



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

JUDICIAL REVIEW NO. 6 OF 2017

JENNIFER LETUIYA.....APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1st APPLICANT

PAULINE WANJIKU KIGERA.....2nd APPLICANT

JUDGMENT

1. **JENNIFER LETUIYA**, the applicant has approached this court seeking Judicial Review orders of Certiorari for this court to call and quash the decision of **THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (I E B C)** vide the Kenya Gazette Notice 5116 of 6th September, 2017 which replaced the applicant's name with that of **PAULINE WANJIKU KIGERA**, (the 2nd Respondent as member) of County Assembly of Samburu County.

BACKGROUND

2. The applicant applied to be nominated by the Jubilee party to represent persons with disability in the Samburu county Assembly.

3. Her name was forwarded by the Jubilee Party to the I E B C. The applicant's name was published in the Sunday Nation Newspaper and in the I E B C's website. Subsequently the applicant's name was gazetted in the Kenya Gazette.

4. On 5th September, 2017 the applicant was sworn in as a member of the County Assembly of Samburu County.

5. The applicant in her supporting affidavit sworn on 15th September 2017 deponed:

“That as advised by my advocates on record whose Counsel I verily believe as sound, my nomination was carried according to the law and therefore a duly nominated member of the Samburu County Assembly representing persons with disabilities.”

6. On 6th September, 2017 I E B C gazetted a Notice 8752 (**and not Notice 5116 as stated in the Notice of Motion**) whereby

I E B C cancelled the gazettement of the applicant and instead gazetted the 2nd Respondent as the member of County Assembly of Samburu County. Therein lies the applicant's grievance and the basis of this action.

7. The applicant deponed that I E B C had no basis to nullify her nomination in the absence of a court order nullifying the same. That because a nomination, such as hers, is an election any contest of that election ought to have been by an election petition.

That accordingly the gazette Notice of 6th September, 2017 by I E B C, was an act in excess of the powers I E B C possesses.

8. The 2nd respondent opposed the applicant's application.

9. The 2nd respondent is a member of the Democratic Congress Party. As such a member her name was forwarded to I E B C by that party, to represent the marginalized group category in the Samburu County.

10. The available seats for marginalised, in the Samburu County, were four. The 2nd respondent deponed that the I E B C erroneously allocated those seats by giving Jubilee Party three seats and Kanu Party one seat. That in accordance with the Regulation 56 of the **Election (General) Regulation 2012** and **The Election (Party Primaries and Party Lists) Regulation, 2017** and other requisite Laws, the Democratic Congress Party was entitled to one seat, Kanu Party was entitled to one seat and Jubilee Party was entitled to two seats.

11. The 2nd respondent raised a query with I E B C, on that allocation of those seats which was followed by the I E B C declaring the 2nd respondent as the duly nominated member of county Assembly of Samburu County through a Gazette Notice 8752 of 6th September, 2017, which cancelled the applicants gazettelement.

12. The 2nd respondent deponed that she had been duly elected and that she would suffer a great injustice if this court, not being an electoral court, under **Section 75 (1 A) of the Election Act**, was to proceed to quash the gazette Notice which nominated her.

APPLICANT'S SUBMISSIONS

13. The applicant submitted that the limits of the I E B C jurisdiction are set out in legislation which is a replica of Article 88 of the Constitution. Under that Article 88 (2) (e) the Constitution provides that: the responsibilities of I E B C, amongst others, are:

“The settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petition and disputes subsequent to the declaration of election result.”

14. That any action on the part of the I E B C which is beyond the power donated to I E B C by legislation and the Constitution is ultra vires, null and void.

15. The applicant relied on the three decisions on this head of argument.

16. The first case is of **Hassan Ali Joho & Another – v- Suleiman Said Shahbal & 2 others [2014] e-KLR** the Supreme Court observed as follows:-

[65] The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer. Once the Returning Officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the Returning Officer, according to Regulation 83(3), terminates upon the return of names of the persons-elected to the Commission. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the Returning Officer's mandate, thus shifting any issue as to validity, to the election court. Based on the principle of efficiency and expediency, therefore, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the Returning Officer.

