



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT KISII
ELECTION PETITION NO. 8 OF 2017
IN THE MATTER OF ELECTION ACT NO. 24 OF 2011

AND

IN THE MATTER OF ELECTIONS (GENERAL) REGULATIONS, 2012

AND

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

AND

IN THE MATTER OF NOMINATION OF A MEMBER OF COUNTY ASSEMBLY WARD

AND

IN THE MATTER OF THE PETITION OF ROSE MOTURI MWENE

BETWEEN

ROSE MOTURI MWENE.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...1ST RESPONDENT

THE JUBILEE PARTY.....2ND RESPONDENT

HARRIET KERUBO ONGERA.....3RD RESPONDENT

KISII COUNTY ASSEMBLY.....4TH RESPONDENT

R U L I N G

1. Background:

The Petitioner herein was sworn by the clerk Kisii County Assembly as a member of Kisii County Assembly on the 7th September 2017 and issued with a Certificate of Affirmation of Office for a Member of County Assembly. This was after she had been nominated by Jubilee Party, (2nd Respondent) in the

Gender Top up List which was sent to the 1st Respondent (I.E.B.C) pursuant to Article 90 and 177 1(b) of the Constitution and Section 34 (1) and (4), and Section 35 of the **Election Act No. 24 of 2011**.

2. On 8th September 2017, her name was deleted by the 1st and 2nd Respondents vide **Kenya Gazette Vol. CXIV No. 132** and replaced by the 3rd Respondent, thus giving rise to the current Petition. The 3rd Respondent herein, filed a preliminary objection dated 28th September 2017 on grounds:

(i) That this court lacks jurisdiction to adjudicate upon the nomination of a Member of County Assembly as provided for under Section 75(1) of the Elections Act, 2011.

(ii) That the dispute concerns interpretation of the Constitution or the constitutionality of the actions by the 1st Respondent, which falls under the ambit of Article 165 of the Constitution.

(iii) That the dispute falls under the ambit of the Political Parties Tribunal and the jurisdiction of this court is ousted by dint of the provisions of Section 40 of the Political Parties Act, 2011

3. The preliminary objection was canvassed by way of written submissions.

The 3rd Respondent Submissions:

4. The 3rd Respondent raised two issues in his submissions

(1) Lack of jurisdiction;

That the 2nd Respondent forwarded its party list to the 1st Respondent pursuant to Article 177 of the Constitution as read with Section 34 of the Elections Act.

That Section 39 of the Political Parties Tribunal Act No. 11 of 2011 establishes a Political Parties Tribunal while Section 40 thereof prescribes the jurisdiction of the said Tribunal.

That the issue in the instant Petition involves nomination and any dispute arising from the process of nomination, the same ought to be addressed by the Political Parties Tribunal under Section 40(a) and (b).

That the 1st Respondent is mandated under Article 88 of the Constitution to handle issues that arise out of nominations and elections to any elective body or office.

It was the 3rd respondent's submissions that this court lacks jurisdiction and when the issue is raised, the court must down its tool to determine the issue placed before proceeding with the matter. This position was stated in the cited case of Esther **Gachambi Mwangi –vs- Samuel Mwangi Mbiri [2013] KLR** and **Owners of Motor Vessel 'Lilian' –vs- Caltex Oil Kenya Limited [1989] KLR**.

(2) Petition is an abuse of the court's process.

The 3rd Respondent submitted that the decision to publish the Corrigenda for purposes of deleting/revoking the Petitioner's name, was an administrative decision aimed at after it was ascertained by the 2nd Respondent that the 3rd Respondent was number 2 in the party list but had been quoted as 'male' instead of 'female'.

The 2nd Respondent, who was mandated to prepare the party list, wrote to the 1st Respondent clarifying the anomaly and the resultant effect was the revocation of the Petitioner herein, who was position 8 in the said party list. That if the Petitioner was aggrieved by the said decision then the best recourse was to approach the court by way of judicial review.

That under Section 74 of the Elections Act 2011 the 1st Respondent had jurisdiction to publish a Corrigenda deleting the publication of the Petitioner and therefore the instant suit is an abuse of the court process.

1st Respondent's Submissions:

5. The 1st Respondent in his submissions supported the position put forth by the 3rd Respondent, that this court lacks jurisdiction owing to statutory provisions of Section 40(1) and 41 of the Political Parties Act.

6. That the 1st Respondent was fulfilling its constitutional and statutory mandate under sections 35, 36 (6) and (7) of the Elections Act No. 24 of 2011.

7. That the Petitioner ought to have lodged her complaint within the 2nd Respondent's dispute resolution mechanism and thereafter with the Political Disputes Tribunal which has original jurisdiction to hear and determine dispute that concern party list nominations. They relied on the case of **Erick Kyalo Mutua – vs- Wiper Democratic Movement Kenya & Another [2017] KLR.**

8. That the court should allow the preliminary objection as the 1st Respondent was acting within the constitutional and statutory mandate. That the court should be slow to interfere with the decision of the 1st Respondent where due process has been followed.

9. The 2nd and 4th Respondents did not file their written submissions.

Petitioner's Submissions:

10. The Petitioner in his submissions stated that on the issue of jurisdiction, the Political Parties Disputes Tribunal is exempted from hearing any dispute under section 40(1) (a) and (b) unless the dispute has been heard and determined by the internal political party dispute resolution. The 2nd Respondent did not have a dispute between the Petitioner and the 3rd Respondent.

11. That the dispute is no longer in the hands of Jubilee Party, I.E.B.C or the Political Parties Disputes Tribunal and they made this submission pursuant to Section 35 of the Elections Act No. 24 of 2011.

12. That the list forwarded by the 2nd Respondent on 18th July 2017 to the 1st Respondent indicated the 3rd Respondent as male. Later the 2nd Respondent wrote to the 1st Respondent on 15th August 2017 resubmitting a further list which action was irregular, illegal, unlawful because the nominations had long closed.

13. That the election had already been done on 8th August 2017 and there was no legal basis whatsoever for the commission to accept the further party list forwarded on 15th August 2017.

14. That the gazettelement and swearing in of the Petitioner as the member of Kisii County Assembly on 7th September 2017 divested I.E.B.C, parties and Political Parties Disputes Tribunal with the jurisdiction to deal with any election dispute which will arise thereafter.

15. The Petitioner relied on the case of **Moses Mwicigi & 14 Others** where it was held that:

“The publication of the Gazette Notice marks the end of the mandate of I.E.B.C regarding the nomination of party representatives and shifts any consequential dispute to the Election Courts”

16. On the issue of judicial review as submitted by the 3rd Respondent, the Petitioner submitted that as held in the **Moses** case (supra), the Constitution and the Elections Law does not provide for judicial

review. They provide for Election Petitions especially as regards any dispute concerning the nomination of the Member of a County Assembly after the final Gazette Notice. The Resident Magistrate's Court seized with the necessary jurisdiction to determine the dispute.

17. On the issue of the Corrigenda which deleted the Petitioner's name and inserted the 3rd Respondent, the Petitioner relied on the case of **Moses Mwiciji** and submitted that once the 1st Respondent publishes the final list in the Kenya Gazette, its work of nominations comes to a complete end.

18. That under Article 88 4(e), the mandate of the I.E.B.C excludes election petitions and disputes subsequent to the declaration of election results.

19. That the Petitioner had already been nominated sworn in as a member of Kisii County Assembly and she is entitled to remain in the office for the next 5 years unless removed by an election court vide a successful election petition.

Analysis and determination;

20. The issue for determination is whether this court has jurisdiction to hear the petition.

21. This court notes that there are two categories of elections that were conducted 8th August 2017. Elections by voting in polling stations and elections by way of nomination through party lists.

22. The nominees secured their seats on the strength of what their various parties garnered. This Petition relates to the elections by way of nomination through party lists. The Petitioner was nominated by the 2nd Respondent, her name put in the Gender Top Up List which was sent to the 1st Respondent pursuant to Article 90 and 177 1(b) of the Constitution and Section 34(1) and 4, 35 of the Elections Act No. 24 of 2011.

23. The 1st Respondent published her name in both Standard and Daily Nation Newspapers pursuant to Regulations 54(8) and 56. The 1st Respondent later Gazetted her in the Gender Top Up List as the elected Member of Kisii County Assembly, she was sworn in on 7th September 2017 and issued with a Certificate of Affirmation of Office for a Member of County Assembly.

24. On the 8th September 2017, the 1st and 2nd Respondents through a Corrigenda in Kenya Gazette deleted her name and replaced her with the 3rd Respondent. The 1st Respondent indicated that they are bound under Section 36(7) of the Elections Act No. 24 of 2011 to ensure the list submitted to them is on the basis of proportional representation under Article 90(1) of the Constitution.

25. That while allocating the special seat member, the 3rd Respondent had been referred to as '**male**' in the list submitted by the 2nd Respondent, hence the reason the seat was given to the Petitioner but later the anomaly was corrected and the gender of the 3rd Respondent was indicated as female hence the publication of the Corrigenda.

26. I will not dwell on the merits of the Petition at this juncture, since a preliminary objection has been raised on the jurisdiction of this court and as rightly submitted by the 3rd Respondent in his submission that once jurisdiction issue has been raised, the court must down its tool and deal with the issue before dealing with the suit itself. In **LilianS** case (supra) jurisdiction is everything and the court cannot make any move when it lacks the same.

27. Article 88 outlines the mandate of the I.E.B.C and emphasis is on Article 88 4(e) which provides:

“88. 4(e) The settlement of electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of results....”.

28. The following provisions; Section 34, 35 and 36 of the Elections Act, Regulations 54 and 55 of the Elections General Regulation, Article 88 and 90 govern the electoral process and therefore they must be read together in a manner that gives full effect to the purpose of the Constitution.

29. Having stated the relevant provisions of the law, the question is, does the dispute in question fall under the ambit of Section 40 of the Political Parties Act? If yes, then the matter ought to be dealt with by Political Parties Tribunal before the same is brought to court and therefore this court would lack jurisdiction to deal with the matter in the first instance. This is the position submitted by the 1st and 3rd Respondents in their submissions to the preliminary objection.

30. This court holds the view that the issue raised in the Petition does not fall under disputes to be dealt by the Political Parties Tribunal under Section 40 of the Political Parties Act.

31. As rightly stated by the Petitioner, she had been sworn on 7th September 2017. The Corrigenda was published on 8th September 2017 after she had assumed office.

32. Article 88 4(e); The commission is excluded from dealing with election petitions and it is only a Gazetted court which is seized of jurisdiction. Further a political party can amend its party list. Therefore, any time between its submission to the I.E.B.C and its publication in the Gazette Notice, legal challenges to party, should ideally be raised before the publication of the nominated persons in the Gazette Notice and their assumption of the relevant office. Such legal challenges may take any form including a constitutional reference, where the persons named in the party list have not assumed the relevant office.

33. Where the persons included in a party list have assumed the relevant office, their nomination can only be challenged by way of an election petition. Refer to **National Gender and Equality Commission (NGEC) –vs- I.E.B.C Constitutional Petition No. 147 of 2013.**

34. The upshot of the above is that this court has jurisdiction to hear the Petition, it is properly before this court and it is for this reason that I dismiss the preliminary objection dated 28th September 2017 with costs in the cause.

RULING DATED and DELIVERED at KISII this 15th DAY of NOVEMBER, 2017.

V. KARANJA

SENIOR RESIDENT MAGISTRATE

In the presence of:

..... for the 1st Petitioner

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent

..... for the 4th Respondent

..... court assistant

V. KARANJA

SENIOR RESIDENT MAGISTRATE