



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

JUDICIAL REVIEW NO. 5 OF 2017

STEFANIA STAIN LANYASUNYA.....APPLICANT

versus

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1st APPLICANT

EMILY CHEPKEMOI.....2nd APPLICANT

JUDGMENT

1. **STEFANIA STAIN LANYASUNYA**, the applicant on 18th September, 2017 obtained leave to institute Judicial Review proceeding for an order of Certiorari to call for and quash the decision of the **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)** vide the Kenya Gazette Notice 5116 of 6th September, 2017 in respect of Samburu County where by that gazette Notice I E B C replaced the applicant's name with that of **EMILY CHEPKEMOI**, the 2nd respondent, as an nominee of the Democratic Congress Party (herein after referred as the D.C. party) for the Samburu County Assembly (herein after referred to as the Assembly).
2. Following the leave of court of 18th September 2016 permitting the applicant to seek Judicial Review orders the applicant filed the substantive Notice of Motion application dated 19th September, 2017.
3. Although the Assembly was an interested party in this matter the applicant obtained leave, on 14th December 2017, to withdraw this action against it.
4. What is at stake in this judicial review matter is the nomination to the Assembly by the D.C. party.
5. The applicant by her affidavit, sworn on 13th September 2017 deponed that she applied to be nominated by the D.C. party as a gender representative at the Assembly. That her name was forwarded to the Assembly and was published in the Sunday Nation Newspaper on 23rd July 2017 and thereafter her name was availed at the I E B C website. I E B C thereafter gazetted her as the D.C. party's nominee for the Assembly.
6. Following that notifications and gazettelement she deponed that she was on 5th September 2017 sworn as a member of the Assembly.
7. That in violation of the decision of the D.C. party to nominate her I E B C, on 6th September 2017, by gazette Notice NO. 5116 deleted her name and replaced her name with that of the 2nd respondent as the D.C. party's nominee at the Assembly.
8. It is the applicant's case that there was no legal basis upon which I E B C could have cancelled her nomination, and that the gazette Notice effecting that cancellation is a nullity; and that I E B C acted in excess of its powers because once a nominee was gazetted, as the applicant was gazetted, it is only a court of law that could alter such nomination. That, accordingly this court should issue an order of Certiorari to call for and quash the I E B C decision in the Gazette Notice 5116.
9. The I E B C did not respond to the applicant's application.
10. The 2nd respondent opposed application by her replying affidavit sworn on 18th October 2017.

11. By that affidavit she deponed that she was nominated by D.C. Party as a member of the Assembly of Samburu County vide Gazette Notice 8752 of 6th September. 2017. She was top of the list that was forwarded to the I E B C. The list to I E B C attached to her affidavit shows the order of nomination by D.C.Party as follows:

(a) **EMILY CHEPKEMOI** (2nd respondent)

(b) **MURAGE GEOFFREY MUTHIRU**

(c) **STEFANIA STAIN LANYASUNYA** (the applicant)

12. That following the forwarding of those names by the D.C. party to I E B C, the I E B C gazetted, by Gazette Notice 8380 of 28th August 2017, the applicant's name as the D.C.party's nominated candidate.

13. The 2nd respondent deponed that I E B C was obligated to pick the names of the nominees in accordance with the priority reflected in the D.C. party's list forwarded to them. However that in error the I E B C gazetted the applicant as the D.C. party's nominee.

14. The 2nd respondent being aggrieved by the error of I E BC made inquiries, and the D.C party also clarified the list of nominees that was forwarded to I E B C was as reflected above. The D.C party wrote to I E B C on 30th August 2017 to question the decision of

IEBC to gazette the applicant, as their nominee, and yet she was number three in the list forwarded to them.

15. That I E BC responded by issuing fresh Gazette Notice, to correct their error, and by that fresh gazette Notice declared the 2nd respondent as the nominee of the D.C. party.

16. The 2nd respondent deponed that by the Gazette Notice 8752 of 6th September 2017 she was declared the nominee of member of the Assembly of the Samburu County, and thereafter her grievance dissipated and there was, therefore, no need for her to file an election petition.

17. The 2nd Respondent further deponed as follows:

***“16. That my election through nomination declared on the 6th September, 2017 disputed by the applicant became an election dispute that can only be resolved through an election court by way of an election petition and this court lacks jurisdiction to settle electoral disputes.*”**

17. That if this court was to quash the gazette Notice NO. 8752 of 6th September, 2017 nominating me (the 2nd respondent) as an

M C A, (Member of the County assembly) it will be indirectly questioning the validity of my nomination and nullifying my election in contravention of Article 87 of the Constitution and Section 75 (A) of the Election Act, which is a preserve of a Resident Magistrate sitting in an Election Court.”

18. The 2nd respondent in reliance on the Supreme Court decision **MOSES MWICIGI & 14 OTHERS – V- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS (2016) eKLR** deponed that to entertain this matter through a Judicial Review has the risk of opening up a parallel electoral dispute-resolution regime.

19. Finally the 2nd respondent deponed that the applicant's Notice of Motion application lacks merit and should be dismissed.

APPLICANT SUBMISSIONS

20. The applicant opened her submissions by making the following statement:

“The issue on whether this court or the election's court has the mandate to hear and determine this case is pegged on the question whether the 1st respondent (I E B C) had the jurisdiction to delete the names (sic) of the applicant and replace with the name of the 2nd respondent.”

21. The abovequoted statement is the main stay of the applicant's case.

22. The applicant referred to Article 88 of the Constitution, which Article sets out the responsibilities of I E B C, and laid emphasis on Article 88 (4) (e) which provides that one of I E B C's responsibilities is:-

“The settlement of electoral disputes, including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results;”

23. It was submitted that I E B C's mandate was restricted to the above provisions of the Constitution, as reproduced in Section 74 (3) of the Election Act, and therefore any act by I E B C that went beyond the powers donated to it by the Constitution and the Election Act was ultra

vires, null and void.

24. The applicant relied on the Supreme Court case **HASSAN ALI JOHO & ANOTHER - V- SULEIMAN SAID SHAHBAL & 2 OTHERS (2014) eKLR** to support her argument that I E B C in de-gazetting her name and replacing it with that of the 2nd respondent's name had acted beyond their power, and by so doing had exercised power only preserved for the election court. The court in that case stated:

“[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.”

25. The applicant also relied on the case **STEVEN KARIUKI GEORGE MIKE WANJOHI & 2 OTHERS [2014] eKLR** where

I E B C had cancelled the certificate, in Form 38, which declared the winner of parliamentary seat. The court stated thus:

“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 favour of the appellant and issue another one in favour 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.”

26. The applicant submitted that the above two cases demonstrated the scope of I E B C jurisdiction. That I E B C's jurisdiction was confined to determination of disputes before declaration of results. That by the publication of gazette notice, of the applicant's name as the nominee, that was a declaration of results.

27. To support it above submission the applicant relied on the Case **MOSES MWICIGI & 14 OTHERS (supra)** where the Supreme court stated:

“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 gazette ment 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.”

28. It was the applicant's position that I E B C acted beyond its jurisdiction, and therefore a nullity, by conducting another election and resolving a dispute of an electoral process.

29. The applicant further submitted that this court has jurisdiction to entertain this Judicial Review arguing that:-

“the jurisdiction of the election court to determine the validity of an election proceeds from the premise that the 1st respondent (I E B C) has acted within the confines of jurisdiction and there is a decision which can be challenged either on fact or law.”

Further it was submitted that an election petition is filed to determine the correctness of the decision of I E B C, when I E B C is resolving a dispute which it is empowered by legislation or the Constitution. But that an election petition does not resolve a dispute of an act which was beyond the mandate of I E B C.

2nd RESPONDENT'S SUBMISSION

30. The submissions of the 2nd respondent were diametrically opposed to the applicants.

31. That is from the moment the I E B C published the name of the 2nd respondent as the validly nominated member of the Assembly a dispute arose. That the dispute was, who was validly nominated. That even the contention of the applicant that she was the validly nominated member of the Assembly is itself an electoral dispute. That accordingly Section 75 (1A) of the Election Act should have guided the applicant to file her dispute before the Magistrate's court.

32. That if this court was to quash the gazette notice which declared the 2nd respondent member of the Assembly this would be usurping the jurisdiction of the election court.

33. 2nd respondent submitted that the I E B C had power to delete the applicant's name and the applicant should have directed her grievance, in that regard to the election court. 2nd respondent relied on the case **NATIONAL GENDER AND EQUALITY 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.

34. The 2nd respondent also relied on the case **NATIONAL ALLIANCE PARTY & ANOTHER - V- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS [2016] eKLR**, where the court stated;

“An order quashing the gazette notice will result into the loss of seats of persons already members of the 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 seat. This must be done only in the manner in which court is permitted to intervene and that manner is through the election petition.”

35. 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

36. Having considered the well-articulated arguments of the applicant and the 2nd respondent I think the first point to start is to determine what is an electoral dispute. In my search for an answer I found that neither the Constitution nor the Election Act defines it. I will endeavour to define the term. In my view any dispute which seeks to unseat 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.

37. In the High Court in the case **IN THE MATTER AN APPLICATION BY JALDESA TOKE DABELO[2014] eKLR**, as per justice J A MAKAU, where the judge was of the view that electoral dispute could only be entertained by an election court and not by judicial review. The learned judge 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 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.”

38. 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 could only regain their claim to a win in an election by a court process that is permitted by law.

39. 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.

40. The issue raised in this matter brings to mind the dilemma, which is epitomized, in the ‘chicken and egg’ theory. That is, whether the act of gazetting the applicant (although erroneously as argued by the 2nd respondent) in itself signified the completion of an election. And if so whether the subsequent act of de-gazetting the applicant was an act; not an electoral act, but one which would justify this court to issue judicial review order to quash it. In my view, I E B C by de-gazetting the applicant: that act was also an electoral process act which would require an election court to determine its correctness or otherwise.

41. In my considered view there would not be a basis of ‘side stepping’ the Constitutional Provision of Article 87, or Section 75 Election Act, to proceed to entertain the dispute of the applicant through a judicial review.

42. The applicant was ‘stretching’ the argument in submitting that the election petition would only be the route to a determination of a dispute if the I E B C action were supported under the law. If one was to take that argument to its logical conclusion, then it hardly looks likely that there would be any reason to file any action in an election court. The implication of that argument is that the I E B C’s action would have been legal and not disputable for one to be justified to file an election petition.

43. 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 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.”

44. 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