



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 561 OF 2017

IN THE MATTER OF AN APPLICATION BY ABDIA HASSAN MAHAT ADEY HUSSEIN GULIYE AND FATUMA ADAN NOOR FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF ARTICLES 87, 88(5), 90 AND 177 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011

AND

IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT 2011

AND

IN THE MATTER OF THE ELECTIONS PRIMARIES AND PARTY LISTS REGULATIONS, 2017

AND

IN THE MATTER OF THE LIST OF NOMINATED MEMBERS OF THE COUNTY ASSEMBLY GENDER TOP UP AND MARGINALIZED LIST FOR WAJIR COUNTY

BETWEEN

REPUBLICAPPLICANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES.....RESPONDENT

PARTY OF NATIONAL UNITYINTERESTED PARTY

ABDIA HASSAN.....EXPARTE APPLICANT

RULING

1. By an application dated 11th September 2017, the exparte applicants seek from this court leave to apply for Judicial Review orders of mandamus to compel the gazettment of the applicants Abdia Hassan, Addey Hussein Guliye and Fatuma Adan Noor as nominated members of the party of National Unity (PNU) for the gender top up members with respect to the 1st and 2nd applicants and the 3rd applicant as the marginalized member of the County Assembly of Wajir.

2. The application which is brought under the provisions of Section 8 and 9 of the Law Reform Act, Order 53 Rules 1,2,3 and 4 of the

Civil Procedure Rules, 2010 citing Articles 87,88(5),90 and 177 of the Constitution, the Elections Act and IEBC Act, the Elections (Party Primaries and Party Lists) Regulations, 2017 is predicated on the grounds contained in the statutory statement and verifying affidavits sworn by the three exparte applicants Abdia Hassan Mahat, Adey Husseing Guliye and Fatuma Noor all sworn separately on 11th September 2017.

3. According to the exparte applicants, the Party of National Unity(PNU) won three (3) seats of the County Assembly of Wajir during the 8th August 2017 elections and that as a result, the party was entitled to one marginalized member seat and two gender top up member seats to the County Assembly proportionately.

4. That comparably, Amani National Congress (ANC) party got two(2) elected seats (1Narc-K) got three (3) elected seats, ODM got three seats party for Development and Reforms (PDR) got six(6) elected seats and Wiper Party (WP) got three(3) seats.

5. That the respondent IEBC in compliance with Articles 87, 88(5), 90 and 177 of the Constitution; Sections 4(2) of the IEBC Act; Sections 34, 35, 36 and 37 of the Elections Act; Regulation 54,55 and 56 of the Election (General) Regulations, 2012 and Regulation 26 of the Election (Party Primaries and Party Lists) Regulations, 2017 allocated Gender top up seats as follows:

Jubilee party – 3 seats

PDR - 2 seats

Nark- K – 2 seats

WP – 2 seats

ODM – 2 seats

ANC - 1 seat

KANU- 1 seat.

All for gender top up.

6. This was as per the annexed Gazette notice No. 8380 special issue published on 28th August, 2017 VOL CXIX No. 124.

7. It is alleged that nonetheless, the Gazette Notice failed to allocate any Gender top up or marginalized member seat and gender top up slots to the party of National Unity (PNU) the interested party herein.

8. It is alleged that on 30th August 2017 the interested party (PNU) wrote a letter to the respondent IEBC raising the issue of discrimination in the manner in which the proportionality principle was applied in the allocation of seats.

9. The applicant claims that they were nominated by their party (PNU) as a gender top up (for 1st and 2nd applicant) and marginalized for Wajir County.

10. That despite their nominations, the IEBC has refused and failed to gazette them and that even the corrigenda Gazette notice published on 6th September, 2017, No. 8752 VOL CXIX No. 131 on 6th September 2017 No. 8380 only amended the Kanu gender top up names without any inclusion of the applicants despite the said notification by the interested party(PNU).

11. The applicants claim that their legitimate expectation to have their names reflected in the addendum was violated.

12. That subsequently, members of the County Assembly were sworn in on 7th September 2017 leaving out the applicants herein.

13. According to the applicants, the 1st respondent IEBC while supervising the election of members to special seats ought to have been done on the basis of proportional representation those nominated by Political Parties would be in proportion to the seats received in that election in that County by each political party hence it was legitimately expected that the names that would be gazette would have reflected the same position.

14. That like the other Political Parties, the interested party would be entitled to one marginalized member seat and two gender top up member seats to the County Assembly proportionately.

15. The applicants claim that despite complainants s to IEBC, it has refused to respond or to gazette the applicants hence they should be compelled d to gazette the applicant as such.

16. The respondent filed a notice of preliminary objection dated 26th September 2017 through the firm of Ogle & Company Advocates contending that this court has no jurisdiction to hear and determine this application as well as the intended substantive application for Judicial Review in view of Article 88 (4) of the Constitution, Sections 74(1) and 75 1A of the Elections Act, 2011.

