



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
COSNTITUTION AND JUDICIAL REVIEW DIVISON)

PETITION NO.2 OF 2013

ZEDDY CHEROTICH ROTICH.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE UNITED REPUBLICAN PARTY.....2ND RESPONDENT

AND

ESTHER WANGUI GITAU.....1ST INTERESTED PARTY

MARISIN AGNES CHERONO.....2ND INTERESTED PARTY

JOSPHINE CHEPKORIR YEGON.....3RD INTERESTED PARTY

JOYCE CHEPKIRUI.....4TH INTERESTED PARTY

JUDGMENT

This judgment is the outcome of the Petition dated 16th September, 2013 and taken out by **Zeddy Cherotich Rotich**, the Petitioner herein. In the aforesaid Petition, the Petitioner sought for the following orders:

1. **That the Petitioner is a female adult of sound mind and disposition who is the holder of the 2nd Respondent's party membership card no.577356 and a duly registered voter who on 30th January, 2013 applied for nomination as a member of the County Assembly for Kericho under the 2nd Respondent party in respect of the gender top up list.**
2. **That the 1st Respondent hereinafter referred to as (IEBC) is established under Article 88(1) of the Constitution of Kenya, 2010 whose mandate is to conduct or supervise referenda and elections to any elective body of office established by the constitution or legislation which has pursuant to Section 74(2) of the Elections Act, No.24 of 2011 (the Act) as established the Independent Electoral and Boundaries Commission Dispute Resolution Committee (the Committee).**
3. **That the 2nd Respondent (hereinafter referred to as “The Party” is a political party duly**

registered under the political parties act, 2011 (No.11 of 2011).

4. That on Thursday 16th May, 2013 IEBC published in the daily nation the political parties first submission list for nominees in respect of the gender top up list.
5. That in the aforesaid list the Petitioner's name was number ten (10) in terms of ranking in order of priority amongst the Women nominees though erroneously indicated as male.
6. That owing to the aforesaid erroneous indication of the Petitioner's name as male in the aforementioned list, the Respondents omitted the Petitioner's name in the subsequent list of nominees and inserted therefore the names of the interested parties including those who were behind the petitioner in terms of ranking or had not applied for nomination.
7. That the Petitioner being aggrieved by the said omission, lodged a complaint with the IEBC Nomination dispute resolution committee who on 7th June 2013 reached a finding that the complaint was outside their jurisdiction hence the complaint was for dismissal.
8. That the judgment dismissing the Petitioner's complaint was biased, irrational and or unlawful hence in infringed on the Petitioner's right to a fair hearing enshrined in Article 50(1) of the Constitution as it flagrantly discriminated against the Petitioner as the Respondent in similar situations and in the same judgment had reached a contrary opinion.
9. That IEBC failed and or abdicated its responsibility to discharge its mandate conferred upon it under Article 88(4)(e) of the Constitution and Section 74 of the Act and Regulation 99 of the General Regulations 2012.
10. That nomination of the interested party was irregular and lacked transparency as their nomination by the party was not within 45 days before the election as required under the law hence their nomination and gazettelement ought to be revoked.
11. That vide a special gazettee Notice no.9794 dated 17th July, 2013 the 1st Respondent in exclusion of the Petitioner gazetted among others the interested parties as the duly nominated members of the county assembly for Kericho County.
12. That the Petitioner being aggrieved by the 1st Respondent's decision filed the Kericho High Court Judicial Review Application No.2 of 2013 seeking among other prayers stay orders whereby the court on 26th July 2013 ordered for a stay of the execution IEBC's decision dated 7th June 2013.
13. The Petitioner's fundamental rights and freedoms guaranteed under the constitution were violated by the committee when it failed to act within the jurisdiction conferred upon it under Article 88(4)(e) of the constitution and Section 74 of the Elections Act hence her right to fair administrative action guaranteed under Article 20 and 47 of the constitution were contravened by the apparent bias in the proceedings.
14. The Petitioner contends there has been a breach of her right to equal protection of the law and the right to non-discrimination under Article 27 of the Constitution as the Respondents had applied the law in a manner that was selective, discriminatory and prejudicial to the Petitioner.
15. The 1st Respondent has infringed on the Petitioner's political rights under Article 38 as a furtherance of the 2nd Respondent's illegal acts intended to thwart the Petitioner's legitimate expectation as a duly nominated member of the county assembly for Kericho County under the URP Party.
16. That it is the duty of the 2nd Respondent to nominate a person who meets the requirements

of the constitution and the electoral laws.

17. That this Honourable court by virtue Article 165 of the constitution has both original and supervisory jurisdiction and it is imperative that the court takes charge where the constitution allows it to do so in order to ensure that the constitution is observed and respected by tribunals and other bodies under its supervisory jurisdiction.

When served with the Petition, The Independent Electoral Boundaries Commission (I.E.B.C), the 1st Respondent filed grounds of opposition to resist the Petition. The 1st Respondent also filed an answer to the Petition. Esther Wangui Gitau, Marisin Agnes Cheron, Josphine Chepkorir Yegon and Joyce Chepkirui who were named as the 1st, 2nd, 3rd and the 4th Interested Parties filed replying affidavits to oppose the Petition.

When the Petition came up for hearing, learned counsels appearing in the matter recorded a consent order to have the Petition disposed of by written submissions. I have considered the material placed before me plus the rival written submissions. Though the Petition appears so voluminous, two issues emerged for the determination of this court namely:

- 1. Whether or not this court lacks the requisite jurisdiction to determine the question of membership to the county assembly?**
- 2. Whether or not time to bring this Petition has lapsed?**

The brief facts of this dispute are that the Petitioner applied for nomination to serve as a member of the County Assembly of Kericho County on 30th January, 2013 to the United Republican Party (2nd Respondent) in respect of the gender Top-up List. The 2nd Respondent submitted a list of its nominees to The Independent Electoral Boundaries Commission (I.E.B.C) (1st Respondent). The later caused to be published in the Daily Nation of 16th May, 2013 the list of those nominees in respect of gender Top-up List. In the aforesaid list, the Petitioner was placed no.10 in order of priority amongst female nominees from Kericho County. It is not in dispute that the Petitioner's gender in the said publication was indicated as male instead of female. This error is said to have cost the Petitioner a chance in the nomination to the Kericho County Assembly thereby forcing her to lodge a complaint with the 1st Respondent's Nomination Dispute Resolution Committee which dismissed the Petitioner's complaint citing lack of jurisdiction. That decision prompted the Petitioner to file this petition. It would appear from the Replying Affidavit of David Koech, the Executive Director of the 2nd Respondent that the 2nd Respondent does not oppose the Petition. The 2nd Respondent blamed the 1st Respondent for the mistake which cost the Petitioner nomination to serve in the County Assembly.

Let me start by determining the question of jurisdiction. It is the 1st Respondent's submission that this court can only audit the decision making process of the committee and cannot substitute its decision with that of the committee hence it lacks jurisdiction to entertain this petition. This argument is also shared by the interested parties. The Petitioner is of the view that pursuant to **Article 165(6) and (7) of the Constitution** this court has jurisdiction to entertain the dispute. What is clear in my mind is that the 1st Respondent set up a Dispute Resolution Committee which heard the Petitioner's complaint. It is also clear from the material placed before this court that the preparation of the list of nomination was the responsibility of the 2nd Respondent. The 2nd Respondent was to ensure that the correct information was availed to the 1st Respondent. It would appear the published lists were drawn by the 1st Respondent in priority from those supplied by the 2nd Respondent. With respect, if the orders sought are granted I think, the court would in essence be reviewing or allowing an appeal against the orders of the committee of the 1st Respondent which jurisdiction was not given to this court. This court can only intervene where the decision making process of the committee is found to be flawed. The other ground which was argued and is related to the first ground is the question as to whether this is a matter for this court or that of the subordinate court. There is no dispute that the names of the Interested Parties herein were gazetted vide the Kenya gazette notice of 17th July, 2013 as the nominated members of the County Assembly of Kericho County. The Petitioner was enjoined by law to lay a basis of the prayer for the revocation of the above gazette. I have looked at the Petition and it would appear its constitutionality has not been challenged. The prayer for revocation is premised on the assertion that the Petitioner was validly

nominated member of the Assembly. Before making such an order, this court would have to determine first the question as to who was validly nominated member for Kericho County. Such a question can only be determined pursuant to **Part VII** of the **Elections Act, 2011**. In brief, after the gazettelement of any person as a member of the County Assembly any challenge to his or her membership to the County Assembly must be presented before the Chief Magistrate's Court. The Petition is therefore not that envisaged under the **Elections Act no.24 of 2011** hence it is improperly before this court.

The determination of the above issue leads me to the second issue as to whether or not the time of filing the petition has lapsed. This ground appears to have been abandoned because no party has pursued it in their submissions hence I will not venture to make a determination on it.

In the end, this Petition is found to be incompetent and unmeritorious. The same is ordered dismissed with costs to the 1st Respondent.

Dated, Signed and delivered in open court this 7th day of March 2014.

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J.K.SERGON

JUDGE

In the presence of

Mr. Orina for Petitioner

Mr. Mutai holding brief for Mr. Kageni for 1st Respondent

Mr. Mutai for 2nd Respondent

Mr. Mutai holding brief for Mr. Siele for Interested Parties