



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE COURT AT NAIROBI
MILIMANI COMMERCIAL COURTS
ELECTION PETITION NUMBER 22 OF 2017

HELLENAH KISIKU KITHEKA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

In this petition, the petitioner alleges that her name appeared in the final party list submitted by her party to the respondent on the 7th August 2017 pursuant to article 177 (1) (b) of the constitution. *She alleges that* she was placed position (11) eleven in the gender top up list and thus was position 6 (six) of the females in that final party list. She further states that subsequent to the elections her party, Orange Democratic Movement, was allocated 14 (fourteen) seats in the Nairobi County Assembly under gender top up. That thereafter, on the 28th August 2017 through gazette Notice Volume CXIX NO. 124 the respondent gazetted the Nairobi Nominated members of County Assembly for the Orange Democratic Movement Party. That the party having been allocated fourteen seats her name should have appeared in the Gazette Notice for nominees but it did not. That the said nominated members were subsequently sworn in by the respondent. It is alleged that the respondent failed to conform to the party list forwarded to it by Orange Democratic Movement and received on the 10th August 2017. It is also stated that the Orange Democratic Movement Party leader wrote a letter of protest against the respondent acts but the respondent went ahead and swore the nominated members. It is alleged that the respondent has no power under the Election Act or any other law to alter the list of nominees as proposed by any party and that its acts amount to breach and violation of the provision of the Act and the *Elections (General) Regulations 2012*, massive irregularities and Electoral Malpractices. That the respondent failed to act in accordance with the principals laid out in law and principals of the electoral process as set out in the Constitution. It is also pleaded that the 1st respondent failed to adhere to principals of natural justice, rule of law and democracy.

The petitioner further alleges that the gazette notice as published on 28/8/2017 fell short of the constitutional threshold required in publishing the names of the nominees to the office of Members of County Assembly in priority of nominees submitted by the party. The petitioner states that she is aggrieved by the respondent decision in failing to gazette her name per the list and seeks the following prayers:

- a) A declaration that the non-compliance, irregularities and improprieties in the Gazette Notice volume CXIX NUMBER. 124, under Schedule II, Nairobi Nominated Members of County

Assembly, Gender Top Up List of the Orange Democratic Movement Party dated 28th August 2017, were substantial and significant and that they altered the Final list of the Nominated Member of Nairobi County Assembly, Gender Top Up of the Orange Democratic Movement to the disadvantage of the Petitioner hereof.

b) A declaration that the Gazette Notice volume CXIX No. 124, under Schedule II, Nairobi Nominated Members of County Assembly, Gender Top – Up List of the Orange Democratic Movement Party dated 28th August 2017 was not in accordance with the principles laid out in the Constitution of Kenya 2010 and the applicable electoral laws and regulations, rendering the Nairobi Nominated Members of County Assembly, Gender Top –Up List of the Orange Democratic Movement Party invalid, null and void.

c) A declaration that *HELLANAH KISIKU KITHEKA*, the petitioner here is duly nominated **ELEVENTH (11)** Nairobi Nominated Members of County Assembly, Gender Top – up List of the Orange Democratic Movement Party being male and female and is the **SIXTH (6)** woman in the said list.

d) An order that the Respondent does a fresh gazette Notice in accordance with the ODM list dated 7th August 2017 and submitted to the Respondent on 10th August 2017 for the Nairobi nominated Members of County Assembly, Gender Top- Up List of the Orange Democratic Movement Party.

e) An order that the Respondent to do gazette and ensure the swearing in of the Petitioner as a Nairobi Nominates Members of County Assembly, Gender Top – up List of the Orange Movement Party.

f) The Respondent be condemned to pay your Petitioner’s costs and the incidentals to this Petition.

g) Such further, other and consequential orders as this Honourable Court may make lawful.

The petition is supported by the affidavit of the petitioner sworn on the 22nd September 2017 and the annexure attached to it in support of the petition. The annexures are:

i. Letter of submission of Orange Democratic Party list from the Party National Executive Council subcommittee chair Oгла Karani dated 7th August 2017.

ii. Copy of Gazette Notice volume CXIX No. 124 for 28th August 2017.

iii. Letter by the chair of Orange Democratic Movement Party Hon. Raila Amollo Odinga dated 2nd September 2017.

iv. Summary of the Respondent Ruling complaint number 434/2017.

In response to the petition the respondent admitted that it received the Orange Democratic Movement Party final party list for Nairobi County for the gender top up vide a letter dated 7/08 2017. That the list was received on 10/08/2017. It is admitted that the Orange Democratic Movement was allocated fourteen seats in the Nairobi County assembly for party list nominee gender top up and that the respondent gazetted nominated members on 28/8/2017 vide gazette notice CXIX Number 124 as alleged and subsequently swore in the said nominated members. It is contended that in designating special seats, the respondent adhered to the formula of allocation as set out under the law and denied that it in any way flouted the provision of the law. It denied that it acted unconstitutionally and unlawfully. It is further contended that the petitioner appeared as number 51 (fifty one) in the party’s final list and not number 11 (eleven) as alleged and denied that she was the sixth woman in the list. It denied that it acted illegally, unprocedurally and in bad faith. It is stated that the respondent acted within the constitutional and statutory limits of its mandate. The respondent admits that it received the alleged letter from Orange Democratic Movement leader but states that the letter did not adhere to time limits set under the law. It

denied that it altered the party list. It also denied that it presided over complaint Number 434 of 2017. The respondent prays to this Court that;

- a) The petitioner's petition dated 22nd September 2017 in its entirety and denies all of the Petitioner's prayers and orders sought therein;
- b) It is declared that the Respondent, by publishing Gazette Notice number 8380 of 28th August, 2017 in which it declared the ODM duly elected members of the Nairobi County Assembly, acted within its constitutional and statutory mandate and in compliance with the principles of proportional representation and gender balance.
- c) The Petitioner prays the costs of this petition.

The response is further supported by the affidavit of Salome Oyugi the respondents legal officer plus the annexure stated in the response which are:

- i. Final list for Gender Top up Nairobi County submitted to it vide a letter dated 7/8/2017 and received on 10th August 2017.
- ii. Gazette Notice CXIX no. 124 of 28th August 2017.

The parties filed agreed issues. There after they filed written submissions. They then appeared before Court for highlighting of the written submissions.

The Court will consolidate the agreed issues into only two:

- i. Whether Independent Electoral & Boundaries Commission altered the final list sent to it by Orange Democratic Movement on the 7th August 2017 by failing to follow the party's priority and thus omitted the petitioner's name.
- ii. Whether in publishing gazette Notice Number 8384 of 124 for Gender Top up Orange Democratic Movement party violated its mandate under Constitution and the Election Act.

The Court will first examine the Independent Electoral & Boundaries Commission mandate under both the constitution and the Election Act.

In her submission the petitioner has taken the Court through various provisions of law regarding party lists.

Article 177 (1) (b) creates Gender Top Up seats in the County Assembly. Under Article 90 (1) of the constitution election for seats provided for under *Article 177 1 (b)* shall be on the basis of proportional representation by use of party list.

The Independent Electoral & Boundaries Commission mandate on party list is then created by *Article 90 (1) (2)* which provides;

“The Independent Electoral & Boundaries Commission shall be responsible for the conduct and supervision of election for seats provided for under clause 1 and shall ensure that:

- i. Each Political party participating in a general election nominate and submits a list of all the persons who would stand elected if the party were to be elected to all the seats provided for under clause (1) within the time prescribed by National Legislation.
- ii. Except in the case for seats provided for under *Article 98 (1) (b)* each party list comprises the appropriate number of qualified candidates and alternate between male and female candidate in the

priority in which they are intended”.

Under Section 34 (6) (A) of the Elections Acts once the Independent Electoral and Boundaries Commission receives the lists from a political party it has a duty to review it to ensure that it complies with the law. If it does not it will require the political party to amend the list and comply. It may reject it as well. Article 88 (4) (e) of the Constitution gives Independent Electoral and Boundaries Commission the mandate to settle electoral disputes including those relates to nomination Section 74 (1) of the Election Act provides for this mandate as well.

Regulation 21(2) of the election party primaries and party list regulation 2017, echoes the provisions of section 34 (6) A of the Election Act. Regulation 21 (2) mandates Independent Electoral and Boundaries Commission to sanitize a party list and if it is of the opinion that it does not conform to the regulation of the Constitution including Article 177 (1) (c), the Act and the aid regulation require a political party to review and amend the list so that it conforms to the requirement of the law and guidelines by the constitution. All the above quoted provisions clearly provide for Independent Electoral & Boundaries Commission mandate regarding party lists.

The mandate under Article 90 (2) of the constitution was emphasized in quoted case **BEN NJOROGE & ANOTHER VERSUS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS (2013) eKLR** in this decided case, it was held that if the independent Electoral and Boundaries Commission did not return the list to a party for amendments then it had deemed it valid and that its further mandate was to consider it in order of priority in which the nominees were listed. This mandate is again echoed in the decided case. **MOSES MWICIGI & 14 OTHERS VERSUS THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 14 OTHERS (2016) eKLR**

Further section 36 (7) of Election Act Provide;

“For purpose of Article 177 (1) (b) of the Constitution, commission shall draw the list under subsection (1) (a) such number of special seats members in the order of given by the party necessary to ensure that no more than two thirds of the membership of the assembly are of the same gender”.

The petitioner has alleged that the respondent violated its mandate by failing to draw from the list in the order of priority given by her party and as required by the provision quoted above and the quoted decided cases. The respondent has submitted that it did not make any alteration to the list and further submitted that the petitioner’s name did not appear in position 11 (eleven) of her party’s final list. **So which is this final list?** Paragraph 7 of the petition states that the final list was forwarded by the respondent vide a letter dated 7th August 2017. Paragraph 7 and 8 of the response to petition admits that the list was received on the 10th August 2017. From the pleadings under paragraph 14 of the response to petition, it emerges that an earlier list had been published by the respondent on the 23/07/2017 pursuant to Regulation 54(8) of election (General) Regulation 2012. The petitioner does not mention this list in the petition and whether her name appeared in it or not. Paragraph 17 of the petition however, confirms that the petitioner may not have been in the list published on 23/07/2017 or alternatively if she appeared in it she may not have been in what she perceived as a favourable position hence the statement that “the respondent through complaint **434 of 2017 ROSELYN GRACE OSOO VERSUS ORANGE DEMOCRATIC MOVEMENT** allowed the complaint, as the nominee was not a registered voter and her name was replaced by Ms. Hellenah Kisiku Kitheka in the Gender Top up list”. The respondent has denied that it presided over such a matter. Only a summary of the outcome of the complaint has been filed in Court. The ruling was not annexed to the petition. It’s not even clear who prepared the summary as it starts at page 2. It is on the strength of the said complaint that the petitioner alleges that she was placed position 11 (eleven) in the final list. She attached a letter from the chair of the party National Executive Council forwarding the final party list. She has also attached the list that she alleges was forwarded to respondent together with that letter. In that list she is placed position 11(eleven) of Gender top up category for her party. In a further list of documents supplied to the Court by the petitioner, an earlier list forwarded by her party to the respondent on 19th July 2017 is attached. She submits that this is the list published on 23/07/2017. In that list she is position 51 (fifty one).

The respondent on the other hand has attached the list sent to it on the 7th August 2017 which it terms final list. In that list the petitioner is position 51. What the petitioner submits is the list published on the 23/07/2017 is what the respondent submits was final list submitted to it by the party on the 7/8/2017 and from which list it picked the nominees it gazetted on 28/8/2017.

Further the petitioner relies on a letter of complaint to Independent Electoral & Boundaries Commission by the Orange Democratic Movement party chair that states that petitioner was positioned number 11 (eleven) in the final list. Respondent says that the letter did not adhere to its timelines and thus disregarded it. That letter is dated 2/09/2017. I find that the letter was written subsequent to the nominees names being published in a gazette notice on 28/8/2017 when the term of county assembly had already began as was held in the decided case ***NARC KENYA & ANOTHER VERSUS THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & THREE OTHERS (2013) eKLR***. The Court has noted that letters regarding party list were forwarded to Independent Electoral & Boundaries Commission by the party's National Executive Council chair. It is not clear why this particular letter of complaint did not emanate from that person. The respondent being the custodian of party lists pending outcome of the elections and even after elections is best placed to produce the accurate list. There is no reason and I have not found any why it would provide the wrong list to this Court. That list rebuts the petitioner's assertion that she was placed number 11 (eleven) in her party's final list. It was not difficult for the petitioner to enjoin her party as a participant in this matter for purposes of confirming which list was forwarded to the respondent on the 7/8/2017. It is noted that the lists produced by the petitioner in support of her case are not even certified as true copies of the party's record. It is difficult to know the documents authenticity. Given that the party was not invited to produce its final list in Court and that the ruling in the complaint that allegedly exchanged her position was not produced in Court, I find the final list produced by Independent Electoral & Boundaries Commission most reliable. Her party had placed her in position 51 (fifty one) and not 11 (eleven). The nominees in the gazette notice published on the 28/08/2017 follow the order of the party's priority per its final list exhibited by the respondent. The seats allocated to her party under gender top up were limited and so so the petitioner at position 51 (fifty One) could not be nominated. The respondent could only allocate seats up to position 26 (twenty six) and that is what is did. Further once the respondent's disputes committee makes a finding on any complaint and there is need for amendment of the party list, the list is sent back to the party for it to incorporate the amendments. Once a recommendation and directive is made, the party then amends its list. The finding of a tribunal thus cannot be sufficient evidence that the petitioner was indeed placed in position 11 (eleven) in the amended list. The Court is satisfied that the respondent discharged its mandate properly and in accordance with the principles laid down in the constitution and the Elections Act. It did not make any alteration to the final list.

In conclusion the petitioner's case is not proved as by law required and as set out in the decided case ***RAILA ODINGA & OTHERS VERSUS INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & THREE OTHERS (2013) eKLR***. In that case the threshold of proof of election petition matters "should in principle, be above the balance of probability though not as high as beyond reasonable reasonable doubt - save that this would not affect the normal standards where criminal charges linked to an election are in question." The petitioner's case does not attain that threshold. The orders sought are not merited. The petition is dismissed with costs to the respondent.

Costs not to exceed Kshs. 200,000/= (two hundred thousand shillings only).

HON E. K. USUI (MS.)

SENIOR PRINCIPAL MAGISTRATE

19/01/2018

Before Hon. E.K. Usui SPM

Court Assistant Omollo

Court: Judgment of court read and dated in open Court as per the typed copy in Court file on 19/1/2018.

Parties present:

Ms. Githuku and Githuku for Petitioner.

Mr. Walubengo for the Respondent.

Court Assistant: Omollo

HON E.K. USUI (MS)

SENIOR PRINCIPAL MAGISTRATE

19/01/2018

Ms. Githuku: Seek leave to appeal the decision. I would seek copies of judgment and typed proceedings. We also seek direction on release of security offered to Court.

Walubengo: We are satisfied with the judgment. Appeal is their right. It's the Appeal Court to decide. The security should not be released as they seek to appeal against that decision.

Court: Leave to appeal is allowed. Copies of judgment and proceedings to be supplied upon payment of requisite fee.

Security to be treated as part of the costs.

HON. E.K. USUI (MS.)

SENIOR PRINCIPAL MAGISTRATE

19/01/2018