



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

PETITION NUMBER 3 OF 2017

PERPETUA MPONJIWA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....1ST RESPONDENT

EVE MALENYA.....2ND RESPONDENT

CLERK OF NAIROBI CITY COUNTY ASSEMBLY.....1ST INTERESTED PARTY

THE ORANGE DEMOCRATIC MOVEMENT PARTY.....2ND INTERESTED PARTY

JUDGMENT

The petitioner Perpetua Mponjiwa contests the Independent Electoral & Boundaries Commission act of publishing the 2nd Respondent name as Orange Democratic Movement Party nominee for the Member of County Assembly for Nairobi County pursuant to article 177 (1) b of the constitution under gender top up rule . The petitioner alleges that the 2nd respondent name did not appear in the Orange Democratic Movement party list for gender top up that was published on 23rd July 2017 and as such is undeserving of the position of member of County Assembly. The petitioner also alleges that the 1st respondent released the party list to the party for further amendments after it had already published it whereupon her name was deleted from the list and that of the 2nd respondent introduced. The Petitioner alleged that by so doing the 1st Respondent acted in contravention of the Petitioner's rights under the Constitution, the Political Party Act and Elections Act and seeks prayers that:

1. Declaration that the process that led to the gazettelement of the 2nd Respondent was irregular and illegal.
2. Revoke the gazettelement of the 2nd Respondent as a member of the Nairobi City County Assembly.
3. Gazette the Petitioner, Perpetua Mponjiwa as the nominated member of the Nairobi City County Assembly under the gender top up category and consequently swear her in.

Recommend investigations and prosecution of the Independent Electoral & Boundary Commission involved in the fraud and lastly any other relief this Court may deem fit.

Through a Supporting Affidavit and Further Supporting Affidavit the Petitioner introduced the document she intends to rely in her evidence in Court.

In its Response to the Petition the 1st Respondent denied that it illegally and irregularly introduced the 2nd respondent's name in the Orange Democratic Movement party list and stated that it has no prerogative in the listing of party members as a party hands over its list and in order of preference. It also stated that it's required under the Law to ensure that all party lists are in compliance with the provision of the Law. The replying affidavit of the 1st Respondent's Manager Political Party and Campaign Financing Salome Oyugi introduced documents in support of its case. The 1st Respondent asked the Court to dismiss the Petition against it.

For reasons shown in the Court file and Ruling of the Court dated 7th November, 2017, the 2nd Respondent response to the Petition was struck out by the Court. The Orange Democratic Movement Party was enjoined as 2nd interested party in this matter. In response to the the petition the 2nd interested party stated that it had complied with Party's Elections and Nomination Rules and in accordance with Section 34 of the Elections Act. It is stated that both the Petitioner and 2nd Respondent applied to be included in the list for nominated members of the County Assembly under the gender top up list. That indeed the petitioner's name had been placed number 23 in its list sent to the 1st Respondent and published on the 23rd July 2017. That after publication of the list disputes arose before the Political Parties' Disputes Tribunal and the Independent Electoral and Boundaries Commission Disputes Committee and after they were determined, the 1st Respondent directed Orange Democratic Movement to review its list and consequently the Petitioner's name was excluded from the amended final list received by the 1st Respondent on 7th August 2017. It stated that the Petitioner's name was never included in the list sent to Independent Electoral & Boundaries Commission after the amendments.

At the time of hearing the parties adopted their respective affidavits and documents as evidence and were each cross-examined by the adverse party.

I should at this stage clarify that the 1st Interested Party opted to take a neutral position in this matter and observed the proceedings silently.

On cross-examination, the Petitioner stated that following a Consent Order recorded in Court and a judgment issued in her favour by Political Party Disputes Tribunal after publishing of the list on 23rd July 2017, the 2nd Interested Party was ordered to place her in a guaranteed position and was expected to comply with it. She told Court that in the Gazette Notice published on 23/07/2017 she appeared in the Orange Democratic Movement Gender top up list at position 23. She admitted that she had learnt that her name had been omitted from an amended list by her Political Party.

The 1st Respondent called a witness (Salome Oyugi) on cross-examination told Court that the 1st Respondent discharged her mandate under the Law. She admitted that Independent Electoral & Boundaries Commission published a list on gender top up on 23/7/2017. She told Court that several complaints arose and after deliberation Orange Democratic Movement was ordered to reconstitute the list in accordance with the law. She told Court that the name of the Petitioner did not appear in the reconstituted list from which a list of nominees were finally published in a gazette notice on 28th August, 2017. She also admitted that in Orange Democratic Movement's reconstituted list several names that had earlier appeared in the published list were removed.

The 2nd interested party through its witness Olga Karani told Court that it complied with the Constitution, the Election Act and Party's Election rules when it came up with its party list. She took the Court through the process of preparing the party list she admitted that the 2nd respondent name did not appear in the list published on 23rd July, 2017 whereas the petitioner's name appeared in compliance with the consent order recorded in Court. She told the Court that the list was reconstituted per directions issued by Independent Electoral and Boundaries Commission and in the process of reconstitution the petitioner's

name was removed and that of the 2nd respondent introduced.

After close of respective cases, the parties filed written submissions and appeared before Court for highlighting. Several cases were quoted in support of each party's case. The parties filed separate issues. This Court will consolidate the said issues into only one. Whether the 1st Respondent, in publishing the 2nd Respondent as the Orange Democratic Movement Party Nominee for the Member of County Assembly for Nairobi **under Article 177 (1) b** of the constitution in a gazette notice on the 28th August 2017 acted within its mandate under the Law.

I have read the evidence, the submissions filed before this Court and all quoted cases carefully. The Petitioner in her evidence has raised several allegations against the 2nd Interested Party. It is noted that the 2nd Interested Party was not cited as a Respondent in the petition before this Court and that it only applied to be enjoined as an Interested Party for a particular reason. The Court shall therefore, not delve into issues that are not addressed in the Petition filed before Court. The Court will restrict itself only to the issues that are raised in the pleadings and not otherwise. In the decided case **Election Petition number 3 of 2017** (Kisumu High court) **JACKTON NYANUNGO RANGUMA VERSUS THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 4 OTHERS**, the Court held that a Petitioner is bound to prove the case she has pleaded. That a Petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded.

In another decided case **MAHAMUD MUHAMED SIRAT VERSUS ALI HASSAN & 2 OTHERS NAIROBI ELECTION PETITION 15 of 2008 (210) eKLR**, the Court declined to render any opinion in respect of aspects of the Petitioner's case which he adduced evidence on but were not based on the pleadings filed in Court specifically the Petition.

What is the Independent Electoral & Boundaries Commission's mandate under the Law regarding the Party List?

Article 90 of the Constitution provides that Election for Member of County Assembly provided under **Article 177(1) (b)** and **(c)** shall be on the basis of Proportional representation by use of party list. **Article 177 (1) (b)** provides for gender top up.

Section 90 (2) of the Constitution reads:

a) **Independent Electoral & Boundaries Commission** shall be responsible for the conduct and supervision of Election for seats provided under **Article 90 (1)** and ensure that,

(a) Each Political Party participating in a General Election nominates and submits a list of all persons who would stand elected if the party were to be entitled to all the seats provided for under **90 (1)** within the time prescribed by the National legislation .

(b) Except in the case of the seats provided for under **article 98**, each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed.

No issue is raised regarding the 1st Respondent's responsibility under **article 90 (2a)** of the Constitution. An issue is however raised regarding Independent Electoral & Boundaries Commission's mandate under **Article 90 (2) (b)**. It is alleged by the Petitioner that the 1st Respondent failed to ensure that the list comprised of qualified members and thus gazetted the 2nd Respondent as a nominated Member of County Assembly and thus caused the Petitioner prejudice as she missed out.

In the Petition filed in this Court the only issue raised by Petitioner against the 2nd Respondent's nomination is that her name did not appear in the list forwarded to Independent Electoral & Boundaries

Commission by Orange Democratic Movement and published on 23/7/2017 and thus was not qualified to be nominated. On the other hand she alleges that she appeared in that list and was not nominated. She further alleges that that was the final list which Independent Electoral & Boundaries Commission should not have interfered with. It is also alleged the Independent Electoral & Boundaries Commission failed to comply with a Court Order that directed that she should be placed in a favorable position. On that issue the Court makes a finding that the order of placing the Petitioner on a favorable position could only be complied with by the Party itself.

All parties are in agreement that indeed the Petitioner was placed number 23 in the list published on the 23/07/2017. The parties are also in agreement that the petitioner's did not appear in the list of nominees published on 28/08/2017 and that indeed the 2nd Respondents name did appear. It is also not denied that the 2nd Respondent did not appear in the list published on the 23/07/2017. The 1st Respondent's explanation is that after publishing of the list on 23/07/2017, several complaints arose and after determination, the list was taken back to Orange Democratic Movement directing it to reconstitute to reflect diversity and in compliance with the Law. The petitioner does not deny this that she was one of the complainant in the one of the disputes before the Political Party Disputes Tribunal the 1st respondent further explanation is that following those directions a reconstituted list was sent to it by Orange Democratic Movement on 8/7/2017 and that the Petitioner's name was missing in that list. That position is confirmed by both the Petitioner and 2nd Interested Party. The Petitioner alleges that her name should not have been removed from that list she terms final.

Section 36 (A) of the election Act, the Commission has a duty to review a party list to ensure compliance before publishing it and may require the political party to amend the party list to ensure such compliance. The Petitioner says that once that is done, the published list is final and should not be changed under **Section 34 (7)** of the **Election Act**. That appears to be the case under the provision of **Section 34(7)** of the Act. The Petitioner has submitted that once the list was published on the 23/07/2017 the Respondent had no further jurisdiction in giving further directions for reconstitution of the list. The respondent has submitted that it exercised its mandate after complaints were filed following the publishing of the list on the 23/07/2017. Both parties are in agreement that after the list was published on 23/07/2017, several complaints were filed at the Political Party Disputes Tribunal and the Independent Election Boundaries & Commission Committee. The Respondent submitted that after the complaints were decided it necessitated further directions on the party to reconstitute its list and respect diversity thus a further list was received by it on the 07/08/2017. It is this list that Petitioner submitted was altered and replaced her name with that of the 2nd Respondent. The Orange Democratic Movement has indeed confirmed that it received directions from Independent Electoral & Boundaries Commission to reconstitute the list and by so doing replaced the Petitioner's name. On whether the Respondent had the mandate to give further directions on the list: the Court has considered the provision of **Article 88 (4) (e)** of the Constitution and **Section 74 (1) of the Election Act 2011**.

Article 88 (4) (e) of the Constitution provides: “ The commission is responsible for conducting and supervising referenda and election to any elective body or office established by this constitution, and any other election as prescribed by the Act of Parliament and in particular.

(e) The settlement of electoral disputes, including disputes relating to or arising from nomination but excluding election petitions and disputes subsequent to the declaration of election results.”

Section 74 (1) of the **Elections Act** provides:

(1) Pursuant to **Article 88 (4) (e)** of the Constitution, the Commission shall be responsible for settlement of Electoral Disputes including disputes relating to or arising from nominations but excluding Election Petition and disputes subsequent to the declaration of election results.

The respondent submits that it exercised its mandate to entertain disputes that arose after nominations. It is this Court's finding that indeed the respondent had the mandate to entertain such disputes. It's this

Court's further finding that these provisions of the law are not in vain. It is not expected that disputes would be heard and determined just for the sake of it. The reasonable conclusion is that after the hearing and determination of such disputes, the outcome would have a bearing to the already published Party Lists. Changes to the list were definitely anticipated by the plaintiff having been a beneficiary of this Independent Electoral & Boundaries Commission mandate to determine such disputes. In the decided case **NATIONAL GENDER AND EQUALITY COMMISSION VERSUS IEBC AND ANOTHER (2013) eKLR** the Court made a finding that the provision of **Regulation 54 (8)** and the **Elections General Regulation 2012** requiring publication of party list is not idle. That part of Independent Electoral & Boundaries Commission's responsibility is;

Para 77 "to publish Party Lists in order to afford the public an opportunity to review the list to see whether they comply with the Constitutionand for members of public to know the person proposed to be elected on the basis of Party Lists... that it enhances the Political Parties as a tool to propounding good governance, integrity, transparency and accountability". The Court further held that:

Para 78 "Another important reason for publication of the Party List is to enable parties invoke the disputes resolution process provided for under the Constitution. Under **Article 88 (4) (e)** of the Constitution as read with **Section 74 of the Elections Act, 2011**, Independent Electoral & Boundaries Commission has the mandate to settle Electoral disputes including disputes relating to or arising out of nominations".

Further under **Regulation 21 (2)** of the **Elections Party Primaries and Party Lists) Regulations, 2017** the Respondent is mandated to sanitize a party list and where it is of the opinion that it does not conform to the requirements of the provision of the Constitution including **Article 177 (1) (c)**, the Act of the said Regulations require Political Party to review and amend the list so that it conforms to the requirements of the Law and guidelines by the Commission. Under **Regulation 26 (2)** where the list is rejected or a nominee on the party list, the Commission shall require the Political Party to resubmit the party list or nominee within such period as the Commission may specify.

Since the Constitution under **Article 88 (2)** has created an avenue for disputes which may arise after publication of party list, It is this Court's finding that the disputes are a one method of scrutiny and thus the Commission acted within its mandate under the Law to return the list to the Party once it was satisfied that there were genuine reasons (raised in the disputes) that touched on qualification, eligibility of the persons named in the list and compliance with the Law by the Party. It is therefore clear that Independent Electoral & Boundaries Commission exercised its mandate properly in entertaining disputes after the publication on the 23/07/2017 and giving further directions on the Party List after the disputes were determined, I find it acted in furtherance of its mandate to conduct and supervise election for seats under the provisions of **Article 177 (1) (c)** of the Constitution and **Sections 35, 36** and **37** of the **Elections Act** and **Regulation 55 (2)** of the **General Regulations**.

The Petitioner submitted that the Independent Electoral & Boundaries Commission did not ensure that the Consent Order between herself and Orange Democratic Movement was not complied with. I however find that the Independent Electoral & Boundaries Commission's mandate does not include interference with the manner in which a Party arrives at its Party List.

In the **National Gender Equality** case, the court held that Independent Electoral & Boundaries Commission's responsibility to conduct and supervise election under **Article 90 (2)** of the Constitution includes the duty to confirm that persons that appear on the list are duly qualified for election.... **Section 34 (6)** of the **Election Act**. The court held that Independent Election & Boundaries Commission's "role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties".

How the party reconstituted the list after it was returned to it for reconstitution concerns the party alone and Independent Electoral & Boundaries Commission had no say in it expect to discharge its mandate in confirming that the reconstituted list complied with the law. The party is not named as a Respondent in this matter and thus the Court will not delve into determining whether it had valid reasons for removing

the petitioners name from the list. As earlier noted by this court the only issue raised is that 2nd Respondent was not eligible as her name did not appear in the publication for 23/07/2017. The Independent Electoral & Boundaries Commission and the Interested Party have confirmed that the Petitioner's name was deleted from that list and the 2nd Respondent's name included when they reconstituted the list. The circumstances in this case are distinguishable from those of the cited case **BEN NJOROGE & ANOTHER VERSUS INDEPENDENT ELECTORAL BOUNDARIES COMMISSION & 2 OTHERS (2013) eKLR** in that the cited case the published list was not sent back for reconstitution by the party yet Independent Electoral & Boundaries Commission went ahead and nominated members who were not in it.

The Court agrees with the Petitioner that after the reconstitution, the public was not afforded the opportunity to scrutinize and raise any complaint against new entrants. That is the true but still find that the law that has created that situation since publication came so close to the election date and that in itself cannot invalidate the nominations. If Independent Electoral & Boundaries Commission was satisfied that she qualified to be elected and accepted her name it discharged its mandate. In the decided case **NARC KENYA & ANOTHER VERSUS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER ELECTION PETITION NAIROBI NUMBER 12. OF 2013** the term of County Assembly under **Section 34 (10)** of the **Elections Act 2011** commences when the names of the persons named in the party list are gazetted as members of the County Assembly. I find it in order and in accordance with law that any change to the party list may be made by the party any time between submission to the Independent Electoral and Boundaries Commission and publication of nominees in the gazette.

The upshot of it is that 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 Supreme Court held that the threshold of proof of election petition matters "should in principle, be above the balance of probability though not as high as behold reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election are in question". This Court finds that the 2nd respondent was validly nominated as the member of Nairobi County Assembly under gender top up. The respondent discharged its mandate under the Constitution and Election Act fully. The petition is hereby dismissed with costs to the 1st respondent and in any event cost not to exceed Kshs. 200,000/= (two hundred thousand shillings only).

Dated and delivered in Nairobi this 11th day of January 2018.

HON. E.K. USUI (MS.)

SENIOR PRINCIPAL MAGISTRATE

11/01/2018