



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**ELECTION PETITION NO.4 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ACT (NO.9 OF 2011)**

**IN THE MATTER OF THE ELECTION ACT (NO.24 OF 2011)**

**IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS (LN 128 OF 2012 & LN  
NO. 72 OF 2012)**

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

**-AND-**

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)  
PETITION RULES, 2017**

**-BETWEEN-**

**PETER MUCHIRI MWANGI.....PETITIONER**

**-VERSUS-**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....RESPONDENT**

**-AND-**

**JUBILEE PARTY.....1<sup>ST</sup> INTERESTED PARTY**

**SUSAN MAKUNGU KAVAYA.....2<sup>ND</sup> INTERESTED PARTY**

**MBUGUA KABIRO.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGMENT**

## **INTRODUCTION AND BACKGROUND**

1. The Petition filed by **Peter Muchiri Mwangi** on 4<sup>th</sup> September 2017 seeking for an injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties from being sworn in as members of the County Assembly for Nairobi County, a declaration that the Party List of nominees to represent Marginalized Groups for Nairobi published by the Respondent in the Sunday Nation of 23<sup>rd</sup> July, 2017 is unconstitutional for failing to prioritize the representatives of persons with disability and the youth, a declaration that the list of nominated members of County Assembly of Nairobi County published by the Respondents on **28<sup>th</sup> August 2017** in respect of the Marginalized Group category is unlawful, unconstitutional hence null and void.

2. The Petitioner seeks reconstitution of the party list by the Respondent gazetting the Petitioner in the persons with disability category and to fill the remaining positions as provided for by Section 36 of the Elections Act.

3. The Petition is premised on the grounds that the Respondent violated the provisions of **Article 177(1)(c)** and **Section 36(3)** of the **Election Act** by failing to prioritize the representatives of persons with disability and youth.

Secondly, that the Respondent violated the provisions of **Article 54,55,82, 100** and **177**.

4. The Petition was opposed vide the response to Petition by the Respondent dated 29<sup>th</sup> September, 2017, who contended that the seats allocated to the 1<sup>st</sup> Interested Party was in accordance with **Regulation 56(2)** of the Election (General) Regulations and based on the elective seats won by the 1<sup>st</sup> Interested Party. The Respondent allocated the 1<sup>st</sup> Interested Party two(2) seats from the constituted list of 17<sup>th</sup> August, 2017.

5. The First Interested Party stated that the nomination of members of vicarious seats was guided by the Law and was done in a fair and justifiable manner as provided by Law, Party Regulations and best practice. The 1<sup>st</sup> Interested Party stated that the Petitioner was among those whose applications were successful. His name was included in the Part List and forwarded to the Respondent herein. That their role after submitting the party list to the Respondent ends there. That they have no role in selecting the persons to be nominated as the same is the mandate and preserve of the Respondent.

6. The 1<sup>st</sup> Interested Party maintains that at the time of submitting the party list to the Respondent, all categories of persons required by the Law to be nominated were indeed factored. That the submitted list was inclusive of all special interest groups and necessary categories considered and nominated.

7. That the Petitioner had not demonstrated how the 1<sup>st</sup> Interested Party acted to his detriment in submitting the list of nominees to the Respondent. That the 1<sup>st</sup> Interested Party denies all allegations made in the entire claim, and that the Petitioner failed to adduce evidence or any at all to prove the allegations which were a figment of his imagination and not representative of the truth. The 1<sup>st</sup> Interested Party urged the Court to dismiss the Petition with costs.

8. The 2<sup>nd</sup> Interested Party never entered appearance and or filed any response to the Petition.

9. The 3<sup>rd</sup> Interested Party filed a response to the Petition vide the Affidavit sworn by **Hon. Mbugua Kabiro** whereof she deponed that the 3<sup>rd</sup> Interested Party's nomination cannot be viated merely on grounds that the Petitioner had not been selected to represent people with disability. He further depones that he was selected to represent the youth accordance with **Article 177 (1) (c)** and **177 (2)** of the Constitution of Kenya 2010.

10. That the Petition is not merited as the Petitioner has not demonstrated how in arriving at the list

submitted by the 1<sup>st</sup> Interested Party to the Respondent was in contravention of the Constitution, the Election Act and the Election General Regulations.

11. At the close of the pleadings, the parties agreed to set out the issues of determination following which the Petition was set down for hearing. The Petitioner testified in Court but the Respondent and the 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties adopted their respective affidavits as evidence.

### **ISSUES OF DETERMINATION**

12. The parties filed statements of issues for consideration which are distilled from the grounds challenging the Petition and outlined in the Petition which are as follows;-

(a) Whether the 1<sup>st</sup> Interested Party submitted to the Respondent its reconstituted party list on 17<sup>th</sup> August, 2017 in compliance with the orders issued by Political Parties Dispute Tribunal.

(b) Whether the Respondent's Gazette Notice No.8380 of 28<sup>th</sup> August, 2017 nominating the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to Nairobi County for Marginalized category of Jubilee Party was in accordance with the provisions of the Constitution and the Election Act 2011.

(c) Whether the Petitioner is entitled to the reliefs sought for in his Petition.

### **13. WHETHER THE 1<sup>ST</sup> INTERESTED PARTY SUBMITTED TO THE RESPONDENT ITS RECONSTITUTED PARTY LIST ON 17<sup>TH</sup> AUGUST 2017 IN COMPLIANCE WITH THE ORDERS ISSUED BY THE POLITICAL PARTIES DISPUTE TRIBUNAL.**

The Petitioner in his testimony stated that the Jubilee Party submitted to Independent Electoral and Boundaries Commission (herein referred to as "IEBC") a party list in July 2017. IEBC renewed the said list and made comments with regard to individuals nominated therein in compliance to the law as directed by IEBC. Jubilee Party submitted a fresh party list on 18<sup>th</sup> July, 2017 which is annexed as SO1 to the IEBC response. The party list having met the required constitutional and statutory threshold was gazetted on the 23<sup>rd</sup> July 2017 pursuant to Regulation 54 (8) of the Election (General) Regulation 2012.

14. The aggrieved members of Jubilee Party lodged complaints to the Political Parties Disputes Tribunal as envisioned by Electoral Laws. The Petitioner's complaint was **No.384 of 2017 (Peter Muchiri Mwangi -Vs- Jubilee Party)** the complaint being primarily that, the order of listing of the Petitioner herein in the impugned party list. The consent order provided that the Petitioner herein should be listed as the first among persons living with disability. This was confirmed by the Petitioner upon being cross-examined by Respondent's counsel and is also contained in **(Annexure PMM4 to the Petition)**.

15. There was also complaint **No.454 of 2017 SULEIMAN YUSUF HAJEE -VS JUBILEE PARTY** which was primarily based on non-inclusion of marginalized communities in the party list. The orders emanating therefrom were for Jubilee Party to reconstitute the list in accordance with the Constitution and the Law **(ANNEXTURE SO2 to IEBC's Response)**.

Jubilee Party in compliance to the afore orders submitted to IEBC a fresh party list on 16<sup>th</sup> August 2017. In the said list, the following changes had been effected; **(Annexure SOO 3 to IEBC Response)**.

16. (1) The Petitioner herein had been listed in position 5 and as the first person living with disability as opposed to the previous list where the person living with disability was **GRACE NDUNGE NZOMO**.

(2) The other persons to be listed as marginalized by ethnicity were enhanced from positions (4) and (5) on the list to position (2) and (2) respectively.

17. The Petitioner has cited complaint No.522 of 2017 which is not contained in his pleadings hence

purporting to introduce new facts in his written submissions. The same is improper and inadmissible. In the case of **MOHAMUD MUHUMED SIRAY -VERSUS- ALI HASSAN ABDIRAHMAN & 2 OTHERS – NAIROBI EP NO.15 OF 2008 (2010)KLR.**

“.....in respect of matters that he had not pleaded in his petition. It is trite law that a decision rendered by a Court of Law shall only be on the basis of the pleadings that have been filed by the party moving the Court for appropriate relief..... In the present petition, this Court declined the invitation offered by the Petitioner that required it to make decision in respect of matters that were not specifically pleaded.

This Court will therefore not render any opinion in respect of aspects of the Petitioner’s case which he adduced evidence but which were not based on the pleadings that he had filed in Court.....”

Based on the foregoing authority and what was held, I find that the same is the scenario in the instant petition where the Petitioner by introducing new evidence is poised to misleading the Court and such new evidence is not admissible.

The grand question is; did the Respondent act in compliance of orders issued by the Political Parties Dispute Tribunal with respect to marginalized party list? As per the Respondent’s submissions, they duly complied and submitted a reviewed and complainant list to IEBC on 16<sup>th</sup> August, 2017.

**18. The next issue to consider is: WHETHER THE RESPONDENT’S GAZETTE NOTICE NO.8380 OF 28<sup>TH</sup> AUGUST, 2017 NOMINATING THE 2<sup>ND</sup> & 3<sup>RD</sup> INTERESTED PARTIES TO NAIROBI COUNTY FOR THE MARGINALIZED CATEGORY/JUBILEE PARTY WAS IN ACCORDANCE WITH THE PROVISION OF THE CONSTITUION AND THE ELECTION ACT 2011.**

The Respondent IEBC is established under Article 88 of the Constitution charged with the exclusive mandate of supervising refenda and elections to any elective body or office established by the constitution and any other elections as prescribed by the Act of Parliament. Under Article 90 of the Constitution IEBC has the mandate to conduct any supervise elections for special seats by use of party lists, hence the election of members of the County Assemblies for party lists, seats specified under ARTICLE 177(1) (b) and ( c) of the Constitution. The same is the basis of proportional representation and in accordance with Article 90 of the Constitution.

In a nutshell, the legality of a party list is measured against the constitution and statute salient among them the **Election Act Chapter 7 Laws of Kenya.**

**Section 34 (4) of the Election Act** provides interalia that;-

“ A Political Party which nominates a candidate for election under Article 177(1) (a) of the Constitution shall submit to the commission a party list in accordance with Article 177(1) (b) and (c ) of the Constitution.

The party lists under subsection (2) (3) & (4) shall be submitted in order of priority.

**SECTION 36(1) provides that;-**

“ A party list submitted by a political party under(f) Article 177(1) (c) of the Constitution shall include 8 candidates at least two of whom shall be persons with disability, two youth and two of whom shall be persons representing a marginalized group.

**36 (2)** “ A party list submitted under subsection 1(a), ( c ), (d), ( e) and (f) shall contain alternative between male and female candidates in the priority in which they are listed.

**36 (3)** “The party list referred to under subsection (1) (f) shall prioritize a person with disability, the youth and any other candidate representing a marginalized group.

**36 (8)** “ For purposes of Article 177(1) (c) of the Constitution, the commission shall draw from the list under subsection 1(f) four special seat members in the order given by the party. The Respondent contends that as per guidelines issued by IEBC to Political Parties, it is clear that the list system adopted in Kenya is a closed system.

“(b) The party list shall be a closed list, that is, the list may not be amended after it has been submitted to the commission”.

It is the responsibilities of the parties to choose their preferred candidates and rank them in order of priority of preference. The seats won by each party are filled by candidates in the order they appear on the parties respective list, hence in closed list system. The power over who gets the reserved seat resides with the parties themselves. The same list serves as a reservoir of candidates in any of the eventualities, hence it follows that IEBC in a closed list system has no power to rearrange the list or pick out from the list any other candidate apart from the parties preferred candidate listed at the top of the list if only one candidate is required.

In the instant case, it would have been an illegality for IEBC to reorganize the party lists as submitted by Jubilee Party to take into account what the Petitioner terms as spirit of the constitution with regard to special seats when the same constitution is unambiguous when it comes to the issue of priority in party lists. Hence what the Petitioner is demand for cannot be executed by IEBC (the Respondent herein).

**19. The Petitioner relied heavily on the Authority:- COMMISSIONER OF THE IMPLEMENTATION OF THE CONSTITUTION -VERSUS- THE ATTORNEY GENERAL & OTHERS - CIVIL APPEAL NO. 351 OF 2012.**

**Held:-** “That the interpretation of Article 97 (1) ( c) of the Constitution invites the application of the ejusdem Rule, the Youth persons with disability fall in the category of the marginalized and disadvantaged and the vulnerable. Those who are sufficiently empowered to muscle their way generally speaking into inner sanctions of political and state power”.

Thus they are of the same kind, class or nature (Ejusdem Generis). This means that one marginalized group is not superior to the other and or more deserving and as I have stated above it is left to the political party to determine in the first instance who among its members fits the marginalized group category and determine which order of priority they will list the said members with no regard to the kind of marginalization.

When cross-examined by counsel for the 1<sup>st</sup> Interested Party, the Petitioner contended that there is no category as persons with disability. The list is for marginalized group.

When cross-examined by counsel for the 3<sup>rd</sup> Interested party, he admits that under Article 177 (1) of the Constitution, the same provides for special category which are comprised of Youth, minority, and marginalized. He also admits that the party complied as the list published by IEBC contained;

**Youth – 2 slots.**

**Minority – 2 slots.**

**Marginalized – 2 slots.**

**Minority – 2 slots.**

**Ethnicity – 2 slots**

He stated that the list was in order and complied with what is required by the constitution of Kenya. Up to that point, the question the Court poses is then why the Petitioner?

On further cross-examination by counsel for the 3<sup>rd</sup> Interested Party, the Petitioner states that the list should be disregarded and that the 20 people nominated should not be regarded. He stated that he fell under the marginalized category. He further stated that Susan Kavaya her name was appearing as No.(4) and No. (17). In the same breath he avers that Susan Kavaya's name was deleted and replaced with Asili Mohamud but qualifies the same by stating that this was after he filed the petition. That he filed the petition on 4/9/2017 and the Kenya Gazette where name of Susan Kavaya has been deleted and dated 6<sup>th</sup> September, 2017.

At page 165 of the party list. Party list for Nairobi County, the first person is Mbugua Kabiru and Susan Kavaya is number 2.

At page 192 of the party list.

Mbugua Kabiru – No.1.

Susan Kavaya – No.2

At paragraph 27 of the Petitioner's marginalized list;-

1. Mbugua Kabiru – (3<sup>rd</sup> Interested Party).
2. Grace Nzomo.
3. Mohamed Abdi

This was the list published by the Respondent (IEBC) and the same is the list published by IEBC and tallies with the list at page 165 which was published in the Daily Nation on 23<sup>rd</sup> July 2017. It goes without saying that the Respondent publishes the final list.

**20.** The Petitioner upon being cross-examined by the counsel for the 3<sup>rd</sup> Interested Party admits. In the final gazette Notice, the names were;-

1. Husni Mohammed.
2. Immapet Kimutai
3. Mbugua Kabiro.
4. Susan Kavaya

Which list comprises of one person with disability and three (3) people representing the youth. He confirms that he was Number 5 on that party list. The Petitioner reasoning that because his party (Jubilee) had majority of members of Parliament hence he should have been the one nominated is not backed by any legal evidence hence it is neither here nor there.

Upon being re-examined he contends that he states that persons with disabilities were not given priority yet earlier on in his evidence in-chief he admits that Jubilee Party presented the correct party list and when cross-examined by counsel for the 3<sup>rd</sup> Interested Party admits that all categories were catered for in the final list that was published by the Respondent (IEBC) hence which is which?

It is my considered view that the standard of prove in Election Petition in principle should be above the balance of probability though not high as beyond reasonable doubt. This was what was held in the case of: **RAILA ODINGA AND OTHERS -VERSUS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS SCK PETITION NO. 5 OF 2013 (2013) eKLR.**

In the instant petition the Petitioner was bound to prove the case he has pleaded and not to make a case outside the pleadings and his affidavits and testimony.

In respect to the first prayer by the Petitioner, he seeks for injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties from being sworn in as members of the County Assembly for Nairobi County, a declaration that the party list of nominees to represent marginalized groups of Nairobi published by the Respondent in the Sunday Nation of 23<sup>rd</sup> July 2017 is unconstitutional by failing to prioritize the representatives of persons with disability and the youth, a declaration that the list of nominated members of County Assembly of Nairobi County published by the Respondent on 28<sup>th</sup> August, 2017 in respect to marginalized group category is unlawful, unconstitutional hence null and void.

The first limb seeking for restraining orders same has been overtaken by events as the swearing in took place. In regard to the 2<sup>nd</sup> and 3<sup>rd</sup> limbs, the Petitioner testified and was subjected to cross-examination by counsels for Respondent and the 3<sup>rd</sup> Interested Party whereof he admitted that the final list published by the Respondent was in order as the same catered for all categories.

**21.** Secondly, the Petitioner seeks reconstitution of the party list by the Respondent gazetting the Petitioner in the persons with disability category and to fill the remaining positions as provided for by Section 36(1) of the Election Act which provides interalia;-

“A party list submitted by a Political Party under Article 177(1) ( c) of the Constitution shall include 8 candidates at least two of whom shall be persons with disability, two youth and two of whom shall be persons representing the marginalized group”.

**Section 36(2)** - “A party list submitted under Subsection 1(a), ( c ), (d), ( e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed”.

**Section 36(3)** – “The party list referred to under subsection (1) (f) shall prioritize a person with disability, the youth and any other candidate representing the marginalized group”.

**Section 36(8)** – “For purposes of Article 177(1) ( c) of the Constitution, the commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the Party”.

I have expounded above that the Respondent duly published the list as received from the Jubilee Party and the Petitioner has confirmed in his testimony that the list received from his party had no anomalies and as stated above it is the responsibility of parties to choose their preferred candidates and rank them in order of priority. The IEBC could not reorganize the party list submitted by Jubilee Party. The same will not be in the spirit and letter of the constitution of Kenya 2010.

In effect I do not see anywhere in his evidence that the Petitioner has demonstrated and proved that the Respondent violated Article 177(1) ( c) of the Constitution, Section 36(3) Elections Act and Articles 54, 55, 82, 100 and 177 of the Constitution of Kenya 2010.

### **CONCLUSIONS:-**

**22.** In his submissions, counsel for the Petitioner contended that the Petitioner’s evidence was not challenged and that the same remained unshaken and that Article 177 (1) (c) of the Constitution of Kenya and Elections Act were violated. From the evidence tendered, the person with disability was prioritized followed by the youth and other candidate representing marginalized group. As I have stated elsewhere in this judgment, the burden of proof rests with the Petitioner.

In the **RAILA CASE (2013) (Supra)** this Court echoes the principle that:-

“An Electoral Cause is established much in the same way as a Civil Cause. The legal burden rests on the Petitioner, but depending on the effectiveness within which he or she discharges this, the evidential

burden keeps shifting. Ultimately of course, it falls to the Court to determine whether a firm and unanswerable case has been made.

23. The Respondents and Interested Parties could not be called upon to answer a case whose basis had not been pleaded and or proved to the extent that it required them to answer.

The totality of the findings I have made is that the Petitioner has failed to prove his case against the Respondent, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. The Petition is therefore dismissed.

### **COSTS**

24. Section 84 of the Election Act provides that;

“An election Court shall award costs of and incidental to a petition and such costs shall follow the cause. Such costs are to follow the event and the Court has broad jurisdiction to determine costs. Rule 30(1) of the Rules provide as follows;

**Section 30(1)** –The Court shall at the conclusion of an election petition make an order specifying;

(a) Total amount of costs payable and;

(b) The person by and to whom the costs shall be paid. If the Court does not determine the costs, the Registrar of Court is required to tax such costs under Rule 3(1) of the Rules.

**Section 31(3)**- The Election Court may direct that the whole or any part of any money deposited by way of security shall be applied in the payment of taxed costs.

### **25. DISPOSITION**

(a) Taking all the facts I have outlined above, I herewith award costs to the 1<sup>st</sup> Respondent and 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties in the following terms.

(b) Instruction fees for Respondent capped at **Kshs.100,000/=**.

(c) Instruction fee for 1<sup>st</sup> and 3<sup>rd</sup> Interested Parties capped at **Kshs.100,000/=**.

(d) The certified taxed costs awarded shall be paid out of the security deposit on a pro-rata basis.

(e) A certificate of this determination in accordance with **Section 86(1)** of the Election Act 2011 shall issue to the Independent Boundaries and Electoral Commission.

DATED and DELIVERED at MILIMANI COMMERCIAL COURT AT NAIROBI this **12<sup>TH</sup> DAY OF JANUARY, 2018.**

**HON. G.A. MMASI(MRS)**

**SENIOR PRINCIPAL MAGISTRATE**

**12/1/2018**

NJIRI KARIU & NJAU – ADVOCATE FOR THE PETITIONER

NOW ADVOCATE FOR THE RESPONDENT

STEPHEN OMBASA – ADVOCATE FOR THE 1<sup>ST</sup> INTERESTED PARTY.

WAIREGI GATETUA & ASSOCIATES ADVOCATES FOR THE 3<sup>RD</sup> INTERESTED PARTY.

**HON. G.A. MMASI(MRS)**

**SENIOR PRINCIPAL MAGISTRATE**

**12/1/2018**