17. The second case is of **STEVEN KARIUKI – V- GEORGE MIKE WANJOHI, & 2 OTHERS [2014] eKLR** where what was in contestation was whether the I E B C had power to cancel a certificate issued to a winner of an election. The court had this to say in that case:

“Under Article 88(4) (e) of the Constitution, I E B C is responsible for “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.” In view of the interpretation of Article 88 (4) (1) of the Constitution by the Supreme Court in the case of Hassan Ali Joho and Another Vs. Suleiman Said Shahbal and 2 others that:

“The certificate in form 38 declares the winner of the election and terminates the mandate of the Returning Officer, who acts on behalf of the Commission, shifting the jurisdiction in respect of the electoral process to challenge the results of the election to the Election Court. The election court erred in holding that the Returning Officer was not functus officio and had jurisdiction to cancel form 38 and issue another one to another person.

36 With that pronouncement by the Supreme Court whose decision is binding on this Court by dint of Article 163 (7) of the Constitution, the argument that the 2nd and 3rd respondents could cancel the certificate in favor of the appellant and issue another one in favor of the 1st respondent two days later is clearly wrong. In accordance with the decision of the Supreme Court, we hold that the 2nd and 3rd respondents became functus officio after announcing the appellant as the winner at the tallying centre on 6th March, 2013.”

The third case is **Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] e-KLR** the Supreme Court found as follows:

“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 gazettelement of the nominees' names by the I E B C, as an integral part of the election process.

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 I E B C to the Election Court.”

18. 2nd respondent submitted that jurisdiction of the elections court to determine validity of an election proceeds from the premise that I E B C has acted within the confines of its jurisdiction and that is the decision which can be challenged.

19. That however where an inferior tribunal acts outside its jurisdiction the said act is challengeable through a Judicial Review application.

I E B C SUBMISSIONS

20. The I E B C argued that the court had no jurisdiction to entertain the present application and that in accordance to the holding of the case **OWNERS OF MOTOR VESSEL “LILIANS” – VS- CALTEX OIL KENYA LTD [1989] KLR**, this court has no power to make one more step and there would be no basis to continue with the proceedings.

21. Further that the Supreme court has pronounced itself on challenges to nomination of members of County Assembly in the case MOSES MWICIGI (supra) thus:

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

22. I E B C submitted, therefore, that the only way of contesting on election, whether by universal suffrage or by nomination, is through filing an election petition. That because there is that clear special electoral dispute resolution regime, that this court should not entertain Judicial Review application.

23. I E B C submitted that by virtue of the gazette, which gazetted the 2nd respondent as a member of the County Assembly of Samburu County, which gazette Notice deleted the gazette of the applicant, the 2nd respondent could only be removed from that position through an election petition. On this submission the I E B C relied on the case **NATIONAL ALLIANCE PARTY & ANOTHER VS-INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION [2013] eKLR** where the court held:

“An order quashing the gazette notice will result into the loss of seats of persons already members of County Assemblies. Flowing from the fact that they are already members as such, flawed or otherwise the appellant can only, as a matter of law, “regain” their claim to those seats if those members whose election they challenge lose their seats. This must be done only in the manner in which the court is permitted to intervene and that manner is through on election petition.”

24. The I E B C also referred to the case **SPEAKER OF THE NATIONAL ASSEMBLY – V - KARUME [1992]** to support its argument that, where a statute establishes a dispute resolution procedure it must be strictly adhered to by the court. In that case it was stated:

“Where a dispute procedure is provided for in statute, and where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or statute, that provision ought to be strictly followed.”

25. Finally the I E B C cautioned the court to bear in mind that the issue of jurisdiction is a substantial question and not a mere procedural technicality as was held in the case **SAMUEL KAMAU MACHARIA AND ANOTHER – V- KENYA COMMERCIAL BANK AND 2 OTHERS [2012] eKLR**, thus:

“We agree with Counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the matter of Interim Independent Electoral Commission (Applicant), Constitutional Application Number, 2 of 2011. Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

26. I E B C therefore sought the dismissal of the application.

2nd RESPONDENT’S SUBMISSION

27. The 2nd respondent submitted that the moment I E B C published her name instead of the applicant, as the validly nominated member of the Samburu County Assembly the dispute that arose was, who was validly nominated. That the applicant’s argument that she was the validly nominated member; that in itself was an electoral dispute. Accordingly, that, as provided under **Section 75 (1A) of the Election Act** the applicant should have filed an election petition before the Magistrate’s Court.

28. That if this court was to quash the gazette notice which declared the 2nd respondent a member of the Samburu County Assembly this would be to usurp the jurisdiction of the election court.

