



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

ELECTION PETITION APPEAL 3 OF 2018

ROSE MOTURI MWENE.....APPELLANT/APPLICANT

VERSUS

I.E.B.C.....1ST RESPONDENT

THE JUBILEE PARTY.....2ND RESPONDENT

HARRIET KERUBO ONGERA.....3RD RESPONDENT/APPLICANT

KISII COUNTY ASSEMBLY.....4TH RESPONDENT

RULING

1. In this Ruling I will consider two (2) applications. The 1st application is the one dated 13th **March 2019** brought by the **3rd Respondent/Applicant** and the 2nd one is dated 28th **March 2019** filed by the Appellant/ Applicant.

2. Harriet Kerubo Ongera, the 3rd Respondent is the applicant in a Notice of Motion dated the 18th March 2018 brought under Regulations 4 & 5 of Elections (Parliamentary & County Elections) Petition Rules, 2017 and Section 80 (4) & 86 of the Election Act , 2011 and Articles 27 (1), 48,50 (1) & 159 (2) (d) of the Constitution , 2010. The applicant seeks the following orders;

i. The Honorable Court be pleased to grant and/or issue a Certificate to the Independent Electoral and Boundaries Commission, the 1st Respondent and the Speaker, Kisii County Assembly, certifying the Election of the 3rd Respondent, as the duly elected/nominated member of the Kisii County Assembly, under the cluster of Jubilee Party gender top Up list, in accordance with the provisions of Section 86(2) of the Election Act, 2011.

ii. Consequent to prayer (2) hereof being granted, the Honourable Court be pleased to fix a timeline within the Speaker of the County Assembly, Kisii County Assembly, do proceed to swear in the 3rd Respondent/Applicant, in accordance with the Decision and/or Decree of the Honourable Election Court.

iii. In the event of default and/or failure to comply, the Honourable court be pleased to cite and punish the Speaker, to facilitate the actualization and/or realization of the judgment of this Honourable Court.

iv. The Honourable Court be pleased to issue such further writs and/or orders as may be necessary and/or expedient, to facilitate the actualization and/or realization of the judgment of this Honourable Court.

v. Costs of this Application be borne by the 1st and 4th Respondents.

vi. Such further and/or other orders be made as the court may deem fit and expedient

3. The applicant in her affidavit gives a background of the orders sought. In the judgment dated the 10th August 2018 this court held that the 3rd Respondent was a female and a person entitled to be on the Gender Top list for Jubilee party and that since IEBC could not correct the error the court being an election court then was entitled to correct the error. The court set aside the trial court's order directing that the 1st and 2nd Respondent to conduct fresh nominations for the Gender Top list to fill the vacancy. This court declared Gazette Notice **No. 8847 null and void** and ordered that **Gazette Notice No. 8380 reinstated** with an amendment to reflect the proper gender of the 3rd Respondent, Harriet Kerubo Ongera as number 2 on the list as female. The notice was to be published 14 days thereafter.

4. Following this judgment the Appellant/ Respondent filed an appeal in the Court of Appeal and by its Ruling dated the 14th February 2019

the Court of Appeal struck out the Respondents appeal as incompetent with costs to IEBC and the Applicant.

5. The 3rd Respondent is now back seeking the orders in her Notice of Motion dated the 13th March 2019. I have considered the affidavits filed and the submissions made by the parties. The applicant argues that after the Court of Appeal Ruling, the judgment of this court delivered on the 10th August 2018 remains valid and ought to be implemented. That the Speaker of the 4th Respondent has failed to swear her in and that unless the Court issues a Certificate which is statutory requirement the Speaker will not perform his statutory mandate. That this application is a formal one under the provisions of Section 86 (2) of the Election Act 2011 and that the same should be allowed Ex-DebitoJustitiae.

