



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA
CONSTITUTIONAL PETITION NUMBER 2 OF 2017

AGNES CHEPKORIR NDEGE ::::::::::::::::::::::::::::::::::::::: 1ST PETITIONER

VERSUS

IEBC ::::::::::::::::::::::::::::::::::::::: 1ST RESPONDENT

CLERK OF THE W. POKOT COUNTY ASSEMBLY :::::::::::::: 2ND RESPONDENT

RULING

Agnes Chepkorir Ndege, the petitioner herein, filed a complaint at *Political Parties Disputes Tribunal at Milimani, Complaint number 503 of 2017* against Kenya African National Union (KANU). Both parties entered a consent in the matter on 28.7.2017 to which an order was issued on 29.7.2017 in the following terms:-

- 1. That an order do and is hereby issued directing the Independent Electoral Boundaries Commission (IEBC) to rectify the claimant’s record under the West Pokot County Member of County Assembly (MCA) for Minority and Marginalized persons to note that she is of SENGWER ETHNIC background;**
- 2. That there shall be no order as to costs.**

On 31st July 2017 the petitioner presented the consent order to the 1st respondent (IEBC) expecting that the 1st respondent would as per the law, issue and publish the final party list and the formular to be used in allocating seats, before the 2nd respondent could lawfully allocate the special seats after declaration of the election results. It was further expected that the final party list would reflect the directions given by the Political Parties Dispute Tribunal. The 1st respondent failed to publish and make public the final parties lists and formular to be used in allocating seats prior to the 8th August, 2017 General Elections.

Subsequent to that, the petitioner made several inquiries at the offices of the 1st Respondent about the progress of implementation of the directions of the Political Parties Dispute Tribunal but received no response.

On 28.8.2017 vide the **Kenya Gazette Notice number 8380**, the 1st Respondent published a list of persons for Nomination of the West Pokot County Assembly. Contrary to the male female agreed order of listing, Jubilee party had two males listed, while KANU, the applicant’s party had a male and a female, both under the youth category. National Gender and Equality Commission which monitored the process raised issues with the said list. According to the petitioner, the said list contravened the provisions of **Articles 97(1)(c), 98(1)(b) and 177(1)(b)(c) of the Constitution 2010.**

The Petitioners pray that:-

- i. A declaration be issued that the Independent Electoral and Boundaries Commission (IEBC) failed to comply with Article 90(3) as read with Article 97(1)(c), 98(1)(c) and (d) and 177(1)(b) (c) and (d) of the Constitution in proceeding to allocate special seats pursuant to the party list published on 23rd July, 2017.**
- ii. A declaration be issued that the election of special seat members of the West Pokot county Assembly must conform to the Constitutional principles of ethnic inclusivity and protection of ethnic minorities and marginalized groups, pursuant to Article 56 and 100 of the Constitution.**
- iii. A declaration be issued that the Kenya Gazette Notice number 8380 to the extent that its lists members nominated to the West Pokot county Assembly, published on 28th August, 2017 by the (IEBC), violates substantive constitutional and statutory provisions therefore is unconstitutional and illegal, hence null and void.**
- iv. An order of *mandamus* be issued directed to the Independent Electoral and Boundaries Commission (IEBC) to compel them to include the petitioner as a nominated member of the West Pokot County Assembly representing the Sengwer Ethnic Minority.**
- v. An order of *mandamus* be issued directed to the Independent Electoral and Boundaries Commission IEBC to compel them to prepare and publish the final party list in two daily newspapers with nationwide circulation, including the names of successful complainants who had lodged complaints before the IEBC, Disputes Resolution committee and the Political Parties Disputes Tribunal.**
- vi. The costs of this petition be awarded to the petitioner.**

The 1st respondent raised a preliminary objection to the petition on the following grounds:-

- 1. This Honourable Court lacks jurisdiction to hear and determine this petition in view of the provisions of Article 88(4)(e) of the Constitution Section 74(1) of the Elections Act, 2011 and Section 39 of the Political Parties Act.**
- 2. The petitioner's petition is time-barred in view of the provisions of Article 87(2) of the Constitution and Sections 74, 75 and 76 of the Elections Act, 2011.**
- 3. The Petitioner's petition is incompetent and legally untenable in view of the provisions of Article 84(4)(e) Section 74(1) of the Election Act and Regulation 99(2) of the Elections (General) Regulations, 2012 which vests the 1st respondents with power to settle nomination disputes.**
- 4. The petitioner's petition is incompetent for lack of security deposit contemplated in Section 78 of the Election Act.**

On 21.9.2017 parties agreed to dispose off the application by way of written submissions. They were given time up to 19.10.2017 to do so. The petitioner/respondent filed hers but the applicant/respondents did not.

The learned counsel for the petitioner submitted that a preliminary objection must abide by the criteria set out in the celebrated case of *Mukisa Biscuits Manufacturing Ltd versus Westend Distributors Ltd, Civil Appeal number 9 of 1969 E.A 696*, and also *Oraro versus Mbaja [2005] 1 KLR 141*. In the cases it was held that a preliminary objection consists of a point of law, which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Further, it raises a pure point of law, which is argued on the assumption that all the facts pleaded are

correct. It can't be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Relying on the above finding the petitioner argued that the 1st respondent in raising the preliminary objection must have well assumed that the facts pleaded are correct.