29. 2nd respondent submitted that the I E B C had power to delete the applicant’s name and the applicant should have directed her grievances,

in that regard, to the election court. 2nd respondent relied on the case NATIONAL GENDER AND EQUITY COMMISSION – V- I E B C & ANOTHER[2013] eKLR where the court stated:

“86. Likewise, upon gazettelement of any person as a member of the County Assembly, any challenge to his/her membership to the County Assembly must be in accordance with the provisions of part VII of the Election Act, 2011.” “

In other words the court stated that such an aggrieved person ought to file an election petition.

30. The second respondent also relied on the case NATIONAL ALLIANCE PARTY & ANOTHER - V- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS (Supra) which held that an intervention by the court to an electoral dispute could only be through an election petition.

31. The 2nd respondent submitted that the prayers sought by the applicant are incapable of being granted, firstly because the applicant failed to state the correct gazette notice to be quashed and, secondly, because this court lacks jurisdiction.

ANALYSIS AND DETERMINATION

32. Having considered the well-articulated arguments of the applicant, of I E B C and the 2nd respondent I think the first point to start is to determine what an electoral dispute. In my search for an answer I found that neither the Constitution or the Election Act defines it. I will endeavour to define the term. In my view any dispute which seeks to unseat or remove one who is declared a winner in an election is an election dispute. This becomes very clear from the various decisions of the courts.

33. In the High Court in the case IN THE MATTER AN APPLICATION BY JALDESA TOKE DABELO[2014] eKLR, as per Justice J A Makau, the court had this to say:

“ In the case of HCP 147/2013 THE NATIONAL GENDER AND EQUALITY COMMISSION (NGE & I E B C V ASSOCIATION OF THE PHYSICALLY DISABLED OF KENYA & 4 OTHERS Hon. I. Lenaola, M. Ngugi and Majanja, JJ quoting from the case of Kones v R & ANOTHER EX-PARTE KIMANI WANYOIKE and OTHERS [2008] 3KLR EP 29 stated that the Court of Appeal considered whether the nomination of Hon. Kones to parliament under the former constitution could be challenged by way of proceedings of Judicial Review and the court held: “We think we have said enough to show that a seat in National Assembly can only be declared vacant under circumstances stated in the Constitution and through the “ “ We think we have said enough to show that a seat in National Assembly can only be declared vacant under circumstances stated in the Constitution and through the process set out therein.

Yet in the case of the speaker of the NATIONAL ASSEMBLY IN THE HON. JAMES NJENGA KARUME CIVIL APPLICATION NO. NAI 92 OF 1962 (NAI 40/92) V R) unreported the court of appeal consisting of Kwach, Cocker and Muli, JJA stated as follows in their ruling dated 29th May, 1992.

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and Statutory Provisions.

“ “

I have considered that Section 75(1A) of the Election Act is couched in a mandatory manner and cannot be circumvented by an application of this nature. The 1st interested party having been gazetted is deemed as duly elected member of Isiolo County Assembly and his election can only be challenged as set out under Section 75(1A) of the Election Act an before the Resident Magistrate’s Court designated by Chief Justice and not by way of Judicial Review which I find and hold cannot oust the Constitution or the Election Act.”

34. Also in the case relied upon by the 2nd respondent, NATIONAL ALLIANCE PARTY (supra) the court was of similar vein, that as a matter of law one can only regain their claim to win in an election by a court process that is permitted by law.

35. In the case STEVE KARIUKI – V- GEORGE WANJOHI (supra), where the I E B C cancelled the certificate of result of an election, that act of cancellation of the certificate was challenged through an election petition.

36. In my considered view there would not be a basis of side stepping the Constitutional Provision of Article 87, or the Election Act, Section 75, to entertain the dispute of the applicant through a Judicial Review.

37. The applicant was ‘stretching’ the law in suggesting that this court can entertain her grievance through Judicial Review process.

38. In this court’s view the procedure adapted by the applicant was erroneous. The Supreme Court in the case MOSES MWICIGI (supra) emphasized the importance of adhering to procedure and stated:

“[65] This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation.

In many cases, procedure is so closely intertwined with the substance of a case that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.

[66] Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure could undermine the cause of justice. Hence the pertinence of Article 159(2) (d) of the Constitution, which proclaims that, "..... Courts and tribunals shall be guided by ... [the principle that] justice shall be administered without undue regard to procedural technicalities."

This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.

39. It is because of the above finding that the applicant's application is **hereby dismissed with costs.**

Dated and Delivered at Nanyuki this 1st February 2018

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

For Applicant.....

For 1st Respondent.....

For 2nd Respondent.....

For interested party.....

Language

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE