



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 531 OF 2017

JILLO TADICHA JARSO & 37 OTHERS..... PETITIONERS

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....3RD RESPONDENT

WIPER DEMOCRATIC MOVEMENT.....4TH RESPONDENT

FORUM FOR THE RESTORATION

OF DEMOCRACY-KENYA.....5TH RESPONDENT

JUDGMENT

1. In a Petition dated 10th October 2017 and filed in court on the 14th October 2017, the Petitioners who claim to be members of the Independent Society, founded on the 23rd August 2012, sued the Independent Electoral & Boundaries Commission (IEBC), the 1st respondent, the body responsible for conducting elections in the country together with various political parties, the 2nd to 5th respondents.

2. According to the petition, the Independents won 13 out of 290 National Assembly seats, about 5% and one seat out of forty seven in the Senate. The petitioners state that in the nominations for positions to represent various interest groups in the assemblies and senate, which was based on the seats won by different political parties and done proportionately, the Petitioners were left out.

3. The Petitioners aver that whereas the Constitution and the Elections Act use the word **“Party Lists”** that word is generic and should be read so as not to mean political parties. The Petitioners further aver that some of the so called political parties are movements and congress such as ODM and ANC and allowing them to nominate representatives while denying the Petitioners the right to proportionately nominate their own representatives is a violation of their constitutional rights.

4. It is the Petitioners’ case that with respect to the National Assembly, the proportionate rule demands that the Independents with 13 seats should have been given an opportunity to nominate a member but their chance was given to Amani National Congress (ANC) which had 12 seats and the 5th Respondent which had 10 seats was given a chance to nominate yet it did not qualify to nominate one. On the basis of the above averments the Petitioners sought the following reliefs:

(a) That the court orders that all nominations to the County Assemblies and Parliament under the Constitution and Elections Act be done preferentially and proportionately to the number of seats won by each of the lawful participants in the general elections, without reference to what the qualifier to the nomination calls itself on how it is organized

(b) That the respondents pay costs of the Petition

(c) Such other reliefs as the court may deem fit

1st Respondent's Response

5. The 1st respondent filed a notice of preliminary objection dated 13th December 2017 contending that this court lacks jurisdiction to hear and determine this petition given that nominations to various assemblies can only be challenged through an election petition; that the procedure for removal of member of assemblies has not been invoked and that the period within which to mount a challenge to nominations of members of the various assemblies has lapsed. It is also contended that the Petitioners are not members of a registered political party and do not qualify for nomination or to nominate.

6. The 1st respondent also filed a Replying Affidavit by **Salome Oyugi** sworn on the 29th March 2018, in opposition to the petition. **Ms. Oyugi** deposed that the court lacks jurisdiction to determine the Petition for the reason that the nominated persons have already been gazetted, sworn in and assured their seats; that the Petitioners have not invoked the correct procedure for removal of a Member of Parliament and County Assembly through election petitions: that the Petition is incompetent by virtue of Part III of the Constitution (Chapter seven) in that the Petitioners' Society is not a Political Party as envisaged by the constitution and the law including the Political Parties Act.

7. **Miss Oyugi** further deposed that members of the Petitioners who participated in the general elections of 8th August 2017 did so as Independent candidates and not as members of an organized political outfit and as independent persons none was affiliated to political parties; that the law requires that for one to participate in elections as an independent candidate, s/he should not belong to a political party and that the petitioners presented their nomination papers under regulation 39 of the elections (General Regulation) 2012 as individuals with no political affiliation.

8. It was further stated that under section 35 of the Elections Act, political parties were required to submit party lists in terms of regulation 54(4) of the Regulations and that Article 90 of the Constitution as read with section 34 of the Act and regulation 54 of the regulations regulate allocation of nomination seats. She deposed with regard to the 3rd and 4th Respondents that they are political parties duly registered in accordance with the Political Parties Act unlike the Petitioners. It is their case that section 36(4) of the Act allows the 1st Respondent to designate from each qualifying list, party representatives on the basis of proportional representation but the Petitioners' alleged society is not a political party hence it did not qualify for allocation of seats on the basis of the 13 elected members who were members of a Political Party. It is the 1st deponent's contention it acted in accordance with the Constitution and the law hence the Petition lacks merit.

4th Respondent and Interested Party's response

9. The 4th Respondent filed a Notice of Preliminary Objection dated 23rd January 2018, contending that the issue raised by the Petitioners arises from the general elections of 8th August 2017 and nominations thereof to the National Assembly, Senate and County Assemblies hence it should be by way of an election Petition and not a Constitutional Petition. It was contended that this court lacks jurisdiction to determine an election petition challenging elections and or nominations; that the constitutional provisions relied on namely: Articles 90, 91 (l) (g), 97 (1) 9b), 177 (1) (b) of the Constitution only envisage nominations to various assemblies by Political parties and not the Petitioners who are not a political party; and that political parties procedurally nominated persons as required by the Constitution and Elections Act who have since been gazetted and assumed office. It was contended that any revocation of such nominations and subsequent gazettelement would be in contravention of constitutional rights of those nominated.

10. The 4th respondent and the Interested Parties in their response dated 4th May 2018 contended that the Petition is frivolous and vexatious; that the 4th Respondent is a duly registered Political Party which lawfully nominated persons as required by the Constitution and the law [Article 90(3)] and that section 4 of the Political Parties Act is clear on what a Political Party is.

5th Respondent's Response

11. The 5th Respondent also filed a Preliminary Objection dated 15th January 2018, contending that this court lacks jurisdiction to hear and determine the Petition in view of Article 88(4) (e) of the Constitution; section 74(1) of the Elections Act; regulation 99 of the Elections (General Regulations) 2012 and section 40 of the Political Parties Act. According to the 5th respondent, the Petition is incompetent and legally untenable.

12. The 5th Respondent filed a Replying Affidavit by **David Eseli Simiyu**, its Secretary General, sworn on 24th April 2018. He deposed that this court lacks jurisdiction since the Petition being a nomination issue; that it is the 1st respondent that has authority to handle nomination disputes and that only Political Parties have the right to nominate members for positions reserved by the Constitution.

13. Mr. Simiyu further deposed that the Petitioners or an independent society is not a Political Party and has no mandate to nominate members for nomination seats; that persons nominated by political parties vide section 34 (8) of the Elections Act must be members of the responsible political parties which is not the case with the Petitioner and that the Petitioners are not members of a political party and are not qualified for nomination to Parliament. It is contended that political parties do not allocate seats to themselves but this is done by the 1st respondent depending on the number of seats each political party garnered during the general elections.

Petitioners' Submissions

14. Mr. Wanyiri Kihoro, learned counsel for the Petitioners, submitted highlighting their written submissions dated 22nd October 2018, that the petitioners are Independents who do not belong to any political party; that they participated in the general elections held on 8th August 2017 but that the 1st respondent who was supposed to consider Independents excluded them from nomination to various top up lists.

15. Learned counsel further submitted that when the 1st respondent issued a list and people to be nominated, it contained names of persons

from political parties excluding the Independents. Counsel argued that in 28 counties, independents won more than 2 seats but were not considered in the nomination exercised. He therefore argued that the Petition seeks the courts' order directing the 1st Respondent to call for re-distribution of those seats.

16. Counsel gave the example of Isiolo County where out of 10 county seats the Independents won 4 of those seats and governorship, Jubilee won 4 and ODM 1 but when it came to nominations, the 1st respondent locked out the independents from nominating members. He contended that the 1st Respondent did not follow the law and failed to apply proportionality in carrying out the nomination exercise.