6. The 4th Respondent in an affidavit dated 4th April 2019 deposes as follows in brief; that as the Speaker of the Kisii County Assembly he guided by the law. That following the Court of Appeal Ruling he is aware that this court's decision delivered on the 10th August 2018 is alive and valid. That the said judgment had no specific orders against the office of the Speaker. That orders of the court were specific to the gazette, amendment to gazette Notice 8380 and/ or time bound publication of the said notice which the 4th Respondent has no legal right, stake, mandate or obligation. That he cannot act by declaring the seat vacant unless and until the 1st Respondent de-gazettes the name of the appellant and gazettes the name of the 3rd Respondent/ Applicant as the Nominated Member of Kisii County Assembly within the Jubilee ticket which action is a constitutional mandate of the 1st Respondent. That the Applicant has admitted that she does not have the Certificate certifying her nomination as a member of the County Assembly nor has she presented that the 1st Respondent effected the published amendments to Gazette No. 8380 as directed by the Court. That if the orders are granted then the Court the consequence would be awarding fathomable power to the Speaker of 4th Respondent to declare seats of Members of the County Assembly vacant with no or little regard to established rules, law, procedure and structures. This court risks setting a precedence that will be open to abuse and as such injure the spirit of devolution. That having not been a party in the suit he cannot be cited for Contempt of Court proceedings. That no contravention or threat of contravention of the Court order has taken place or been demonstrated in any respect and neither had there been any alleged or threatened infringement of any of the Applicant/3rd Respondent's rights under the constitution as alleged.

7. The Appellant argued that the Court's jurisdiction has been improperly invoked.

8. The 1st Respondent and 2nd Respondent did not respond to the 2 applications.

DETERMINATION OF APPLICATION DATED THE 13th March 2019

9. Having considered the affidavits and oral submission there is no dispute that after the Court of Appeal ruling the judgment of this court dated 10th August 2018 remains a valid judgment. The 4th Respondent argues that it has not been able to swear in the 3rd respondent because the 1st Respondent has not acted on the court's orders on gazette. In the case of **Moses Mwicigi and 14 others vs. IEBC & 5 others (2016) eKLR** the Supreme Court held that the publication of a Gazette notice is the mandate of IEBC. The process of nomination and gazette of nominated members of the County Assembly is the role of IEBC. The results of any election are addressed to IEBC. The Speaker is notified as an institution. The 1st Respondent shall implement the orders of the Court dated 10th August 2018. A time limit was given in the said order. **In line with the Court's judgment dated 10th August 2018, a Certificate shall issue to the 1st Respondent IEBC certifying that the election of the 3rd Respondent as the duly elected/ nominated member of Kisii County Assembly, under the cluster of Jubilee Party Gender top uplist, in accordance with the provisions of Section 86 of the Elections Act 2011. The Speaker of the national assembly shall be duly notified. Costs shall be in the cause.**

2ND APPLICATION DATED 28TH MARCH 2019

10. The application dated the 23rd March 2019 was filed by the Appellant/ Applicant, she seeks the following order;

- i. That this Honorable Court be pleased to set aside/review its orders made by Hon. Justice R.E Ougo on 10th August 2018.
- ii. That such further Orders be issued as the Court may deem fit and expedient.
- iii. That costs of this Application be provided for;

The application is based on the following grounds;

- (a) That on 8th August 2017, General Elections, the Jubilee party nominated the Appellant as a Member of the Kisii County Assembly.
- (b) That on 28th 2017, THE Appellant was then gazette by the 1st Respondent as a Nominated Member of the Kisii County Assembly in Kenya gazette notice No.8380.
- (c) That after the gazette, the Appellant was sworn in on 7th September 2017 and assumed office.
- (d) That on 8th September 2017, the 1st Respondent published corrigenda No.8847 purporting to delete the Appellant's name as a nominated Member of the Kisii County Assembly and replaced it with the 3rd Respondent's name.
- (e) That on 10th August 2018, this Honorable Court ordered inter alia that Gazette Notice No.8847 be declared null and void.

