



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT NAIROBI

ELECTION PETITION NO. 23 OF 2017

IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE GAZETTEMENT OF NOMINATED MEMBERS OF THE COUNTY ASSEMBLY

AND

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

BETWEEN

HAMIDA YAROI SHEK NURI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

AMANI NATIONAL CONGRESS.....2ND RESPONDENT

FAITH TUMAINI KOMBE.....3RD RESPONDENT

JUDGMENT

1. The petitioner herein HAMDIA YAROI SHEK NURI moved this court by way of a petition dated 25th September, 2017 seeking the following reliefs:-

- a) A declaration that FAITH TUMAINI KOMBE was not eligible for nomination as a Member of County Assembly for Tana River County Assembly as she is not a registered voter.
- b) A declaration that the nomination of the 3rd Respondent as a Member of County Assembly was invalid, null and void.
- c) That this Honourable court be pleased to bring into this court for the purpose of quashing and to quash the nomination of FAITH TUMAINI KOMBE as a Member of County Assembly, Tana River County contained in Gazette Notice Number 8380.
- d) That this honorable court be pleased to compel the 1st respondent to Gazette the petitioner, HAMDIA YAROI SHEK NURI, among the duly nominated Members of County Assembly of

Tana River County for being the woman nominee of the 2nd respondent for Tana River County Assembly Nominee in the Gender top up list.

e) That the costs of this petition and interest thereon be provided.

f) Any other order that this court may deem just and fit in the circumstances.

2. This is a party list petition in respect of the Amani National Congress Party list for Tana River County which had three nominees in the following order:

i. FAITH TUMAINI KOMBE

ii. CATHERINE MUTHONI MWAURA

iii. NURI HAMDIA YAROI SHEK

3. After receiving the said party list, the 1st respondent gazetted the name of FAITH TUMAINI KOMBE as the 2nd respondent's nominated Member of County Assembly, Tana River County. This is the decision which is being challenged in this petition.

4. The petition is grounded on the petitioner's supporting and supplementary affidavits as well as the grounds stated on the face of the petition.

5. The 1st respondent opposes the petition by way of a reply to petition and a replying affidavit, both dated and filed on 24th November, 2017 with leave of the court.

6. The 1st and 2nd respondents filed their responses to petition which were later struck out by the court for having been filed out of time and without leave of the court. Consequently, by virtue of the provision of Rule 11(8) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, the 1st and 2nd respondents did not participate in the subsequent proceedings.

7. By consent of the petitioner and the 3rd respondent through their respective counsels, the matter was disposed of by way of written submissions which were orally highlighted before court on the 11th December, 2017.

8. Having carefully read through the petition, the affidavits in support thereof, the response filed by the 3rd respondent, the affidavit filed by the 3rd respondent in support of the response to the petition as well as the written and oral submissions, I have deduced the following to be the issues for determination in this petition: -

i. Whether or not the 3rd respondent was validly nominated and subsequently elected as a member of Tana River County Assembly.

ii. If the answer to issue (i) above is in the negative, what orders or reliefs should the court grant?

Whether the 3rd respondent was validly nominated and subsequently elected as a member of Tana River County Assembly

9. The petitioner contends that the 3rd respondent was not validly nominated for the reason that she was not a registered voter and therefore failed to meet the requirement set out under Article 193(1) (a) of the Constitution of Kenya 2010 which requires that in order for a person to qualify for election as Member of County Assembly, they must be registered as a voter, amongst other requirements. The other constitutional requirements are not in issue in this petition so I will not list them in this judgment.

10. The constitutional qualifications provided by Article 193(1) are replicated word for word under section 25(1) of the elections Act, Act Number 24 of 2011. As rightly submitted by counsel for the petitioner, the first consideration both under the Constitution of Kenya and the elections Act for a person to be eligible for nomination and/or election as a member of a County Assembly is that the person must be a registered voter.

