



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

ELECTION PETITION APPEAL NO. 9 OF 2018

IN THE MATTER OF APPEAL

-BETWEEN-

PATRICIA MUTHONI WAWERU.....1ST APPELLANT

IRENE WACHUKA JOHN.....2ND APPELLANT

JUDY WANJIKU LUKIO.....3RD APPELLANT

CATHERINE NYOKABI KIBUE.....4TH APPELLANT

CATHERINE NYAWIRA MATHENGE.....5TH APPELLANT

- AND -

JANE CHEMUTAI KOSKEI.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....2ND RESPONDENT

JUBILEE PARTY OF KENYA.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the Honourable Senior Resident

Magistrate G.A MMASI (MRS) delivered on the 27th day of February, 2018

at Nairobi in [Miscellaneous Election Petition No. 3 of 2017](#))

JUDGMENT

1. This is an appeal against the decision of the Election Court of *MMASI* (Mrs) Senior Resident Magistrate delivered on *27th February 2018*. Before the said Election Court *Jane Chemtai Koskei (Jane)* was the petitioner while *Independent Electoral and Boundaries Commission (IEBC)* was the *1st Respondent* and *Jubilee party of Kenya (Jubilee Party)* was the *2nd Respondent*.

2. By the impugned judgment the Election Court made the following orders:

1. THAT the Petition succeeds in the following terms;

a. THAT the publication, of laikipia County Assembly Gender Top-up list gazetted on 28/8/2017 vide gazette notice Number 8350 is illegal as it goes against the orders of the Political Parties Disputes Tribunal as contained in the judgment of 27th July, 2017.

b. THAT the 1st Respondent is directed to degazette the Laikipia Gender Top-up list as it failed to comply with the Political Parties Disputes Tribunal directives.

c. THAT the 1st Respondent is ordered within 45 days hereof to gazette a new Laikipia County Assembly Gender Top up list with Petitioner's name included as ordered by the Political Parties Disputes Tribunal.

2. THAT costs to the petitioner to be paid by both Respondents (1st and 2nd Respondents) capped at Ksh 200,000/= (Two hundred thousand shillings only).

3. THAT a certificate of this determination in accordance with Section 86 (1) of the Election Act 2011 shall issue to the Independent Electoral and Boundaries Commission.

BACKGROUND

3. The background of this appeal is somewhat convoluted. It commences with the application made by **Jane** to the **Jubilee party**. By that application **Jane** sought to be included by the **Jubilee party** and be nominated as a member of county assembly (MCA) at Laikipia county. **Jane** sought that nomination on two grounds; firstly on gender equality category; and secondly, to represent the Kalenjin Community, a minority group in Laikipia. Following that application her name was included in the first list presented by the **Jubilee party** for nomination of MCA. **Jane** deponed that while she was at the Jubilee party branch office, although the branch office was not identified, she was informed she would be included in the "closed" Jubilee party list in view of her participation in the **Jubilee party** activities. She stated that she later learnt that her name was excluded from the final list which was submitted to IEBC.

4. Being dissatisfied with that exclusion, **Jane** petitioned the Political Parties Dispute Tribunal (PPDT) whereby she challenged her exclusion from the final Jubilee Party List. In that petition, **Jubilee Party** was the only Respondent.

5. **Jane** succeeded in her challenge before PPDT when the following orders were issued on 27th July, 2017:

"1. THAT a declaration be and is hereby issued to the effect that the Respondent's gender top up party list as well as the list of marginalized persons for nomination to the Laikipia county Assembly does not reflect the ethnic diversity of the people of Laikipia County and is therefore null and void and of no effect in law.

2. THAT the Respondent is hereby directed to reconstitute its gender top up party list as well as the list of marginalized persons for nomination to the Laikipia County Assembly to reflect the ethnic diversity of the people of Laikipia county within 48 hours from the delivery of this judgment.

3. THAT the Respondent is further directed to include the Complainant's name in the first slot on the gender top-up list in light of minority status in the county.

4. THAT the Respondent is directed to afford a hearing to and to supply all affected persons with the reasons for any decision made in complying with the order in (b) (sic) above.

5. THAT no orders as to costs in view of the nature of the dispute.

6. THAT a copy of this Judgment be transmitted to the Independent Electoral and Boundaries Commission.

Jubilee party did not comply with the judgment of PPDT. On 28th August 2017, IEBC gazetted the Jubilee party top-up list of MCA of Laikipia county wherein Jane's name was excluded.

6. **Jane** filed a petition before the chief magistrate Milimani Commercial court seeking the following prayers:

a. A declaration that the purported publication of the Laikipia County Assembly Gender Top-up list as contained in the Kenya Gazette dated **28th August 2017**, Gazette Notice **No. 8380** is illegal and goes against the express orders of the political parties dispute tribunal as contained in judgment of **27th July 2017**.

b. A declaration that the petitioner's right to legitimate expectation was violated by the Respondents when they illegally and irregularly omitted to include her name in the Gender Top-up List as ordered by the Political Parties Dispute Tribunal vide the Judgment of **27th July 2017**.

c. A declaration and Order that the Laikipia County Assembly Gender Top –up list published in Gazette Notice **No. 8380** does not reflect the principles of proportional representation and the rights of minorities and marginalized groups within Laikipia County.

d. An order directed at the 1st Respondent to degazette the Laikipia County Assembly Gender Top-up List contained in Gazette Notice **No. 8380** for failing to comply with the orders of the Political Parties Dispute Tribunal as contained in Judgment of **27th July 2017**.

e. An order directed at the 1st Respondent to gazette a new Laikipia County Assembly Gender Top-up with the Petitioner's name included in it as ordered by the Political Parties Dispute Tribunal

f. A declaration and Orders that the Costs of this petition be borne by the Respondents.

7. The election court delivered its judgment of the above stated petition as reproduced above in this judgment.

THIS APPEAL

8. This appeal is filed by the five appellants shown in the title of this appeal. It is important to state that the five were not parties in the action before PPDT or before the Election Court. The five appellants were however, those who were nominated by *Jubilee party* as its gender top-up list for MCA Laikipia County and were duly gazetted by IEBC as such by gazette notice of **28th August 2017**.

9. There are two *Memorandums of Appeal*. One is by four of the appellants namely; *Patricia Muthoni Waweru, Irene Wachuka John, Judy Wanjiku Lukio* and *Catherine Nyokabi Kigwi*. Those are the 1st to the 4th appellants respectively.

10. The second memorandum was filed by **Catherine Nyawira Mathenge**, the fifth appellant.

11. will paraphrase the grounds of those two appeals, because there is convergence of them. They are:

a. That the election court erred by hearing and determining the election petition without service upon and in the absence of all the appellants, thereby not following due process.

b. Election court erred in placing reliance on its judgment to the decision of PPDT.

c. Election court erred to entertain Jane's defective petition where she had failed to pay security of costs as required under Rule 13 of The Elections (Parliamentary and County Elections) Petition Rules (herein after referred to as Election Rules).

d. The election court erred to entertain the petition which had not been served in compliance with rule 10 (1) of The Election Rules.

e. That the election court exceeded its jurisdiction by directing Jubilee party to gazette within 45 days a new Laikipia County Assembly Gender top-up list with Jane's name included as ordered by PPDT.

Those 5 identified grounds will form the basis of the analysis and determination of this appeal.

NON-SERVICE ON THE APPELLANTS

12. The appellants as stated before were gazetted by IEBC as the Jubilee party's gender top-up list for MCA Laikipia County. They were gazetted on **28th August 2017**. The petition challenging that gazetting was filed by Jane before the Elections Court on **4th September 2017**. That petition; and I call it petition, because although the title states Miscellaneous Application it is indeed a petition in the body thereof; was not served upon the appellants herein, nor were they made parties.

13. Section 77 (2) of the Election Act provides that an election petition shall be served personally upon the respondent. That act does not define who a respondent is. Rule 2 however, of the Election Rules defines respondent in relation to a petition to mean:

“a. The person whose election is complained of;

b. returning officer;

c. the commission (IEBC);

d. any other person whose conduct is complained of in relation to an election.”

14. Section 76 of The Elections Act provides that a petition to question the validity of an election shall be filed within 28 days after the date of declaration of results of the election. The question in respect to this matter is, when did the declaration of results of election in respect to nomination occur. This question was answered by the Supreme Court in the case of ***Moses Mwicigi & 14 Others vs Independent Electoral & Boundaries Commission & 5 Others [2016] eKLR***, in that case it was stated:

“the gazette notice in this case, signifies the completion of the ‘election through nomination’, and finalizes the process of constituting the assembly in question....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.....is it conceivable that such a petition had nothing to do with elections, and was only concerned with constitutional questions. Not in our view: this was a petition contesting the nomination of the appellants, a nomination which we hold to have been an integral part of the electoral process, in terms of the constitution and the electoral law.”

15. From the above decision, it does become very clear that what *Jane* was contesting before the elections court, since by then the appellants names had been gazetted as members of MCA Laikipia County, was that nomination of the appellants.

16. In this court's view, the fact that *Jane* failed to serve the appellants with the petition and thereby denied them the right to be heard was against the principles of natural justice, that is no man should be condemned unheard which in Latin is '*audi alteram partem*'. The effect of the election court judgment was to terminate the tenure of the appellants as MCAs of Laikipia County without affording them a hearing. The appellants as per the definition in Section 2 of the Election Rules were Respondents who should have been served with the petition.

17. That breach of the appellants' rights to be heard cannot be explained away, as Jane's learned counsel attempted to do, by stating that since the Jubilee party top-up list was found by the election court to be illegal, the appellants cannot be allowed to benefit from such illegality. The bigger and more important question is how can a court determine the appellants' nomination was illegal without affording those appellants an opportunity to be heard.

18. Jane's learned counsel cannot be heard to argue that the appellants are estopped from raising issues on jurisdiction at this late stage during the hearing of this appeal, when it was *Jane* who failed to involve the appellant in the 1st instance.

19. I do also find that the appellants are entitled to bring this appeal by virtue of the fact that they were aggrieved by the decision of the election court. In this regard, I wholly agree with the holding of *Olga Sewe, J* in the case *Meymuna Osman Gabow & 16 Others v Mariam Abdi Mohamud & 2 Others & Another [2018] eKLR* where the Judge faced with exactly the same facts, as before me, first quoted the case of *Law Society of Kenya Nairobi Branch vs Malindi Law Society of Kenya & 6 Others [2017] eKLR* which states as follows:

"it seems to us that the issue as to who has locus standi before a court of law has now been crystallized. It is any aggrieved party this creates no doubt in our minds that a person, association, body corporate or an unincorporated body, have the locus standi, not only to institute original proceedings but also appellate proceedings provided that such a party is aggrieved by the decision intended to be challenged. The respondent branches asserted that they were aggrieved by the impugned decision as the same had impacted negatively on their legal practice in particular and the general welfare of their members. In our view, such an assertion was sufficient justification for them to intervene irrespective of its ultimate outcome."

20. The judge proceeded to determine the facts before her thus:

"[31] In the light of the foregoing, and having shown that they were duly elected as Members of the county Assembly of Wajir vide the Gazette Notice No. 8380 dated 28th August 2017 which was nullified by Hon. Wanjala, SRM, on 14th December 2017, there can be no doubt that the Appellants qualify as 'aggrieved parties' and therefore have the requisite locus standi to lodge and maintain this appeal. It is further my finding that it matters not that there was no specific order by the Trial Magistrate directed at the Appellants as a group or any of them in particular for compliance purposes. It suffices for the Appellants to show that they are aggrieved by the outcome of the petition. The nullification of the Gazette Notice by which they were elected is bad enough for them, noting that they had acquired justiciable legitimate expectations. The court takes judicial notice that they were sworn in and have assumed their respective positions as members of Wajir County Assembly. In the premises, I am satisfied that they have the requisite locus standi herein as persons aggrieved by the decision of the Hon. E. Wanjala, SRM, that is the subject of this appeal."

21. The facts of this appeal are distinguishable to those in the case of *Jeniffer Koinante Kitarpei V Alice Wahito Ndegwa & Another [2014]eKLR* relied upon by *Jane*. In that case, the applicant who had not participated before the High Court and before the Court of Appeal filed an application before the Court of Appeal seeking a review of the Court of Appeal's final Judgment on the ground that the said judgment unfairly and unjustly removed the applicant's name as an MCA and replaced it with the name of the successful appellant before the Court of Appeal, on the basis that the applicant was not a member of a political party known as TNA. The Court of Appeal was reluctant and indeed declined to invoke its residue jurisdiction of review in favour of the applicant because such invocation would have caused further injustice, because there had been delay on the part of the applicant and because the applicant had a right to proceed to the Supreme Court for determination of whether her rights to fair hearing had been violated.

22. In this appeal the appellants were aggrieved by the Election Court's Judgment because the effect of that judgment was to nullify their election by nomination; and the appellants filed their appeal before this court within the 30 days set out in Section 75 (4) (a) of The Election Act. There can be no basis to deny the appellants a hearing hereof and more importantly, the Election Court erred to have failed to give the appellants a hearing. The appellants were the rightful Respondents who should have been served with the petition. In that regard the appellants succeed in ground (a) identified above.

DID ELECTION COURT ERR TO HAVE RELIED ON PPDT JUDGMENT?

23. The election court made a finding that PPDT judgment and decree had not been complied with by IEBC and the Jubilee party. That court stated that the two parties had not appealed against the PPDT Judgment. In its conclusion the election court found that the Jubilee party top-up list was illegal because it went against the orders of PPDT. The election court proceeded to order IEBC to de-gazette the Laikipia County Assembly Gender top-up list because in its finding that list failed to comply with PPDT directives. Election Court ordered IEBC to gazette a new Laikipia County Assembly gender top-up list within 45 days of its Judgment and that the said list was to include the name of Jane as a MCA.

24. PPDT is established under section 39 of the Political Parties Act. The jurisdiction of PPDT is set out in Section 40 of that Act. Section 40(2) provides that PPDT shall not hear disputes between members of political party; disputes between members of political parties and a political party; disputes between political parties; and disputes between coalition partners, unless those disputes have been heard and determined by the Internal Political Party Dispute Resolution Mechanism.

25. The decision of PPDT, in the case filed by *Jane*, was so reached despite the fact the internal political party dispute resolution mechanism of Jubilee party had not been exhausted. It therefore follows that PPDT, in reaching its decision, overreached its powers, and acted without jurisdiction. See the case of *Jubilee party of Kenya vs Victor Kiplagat & 8 Others [2017]eKLR* where *L. Njuguna, J* found that where a dispute on party list should have been heard by internal disputed resolution mechanism or by IEBC.

26. Similarly, *Olga Sewe, J* in the case *Jubilee party of Kenya vs Farah Manzoor [2017] eKLR* in regard to the provisions of *Section 40(2) of The Political Parties Act* and stated:

“it is instructive that the above provisions is couched in mandatory terms. It is therefore manifest that since the respondent had not exhausted the parties internal dispute resolution mechanism and obtained a determination, the PPDT had no jurisdiction to entertain the complaint. It is needless to say that jurisdiction is everything and without it the tribunal was powerless.”

27. From the above, it becomes clear that the Election Court in purporting to give effect to PPDT judgment erred because that judgment was reached without jurisdiction.

28. But perhaps more importantly the Election Court erred because it was the duty of the Election Court to consider the evidence and the law presented by *Jane* and the Respondents and that consideration should have been independent of the PPDT judgment. The Election Court had no basis to rely on the finding of PPDT because it was not considering an appeal from PPDT. Such an appeal would in any case have been filed before the High Court as provided in *Section 41 (2) of The Political Parties Act*. Further, the Election Court erred because it was not enforcing the PPDT decision. Such an enforcement could only proceed as provided under Section 41 (3) of The Political Parties Act which provides:

“a decision of the tribunal shall be enforced in the same manner as a decision of the magistrates court”.

29. How are decisions of the Magistrates’ Courts enforced? By execution as provided under the Civil Procedure Rules.

30. What however, was before the Election Court was not such an enforcement of PPDT decision but rather it was an Election Petition. The Election Court should have declined the invitation by *Jane* through her petition to enforce the PPDT decision. Such an invitation had no basis in law and was uncalled for.

31. The appellants accordingly also succeed in ground (b) identified above.

32. The other two grounds will be considered together because they relate to the laid down procedure of filing a petition.

WAS THE PETITION DEFECTIVE AND DID THE PETITIONER FAIL PROCEDURAL STEPS?

33. Related to the above sub-title is the appellants’ contention that the petition was not served within the time limit provided under the rules and that the required deposit of costs was not paid within the required time period.

34. The Supreme Court in the case of *Moses Mwicigi & 14 Others vs Independent Electoral and Boundaries Commission and 5 others [2016] eKLR* on procedures stated as follows:

“This court has on a number of occasions remarked upon the importance of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with substance of the case that it benefits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is 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.”

35. Section 77 (2) of the Election Act provides that a petition may be served personally upon a respondent. Rule 10 (1) of the election rules provides that service of a petition on a respondent shall be within 7 days of presentation of the petition.

36. That is the procedure in law. If *Jane* was of the view that the procedure can be overlooked because of Article 159 (2)(d) of the constitution, she will be dissuaded from that argument by the decision of the supreme court in *Raila Odinga & 5 Others vs IEBC & Others, supreme court petition No 3 of 2013*. This is what the supreme court stated:

“...our attention has repeatedly been drawn to the provisions of Article 159 (2) (d) of the constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Articles simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law....(emphasis added).”

37. It follows that there cannot be reliance on article 159 (2) of the constitution when there are clear statutory provisions on procedure.

