



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 46 OF 2017

MARY CHARLES KALINGA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

NEW DEMOCRATS PARTY.....2ND RESPONDENT

THE CLERK OF KWALE COUNTY ASSEMBLY.....3RD RESPONDENT

JUDGMENT

The Petition

1. On or about 23rd July, 2017 the Petitioner claims that the 1st Respondent brought to the attention of the public via publication in the Sunday Daily Nation, the names of individuals which had been forwarded by the various political parties for nomination to the various county assemblies. The Petitioner contends that her name was forwarded to the 1st Respondent by the 2nd Respondent and later vide Gazette Notice of 28th August, 2017, the 1st Respondent published the list of nominated county representatives for Kwale County, which list included the Petitioner's name. The Petitioner avers that the Gazette Notice of 28th August, 2017 did not include the name BINTI JUMAA SULEIMAN.

2. The Petitioner states that sometime later in August, 2017 after the gazettement, she was asked by the 2nd Respondent to pay Kshs. 1, 500,000/= to account number 1161187936- Kenya Commercial Bank held by one DANIEL KISINGU MUSEMBI. The Petitioner did not pay the said money. However, the Petitioner alleges that on 6th September, 2017 she was sworn in by the 3rd Respondent as a nominated County assembly representative for Kwale County. Later on the same day, 6th September, 2017, the Petitioner avers that her name was replaced with that of BINTI JUMAA SULEIMAN vide Gazette Notice No. 131-Vol CXIX.

3. The Petitioner contends that the replacement of her name with that of BINTI JUMAA SULEIMAN was irregular and unconstitutional as there was no public participation and the Petitioner was not afforded an opportunity to be heard before the replacement was done. Therefore, the Petitioner claims that the actions of the Respondents' violated Article 20, 21 and 47 of the Constitution.

4. For these reasons, Petitioner seeks the following orders:

- a) A declaration that a special issue of the Kenya Gazette Vol. CXIX No. 131 Nairobi published in 6th September, 2017 is null and void.
- b) An order quashing and/or invalidating special issue of the Kenya Gazette Vol. No. CXIX No. 131 dated 6th September, 2017 to the extent that the same seeks to replace the Petitioner with BINTI JUMAA SULEIMAN as the Nominated County Assembly Representative of Kwale County.
- c) A declaration that the Petitioner is the duly nominated County Assembly Representative of Kwale County.

d) Costs of this Petition.

The Responses

3rd Respondent

5. The 3rd Respondent responded to the Petition by way of a replying affidavit sworn by DENIS M. MUTUI on 17th October, 2017. However, by way of an application dated 17th November, 2017 the 3rd Respondent sought to have the 3rd Respondent struck out of these proceedings. The said application was not opposed. The court accordingly on 8th March, 2018 struck off the 3rd Respondent from these proceedings.

1st Respondent

6. The 1st Respondent opposed the Petition by way of grounds of opposition dated 30th October, 2017. The 1st Respondent faulted the Petition for offending mandatory provisions of law regarding disputes between members of a political party and the political party. The 1st Respondent suggests that the dispute herein by dint of Section 40 of the Political Parties Act ought to have been referred to the Political Parties Tribunal.

7. The 1st Respondent avers that it is not a necessary party to these proceedings as its involvement in the matter was in fulfillment of its constitutional and statutory obligations.

2nd Respondent

8. The 2nd Respondent opposed the Petition by way of a Replying Affidavit sworn by DANIEL KISUNGU MUSEMBI on 3rd October, 2017.

9. The 2nd Respondent avers that it had initially allocated a nomination place under the gender top list to the Petitioner but later discovered that the Petitioner was not a member of the party as at the time of the nomination. The 2nd Respondent states that it reported the anomaly to the 1st Respondent and rectified the error by replacing the name of the Petitioner with that of BINTI JUMA SULEIMAN.

10. The 2nd Respondent contends that the County Assembly of Kwale has refused to effect the aforementioned changes and the Petitioner still gains access to the County Assembly as a nominated representative leading to the institution of Constitutional Petition **No. 460 of 2017- New Democrats and Binti Juma Suleiman v. County Assembly, Kwale County.**

11. It is the 2nd Respondent's case that nomination is solely reserved for party members and the Petitioner having not been a member of the 2nd Respondent at the time of nomination cannot attempt to use the judicial system to force herself on the party.

Submissions

12. The Petition was canvassed by way of written submissions. The 2nd Respondent filed its submissions on 20th November, 2017. The 1st Respondent on 18th June, 2018 and the Petitioner on 25th June, 2018.

2nd Respondent

13. Mr. Wetaba, learned Counsel for the 2nd Respondent submitted that the 2nd Respondent decided to make changes to its party list and omit the name of the Petitioner when it discovered that the Petitioner was not a member of the party as at the time of nomination. Counsel contended that the 2nd Respondent submitted its list of nominated members in line with Section 36 of the Elections Act but the Petitioner's membership was put into question. Therefore the 2nd Respondent invoked the provisions of Section 37 of the Elections Act and passed the slot to the next member in line. Counsel opined that nomination to the special seats is a by-product of one belonging to a political party and a non-member cannot use the law to create an illegality.

14. Mr. Wetaba submitted that the Petitioner cannot claim that her rights were violated by the 2nd Respondent yet she has failed to prove that she was a member of the 2nd Respondent at the time of nomination. Counsel cited the case of Cornel **Rasanga Amoth v. Jeckonia Okungu Ongutu [2017] eKLR** where the court observed:

“...Only genuine members, proof of which is on them can successfully lodge a complaint over party activities such as nomination irregularities.”

15. Mr. Wetaba suggested that the 2nd Respondent followed the laid down procedure under Section 37 of the Elections Act for substituting a nominee. This being the case, Counsel stated that a political party has to substitute a person who is not a member of the party with a member on its list of nominees.

16. As to whether the dispute herein ought to have been referred to the Political Parties Disputes Tribunal, Mr. Wetaba opined that the Petitioner would only gain audience before the Tribunal if she was a member of the 2nd Respondent.

17. Mr. Wetaba urged the court not to nullify the Gazette Notice without first investigating how the same came to be published and the illegalities perpetuated by the Petitioner. Counsel concluded that the Petitioner cannot enforce a non-existing right on the basis of an illegality.

1st Respondent

18. Mr. Mokaya, Counsel for the 1st Respondent submitted that the 1st Respondent published on 28/08/2017 vide Gazette Notice Vol CXIX-No. 124 the name of the Petitioner as a nominated member of the County Assembly Kwale via the 2nd Respondent. Subsequently, the Petitioner was sworn into office by the 3rd Respondent on 06/09/2017. However, Counsel contended that on the same day 06/09/2017, the 1st Respondent published Gazette Notice Vol. CXIX-No. 131 substituting the name of the Petitioner with that of BINTI JUMAA SULEIMAN upon being requested to do so by the 2nd Respondent. Counsel stated that Section 13 of the Elections Act allows for the amendment of the nomination list once submitted either on the ground of rejection by the 1st Respondent or on substitution.

19. Mr. Mokaya submitted that there were other forums to resolve the dispute arising herein which had not be invoked by the Petitioner. Counsel argued that Regulation 27 of the Elections (Party Primaries & Party Lists) Regulations, 2017 requires political parties to establish internal dispute resolution mechanisms in relation to party primaries and party lists. Further, Counsel submitted that the Political Parties Act, 2011 establishes the Political Parties Dispute Tribunal (PPDT) to hear and determine disputes after internal party mechanisms have been exhausted. Counsel urged the court to consider that the Petitioner had not invoked either of the dispute resolution mechanisms. Also, Counsel pointed out that the 1st Respondent can only come into such a dispute where it has been requested to carry out the nomination for the political party and subsequently have any disputes that may arise resolved by the 1st Respondent's Nomination Dispute Resolution Committee.

20. Alternatively, Mr. Mokaya submitted that the mandate of the 1st Respondent ended when the 1st Respondent issued a corrigenda notice amending the Gazette Notice of 28/08/2017. Therefore the dispute herein was an electoral dispute under Section 75 (1A) which was only capable of determination by an election court. Counsel cited **Moses Mwigi & 14 others v. Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** where the Supreme Court held as follows:

“[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 Elections 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”.

Counsel opined that the High Court sitting as a constitutional court lacks the jurisdiction to determine electoral disputes.

Petitioner

21. Mr. Wameyo, learned Counsel for the Petitioner submitted that the nomination through the party list is an election process as provided under Articles 90 and 177 of the Constitution. This being the case it is the mandate of the 1st Respondent under Article 88(4) (e) to settle electoral disputes arising from nominations excluding election petitions and disputes subsequent to the declaration of election results. Counsel contended that the publication and declaration of the nominations vide Gazette Notice published on 28/08/2017 was an election result with the meaning of Article 88(4) (e) of the Constitution. However, Counsel argued that the 1st Respondent's mandate to resolve the dispute ended after publication of the Gazette Notice on 28/08/2017 and the said mandate was transferred to the Election Court.

22. Mr. Wameyo submitted that although the notice dated 28th August, 2017 could only be challenged in an Election Court, the constitutionality of the notice dated 6th September, 2017 could not be challenged in an election court since it was not part of an election process. Counsel opined that the 1st Respondent having acted outside its constitutional mandate, its offending actions can be considered by this court.

23. Mr. Wameyo urged the court to find that the 1st Respondent's action was arbitrary and draconian as it did not afford the Petitioner an opportunity to be heard and therefore breached the Petitioner's right to fair administrative action.

The Determination

24. The first issue for determination by this court is whether this court has the jurisdiction to hear this matter. The Respondents dispute the jurisdiction of this court to hear and determine this petition on two grounds. First, that there are two avenues for resolution of this matter that were not invoked by the Petitioner. These avenues are; the 2nd Respondent's internal dispute resolution mechanism relating to party primaries and party lists and Political Parties Dispute Tribunal. The Respondents argue that the Petitioner ought to have exhausted these two avenues and approached the court as a last resort. Second, the Respondents aver that the dispute herein arose from an electoral process hence the proper forum for the determination of this dispute was an election court.

25. The Petitioner, on the other hand, is of the view that the issue here relates to the constitutionality of the Gazette notice of 6/09/2017, therefore this court is the proper forum for determination of this matter.

26. In order to establish whether this court is clothed with the jurisdiction to hear and determine this matter, there is need to examine the genesis of this matter. It is not disputed that this matter begun with the nomination of the Petitioner to be a member of the County Assembly Kwale by the 2nd Respondent. The 1st Respondent subsequently published on 28/08/2017 in Gazette Notice Vol CXIX No. 124 the name of the Petitioner as among those nominated to the County assembly of Kwale. On 06/09/2017, the Petitioner was sworn into office by the 3rd Respondent. However, on the same date the 1st Respondent published another Gazette notice Vol CXIX No.131 which was meant to amend the earlier Gazette Notice by replacing the name of the petitioner with that of BINTI JUMA SULEIMAN. The 1st Respondent alleged that it

published the replacement at the request of the 2nd Respondent. The 2nd Respondent attributes the replacement to what can be termed as “due diligence”. The 2nd Respondent claims that after nominating the Petitioner it came to the realization that the Petitioner was not a registered member of the 2nd Respondent as at the time of nomination, and therefore, the 2nd Respondent had to rescind the nomination.

27. Article 177 (1) (b) of the Constitution provides that a County Assembly shall consist of a number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender. Under sub-article (2) the members contemplated in (b) shall be nominated by political parties in proportion to the seats received in that election in the county by each political party. Further Article 90 provides for the allocation of party list seats. It reads as follows:

90. (1) Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—

(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

(b) except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

It is under the above constitutional provisions that the issue herein arose.

28. Under the Election Act the provisions for nomination of members to the County Assembly can be found under Sections 34, 35 and 36:

34. (1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97(1)(c) and 98(1)(b)(c) and (d) and Article 177(1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2) A political party which nominates a candidate for election under Article 97(1)(a) and (b) shall submit to the Commission a party list in accordance with Article 97(1)(c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98(1) (a) shall submit to the Commission a party list in accordance with Article 98(1)(b) and (c) of the Constitution.

(4) A political party which nominates a candidate for election under Article

177(1)(a) shall submit to the Commission a party list in accordance with Article 177(1)(b) and (c) of the Constitution.

(4A) In the case of a person nominated pursuant to Article 177(1) (c) of the

Constitution, the party list shall include a certification in the manner prescribed by the Commission.

(5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.

(6) The party lists submitted to the Commission under this section shall

be in accordance with the constitution or nomination rules of the political party concerned.

(6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and—

(a) issue the political party with a certificate of compliance; or

(b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.