17. It is further contended that the procedure for removal of member of County Assembly and or otherwise effecting changes in the membership of the County Assembly has not been invoked by the applicants.
18. That the applicant did not follow the right procedure for settling nomination disputes which is the IEBC Disputes Resolution Committee as espoused in Article 88(4)(c) of the Constitution, and Section 74(1) of the Elections Act, 2011.
19. Further, that the respondent has gazetted all the nominated members of the County Assembly of Wajir as per the requirements of the Constitution of Kenya, 2010 and all enabling laws hence it has no extra slots to give the exparte applicants herein. The respondent, it was contended, can only by law gazette a member of County Assembly if there is vacancy.
20. It was further contended that there is pending a similar matter namely: **Maryam Abdi Mohamed versus IEBC and another, Election Petition No. 20 of 2017** with the same facts concerning the allocation of nomination slots to the interested party in this application to Wajir County Assembly.
21. It was therefore contended that the application for mandamus is incompetent and legally untenable and ought to be dismissal with costs.
22. The exparte applicant filed grounds of opposition to the preliminary objection notice. It is dated 4th October 2017 contending that the court has jurisdiction to hear and determine the exparte applicant's application; that the notice of preliminary objection is an abuse of the court process.
23. Parties' advocates argued the application orally in court on 8th November 2017 with Mr Wangila counsel for the applicant submitting that the respondent's failure to gazette the applicants as Member of County Assembly for Wajir County Assembly was an anomaly. That the IEBC overlooked the issues and therefore failure to gazette the applicants amounted to discrimination contrary to Article 27 of the Constitution.
24. It was submitted that PNU is entitled to the three seats as it had won many seats but that the IEBC overlooked the party nomination list hence it failed to fairly distribute the seats among political parties noting that PNU had performed well. Counsel maintained that this court is the proper forum for ventilating grievances because after gazetting the nominees, IEBC lacks the requisite jurisdiction to entertain the dispute.
25. That IEBC's mandate under Sections 74 of the Elections Act and Article 88 of the Constitution is a time bound process and that after nomination and gazettment only courts have jurisdiction to determine the disputes.
26. Counsel submitted generally that the authorities relied on by the respondent in the preliminary objection are distinguishable from this case because the IEBC was given a list by the PNU but omitted to gazette.
27. In opposing the chamber summons for leave, the respondent's counsel Mr Ibrahim submitted relying on the Preliminary objection maintaining that this court's jurisdiction is ousted because the applicants did not exhaust the available Dispute Resolution Mechanisms under Article 88(4)(e) and Section 74(1) of the Elections Act.
28. That Election Petition No. 20/2017 involves same issues and facts. Counsel relied on the decision in **Miscellaneous Application 83/2015 Isaiah Ndichu Ndirangu** to advance the argument that the forum for ventilation of disputes of this nature is before the Elections Act, section 75(1) (a).
29. Further reliance was placed on **Petition 147/2013 National Gender and Equality Commission vs IEBC & others** where the court held that any challenge after gazettment of nominees and as to the composition of membership of County Assembly can only be before an Elections Court. In this case, a Resident Magistrate's Court who is designated as such and gazetted by the Chief Justice can hear and determine an election petition for member of County Assembly.
30. It was also submitted that in the Supreme Court **Petition 1 of 2015 Moses Mwigigi & Others vs IEBC & Others**, the Supreme Court held that only the elections court can disturb the status quo in accordance with Section 75 of the Elections Act.
31. Relying on **Petition 497/2014 David Ndwiga vs IEBC & Others** the respondent's counsel submitted that as the issues raised herein can only be ventilated before the elections court, this court should not assume jurisdiction of an Elections court as there shall be parallel orders. He prayed for dismissal of the application for leave with costs.
32. In a rejoinder, Mr Wangila counsel for the applicants submitted that they wrote letters to IEBC for gazettment of the exparte applicants but IEBC ignored and only corrected the anomalies relating to another political party not the applicant.
33. Further, that in Petition No. 20/2017, PNU is the interested party. The applicant's counsel submitted that they are challenging the decision making process by IEBC for refusing to gazette the applicants as per the interested party's list submitted to IEBC. He prayed for the orders sought.

DETERMINATION

34. I have considered all the foregoing and in my view, the main issue for consideration is whether this court has jurisdiction to hear and determine the dispute subject matter of the application for leave seeking to commence Judicial Review orders of mandamus compelling the respondent IEBC to gazette the exparte applicants who are members of the interested Party of National Unity (PNU) as members of the

Wajir County Assembly, representing gender top up and the marginalized.

35. The question of whether or not a court exercising Judicial Review jurisdiction or constitutional or Human rights jurisdiction to hear and determine disputes arising from political party lists and nomination processes leading to gazettment and assumption of office of member of County Assembly whether as gender top up member of marginalized is now settled vide several Supreme Court decisions.