38. On the effect of non-service of the petition, the Court of Appeal in the case *Rozah Akinyi Buyu vs Independent Electoral and Boundaries Commission & 2 others [2014]eKLR* had this to say:

“As we have shown, service of the petition upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went into the root of the petition and the petition could not stand when there was failure to serve the same. The learned judge was clearly wrong in his holding as he misdirected himself on the law applicable where he had found as fact that the 2nd and 3rd respondents were not served.”

39. In the case of the petition before the election court it was filed on **4th September 2017**. It was not served on Independent Electoral and Boundaries Commission or the Jubilee party until the **13th November 2017**. It is doubtless that it will be seen that service of the petition was effected way out of the 7 days provided under **Rule 10 (1) of The Election Rules**. On that ground alone, the election court erred to have entertained the petition when service was effected out of time. The election court was under the mistaken belief that service should have been within 15 days of filing the petition. Service as provided under Rule 10 (1) of The Election Rules should have been within 7 days of filing the petition.

40. The other failure pointed out by the appellants in respect to the petition, was that the absence of payment of the deposit for security of costs within the stated period.

41. Section 78 of the Election Act provides:

“a petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than 10 days after the presentation of a petition under this act.”

42. Section 78(3) of the Election Act continues to provide in regards to security of costs thus:

“where a petitioner does not deposit security as required by the section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondents costs.”

43. The above 2 sub-sections of Section 78 are self explanatory: firstly, the petitioner is mandatorily required to deposit security of costs within 10 days of presentation of the petition; secondly, if no such deposit is made, within the stated period, no further proceedings shall be undertaken.

44. In the case ***Esposito Franco Vs Amason Kingi Jeffah & 2 Others [2010] eKLR*** the Court of Appeal on the issue of deposit of costs stated while relying on the ***National Assembly Presidential Election Act, Cap 7 and the Rules*** (now repealed) as follows:

“...it eliminated vexatious litigants who cannot provide security and assured expedition of election petition by setting deadlines. The consequence of non-compliance with the provisions must therefore be to invalidate the petition. Whether the public interest in the speedy determination of election petitions warrants such a draconian regime is again a matter for parliament to review.”

45. In this case the petition before The Election Court was filed on **4th September 2017**. The petitioner paid the deposit for security of costs on **17th October 2017**. That without doubt was outside the 10 days period set out, in mandatory terms, in **Section 78 of The Election Act**.

46. It was not an excuse that the delay was caused by the delay of gazettment of the election court. That delay, did not affect the requirement to adhere to the timelines set out under statute. The petitioner did not in any case seek for extension of time to deposit the security of costs. The election court ought to have done as directed by **Section 78 (3) of The Election Act**, and should have taken no further proceedings in the petition.

47. The above two grounds therefore succeed.

DID THE ELECTION COURT EXCEED ITS JURISDICTION

48. The election court is required to grant appropriate orders which include:

- i. A declaration of whether or not the candidate whose election is questioned was validly elected;**
- ii. A declaration which candidate was validly elected;or**
- iii. An order as to whether a fresh election will be held or not**

49. The election that was challenged by the petition before the election court was election by nomination. That being so, it cannot be said, that the order by the election court nullifying the nominated MCA Laikipia County and ordering another nomination to be effected which includes Jane's name was not a challenge to an election.

50. It has been held by previous court decisions that nomination is a political party affair. The challenge to the exercise of that political party duty is provided by statute. As stated before, that procedure was not followed. The election court, bearing in mind that process was not followed, the appropriate order that should have proceeded from that court was that the process of nominated be repeated, without

demanding that the name of **Jane** be included. Afterall, no evidence was submitted that **Jane** was the appropriate candidate to represent her gender or her community. There may very well be other more qualified candidates for those categories. It is for that reason that I find the election court erred in ordering the nomination of **Jane** as a member of MCA Laikipia county.

51. In the end, the appeal by the appellants succeed. In my finding, everything that could go wrong did, in the matter before the election court.

52. Accordingly, the orders of this court are:

a. The judgment and orders / decree of Senior Resident Magistrate G.A. MMASI (MRS) delivered on **27th February 2018** in **Miscellaneous Election Petition No. 3 of 2017, Jane Chemtai Koskei vs Independent Electoral & Boundaries Commission & The Jubilee party of Kenya**, are hereby **set aside entirely**.

b.The **appellants are awarded costs** as against **Jane Chemtai Koskei**.

DATED, SIGNED and DELIVERED at **NAIROBI** this **4th** day of **June** 2018.

MARY N. KASANGO

JUDGE

Judgment read in open court in the presence of

Court Assistant.....Sophie

.....for the Appellants

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent