



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES' COURT AT KISII

ELECTION PETITION NO. 9 OF 2017

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

AND

IN THE MATTER OF THE ELECTIONS (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

AND

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010

BETWEEN

ESTHER OKENYURI ANYIENI.....PETITIONER

AND

MOKUMI EDMOND ANTHONY.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

THE SPEAKER, KISII COUNTY ASSEMBLY...4TH RESPONDENT

JUDGMENT

1. Introduction:

The Petitioner Esther Okenyuri Anyieni filed her Petition dated 15th September 2017 where she prayed that:

(a) It be declared that the 1st Respondent was ineligible to apply for nomination by the 2nd Respondent as a nominated member of Kisii County Assembly and that his nomination by the 2nd Respondent in that respect is invalid, null and void abinitio.

(b) An order do issue directed at the 3rd Respondent to degazette the 1st Respondent's name as a nominated member of Kisii County Assembly.

(c) It be declared that the Petitioner is the 2nd Respondent's duly nominated member of Kisii County Assembly and the Petitioner's name be so gazetted by the 3rd Respondent consequent upon which the 4th Respondent be ordered to administer oath upon the Petitioner as a duly nominated Member of Kisii County Assembly.

(d) Costs of this Petition be borne by the 1st, 2nd and 3rd Respondents. The 3rd Respondent herein referred as (IEBC) filed their replying affidavit dated 26th September, 2017 sworn by Salome Oyugi in response to the Petition.

2. The 1st Respondent Anthony Mokumi Edmond filed his replying affidavit dated 4th October 2017. The 2nd Respondent filed his response to the Petition dated 18th October 2017. The 4th Respondent did not file any response to the Petition. When the matter came up for pre trial conference on 10th October 2017, the parties agreed that the Petition proceeds by way of written submissions and parties were given time to file and exchange their respective submissions.

3. The Petitioner's Case;

The Petitioner in her submission narrowed the issues to 6 for determination as follows:

(i) What is the legal effect of failure by Anthony and the IEBC to file responses to the Petition?

(ii) Can the replying affidavit by Anthony and the IEBC be deemed as responses to the Petition?

(iii) Whether the failure by the Petitioner to file a complaint with respect to the party list presented to the IEBC as contemplated by Section 40(1)(b) of the Political Parties Act – Cap 7(b) of the Laws of Kenya is fatal to this Petition.

(iv) Whether the nomination by Anthony by Jubilee and his Gazettement satisfied the constitutional and statutory threshold and the legal effect of failure to satisfy the same.

(v) Whether the reliefs sought by the Petitioner should be granted.

(vi) Who should bear costs of this Petition?

4. **On issue 1**, the Petitioner submitted Rule 13(1) as read with Rule 13(9) provides that for a Petition to be considered as opposed, a response must be filed. That the current Petition should be deemed as uncontested in absence of responses by 1st and 3rd Respondents.

5. **On issue 2**, the Petitioner submitted that Rule 14 clearly shows that an affidavit sworn by a Respondent and their witnesses is to be filed simultaneously with a response to a Petition. The affidavits before court were filed in vacuum not having been preceded by or founded upon lawful responses.

6. **On issue 3**, the Petitioner submitted though the Petitioner did not file a complaint, the foundation of the Petition before the court is that the IEBC did not discharge its constitutional and statutory mandate with regard to the nomination of Anthony Mokumi Edmond and his election through Gazettement as a nominated member of Kisii County Assembly. The IEBC failed to comply with Article 90(2) of the Constitution, Section 34(6A), 27(1) of the **Elections Act, 2011**. Regulations 55(1) (2) of the **Elections (General) Regulations, 2012**. Regulations 26 and 2 of the **Elections (Party primaries and Party lists) Regulations, 2017**. The Petitioner relied on the authority of **Moses Mwiggi & 14 Others –vs- IEBC & 5 Others [2016]eKLR**.

7. **On issue 4**, the Petitioner submitted the nomination application form published by Jubilee categorically provided that applications for nomination would be valid only for the place where the applicant was registered as a voter. That the exhibit marked **“EOA-05”** indicates that Anthony Mokumi Edmond was a registered voter at Ruaraka Constituency within Nairobi County not Kisii County. That when the 2nd Respondent prepared its party list and included **“Anthony”** as a nominee under the marginalized category for Kisii County Assembly it violated its own rule and acted contrary to Regulation 55(1) of the **Elections (General) Regulations, 2012** which requires that party lists prepared under Regulation 54 of the **Elections (General) Regulations 2012**, shall be in conformity with party rules. The petitioner further emphasized on the provisions of Section 34(6) of the **Elections Act 2011**, Article 88, 4(d), that Anthony was ineligible for nomination, the IEBC could not select him, publish his name on its final list of nominees and thereafter gazette his name. Actions by IEBC were based on illegalities and were therefore nullities.

8. **On issue 5**, the Petitioner submitted that the reliefs sought by the Petitioner ought to be granted having established that Anthony Mokumi Edmond was not validly elected. That the Petitioner's name was second in priority in the party list submitted to the IEBC by Jubilee. It is provided in Section 36(8) of the **Elections Act, 2011** that 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. **On issue 6**, the Petitioner submitted that pursuant to Section 32(1) of the **Election Petition Rules**, an election court ought to make an order specifying the total amount of cost payable by whom and to whom. That the 1st, 2nd and 3rd Respondents be condemned to bear the costs.

1st Respondent's case:

10. The 1st Respondent herein, referred to as **“Anthony”** in his submissions stated he is a registered member of the 2nd Respondent and applied to be nominated as a member of the Kisii op kCounty Assembly to represent the 2nd Respondent as laid down in the Constitution. That he is a registered voter within Kisii County, Bonchari Constituency, Bogiakumu ward. He annexed the application for nomination and the same was marked **“AME1”**. That he had applied to be nominated in the special interest group which he was duly nominated and that the Petitioner has applied for a different slot. That he has been listed as number 1 whereas the Petitioner has been listed as number 2 and

therefore the 3rd Respondent did no wrong in gazetting him since his name was having priority to that of the Petitioner and the 3rd Respondent had no powers to short change or rearrange the names.

11. That the Petitioner did not lodge a complaint after the publication of the names in the daily papers as required by law and her failure to lodge her complaint at the IEBC Disputes Resolution Committee in the first instance deprives this court of jurisdiction to entertain her complaint. That the 3rd Respondent under Section 36(8) were required to adhere to the priority of nominees as submitted in the party list. That the 2nd and 3rd Respondents fully complied with Article 177 1(c) of the Constitution. They urged this court to dismiss the Petition for being incompetent, unmeritorious and of gross abuse of the due process with costs to him.

3rd Respondent's case:

12. The 3rd Respondent herein referred to as “**IEBC**” in his submission submitted that the dispute concerns the nomination of a Member of County Assembly of Kisii representing marginalized group list. That the 1st Respondent was fulfilling its constitutional and statutory mandate under Sections 35, 36(6) and 36(7) of the **Elections Act No. 24 of 2011** and Article 90 of the Constitution.

13. That the Petitioner ought to have raised her complaints with the Dispute Resolution Mechanism of the 2nd Respondent or with the Commission or the Political Parties Tribunal owing to statutory provisions under Section 40(1) and 41 of the **Political Parties Act**, Cap 7B of the Laws of Kenya. That the 2nd Respondent was required under Sections 35 and 36(1) of the **Elections Act No. 24 of 2011** to submit to the Commission a party list showing the number of nominees in the marginalized group as required under Article 177 1(c) of the Constitution.

14. That under Regulation 56(2) of the Election (General) Regulations 2012, the 2nd Respondent was entitled to (1) seat under the marginalized category so as to give effect to Article 177(1) (c) of the Constitution. That the Commission is mandated under Section 36(8) of the **Elections Act No. 24 of 2011** to select the candidates who will represent the marginalized group and adhere to the priority. The list submitted to it by the 2nd Respondent on the basis of proportional representation of the membership of the County Assembly as per Article 90(1) of the Constitution.

15. That the Petitioner has not discharged her burden of proof in her claim that the Commission acted improperly in Gazetting the 1st Respondent and he ought to be degazetted. That the burden of proof in an election petition lies on the Petitioner. They relied on the case of **Lydia Mathia –vs- Naisula Lesuuda & Another [2013] eKLR**. Further, that the Petitioner ought to have raised her issue with the dispute resolution board as provided for under Section 40(1) and 41 of the Political Parties Act.

16. That the Petitioner alleges that the 1st Respondent was disqualified from vying for the seat of County Assembly in Kisii because he was a registered voter in Ruaraka Constituency, Nairobi County. Article 193 of the Constitution provides the qualification to be elected as member of the County Assembly.

17. That the 1st Respondent was not disqualified or precluded from being nominated or vying for the position under Article 193. They urged the court to dismiss the Petition and hold that the 1st Respondent was validly nominated and gazetting of 28th August 2017 No. 8330 is valid.

The 2nd Respondent's case:

18. The 2nd Respondent herein referred to as “**Jubilee**” did not file their submissions. I will summarize their response to the Petition. The 2nd Respondent submitted that an application for consideration for a nomination slot is not guaranteed. That such an applicant must be nominated and that the list published by the IEBC is the actual compliant list having been amended by the 2nd Respondent and resubmitted in compliance with the contents of the memorandum or recommendations.

19. That the only list known to the 2nd Respondent is the one published by the IEBC and no prior list was released as having been the list containing the 2nd Respondent's nominees as alleged. That the 2nd Respondent maintains that the criteria adopted in the selection guaranteed democratic, free, fair, transparent, accountable, inclusive participatory, non discriminative, credible approach in accordance with the law, party regulations and best practice and met the prescribed legal threshold.

Court's Analysis and Determination:

20. I have carefully perused the Petition, the replying affidavits by the 1st and 3rd Respondents, the response to the Petition by the 2nd Respondent, the written submission by the Petitioner, her further submissions and the 1st and 3rd Respondents submissions. The issues to be determined by this court are:

1) Whether the replying affidavits by the 1st and 3rd Respondents are responses to the Petition?

2) Whether the failure by the Petitioner to lodge a complaint in the first instance renders her Petition a nullity?

3) Whether the 1st Respondent nomination satisfies the Constitution and statutory requirements?

4) Whether the reliefs sought can be granted?

21. **Issue No. 1;**

The Petitioner submitted that the Petition is uncontested for reasons that the 1st and 3rd Respondents' filed replying affidavit instead of responses as required by Rule 11 of the Elections (Parliamentary and County Elections) Petition Rules 2017.

Rule 11(1): Upon being served with a Petition in accordance with Rule 10, a Respondent may oppose the Petition by filing a response to an election with seven days.

Rule 12(5) provides that:

“a response to the Petition under Rule 11 shall be supported by an affidavit sworn by the Respondent.”

In the instant case the 1st and 3rd Respondents filed replying affidavits as opposed to response though the same answered all the issues raised in the Petition and the question is whether this was proper.

22. A similar issue was raised in Kisii High Court Election Petition No. 4 of 2017 where **Hon. Justice Ndungu A.** stated that:

The circumstances of this case require the court to rise to its higher calling to do substantive justice to the parties and quoted the authority of Raila Odinga & Others –vs- IEBC and 3 Others [2017] eKLR:

“The court should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. The principle of merit however in our opinion bears no meaning casting stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best cause.”

23. When I appreciate all the relevant circumstances and the requirement of the instant suit, I am persuaded that the best cause is to invoke Article 159 2 (d) of the Constitution, Rule 1 and 2 and 5(1) of the Elections (Parliamentary and County Elections) Petition Rules 2017. The Hon. Judge held that the replying affidavit is deemed as regular and will be treated as a response under Rule 11(2) of the Election Petition Rules.

24. It is clear that the position has been settled by the above authority which I entirely rely on and I proceed to determine that the replying affidavit by the 3rd Respondent dated 26th September 2017 and the replying affidavit by the 1st Respondent dated 4th October, 2017 to be regular and will be treated as a response under Rule 11(2) of the Election Petition Rules.

25. **Issue No. 2;**

Article 88 4(e) of the Constitution provides that:

“The 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.”

The position is also settled in Section 74 of the Election Act, 2011. Further section 40 and 41 of the Political Parties Act 2011 provides for the mechanism of disputes resolution by aggrieved parties and it is the submissions of the Respondents that the Petitioner ought to have lodged her dispute first at the tribunal before coming to this court. The 1st Respondent had been gazetted on 28th August 2017 and had already assumed office and the only way the Petitioner would ventilate her issue was by filing an election petition like the instant one and the issue raised in the Petition touch on the constitutionality of the nomination process by the 3rd Respondent. In the case of **National Gender and Equality Commission –vs- IEBC & Another [2013] eKLR** it was held that where persons included in a party list have assumed the relevant office their nomination can only be challenged by way of an election Petition. I hold that the Petitioner is in the right forum and this court has jurisdiction to entertain and determine her Petition.

26. **Issue No. 3;**

It is common ground that the Petitioner and the 1st Respondent are members of the Jubilee Party (2nd Respondent). the Petitioner membership number as per the nomination application form marked exhibit **EOA2** is **JP55017** whereas the 1st Respondent Membership number as per the nomination application for marked exhibit **AME1** is **JP171627**. The borne of contention between the Petitioner and the 1st Respondent is that the 1st Respondent is not a registered voter in Kisii County but a voter at Ruaraka Constituency, Nairobi County. The petitioner produced a search result from IEBC portal marked **EOA5**. A perusal of exhibit marked **EOA3** and **EOA4**. I notice that the 1st Respondent has been categorized under the marginalized group and he is number 1 on the list.