36. In **Moses Mwicigi & 14 Others vs IEBC & 5 Others [2016]eKLR** the Supreme Court stated as follows, while expounding on Section 36(7), 8, 9 of the Elections Act with regard to nomination for County Assembly, for purposes of Article 177 of the Constitution:

“ 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’ fro, 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 gazettment of the nominees name by the IEBC, as an integral part of the of the Electoral process.

The gazette notice in this case, signifies the completion of the election through nomination; and finalises the process of constituting the Assembly in question. On the other hand, an “election by registered voters” as was held in the Joho case I sin principle, completed by the issuance of form 38, which terminate the returning officer’s mandate and shifts any issue as the validity of results from the IEBC to the election court.

It is therefore clear that the publication of the Gazette notice marks end of the mandate of IEBC, regarding the nomination of party representatives, and shift any consequential dispute to the elections 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.”

37. The Supreme Court went further to hold that:

“any challenge to the nomination of parties is an integral part of the electoral process, in the terms of the Constitution and the Electoral law and that only an election court had the powers to disturb the status quo.

Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with Section 75 of the Election Act.

It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to any election, whatever its manifestation, is to be by way of ‘an election petition.

To allow an election dispute to be transmitted into a petition for the violation of fundamental rights under Article 165 (3) of the Constitution, or through Judicial Review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute resolution regime.

Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral disputes resolution mechanism, and notwithstanding the vital role of electoral -dispute settlement in the progressive governance set up of the current Constitution...”

38. See also a similar decision in **Joseph Obiero Ndiege v IEBC A& 2 Others [2017] eKLR delivered** on the same day. In **Petition No. 147 of 2013 NGEK vs IEBC, & the Attorney General**, the petitioners challenged the manner in which the IEBC had allocated the special seats. Citing the above decision, Lenaola J in **Isaiah Gichu Ndirangu & 2 Others v IEBC & 4 Others [2016] e KLR** stated inter alia:

“I also do not agree with the contention by the petitioners that this court should characterize the instant petition as a constitutional dispute instead of a nomination/election dispute.

In my view, such characterization would go against the electoral laws and the Constitution which was tailored in such a manner that it intended to have a special dispute resolution mechanism for electoral disputes, nominations being one of them.”

39. The learned judge found that he had no jurisdiction to hear and determine a constitutional petition challenging nomination process of the 3rd respondent as a member of Nandi County Assembly. The exparte applicants herein claim that despite being nominated in their respective capacities as Gender Top up and marginalized by PNU their political party, and despite their names being forwarded to the IEBC for gazettment, IEBC has refused to do so.

40. Sections 34(4), 35 and 36 of the Elections Act as read with Regulation 54 of the Elections (General) Regulations place a duty on the IEBC to ensure that the party lists submitted to it comply with the relevant provisions of the law, and the Constitution and in particular Article 177 of the Constitution, and under Article 88(4) (e), the IEBC is mandated to resolve all disputes relating to or arising from nominations.

41. The law does not empower IEBC to adjudicate upon nomination processes of a political party. Such role is left to the political parties' internal dispute resolution mechanisms in accordance with their respective constitutions. The IEBC only ensures that the party list as submitted to it by a political party, complies with the relevant laws and regulations.

42. After the IEBC receives the nomination list, it checks for compliance and takes necessary steps to finalise the process of election for special seats and in the event that a political party does not comply with the law then IEBC has the power to reject the party list by requiring an amendment or rectification and a fresh party list be submitted.

43. Once nominees are gazetted, any challenge to the process can only be through an election petition and not Judicial Review process.

44. In this case, even if Judicial Review was to apply, the applicant has not sought to quash the decision of IEBC **to decline** to gazette the exparte applicants for the respective seats. Section 2 of the Fair Administrative action Act, 2015 defines "**failure**" in relation to the taking of a decision, to include a "**refusal**" to take the decision.

45. Mandamus cannot quash a decision and neither can it issue to compel performance of a discretionary power as seen from the provisions of Article 177 of the Constitution and Sections 36(4) (7),(8) and 9 of the Elections Act.

46. For the above reasons, I find that the preliminary objection challenging jurisdiction of this court to hear and determine a dispute relating to party nomination process is well founded.

47. And as jurisdiction is everything, without which, a court of law acts in vain hence it must down its tools as I hereby do and say no more. (see **The Owners of Motor Vessel 'Lilian S' vs Caltex Oil K Ltd [1989] KLR 1 and Macharia & Another vs KCB Ltd & 2 Others Civil Application No. 2 of 2011.**

48. I find and hold that this court lacks the requisite jurisdiction to entertain these proceedings. I uphold the preliminary objection and proceed to strike out the chamber summons dated 11th September 2017.

49. Each party shall bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 29th day of November, 2017.

R.E. ABURILI

JUDGE

In the presence of:

Mr Wangila h/b for Ojienda for the applicant

Mr Ibrahim Ogle for the Respondent

CA: George