they have been lodged while stating that disputes relating to a prospective nomination or election should be determined before the date of the nomination or election. That means after nominations or elections whatever the case may be, IEBC has no mandate to deal with such disputes anymore.

35. The question relating to who between the petitioner and the 1st interested party should have been nominated by Jubilee party could only be legitimately determined by IEBC before 28th August 2017. After that date the action of gazetting those nominated was deemed to be an election and the petitioner was, for that matter, duly elected to the county assembly of Mandera. Thereafter, IEBC did not have mandate to deal with her election..

36. The issue of IEBC’s mandate after declaration of election results has been the subject of court decisions. In the case of **Moses Mucigi & 14 others v Independent Electoral And Boundaries Commission & 5 others [2016] eKLR** the Supreme Court considered the issue and stated thus;

“[102] Article 90(2) of the Constitution provides that the IEBC shall be responsible for the conduct and supervision of elections, in respect of seats provided for under clause (1). Seats in this category include the special seats provided for under Article 177 (1) (b) and (c) of the Constitution. And these seats, by Article 90(3), “shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.”

[103] Section 36(4) of the Elections Act provides that “within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.”

[104] Section 36 (7) (8) and (9) of the Act, with regard to nominations for County Assembly, thus provides:

“(7) For purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

i. “(8) For purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

“(9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution.”

ii. [105] It is clear from the foregoing provisions that 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 gazetting of the nominees’ names by the IEBC, as an integral part of the election process.

37. The Court then went on to state with regard to the legal position after gazetting those nominated;

“[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 the issuance of Form 38, which terminates the returning officer’s 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 a County Assembly.”(emphasis)

38. The Supreme Court made it clear that once IEBC gazettes names of the nominated members it marks the end of its mandate and any other dispute thereafter is for the election court.

39. The Court of Appeal addressed the same issue In the case of **Rose Wairimu Kamau and 3 Others -vs- IEBC, C.A. NO. 169 of 2013** and stated;

“...In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 971(C) and 177(2) respectively have been gazetted....they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Article 105 of the Constitution or Part VIII of the Elections Act as the case may be.”(emphasis)

40. The above decision was followed by a different Bench of the Court of Appeal in the case of **Jaldesa Tuke Deballo -vs-Independent Electoral and Boundaries Commission and Another (2015) eKLR** where the same issue was discussed . The Court again stated;

“ We are cognizant of the principle that upon gazettelement of members of the County Assembly, they are deemed to be elected members of the County Assembly...”

41. The legal position emerging from the above analysis is that once a member has been gazetted as duly nominated, that becomes an election result and anyone unhappy with that result can only challenge it as an election dispute in an election court. Counsel for IEBC and interested parties attempted to argue, quite erroneously, that the petitioner should have filed this petition before the election court and that was one of the grounds advanced to contend that this court did not have jurisdiction to hear this petition. That is not the correct position in law. It is the interested party who should in fact have filed an election petition to challenge the petitioner’s nomination.

42. In view of what I have said above, and after considering the facts of this case and the applicable law, I am satisfied that IEBC acted outside its mandate and violate the constitution and the Elections Act. Its action of purporting to delete the petitioner’s name as a duly nominated member of Mandera county assembly and substitute it with that of the 1st interested party was **ultra vires null and void**. The 2nd respondent could also not lawfully swear in the 1st interested party following that illegal gazette notice no 8752 of 6th September 2017.

43. The upshot is that the petition dated 14th September 2017 succeeds and is hereby allowed and the following orders granted.

1. A declaration that the 1st respondent lacks lawful authority to remove a duly nominated member of the county assembly without following due process of the law as set out under the constitution and the County Government Act.

2. A declaration that gazette notice no 8752 published in vol. LX1X No 131 on 6th September 2017 in so far as it purports to delete the name of the petitioner and in place thereof insert the name of the interested party is irregular null and void.

3. An order of mandatory injunction is hereby issued compelling the Independent electoral and Boundaries commission to withdraw the amendment or corrigenda to gazette Notice No.8380 in so far as it purports to delete the name of the petitioner and in place thereof insert the name of the 1st interested party.

4. An order of injunction is hereby issued prohibiting the 2nd respondent from swearing in the interested party as a member of country assembly of Mandera in place of the petitioner.

5. The 1st respondent, The Independent Electoral and Boundaries Commission, shall pay costs of the petition.

Dated Signed and Delivered at Nairobi this 19th day of October, 2017

E C MWITA

JUDGE