11. In her supporting affidavit at paragraphs 9, 10, 11 and 12, the petitioner has explained why she believes that the 3rd respondent is not a registered voter as follows: -

“9. THAT out of curiosity, I have searched on the register of voters of Tana River County and found out that the 3rd Respondent’s name is not among the registered voters within Tana River County or anywhere else for that matter.

10. THAT the name and national I. D card number of the 3rd respondent as published in the daily nation dated 23/7/17 and Kenya Gazette notice No. 8380 do not so appear in the register of voters for Tana River County hence the 3rd respondent was and is ineligible for nomination as MCA to Tana River County Assembly.

11. THAT except myself, the particulars of the other two names appearing in the daily nation publication as prospective nominees for the 2nd respondent do not appear on the voters register for Tana River County.

12. THAT except myself, no other person proposed by the 2nd respondent to the 1st respondent qualified to be nominated to the Tana River County Assembly.

12. In a bid to prove that the 3rd respondent and the other nominee of the 2nd respondent are not registered voters, the petitioner annexed to her supplementary affidavit annexure HYSN1 being screenshots from the 1st respondent’s SMS platform indicating that the 3rd respondent and the other nominee of the 2nd respondent are not registered voters. The response received from the short messaging service code 70,000 used to check voter registration details from the 1st respondents shows that the 3rd respondent as well as Catherine Muthoni Mwaure who was the 2nd respondent’s other nominee were not registered voters. The electronic print outs are also accompanied by a certificate marked HYSN2.

13. The 1st respondent stated in its response to petition that the 3rd respondent is a registered voter in Tana River County and invited the petitioner to strict proof of the converse. The 1st respondent did not, however avail any evidence of the registration of the 3rd respondent as a voter despite the fact that they are the legal custodian of the voters register for the Republic of Kenya.

14. Salome Oyugi who swore the replying affidavit dated 24th November, 2017 did not address the issue as to whether FAITH TUMAINI KOMBE and CATHERINE MUTHONI MWAURA are registered voters. The defendant neither confirmed nor denied the allegation that the two are not registered voters. The deponent insists that the nomination was done in accordance with the law in order of priority in the list supplied by the 2nd respondent.

15. The petitioner’s averments in her sworn affidavits raise very weighty issues. The petitioner provided to the court the evidence that was reasonably within her reach in support of her claim that FAITH TUMAINI KOMBE and CATHERINE MUTHONI MWAURA are not registered voters. The 1st respondent being the constitutional body charged with the mandate of registering voters in Kenya and maintaining the voter register has all the relevant information in their possession.

16. The petitioner did all that was within her ability to demonstrate that she was a registered voter and that the other two nominees were not. The evidential burden then shifted to the 1st respondent to prove otherwise. This was the holding of the Court of Appeal in **Dickson Mwenda Githinji v Gatirau Peter**

Munya & 2 Others [2014] eKLR where it stated thus:-

“Guided by the provisions of Section 112 of the Evidence Act, it is our considered opinion that failure by the 2nd and 3rd respondents to produce a certified and confirmed figure as to the total number of registered voters at Yururu Primary Polling Station Streams 1 and 2 means that they did not discharge the evidential burden of proof cast upon them. The total number of registered voters is a fact and matter that was well within the personal knowledge of the 2nd and 3rd respondents. The 2nd and 3rd respondents cannot hide behind the concept of legal burden of proof and fail in its duty to provide a statutory figure that is well within its knowledge and custody. It is not sufficient to state that the origin and authenticity of the figure given by the appellant has not been established. Whereas we agree with the trial Judge’s finding that the number given by the appellant as representing the total registered voters cannot and could not be used, this is because the appellant is not the custodian of the register of voters and the appellant by any stretch of imagination cannot authoritatively provide the total number of registered voters.

We find that the evidential burden to prove the total number of registered voters is on the IEBC and not on the petitioner. The Constitutional and statutory duty to register voters and prepare the voters register is on the IEBC and this duty entails generating the total number of registered voters in the country in general and in each polling station in particular. This duty should not be confused with the legal burden to prove the allegations raised in the Petition. The legal burden to prove allegations in an election Petition rests with the petitioner but the evidential burden to provide the total number of registered voters is a Constitutional and statutory obligation on the IEBC. This Constitutional and statutory duty is constant and cannot shift. The 2nd respondent is the statutory custodian of the voter’s register and it cannot be gainsaid that the evidential burden to prove the total number of registered voters can never shift to the appellant. We find that the learned Judge erred in placing the burden to prove the total number of registered voters on the appellant/petitioner. The 2nd and 3rd respondents are the official statutory custodians of the figure representing the total number of registered voters and they should have produced the same to counter the allegations by the appellant.”

17. In this case, the 1st respondent assumed a passive role and failed to produce a certified extract of the voters’ register to prove that the 3rd respondent and the other nominee by the 2nd respondent were registered voters. The 1st respondent therefore failed to discharge the evidential burden of proof cast upon it by the law. The 1st respondent’s constitutional and statutory duty to reveal who is or is not a registered voter cannot be shifted to the petitioner. The 1st respondent cannot hide behind the concept of legal burden of proof and neglect its duty to provide a voters’ register that is well within its knowledge and custody. Had the 1st respondent not failed in this duty, this petition which is a single issue petition would have been automatically determined by the production in court of the relevant information regarding the registration details of the three nominees of the 2nd respondent.

18. In the circumstances of this case, and in view of the refusal and/or neglect by the 1st respondent to avail the voters’ register, the court hereby accepts the uncontroverted evidence provided by the petitioner and therefore finds and holds that the 3rd respondent, and indeed the other nominee of the 2nd respondent, are not registered voters.

19. Under Regulation 52(2) of the Elections (General) Regulations, 2012, the 1st respondent was required to satisfy itself that all the nominees of the 2nd respondent had met all the constitutional and statutory requirements. It cannot be a defence for the 1st respondent to claim that no complaint was lodged after it published the names in the local dailies. The 1st respondent failed to discharge its statutory duties as set out in Regulations 54(5), 54(6) and 55(2) of the Elections, (General) Regulations 2012 with the result that it ended up gazetting an unqualified person.

What orders or reliefs should the court grant?

20. Flowing from my foregoing analysis of the evidence and the law, it follows that out of the three persons nominated by the 2nd respondent only the petitioner was qualified for nomination and/or election as a member of County Assembly. The 2nd nominee one CATHERINE MUTHONI MWAURA did not even raise any issued after the commission failed to gazette her name. Since the 2nd respondent's list had only three nominees out of which only one is qualified to hold the position of Member of County Assembly, the rejection of the other two ought not to affect the 2nd respondent's list.

21. In the result, I do find merit in the Election Petition dated and filed on the 25th September, 2017 and allow it in the following terms:

a) A declaration is hereby made that FAITH TUMAINI KOMBE was not eligible for nomination as a Member of County Assembly for Tana River County Assembly as she is not a registered voter.

b) A declaration is hereby made that the nomination of the 3rd Respondent as a Member of County Assembly was invalid, null and void.

c) The nomination of FAITH TUMAINI KOMBE as a Member of County Assembly, Tana River County contained in Gazette Notice Number 8380 is hereby set aside.

d) The 1st respondent is hereby ordered to forthwith, and in any case not later than 7 days from the date of this judgment, Gazette the petitioner, HAMDIA YAROI SHEK NURI, among the duly nominated Members of County Assembly of Tana River County for being the woman nominee of the 2nd respondent for Tana River County Assembly Nominee in the Gender top up list.

e) On the issue of costs, the 1st respondent shall bear the petitioner's costs since their neglect of constitutional and statutory duty is what culminated in the confusion that necessitated the filing of this petition.

D. W. Mburu

Principal Magistrate

Dated, signed and delivered in open court this 19th day of January, 2018.

In the presence of:-