(6B) For purposes of subsection (6A), the Commission may, by notice in the

gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

(8) A person who is nominated by a political party under subsections (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

(9) The party list shall not contain a name of a candidate nominated for an election.

(10) A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.

35. A political party shall submit its party list to the Commission at least forty-five days before the date of the general election.

36. (1) A party list submitted by a political party under—

(a) Article 97(1)(c) of the Constitution shall include twelve candidates;

(b) Article 98(1)(b) of the Constitution shall include sixteen candidates;

(c) Article 98(1)(c) of the Constitution shall include two candidates;

(d) Article 98(1)(d) of the Constitution shall include two candidates;

(e) Article 177(1)(b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county;

(f) Article 177(1)(c) of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group.

(2) A party list submitted under subsection (1)(a), (c), (d), (e) and (f) shall

contain alternates between male and female candidates in the priority in which they are listed.

(3) The party list referred to under subsection (1)(f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.

(4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.

(5) The allocation of seats by the Commission under Article 97(1)(c) of the

Constitution will be proportional to the number of seats won by the party under Article 97(1)(a) and (b) of the Constitution.

(6) The allocation of seats by the Commission under Article 98(1)(b), (c) and

(d) of the Constitution shall be proportional to the number of seats won by the party under Article 98(1)(a) of the Constitution.

(7) For purposes of Article 177(1)(b) of the Constitution, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

(8) For purposes of Article 177(1)(c) of the Constitution, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

(9) The allocation of seats by the Commission under Article 177(1)(b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177(1)(a) of the Constitution.

29. From the above provisions it is evident that the role of preparation of the party list of members to be nominated to the County Assembly lies squarely with the party. The 1st Respondent cannot direct any party on who to include or exclude from the party list. The role of the 1st Respondent is limited to ensuring that the list submitted complies with relevant provisions of the Constitution and the statutes. This was the position taken in **National Gender and Equality Commission v. IEBC, High Court Petition No. 147 of 2013** where the court opined as

follows:

“Section 34 (6) of the Elections Act, 2011 specifically provides that. ‘The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned.’ This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Dispute Tribunal established under Section 39, Part VI of the Political Parties Act, 2011...”

30. The Petitioner was nominated by the 2nd Respondent and her name gazetted on 28/08/2017 in Gazette Notice Vol CXIX No. 124. However, by Gazette notice Vol CXIX No.131 published on 06/09/2017, the Petitioner’s name was replaced with that of one BINTI JUMA SULEIMAN. The 2nd Respondent contended that the replacement was made after the party discovered that the Petitioner was not a registered member of the party as at the time of nomination. The 2nd Respondent, in my view, seems to have relied on the provisions of Section 34 (8) of the Elections Act which states that “a person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

31. Be that as it may, the dispute herein relates to the nomination of the Petitioner to the County Assembly of Kwale. In my view, the issue of constitutionality of the Gazette notice Vol. CXIX No. 131 published on 6th September, 2017 raised by the Petitioner is rooted on the validity of the nomination of the Petitioner. Can this court determine disputes relating to the nomination of members of the County Assembly? The Respondents argued that once the Gazette Notice was issued any dispute arising thereafter could only be channeled to an election. The Supreme Court in **Moses Mwigigi & 14 others v. Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** settled this issue by finding that the publication of the Gazette Notice marks the end of the mandate of the IEBC regarding the nomination of party representatives and shifts any consequential dispute to the Election Courts. The apex court held as follows:

[105]“It is clear from the foregoing provisions that the allocation of nomination seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. 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 IEBC, as an integral part of the election process.

[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 we 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 Elections Court. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.”

32. It therefore follows that once the Gazette Notice Vol CXIX No. 124 was published on 28/08/2017 and subsequently amended by Gazette notice Vol CXIX No.131 published on 06/09/2017, any dispute regarding the nomination of the Petitioner could only be determined by an election court. Hence, this court cannot entertain this matter as it is not an election court. The Petitioner or any other aggrieved party including the 2nd Respondent which contests the validity of the nomination of the Petitioner ought to have filed this matter before a court Gazetted as an election court by the Chief Justice within the required statutory time frames.

33. For the foregoing reasons the Petition dated 13th September, 2017 is hereby dismissed with costs.

Dated, Signed and Delivered in Mombasa this 10th day of December, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

No Appearance for Petitioner

No Appearance for Respondents

Mr. Kaunda Court Assistant