1st Respondent's Submissions

17. Mr. Mwangi, learned counsel for the 1st Respondent, submitted highlighting their written submissions dated 25th October 2018, that this court has no jurisdiction to hear the Petition. Counsel contended that the issues raised in the Petition can only be dealt with by an Election Court. This, he argued, is because the Petition seeks nullification of elections done by way of nominations. Reliance was placed in the case of ***Moses Mwigigi & 140 Others v Independent electoral and Boundaries Commission 85 Others [2016] eKLR (Paragraphs 107-119)***. Learned counsel submitted that a Petition challenging nominations should be filed as an election Petition and not as a Constitutional Petition.

18. Secondly, counsel contended that the Petitioners are not a Political Party. Relying on section 4(1) of the Political Parties Act, Mr. Mwangi argued that the section provides what constitutes a Political Party, and that under Article 90(2) (a) of the Constitution, only Political Parties participating in elections are entitled to nominate. He also referred to section 34 of the Elections Act and Regulation 54 of the General Regulations which provides for nominations by political parties. He therefore submitted that the Petition has no basis in law and should be dismissed.

4th Respondent's Submissions

19. Miss Chepleting, learned counsel for the 4th Respondent submitted, highlighting their written submissions dated 10th December 2018. Counsel associate herself with the submissions made on behalf of the 1st Respondent. She relied on the case of ***Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] (Paragraph 44)***, submitting that the Petition is about an Election hence the challenge should have been by way of an election Petition and not a Constitutional Petition. Counsel referred to paragraph 52 of that decision contending that the court hearing an Election dispute could hear and determine any issue in that Petition.

20. Learned counsel submitted, therefore, that this Petition could only be heard by an Election Court as the court that has jurisdiction to hear election disputes as was held (at paragraph 49), that these issues are for specialized court. She urged that the Petition be dismissed.

Determination

21. I have considered this Petition, responses and submissions by counsel for the parties. I have also considered the authorities relied on. From all these, two issues that arise for determination. First; whether the Petitioners have a cause of action and second; whether this court has jurisdiction to determine the issue of nomination raised in the Petition

22. The Petitioners were Independents candidates who participated in the general elections held on 8th August 2017. They claim to belong to the Independent Society which was established in 2012. According to the petitioners, they were also entitled to nominate members to the National Assembly, Senate and County Assemblies. They base their claim to the fact that as Independents, they won a number of seats, 13 in number which entitled them the right to nominate members to the National Assembly and county assemblies given their level of performance in the general elections held on 8th August 2017. They contended that the 1st Respondent did not apply the proportionate mode of identifying those to nominate members in the top up lists and, as a result, the 1st respondent ignored the Petitioners thus violated not only the Constitution and but also their rights.

23. The Respondents were united in dismissing the petitioners' claim, arguing that this court has to jurisdiction to determine this matter. In their view, the issue raised in the Petition is about elections through nomination and, for that reason, only the election court can handle the issue of election. They also contended that the nomination was properly and lawfully conducted, that those nominated had been gazetted and sworn in hence their positions could not be revoked without violating their constitutional rights. The respondents further contended that nominations are reserved for political parties and that the petitioners are not a political party hence had no right to nominate.

Whether the petitioners have a cause of action

24. The issue raised by the Petitioners is about nomination to the various assemblies. Nomination by way of top up lists is a process that is carried out by the 1st Respondent in terms of the Constitution and the Elections Act and Rules. Article 90 of the Constitution on allocation of party seats, provides that elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (b), (c) and (d) and in the case of the members of county assemblies under Article 177 (1) (b) and (c), shall be on the basis of ***"Proportional"*** representation by use of ***"Party Lists."***

25. Article 97 provides, in general terms, for the membership of the National Assembly which includes twelve members nominated by Parliamentary Political Parties according to their proportionate members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and women (Article 97 (1)(c)). From the reading to both Article 90 and 97, the nomination to the National Assembly by ***"Parliamentary Political Parties"*** and is done by way of Party lists.

26. There is no doubt, therefore, that these nominations are done by Political Parties represented in Parliament. Parliamentary Party is the party which has won a number of seats in the National Assembly, Senate and county assemblies. It is on the basis of the seats won by a

particular political party that took part in the elections, that entitles that political party to nominate members taking into account the youth, disability and women interests.

27. The first hurdle the Petitioners were to jump was to establish that they fall within the definition of a Political Party taking part in the elections in order to get the benefit of nominating persons to Parliament, (the National Assembly and the Senate). The same thing applies to the county assemblies under Article 177(1), (b) and (c) of the constitution, which provides for special seats in the county assemblies. Of particular importance is Article 177(2) which provides in no uncertain terms that members contemplated in Article 177(1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party in accordance with Article 90.

28. The Petitioners pleaded that they are Independents who took part in the general elections and do not belong to any political party. In that regard, they could not possibly qualify as a category that has been given mandate by the Constitution and the law to nominate persons to Parliament and county assemblies.

29. Section 4(2) of the Political Parties Act recognizes a political party as defined in Article 260 of the Constitution. The Article defines a political party to mean “**an association**” contemplated in Part 3 of Chapter Seven of the Constitution. Part 3 of Chapter Seven, (Articles 91 and 92) of the Constitution, contains requirements to be met by political parties before their establishment. According to the Elections Act, “**party list**” means a party list prepared by a political party and submitted to the Commission (1st respondent) pursuant to, and in accordance with, Article 90 of the Constitution and sections 28, 34, 35, 36 and 37 of the Act.

30. Section 33 of the Act is clear that an independent candidate for purposes of elections, is one who has not been a member of any political party for at least three months preceding the date of the election. Section 34(2) states that A political party which nominates a candidate for election under Article 97(1) (a) and (b), shall submit to the Commission (1st respondent), a party list in accordance with Article 97(1)(c) of the Constitution. Further at subsections (3) and (4), the section is clear that a political party which nominates a candidate for election under Article 98(1) shall submit to the 1st respondent a party list in accordance with Article 98(1)(b) and (c) of the Constitution; and a political party which nominates a candidate for election under Article 177(1)(a) (for county assembly elections), shall submit to the 1st respondent a party list in accordance with Article 177(1)(b) and (c) of the Constitution.

31. Taking the above constitutional and legal positions into account, reading the Constitution holistically and applying the principles of interpreting the Constitution underlined in Article 259(1), that the Constitution be interpreted in a manner that, among others, promotes its purposes, values and principles, as well as the meaning of a political party under the Constitution, it is undeniable that the Petitioners did not meet the Constitutional and Legal Parameters of a Political Party.

32. That being the case, they did not deserve the right to nominate persons to any of the assemblies as contemplated by Articles 97, 98 and 177 of the Constitution. Moreover, section 34 of the Elections Act and regulation 54 of the General Regulations to the Act, are clear on the modalities for nominations. Only political parties taking part in an election are entitled to nominate persons to the National Assembly, Senate and county assemblies. The number of persons to be nominated by each Political Party is determined proportionate to the number of seats won in each house by Political Parties taking part in the elections. A plain reading of the Constitution and the law against the Petitioners’ claim is clear that our constitutional and legal scheme does not favour the petitioners regarding who is entitled to nominate persons to Parliament and county assemblies. I, therefore, find and hold that the petitioners have no cause of action not being a Political Party contemplated by the Constitution and the law.

Whether the Court has jurisdiction

33. The Respondents have argued that this court has no jurisdiction to determine this matter. Their argument is based on the fact that the issues raised herein relate to elections by way of nomination. According to the respondents, the issue of elections could only be determined by an election court. The petitioners have on their part argued that the court has jurisdiction to determine the petition and urged the court to dismiss the objection.

34. Given the court’s finding on the first issue, the second issue would really now be moot since there is no cause of action. However, for the completeness of the matter I find it appropriate to say something about the issue of jurisdiction raised in this Petition. The issue is about nomination of persons to the Parliament and county assemblies by way of top up lists by Political parties. As already adverted to herein above, it is clear that only the 1st Respondent allocates seats proportionate to the number of seats garnered by each Political Party taking part in the elections. Political parties taking part in the elections are required to submit their party top up lists to the 1st Respondent which then allocates seats according to each Political Party’s performance in the elections. If there is any dispute as to the names or person’s whose names are submitted, the issue is raised by the political parties or persons with objections and the 1st Respondent deals with the grievances and whoever is not satisfied, has to move to court.

35. Once election results are declared, the 1st Respondent finalizes the nomination exercise by allocating the seats and gazettes names of those nominated, thus concluding the election. Any challenge to these nominations/elections must then be done by way of petitions to the election courts but not through constitutional petitions or any other court action.

36. It is now settled law that once the process of nomination has ended leading to gazettment of those nominated, it amounts to an elected subject only to be challenged in an election court leaving no room for further litigation on it in any other forum.

37. In *Moses Mwicigi & 140 Others v IEBC and Orange Democratic Party v Hussein & others*, the Supreme Court, after referring to several provisions of both the Constitution and the Elections Act stated;

“[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.”

38. In ***Rose Wairimu Kamau and 3 others v Independent Electoral and Boundaries Commission (C.A. NO. 169 of 2013)*** , the Court of Appeal also stated that once nominees to Parliament and County Assemblies under Articles 97(1)(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.

39. In ***Jaldesa Tuke Dabello v Independent Electoral and Boundaries Commission & another*** [2015] e KLR, it was again held that upon gazettment of members of the County Assembly, they are deemed to be elected members of the County Assembly and thus Section 75 (1A) of the Elections Act expressly indicates that the jurisdiction to consider, hear and determine the question as to the validity of election of Members of County Assembly is vested with the Resident Magistrate’s Court designated by the Chief Justice.

40. In the present Petition, the Petitioners contend that their seats were taken by other political parties and have identified Amani Congress Party, as one that was given a chance to nominate persons when it did not qualify given the number of seats it garnered that, is 10 seats compared to the Petitioners’ 13.

41. As already pointed out, the Petitioners were not entitled to nominate persons to Parliament or county assemblies. Second, Political Parties participating in the general elections are required to submit party top up lists before elections. These lists are to be submitted within given timelines and once the period is closed, there cannot be submission of such lists. If the Petitioners had been entitled to nominate, which is not the case anyway, they would have submitted their lists to the 1st Respondent who would have considered it, failure to which the petitioners would have challenged that inaction as required by law.

42. Once the process of nomination is concluded and those nominated gazetted, only an election court has jurisdiction to deal with the issue but not this court through a constitutional petition. Looking at some of the reliefs sought in the petition, it is clear that the petitioners want this court, sitting as a constitutional court to annul gazettment of some of those already elected and sworn in as either members of Parliament or county assemblies. This is not only against the constitution but precedent. This court cannot exercise jurisdiction it does not have

43. In this regard I find it appropriate to recall the observation by the Court of Appeal in ***Orange Democratic Movement v Yusuf Ali Mohamed & 5 others*** [2018] eKLR), that;

“[44]...a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...”

44. It is therefore my finding and I so hold, that had the petitioners succeeded in demonstrating existence of a cause of action, they would still have lost on the jurisdictional question. This is because the substratum of their petition arises from election nominations hence their claims are essentially founded on an election process, a dispute that could only be resolved by an election court.

45. Having considered the petition, responses, submissions, the Constitution, the law and precedent, I am not satisfied on the merit of the petitioners’ claim. Consequently the petition is declined and struck out with no order as to costs.

Dated, Delivered and Signed at Nairobi this 7th day of June, 2019

E C MWITA

JUDGE