On the issue of jurisdiction of this Honourable Court, the petitioner submitted that **Article 53 of the Constitution of Kenya**, when read together with **Article 23(1) and 165(3)(b)** expressly confers jurisdiction to this Honourable Court to interrogate issues raised in the petition herein. The 1st Respondent failed to address the issues before this court, before the elections and therefore waived and abandoned its responsibility to settle disputes arising out of nominations as provided by **Article 88 of the Constitution and as read with Section 74 of the Elections Act, 2011**. The petitioner by coming to this court seeks legal protection on an issue she feels is not a typical election dispute (raising far reaching constitutional protection issues), and which she feels would suffer greatly if reduced into a mere election dispute as contemplated by the **sections 74 and 75 of the Elections Act 2011**. Her raised issues, is submitted, though relates to County Assemblies, raises issues of a greater magnitude and significance and must be seen as peculiar. I am urged that in case I find that this court is not the proper forum to hear and admit the matter, I adopt the process in the **Republic versus The Chairman of the National Land Commission and 2 others, Exparte Peter Njore Wakaba and Another (Judicial Review Civil Application 516 of 2015)**, and not dismiss the petition.

On whether the petition is time barred, the petitioner submitted that the complaint before political parties disputes Tribunal was within time and as well as the service of the order arising therefrom to the 1st respondent. The petition was filed within the time stipulated by Section 76 of the election Act, 2011. She was not indolent but vigilantly ensured she acted within confines of the law.

On whether the petition is incompetent and legally untenable, she submitted that the petition resulted from 1st respondent's incompetence and inaction. Failure by the 1st Respondent to carry out its legal mandate as required by law, of which actually violates the constitution, accords the petitioner a right to seek the protection of this Honourable Court. In the event where the 1st Respondent refuses to act as is the case in the petition herein, it's the court which serves an oversight role in such a peculiar situation.

In relation to the issue of security for costs, the petition stated that she deposited Kshs.100,000/- as contemplated by **section 78 of the Election Act**. I am thus urged to dismiss the preliminary objection with costs to the petitioner.

In determining the issues before this court in this application, I've considered the provisions of **Article 88(4)(d) and (e) of the Constitution of Kenya 2010**. They provide that:-

88(1) – There is established the Independent Electoral and Boundaries Commission.

88(4) – the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of parliament and, in particular, for –

d. the regulation of the process by which parties nominate candidates for elections;

e. 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.

The dispute herein relates to nomination of persons to the County Assembly by their respective political parties, and therefore lies within the ambit of the provisions aforementioned of the Constitution of Kenya 2010.

The issue with the petitioner is that she raised a complaint about the proposed nominees to the West Pokot County Assembly by Kenya National Union (KANU) party at the Political Parties Dispute Tribunal, to which a consent order was entered in her favour, but of which order the Independent Electoral and Boundaries Commission failed or refused to comply with. Given these set of facts, it is clear that the petition herein is broadly aimed at enforcing the said consent order to which one of the two nominees by KANU party was to be of SENGWER ETHNIC background. The question which arises is therefore whether a petition to the High Court is the right procedure to enforce an order of a Quasi-Judicial Tribunal.

Section 42(3) of the Political parties Act number 11 of 2011 states that:-

“A decision of the Tribunal shall be enforced in the same manner as a decision of a magistrate’s court.”

The 1st respondent (IEBC) declined to comply with clear orders of the Political Parties Dispute Tribunal dated 29th July 2017, and served upon them on 31st July 2017. Looking at the **Fair Administrative Action Act, 2015 Section 3(1)**, it states that the Act applies to all state and non-state agencies, including any person –

- a. exercising administrative authority;**
- b. performing a judicial or quasi-judicial function under the constitution or any written law;**
or
- c. Whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.**

It’s therefore clear that both the Political parties Disputes Tribunal and Independent electoral and Boundaries Commission are subject to this Act.

Section 6(1) of it states that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with **section 5. Part III on Judicial Review** indicates in **section 7(1)** that any person who’s aggrieved by an administrative action or decision may apply for review of the administrative action or decision to:-

- a. A court in accordance with section 8; or**
 - b. A tribunal in exercise of its jurisdiction conferred in that regard under any written law.**
- 2. A court or tribunal under subsection (1) may review an administrative action or decision, if:-**
- d. The action or decision was materially influenced by an error of law;**
 - e. The administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant.**
 - f. The administrative action or decision was made in bad faith;**
 - g. The administrative action or decision violates the legitimate expectations of the person to whom it relates.**

Section 9(1) is clear that a person who’s aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High court or to a subordinate court upon which original jurisdiction is conferred pursuant to **Article 22(3) of the**

Constitution.

Section 11(1) allows the court in Judicial Review proceedings to grant any order that is just and equitable, including an order:-

b. Restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant

d. prohibiting the administrator from acting in a particular manner.

e. Setting aside the administrative action or decision and remitting the matter for consideration by the administrator, with or without directions.

The foregoing provisions of the law shows clearly that the petitioner recourse in the unfavourable administrative action by IEBC was either to enforce the order of **Political parties Disputes Tribunal under section 41(3) of the Political Parties Act**, or file Judicial Review proceedings under **order 53 of the Civil Procedure Rules**.

This court lacks jurisdiction to deliberate on an issue already settled by Political Parties Disputes Tribunal, when presented by way of a petition and filed simply because the petitioner failed or was unable to enforce the decision of the tribunal.

I accordingly find the raised preliminary objection merited. It's allowed. The petition is struck out with costs to the respondents. I do cap the costs at one million shillings. Bills will be submitted to the DR for taxation.

Ruling is read and signed in the open court in presence of the petitioner, Mr. Lowasikou holding brief for Mr. Kanyonge for the petitioner, this 7th day of December, 2017

S. M. GITHINJI

JUDGE

7.12.2017