



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT MIGORI

ELECTION PETITION NO 8 OF 2017

IN THE MATTER OF : ARTICLE 90,100 and 177 OF THE CONSTITUTION,2010

IN THE MATTER OF :THE ELECTION ACT,NO 24 OF 2011.

IN THE MATTER OF: THE ELECTIONS(GENERAL) REGULATIONS,2012.

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

IN THE MATTER OF : NOMINATIONS OF MEMBERS OF THE COUNTY ASSEMBLY OF MIGORI COUNTY.

MATILDER AUMA OLOO.....PETITIONER

V

INDEPENDENT ELECTORAL & BOUNDERIES COMMISSION...1ST RESPONDENT

ORANGE DEMOCTARIC MOVEMENT.....2ND RESPONDENT

PHILISTER ATIENO.....3RD RESPONDENT

AND

JAMES OTIENO OCHIENG RUKU.....INTERESTED PARTY

JUDGEMENT

Brief background

1] Consequent to the holding of the general elections on 8/8/2017, and subsequent nomination of members of Migori County assembly by 2nd respondent and subsequently gazetted of the nominated members, the petitioner herein was aggrieved of the nomination thereof . She therefore challenged vide this petition the nomination by the 2nd 2nd respondent, which petition was timeously filed and served upon the respondents.

2] The petition was filed in Chief magistrates Court at Migori. This court was gazetted to hear this petition. The same on 11/10/2017 was transferred to this Court by Migori High Court for disposal. The same was mentioned before this court on 23/10/2017 where pre-trial conference was set for 9/11/2017 by consent of counsel on record for parties herein.

3] All the respondents filed their respective responses to the petition except the 2nd respondent. No appearance was entered for the 2nd respondent.

4] The matter came up for directions on 30/11/2017, whereupon the counsel on record for respective parties agreed to have the petition canvassed by way of affidavits on record. The court further directed that parties file and exchange written submission. All parties did file respective submissions, which submissions are considered in this judgement.

The petitioner's case

5] The petitioner vide petition filed on 25/9/2017 sought the following prayers:-

a) A declaration that that Philister Atieno of ID No 955631 is not a person living with disability and is not registered by the National Council for Persons with Disabilities as required by the electoral laws. Hence she cannot be elected to be represent the special interest of people living with disabilities I County Assembly of Migori.

b) A declaration that Gazette Notice No.8380 published by the Independent Electoral Boundaries Commission on 28th August, 2017 in as far as it lists 3rd respondent as nominated Member of the county assembly of Migori under the Marginalized list is illegal null and void.

c) An order nullifying the nomination and subsequent gazette of the 3rd Respondent vide gazette No 8380 as nominated Members of the County Assembly in the ODM Party Marginalized List under people of disability Category.

d) An order directed to 1st Respondent to allocate the said seat held by the 3rd Respondent, for representation of marginalized groups in the County Assembly of Migori, to interested party herein who is the next nominee in the 2nd respondents' Party List for nomination to the County Assembly of Migori which was submitted to the 1st Respondent under Article 177 as read with Article 90 of the Constitution.

e) The Honourable Court do issue such orders and give such further directions as it may deem fit to meet the ends of justice.

f) Costs of and incidental to this suit be awarded to the petitioner

Petitioner's case.

6] The petitioners relied entirely on the petition supported by affidavit sworn by Petitioner and annexures thereto. The Petitioners averred as follows:-

7] That on or about May,2017, the Second Respondent invited its members to apply to be nominated to respective County Assemblies. The Petitioner being a life Member of the 2nd respondent and being interested for nomination to Migori County Assembly applied to represent the special interest of persons living with disability. She submitted her application before the deadline which was on 6th June, 2017 but her application was unsuccessful.

8] Thereafter, on 23rd July,2017, the 1st respondent through national dailies published the names nominated by respective political parties under Articles 97(1)(c),98(1)9(c) ,(d) and 177(1)(b) of the Constitution.

