



REPUBLIC OF KENYA

IN THE SENIOR RESIDENT MAGISTRATES' COURT AT MANDERA

ELECTION PETITIONS NOS 2&5 OF 2017[CONSOLIDATED]

IN THE MATTER OF THE ELECTIONS ACT NO 24 OF 2011 & THE ELECTIONS [PARTY
PRIMARIES AND PARTY LISTS] REGULATIONS 2017

AND

IN THE MATTER OF NOMINATED MEMBERS OF THE COUNTY ASSEMBLY FOR MANDERA
COUNTY

BETWEEN

HAFIDMAALIM IBRAHIM-----1ST PETITIONER

MOHAMED ALI BASHIR-----2ND PETITIONER

VS

ECONOMIC FREEDOM PARTY-----1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION-----2ND RESPONDENT

ISSACKDAHIR ABDI-----3RD RESPONDENT

HALIMA BILLOW OMAR-----4TH RESPONDENT

JUDGEMENT

Introduction

HafidMaalim Ibrahim and Mohamed Ali Bashir hereinafter referred to as the 1st and the 2nd petitioners are male adults residing within Mandera County and elsewhere within the republic of Kenya. The 1st respondent is the Economic Freedom Party, a political party registered in Kenya under article 91 of the constitution of Kenya and the political parties act responsible for the preparation of and submission of party lists to the Independent Electoral & Boundaries Commission pursuant to and in accordance to article 90 of the constitution of Kenya and sections 28,34,35,36 and 37 of the elections act 2011. The 2nd respondent is the Independent Electoral and Boundaries Commission, a Commission established under article 88 (1) of the Constitution of Kenya 2010 responsible for conducting referenda and elections to any elective body or office established by the constitution and any other elections as prescribed by an act of

parliament and in particular for-

(a)the continuous registration of citizens as voters

(b)-----

(c)-----

(d)the regulation of the process by which parties nominate candidates for elections

(E) the settlement of electoral disputes including disputes relating to or arising from nominations excluding election petition and disputes arising subsequent to the declaration of election results

(f)-----

(g)-----

(h)-----

(i)-----

(j)-----

(k)-----

The 3rd and 4th respondents IssackDahir Abdi and Halima Billow Omar are the persons who were nominated by the 1st respondent and gazette on the 28th of august 2017 to fill the two slots allocated to the 1st respondent by the 2nd respondent pursuant to and in accordance to article 177 (1) (c) on the basis of proportional representation provided under article 90 (1) of the constitution.During the general election held on the 8th of august 2017,the 1st respondent was allocated two special interest groups seats in the Mandera county assembly in the youth and the persons with disabilities categories .the 1st respondent nominated the 3rd and the 4threspondents to those seats. The petitioners were aggrieved by the nominations and filed their separate petitions dated 4th September 2017 and 15th September 2017 respectively. The two petitions were consolidated and heard as one because the nomination to which they related to and the persons whose nomination was being challenged were the same.

THE 1ST PETITIONERS'CASE

The 1st petitioners' case was that the 1st petitioner had intended to contest in the general elections held in august 2017 for the member of the county assemblyto represent Rhamu ward in the Mandera county assemblyon the economic freedom party ticket but was allegedly prevailed upon by the party leadership together with counsel from clan eldersto halt his ambitionsand in the process he was promised an automatic slot in the nominee position on a marginalized/disabled front in the county assembly in the likely win in the general elections.That the 1st petitioner having had a fair expectation of an automatic slottook it in his stride and continued to invest heavily in financing the 1st respondents'activities,campaigns thereby propagating the party's agendato the electorate and at the same time endearing himself as a foot soldier.That the 1st petitioner applied forinclusion on the party list for consideration on marginalized/minoritygroup slot.That the leadership of the 1st respondent in a well - choreographed move to lock out the 1st petitioner,proceeded and instead of listing him in the rightful slot that he had applied for,listed him in the gender top-upcategory .During his examination in chief he said that he only applied for consideration as a person with disability.That his name was published by the 2nd respondent in the party list submitted by the 1st respondent for persons eligible for considerationon disability .That unknown to the 1st petitioner,the 1st respondentthrough its cartels proceeded to alterthe

published names and forwarded the 3rd and 4th respondents' names for gazette when the said nominees did not meet the constitutional threshold for nomination to the positions. The 1st petitioner challenges the nomination of the 3rd and 4th respondents on the following grounds:-

- (1) That whereas the 4th respondent had applied for consideration on gender top-up, she was nominated on a ticket that was not available to her being that of a marginalized list.
- (2) The 4th respondent is not at all disabled
- (3) That the final gazette list is devoid of clarity as parties down the list were favored without any known formula
- (4) That the 3rd respondent was number 22 on the published list and is a former MCA for Rhamu ward hence had undue advantage over the 1st petitioner and all the other candidates seeking nomination
- (5) that the 3rd respondents' occupation is fraudulently indicated as business when in fact he was a former MCA which is against the law
- (6) That the 1st petitioner has been denied the promised direct nomination.
- (7) That the 4th respondents' name has been gazetted as a person with disability against her application and without a court order for such alteration

On the basis of these grounds the 1st petitioner seeks judgment and orders for:-

- (a) That the nomination of the 3rd and 4th respondents by the 2nd respondent on account of the submission of the names by the 1st respondent to represent the people of Mandera county in the Mandera county assembly be nullified for failing to meet the mandatory constitutional threshold and same be found to be null and void.
- (b) A finding that the 3rd respondent and the 4th respondent have not been validly gazetted in a fair, impartial and open process and an order issued that the 4th respondents' nomination to the Mandera county assembly be replaced by the 1st petitioner as was intended by the published list'
- (c) In any event the 1st and the 2nd respondents be condemned to pay costs of this petition.
- (d) Such other reliefs and consequential orders the honorable court may deem just and expedient in the circumstances to grant.

THE SECOND PETITIONERS' CASE.

The second petitioners case was that the party list that was published on the 28th August 2017 in Kenya gazette notice number 8380 wherein the 3rd respondent was Gazetted as the 1st respondents nominee to represent the interests of the youth in the Mandera county assembly had been altered, varied and or changed irregularly and illegally. His contention was that the list published on 28th August 2017 was not the list submitted to the 2nd respondent by the 1st respondent on 21st August 2017 in compliance with the orders of the Political Parties Disputes Tribunal (PPDT) in Complaint No.528 of 2017 Noordin Ismail Sheikh Vs-Economic Freedom Party & Another. In that case the 1st respondents' party list was nullified and the 1st respondent was ordered to prepare a new list in line with the law and its own rules. That in the new list the 2nd petitioner had been listed first in priority to be nominated for youth affairs but that the 2nd respondent deliberately refused and /or failed to follow the list that was submitted to them by the 1st

respondent on 21st August 2017. That the 2nd respondent acted extraneously without authority and unlawfully published the 3rd respondent's name as the member of the county assembly nominee for youth affairs. That the 3rd respondent was not eligible for nomination as his name was at number 20 on the list by the 1st respondent. That the second respondent exceeded its powers by failing to have due regard to the 1st respondent's list as submitted to it on 21st August 2017 and consequently irregularly and illegally omitted the 2nd petitioner's name who was number one in priority on the list for nomination to the county assembly to represent the youth. That the publication by the 2nd respondent was marred by electoral mismanagement, massive irregularities and malpractices including interference and mishandling of the 1st respondent's nomination list by the 2nd respondent's officials and therefore the whole publication is null and void. That the 2nd respondent deliberately mismanaged the publication process, manipulated the final publication, colluded with the 3rd respondent by giving him undue advantage over the 2nd petitioner and other candidates seeking nomination contrary to articles 10 (2) (b), 38, 81, 90 (1), (2) and (3) of the constitution. The 2nd petition urged the court to allow the petition and grant the following orders:-

- (1) A declaration that the 2nd respondent herein exceeded its powers by failing to have due regard to the list submitted on 21st August 2017 and consequently irregularly and illegally omitting the name of the 2nd petitioner whose name was in the list submitted to the second respondent.
- (2) A declaration that the 2nd petitioner's right to legitimate expectation was violated by the 2nd respondent who irregularly and illegally omitted his name which was contained in the list forwarded on 21st August 2017 for purposes of allocation of special seats in the Mandera county Assembly.
- (3) A declaration that the 3rd respondent was irregularly and illegally nominated as the 1st respondent's nominee for youth Affairs and therefore the nomination is null and void.
- (4) A declaration that the 2nd petitioner is the duly nominated representative of the 1st respondent in the Mandera county assembly for youth affairs.
- (5) A declaration that the 2nd respondent exceeded its powers by failing to have due regard to the list that was submitted to it on 21st August 2017 by the 1st respondent and consequently irregularly and illegally omitting the 2nd petitioner's name that was forwarded by the 1st respondent
- (6) costs of the suit
- (7) Any other or further relief that the honorable court may deem fit and proper in the circumstances.

RESPONSES TO THE PETITIONS

The Respondents filed their responses in opposition to the petitions. The 1st respondent filed his responses one dated 12th September 2017 and another dated 21st September 2017. The responses were accompanied by the affidavits of Abdullahi Abdinoor Gessey, the secretary general of the first respondent and annexures in support of their responses. Its contention was that the petitioners' allegations were not true and that the petitions were frivolous, vexatious, scandalous and an abuse of the process of the court. It maintained that the nomination of the 3rd and 4th respondents was conducted in accordance with the law and the party nomination rules and prayed that the petitions be dismissed with costs.

The 2nd respondent filed its responses dated 18th September 2017 and 25th September 2017. Both responses were supported by the affidavits of one Salome Oyugi, the legal officer of the 2nd respondent. The second respondent denied the denunciations contained in the petitions and averred that during the nominations, the 2nd respondent upheld the nomination laws and at all times used the list

submitted by the party ,the 1st respondent .That it allocated the seats as envisaged in section 36 of the Elections Act and most specifically that it ensured that the party list submitted by the 1st respondent was adopted as per the priority of the names presented.The 2nd respondent urged the court to find that the 3rd and 4th respondents were validly nominated and dismiss the two petitions with costs.

The 3rd respondent also filed his responses to the petitions one dated 12thseptember 2017and another dated 21st September 2017.The responses were supported by affidavits sworn by himself IssackDahir Abdi .He denied that he altered,varied or changed the party list prepared by the party or that he colluded with the other respondents to manipulate the list to have his name appear first in priority. He prays that the petitions be dismissed with costs.

The 4th respondent also filed his response to the petition filed by the first petitioner which was supported by an affidavit sworn on 12th September 2017.In her responseshe said she is a female adult living with disability and a life member of the Economic Freedom Party ,the first Respondent herein. She maintained the she applied to the party for nomination and that she was validly nominated to represent persons with disability and to bring gender equality and equity in the Mandera county Assembly as required by law. She annexed copies of documents to prove she was living with disability .she urged the court to dismiss the petition and award her costs.

THE LAW

The law governing election nominations relevant to this case is contained in Articles 90 and 177 of the constitution of Kenya 2010 and sections 34,35,36 and 37 of the Elections Act 2011together with the rules made thereunder.

Art 90(1)requires that political parties nominate persons to serve in special seats provided under Articles 97(1)(c),98(1)(b)(c)and(d)and for members of county assembly under article 177(1)(b)and(c).Allocation of those seats shall be on the basis of proportional representation by use of party list. The provisions of article 90 are couched in mandatory terms .it means therefore that nomination could not be done in any other manner except that which is provided by the constitution. The seats shall be allocated depending on the number of seats apolitical party won in the county and once allocated nomination to those seats was by use of party lists.

Section 2 of the Elections Act 2011 defines party list.

“Party list means a party list prepared by a political party and submitted to the commission Pursuant to and in accordance with article 90 and sections 28,34,35,36 and 37” .

A party list therefore is prepared by a political party.it is submitted to the commission(The Independent Electoral and Boundaries Commission of Kenya)Pursuant to and in accordance with the law.it means that a party list cannot be prepared by an individual and that it must be submitted by the political party to the commission.

Article 90(2)The Independent Electoral andBoundaries Commission shall be responsible for the conduct and supervision of elections for seats provided 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.

(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 priority in which they are listed

Art 90(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 party at the general election.”

Art 91(1)-every political party shall;-

(e) respect the right of all persons to participate in the political process including minorities and marginalized groups,

(f) respect and promote human rights and fundamental freedoms, gender equality and equity

(g) promote the objects and principles of this constitution

The disputes herein relate to the nomination to special seats provided under article 177(1) (b) and (c) of the constitution.

Article 177(1) provides that the county Assembly shall consist of-

(a)----

(b) the number of special seat members necessary to ensure that not more than two-thirds of the membership are of the same gender,

(c) the number of members of marginalized groups including persons with disability and the youth prescribed by an act of parliament

Art 177(2) the members contemplated in clause (1)(b) and (c) shall be nominated by political parties proportional to the seats received in that election in that county by each political party under paragraph (a) in accordance with article 90.

Art 177(3) the filling of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward

Art 177(4) a county Assembly is elected for a term of five years.

Section 34 of the Elections Act provides the procedure for nomination of party list members and the duration during which such nomination lasts.

s.34(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.

s.34(5) The party lists under subsection 2, 3 and 4 shall be submitted in order of priority

s.34(6) the party list submitted to the commission under this section shall be in accordance with the constitution or the nomination rules of the party

s.34(7) the party list submitted to the commission shall be valid for the term of parliament

s.34 (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.

This is the law as it is. It is couched in mandatory terms. There is no room for discretion by the party, the commission or those who may wish to be nominated. It is to be followed as it is.

BURDEN OF PROOF

It is now settled that the burden of proving the allegations made in an election petition, lies with the

petitioner. In Benard Shinali VS-Boni Khalwale 2011 eKLR, Rawal J as she then held that-

“the burden of proving any allegation made in an election petition lies with the petitioner and has to be to the satisfaction of the court on a higher degree than merely on a balance of probabilities”

The threshold should in principle be above the balance of probability though not as high as beyond reasonable doubt. The petitioner in any election petition must present cogent evidence before court in support of all the allegations made in the petition in regard to any purported breaches of the law by the respondents. Mere suspicion or perception will not suffice. The allegations must be proved by hard concrete evidence. It is against this background that I have carefully considered the pleadings, the evidence and submissions made by counsels for the parties

ISSUES FOR DETERMINATION

The parties in these petitions did not frame issues for determination. After perusing the pleadings filed by the parties I came up with the following issues-

1. Whether the dispute arose subsequent to the declaration of the election results
2. Whether the petitioners were members of the party
3. Whether the petitioners were eligible for nomination by the party
4. Whether the petitioners were nominated by the party
5. Whether the party or any of the respondents violated the party nomination rules, the provisions of the Elections Act or the Constitution
6. Whether the party list submitted by the party to the commission for purposes of section 34(4) of the Elections Act can be amended during the term of the county Assembly for which the 3rd and 4th respondents were nominated

In this case the Economic Freedom Party was allocated two special seats for youth and the other for PWD (Person with Disability) by the commission after the results from all the wards had been declared and the party nominated the 3rd and 4th respondents herein who were gazetted by the Commission as duly nominated on 28th August 2017. After hearing the testimonies of the petitioners I find that it is not in dispute that the petitioners and the 3rd and 4th respondents were members of the Economic Freedom Party immediately before, during and after the questioned nominations. It is also not in dispute that the second petitioner and the 3rd respondent were both eligible for nomination by the party to the Mandera county Assembly to represent the youth and that it was the party to forward the names of its nominees in order of priority. It is also not in dispute that the 4th respondent is female and that she had applied to be considered for nomination to the party list by the party and that the initial party list prepared by the party and submitted to the commission on 21st September 2017 was nullified by the Political Parties Disputes Tribunal on 2nd of August 2017 and the Party was ordered to prepare a fresh list in accordance with the law and its own rules. The petitioners have not said that they ever applied afresh for consideration in the new party list or how they were to be considered but they agree that in the subsequent party list the name of the 3rd respondent appeared number one on the list in priority of the youth while the name of the 4th respondent appeared first in priority for persons with disabilities.

Whether the respondents violated the party nomination rule, the provisions of the Elections Act 2011 or the Constitution?

The petitioners allege that the initial list was altered, varied or changed. That the 1st and 2nd respondents manipulated the list to give the 3rd respondent undue advantage over other candidates who were seeking

nomination. That the 2nd respondent mishandled the list submitted to it by the party causing massive electoral malpractices, irregularities and illegalities

EVIDENCE

The petitioners did not produce any cogent evidence to prove any of the allegations made in the petitions of breaches of the law against any of the respondents. They chose to rely on mere suspicions, perceptions and conjectures which at the end of the day could not prove anything.

Whether the dispute arose subsequent to the declaration of the election results

The issue when the dispute arose goes to the root of the petitions because it will determine whether the petitions are properly before this court. Section 74 of the Elections Act 2011 provides for settlement of certain disputes by the Independent Electoral and Boundaries Commission. Subsection (1) states:-

“Pursuant to article 88(4)(e) of the Constitution, the Commission shall be responsible for 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”

That section gave the Commission the mandate to settle certain electoral disputes including disputes related to or arising from nominations.

Subsection (3) of that section further provides that:-

“Where a dispute under subsection one relates to a prospective nomination or election that dispute shall be determined before the date of the nomination or election whichever is applicable”.

“Prospective” means that which is likely to happen, take place or come about in the future.

The nominations the subject matter of the petitions were to be made after all the election results from the wards in Mandera county had been declared. In the future. Any dispute relating to or arising from these nominations ought to have been settled by the Commission before the date of the nominations as provided by the law. It is therefore the IEBC who had jurisdiction to settle the petitioners' dispute. There is no evidence that they lodged their disputes with the legally mandated body before coming to this court. The petitioners have not given any reasons why they did not and I cannot find any other reason but to assume that they are forum shopping. Having failed to lodge their dispute with the Commission before the date of the nominations as is required by law I find their petitions herein are not properly before this court and are otherwise an abuse of the process of court.

Whether the party list submitted by the Economic Freedom Party to the IEBC for purposes of section 34(4) of the Elections Act can be amended during the term of the County Assembly for which the candidates were elected

Section 34 (10) of the Elections Act provides the answer to that issue. The law provides that:-

“A Party list submitted for purposes of subsection 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”.

I will not add anything.

FINDINGS AND CONCLUSION

It is the finding of the court that:

- (1) The petitioners have not proved any of the allegations of breach of the party nomination rules, the law or the constitution of Kenya as contained in their petitions against any of the

respondents.

(2) The IssackDahir Abdi and Halima Billow Omar the 3rd and 4th Respondents herein were nominated in accordance with the constitution and the Law

(3) That the party list submitted by Economic Freedom Party to The IEBC for the purposes of their nomination cannot be amended during the term of the County Assembly for which the y were nominated

(4) The petitions before this court were frivolous vexatious scandalous and an abuse of the court processes

(5) This court had no jurisdiction to entertain the petitions and the same ought to have been struck out ab initio.

Accordingly I strike out and/or dismiss the petitions dated 4th September 2017 and 15th September 2017 (consolidated) with costs to the respondents to be borne by the petitioners severally.

Those are my orders.

Dated, signed and delivered in open court this 9th day of January 2018

Signed: P.N. Areri (SRM)

Magistrate

In the presence of

Mr. Nyaberi-----for 1st Petitioner

Mr. Kurui-----for 2nd Petitioner

N/A-----for 1st Respondent

N/A-----for 2nd Respondent

N/A-----for 3rd Respondent

N/A-----for 4th Respondent

R/A 30 days