- (f) That on the same date, this Honorable Court also ordered that Gazette Notice No.3880 be re-instated with the amendment to reflect the proper gender of the 3rd respondent, Harriet Kerubo Ongera as female and number 2 on the Jubilee Gender Top Up Party list for Kisii County Assembly.
- (g) That the orders made in the said judgment were made pursuant to mistakes on substantial points of law or errors apparent on the face of the record for the following reasons:
- (h) That there is an apparent disconnect between the decisive ground of Appeal which was on whether the 1st Respondent had the mandate to publish the Corrigenda replacing the Appellant's name with that of the 3rd Respondent, which the Court established that it did not, and the orders given.
- (i) That accordingly, in relation to the above-mentioned point, the court having found for the Appellant, it need not have made the orders that it did.
- (j) That there is an apparent error on the face of the record because of the want of translation of the findings of the Court into the orders of the Court.
- (k) That accordingly, in relation to the above-mentioned point, there was an apparent internal contradiction in the judgment as the court found that the 1st Respondents did not follow the right procedure in publishing the corrigenda and declared the process null and void, but then proceeded to find that the process was conducted in accordance with the law.
- (l) That because the Appellant had already assumed office after her gazette any attempt to remove her would be irregular and in breach of section 34(10) of the Elections Act.
- (m) That this Honorable Court, despite acknowledging the settled position that a publication of a gazette notice marks the end of the mandate of the 1st Respondent in an election through nomination, failed to grant the Appellant a remedy through her reinstatement.
- (n) That similarly, this Honourable Court, despite agreeing with the trial Magistrate that Corrigenda No.8847, which deleted the Appellants' name as Nominated Member of the Kisii County Assembly and replaced it with the 3rd Respondent's name, was illegally done and did not have a legal basis, failed to find that the Appellant herein is the properly and lawfully Nominated Member of the Kisii County Assembly.
- (o) That this Honourable Courts' judgment restoring the 3rd Respondent's name in the party list under Gazette Notice No.8380, and her being gazette as the duly nominated Member of the Kisii County Assembly discloses an error as there is no legal provision allowing the court to do so.
- (p) That this Honourable Court's judgment restoring the 3rd Respondent's name in the party list under Gazette Notice No.8380 discloses an error on the face of the record as it distorts the party-list's proportional representation zigzag formula of allocating special seats based on gender balance.
- (q) That restoring the 3rd Respondent's name radically amends the part-list removing the female-male- female-male formula replacing it with the female –female-male-female formula.
- (r) That this application for review is merited for the above-mentioned reasons.
- (s) That unless conservatory orders are issued by this Honourable Court, the Appellant will suffer losses.
- (t) That although this application is made a few months after the High Court judgment was given, the delay is excusable because there was an appeal at the Court of Appeal which was concluded only a month ago.
- (u) That the Appellant will suffer irreparable loss and prejudice if this Application is not allowed.
- (v) That it is in the interest of justice that this Application be allowed.

These grounds set out the Appellant's / Application arguments in support of her application which her counsel reiterated in her submissions. The application was opposed by the 3rd Respondent/ Applicant. She filed grounds of opposition and her counsel too made oral submissions challenging the orders sought.

11. The Appellant /Applicant seeks to review the orders made on the 10th August 2018. I have considered the oral submissions made by the parties and the law. The cases relied on by the Appellant/ Applicant on review were all decided during the hearing of the said election petitions and not after their conclusion. I agree with holding in the said decisions that a decision whether or not to vary, set aside or review earlier orders is an exercise of judicial discretion and that the Court ought to exercise such discretion if to do so would serve a useful purpose. An application for review is provided for under Order 45 of the Civil Procedure Act. It provides as follows;

(45) (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.

12. Under the said Order an applicant elects whether to appeal or apply for review. The appellant after the judgment of 10th August 2018 opted to exercise her right of appeal. She filed an appeal and the appeal was determined by the Court of Appeal. Her Appeal was struck out. In my view she cannot come back to this court seeking a review of the Courts orders. Further the law on Election petitions is very clear. **Section 75(2)** of the **Elections Act** provides that the Magistrates Court shall determine the petition within 6 months of lodging the petition. **Section 85A(1)** of the **Elections Act** provides that the High Court shall determine appeals from the Magistrates Court within 6 months of lodging the appeal. This court heard the appeal and determined it within the six months. I hold the same view as stated by Justice Majanja in **Election Petition Appeal No. 1 of 2018** that, *“the final determination cannot be re-opened by review of other orders that would extend the time for determination for the election dispute outside the statutory timelines. The High Court having finalized its duty under the Elections Act by dismissing the appeal, it cannot be called upon to review its own appellate decree in a manner that would contravene the timelines set of statute and the Constitution.*

13. An Election Court is bound by the provisions of the Election Act 2011. Even if one argues that an election petition a civil suit in nature, it has strict statutory guidelines. This court cannot consider issues raised in the Appeal by way of Review after the statutory mandatory provisions of 6 months. In my view the application dated the 28th March 2018 lacks merit it is dismissed with costs.

Dated signed and delivered at Kisiithis 2nd day of May 2019

R.E.OUGO

JUDGE

In the presence;

Miss Angasa h/b Mr. Okubasu For the Appellant

Miss Kusa h/b Miss Kangethe For the 1st Respondent

2nd Respondent Absent

Mr. Ochwangi For the 3rd Respondent

Mr. Ondimu For the 4th Respondent

Rael Court clerk