27. The Petitioner has been categorized under the youth group and is 2nd on the list. It is the Petitioner's prayer that the 1st respondent was ineligible to apply for nomination by the 2nd Respondent as a nominated member of Kisii County Assembly and that his nomination by the 2nd Respondent in that respect is invalid, null and *void abinitio*. Regulations 15(1) of the **Election (Party Primaries and Party Lists) Regulations 2017** provides that an aspiring candidate shall submit to an election board of their party, a duly filled application in form 3 set out in the schedule.

28. I have perused the form 3 which indicates "if the application is for party nomination on a party list, the requirements set out are:

- Name of party list
- Ethnic community of the aspiring candidate County for national list
- Category of special interest group
- Women
- Youth
- Person with Disability (type of disability)
- Ethnic minority
- Marginalized community

Represent workers (only for 12 members list for National Assembly).

29. I have also looked at the nomination application form for the Jubilee party at page 3 where it states "**place registered as a voter your application is ONLY valid for the place you are registered as a voter**". Article 90 provides for allocation of party seats which shall be on the basis of proportional representation by use of party lists and the same is to be read together with Article 177 which provides for membership of County Assembly.

30. Article 177 (b) (c) provides for the special seats which both the Petitioner and the 1st Respondent had applied for under youth and marginalized respectfully. Section 36, 1(f) provides that:

"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."

Article 36(8) provides:

"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".

Regulation 54, 55 and 56 of the Elections (General) Regulations 2012 provides for nomination for party list, and the list to be in accordance with the party rules and the formula of allocation of seats.

31. In this case, the 2nd Respondent submitted their lists as marked **AME2** and **EOA3** to the 3rd Respondent who proceeded to gazette the same as shown in the marked exhibit **AME5** and **EOA4** produced by the parties. This nomination was for the position of Member of County Assembly which qualification is provided for under Article 193 as stated hereunder:

193(1) Unless disqualified under clause (2) a person is eligible for election as a member of a County Assembly if the person:

- (a) Is registered as a voter;**
- (b) Satisfies any education, moral and ethical requirements prescribed by this Constitution or an Act of Parliament;**
- (c) Is either;**
 - (i) Nominated by a political party; or**
 - (ii) An independent candidate supported by at least five hundred registered voters in the ward concerned.**

32. Both Article 193 and Regulation 15 of the Election (Party Primaries and Party Lists) Regulation 2017 have no such requirement that one must be a registered voter in the place where they are applying to be nominated and therefore the nomination application form by Jubilee Party cannot supercede the Constitution and written laws since the only requirement provided for under the law is that, one must be a registered voter and the 1st Respondent has met this requirement.

33. The 3rd Respondent did not in any way rearrange the list submitted by the 2nd Respondent and it proceeded to gazette the parties in accordance with Section 36(8) of the **Elections Act, 2011**. From the application forms, the Petitioner and 1st Respondent applied for different special seat (Youth and Marginalized). There are no competing interests between them so that even if this court revokes the Gazette Notice **No. 8380**, the Petitioner would not be eligible to be nominated in the slot of the 1st Respondent as she had not applied for that position.

34. I hold the view that the 1st Respondent was properly nominated and the 3rd Respondent fully complied with the provisions of Article 90, 177 of the Constitution. Section 36(8) of the **Elections Act, 2011**. Regulations 54, 55 and 56 of the **Elections (General) Regulations 2012**.

35. **Issue No. 4;**

On the relief sought, having held that the 1st Respondent was properly nominated and the 3rd Respondent discharged its mandate as required by law, the relief sought by the Petitioner fail as I proceed to dismiss the Petition and hold the **Gazette Notice No. 8380** is valid and the 1st Respondent is duly nominated as Member of County Assembly Kisii County under the marginalized group.

36. On the issue of costs, I direct that each party bears its own costs of the suit.

JUDGMENT DATED and DELIVERED at KISII this 25TH DAY of JANUARY, 2018.

V. KARANJA

SENIOR RESIDENT MAGISTRATE

In the presence of:

Mr. Nyambati for the Petitioner

Mr. Kaburi for the 1st Respondent

N/A for the 2nd Respondent

N/A for the 3rd Respondent

N/A for the 4th Respondent

Grace court assistant