9] Subsequently, on 25th August 2017, the 1st Respondent through Gazette notice No 8380 gazetted the members elected by way of part lists to various County Assembly to various special interest . The 3rd respondent herein, Philister Atieno of ID No 0955631 was elected to Migori County Assembly to

represent the special interest of person living with disabilities.

The Respondents' case.

10] The 3rd respondent in her affidavit deponed that she tendered her application on 5/6/2017 for nomination to the 2nd Respondent for nomination for Migori County assembly to represent the special interest of persons living with disabilities.

11] She further averred that she is registered with the National Council for Persons with Disabilities(NCPWD) under registration number NCPWD/P/413378 as person living with disability. She annexed her registration card as an exhibit.

12] She averred that on 18/11/2011 she was involved in a road traffic accident and that she is physically disable as per the definition of disability under Article 260 of the Constitution as read together with section 2 of Persons with Disability Act..

13] She met all the qualification and she made her application to the second respondents by attaching all the relevant documents.

14] she reiterated her sworn evidence in her replying affidavit.

15] The 1st Respondent opposed the petition and through affidavit Sworn by Salome Oyugi who gave Chronology of events leading to the gazettement of the 3rd respondent.

16] she averred that the commission has the mandate under Article 90(2) to Conduct and supervise election for allocations of seats on the basis of proportionate representation through nomination of candidates by political party lists.

17] That the commission in line with its mandate issued under Article 90 and Section 34(6A) of the Election Act issued guidelines on preparations of party list vide gazette notice(same was not annexed to the affidavit).

18] That the 2nd respondent submitted its party list for consideration in line with section 35 of the Election Act. Thereafter the commission reviewed the party list within 14 days and asked the various parties to resubmit it list and that the second respondent submitted it final list on 19/7/2017. (The party final party list was not annexed although indicated it is annexed)

19] That the submitted list complied with all the requirement and the Commission did comply with the law in gazetted of the 2nd respondent

Analysis and determination.

20] I have considered the entire pleadings on record, the submissions filed by respective advocates on record and authorities thereof, in my considered view the following are the emergent issues for determination:-

1. Whether the or not the 3rd Respondent is a person living with disability hence qualified to be elected to represent person living with disabilities

2. Whether or not the 1st and 2nd Respondent while causing the election of the 3rd respondent acted in utter disregard of the law.

3. Whether the petitioner is entitled to the reliefs sought.

4. Who bears the costs of the petition?

The above issues are intertwined and I will address the jointly.

21] I have perused the petitioner's leadings as well as submission. The main ground of petition is that by the time the 3rd respondent made her application she had no obtained certificate from NCPWD as such she was not qualified to be nominated. It was submitted that the 3rd respondent made her application on 5/6/2017 and that that she obtained her certificate on 14/7/2017 from NCPWD thus her certification was done long after she had submitted her application. It was thus submitted that 3rd Respondent ought to have demonstrated that she is certified and registered by National Council for persons with Disabilities.

22] It was further submitted that Regulation 15(2) of the Elections (Party Primaries and Party Lists) Regulations,2017 requires that where an aspiring candidate intends to be nominated on the ground that the candidate is a person with disability, the candidate shall, in addition to the requirements specified under sub-Regulation (1), submit an application in Form 4 set Out in Schedule which shall be certified by the National Council for Person with Disabilities.

23] It was finally submitted that on 7th June,2017 the 1st respondent issued guidelines to all the political Parties on the manner in which party list must be submitted on the ground that the aspiring candidate is a person with disability shall submit a certification from NCPWD.

24] The 1st respondent counsel as well as counsel for the 3rd respondent both submitted that Article 160 of the Constitution defines disability to include any physical ,sensory, mental and psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have a substantial or long term effect on individual's ability to carry out ordinary day to day activities. The same definition is replicated under section 2 of the Persons with disabilities Act.

25] They further submitted that the 3rd respondent was involved in road traffic Accident as result of which she sustained injuries in 2011 as per medical reports attached in her response. Assessment report attached to her response indicates that she is psychically disabled and that she went ahead to register with NCPWD as a person leaving with disability.

26] It was further submitted that on the 23rd July, the 1st respondent published party list in the daily new papers and the name of the 3rd respondent appeared in the party list submitted by the 2nd Respondent. On 28/8/2017, the 1st respondent gazetted the 3rd respondent as ODM nominated member of Migori County Assembly. It was thus submitted that the election of the 3rd Respondent is considered to have been effected on the 28/8/2017, which is the day she was gazetted as nominated member of the County Assembly of Migori and not the day she showed interest by tendering her application to the party. As at that date it was submitted that 3rd respondent was qualified and had all the relevant documentation.

27] It was further submitted that 1st respondent in their response that indicated that the final list for nomination was forwarded by 2nd Respondent on 19/7/2017, which time the 3rd respondent was qualified and had all the relevant documentation as provided in the regulation.

28] I have considered the rival submission. The Common ground is that the 3rd respondent made her application for nomination on 5/6/2017 as per her annexure marked PA-05. It is also common ground that she registered with NCPWD on 13/7/2017 such that at the time of the application she was not registered thus she did not comply with regulation 15(2) of the Election (party Primaries and party List) Regulation,2017. Regulation 15(2) talks of an interested candidate and what that interest candidate should comply with while making his or her applications.

29] The evidence on record clearly indicates that as at the time of the application, the 3rd respondent was physically disable having sustained a road accident in 2011 as per annexures marked PA-02. In her application for nomination it is also indicated that she is physically disable. The only thing missing is the certification by NCPWD in her application. She has since registered with NCPWD and given registration number.

30] Should the court therefore nullify her election solely on the reason that she did not sought certification by NCPWD on her application? Is failure to seek certification fatal ?. The petitioner's counsel submitted strongly that 1st respondent ought to have complied with the law and reject the nomination of the 3rd respondent having failed to have her application certified with NCPWD. Reliance was placed on Court Of Appeal decision in Lydia Nyanguti Githendu vs IEBC & 17 Others where the court of Appeal held that:-

If the list was not complainant , it was the mandate of IEBC to reject that list and make away for the party to resubmit another list. And where a particular candidate failed to qualify, to select another person on the list who satisfied the relevant gender and constitutional requirements.

It is thus clear that the 1st respondent that IEBC must Comply with the Constitutional requirements and the electoral laws before publishing a party list.

31] In this case, the 3rd respondent made her application for nomination as a person with disability. By the time she made the application she was disable person within the definition of Article 260 of the Constitution as well as section 2 of the Person with disabilities Act. She indicated in her application that she had permanent disability. Her disqualification would have been have been in this case based on her in-disability but evidence adduced clear indicates that she was disable at the time of application. It is my considered view that failure to seek certification with NCPWD and given evidence on record that the 3rd respondent was indeed disable even before the nomination process is not a grave Election malpractice on the part of the 1st Respondent and 2nd respondent to warrant nullification of election of the 1st respondent. She was indeed a disable person save that she lacked certification which is one of the Requirement under the Regulation 15(2) aforementioned. There was no evidence that she had not complied with the other requirements envisaged by regulation. Had she been found not to have been disable by the time of the election then this court would not have hesitate to annul her petition as it would have violated the provision of Article 177(1)9 (c) of the Constitution.

32] It is also evident on record, that the petitioner or interested party raised the issues they are raising here with Political parties Tribunal or IEBC Committee dealing with complainants on party lists when the IEBC gave notices to aggrieved parties to file their compliants.

33] In view of the above I find that the Election of the 1st respondent was done within the Constitution and Electoral Laws thus this Petition lacks Merit and the same is dismissed with costs to the Respondents.

34] It is so ordered.

Dated and Delivered at Rongo this 4th day of January 2018.

R.K.LANGAT.

(S.R.M)

In Presence of :-

- 1.
- 2.
- 3.