



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT ELDORET

ELECTION PETITION NO.1 OF 2017

REGINA CHEPKEMBOI CHUMBA.....PETITIONER

VERSUS

JUBILEE PARTY.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....2ND RESPONDENT

AND

NANCY SANG.....1ST INTERESTED PARTY

JEPTOO HELLEN.....2ND INTERESTED PARTY

TIROP BELINDA.....3RD INTERESTED PARTY

KEMBOI KESUMO MARIA.....4TH INTERESTED PARTY

SAMBAI JEPKEMBOI LEAH.....5TH INTERESTED PARTY

RONO JEBET ALICE.....6TH INTERESTED PARTY

MAIYO JEPKOECH ZIPPORAH.....7TH INTERESTED PARTY

JERUTO BARBEGI.....8TH INTERESTED PARTY

KENDAGOR JEPKOECH EILEEN.....9TH INTERESTED PARTY

BITOK JOAN CHESEREM.....10TH INTERESTED PARTY

HON. DR. BARMAO CATHERINE KIPTANUI.....11TH INTERESTED PARTY

MALOT LEAH JEMELI.....12TH INTERESTED PARTY

JENNY JEBET TOO.....14TH INTERESTED PARTY

SAMORA MACHEL.....15TH INTERESTED PARTY

BOROSWA MARY GORETI.....16TH INTERESTED PARTY

EDWIN KIPKOECH MISOI.....16TH INTERESTED PARTY

KOSGEI SALINA.....17TH INTERESTED PARTY

RULING

INTRODUCTION

The 2nd respondent, has filed a preliminary objection on the grounds that;

- 1. The court lacks jurisdiction to determine the petition in view of Article 88(4)(e) of the Constitution, Section 74(i) of the Election Act and Section 39 of the Political Parties Act.*
- 2. The petition is time barred Under Article 87(2) of the Constitution and Sections 74, 75 and 76 of the Election Act.*
- 3. The petition is incompetent as Regulations 99(2) of the Elections (General) Regulations 2012, which vests 1st respondent to settle nomination disputes.*
- 4. The petitioner is incompetent for lack of deposit of Security Under Section 78 of the Election Acts.*

The interested parties also filed a preliminary objection on the same grounds by the 2nd respondent: -

PETITIONERS RESPONSE

The petitioner filed grounds of opposition stating that: -

- 1. Pursuant to Article 50 (e) and 88(4)(e) of the Constitution and 75 (1A) of the Elections Act, the court has jurisdiction.*
- 2. There is the overriding objective of access to Justice Under Article 48 and 159 (2) of the Constitution.*
- 3. The petition was filed within time.*
- 4. Under Section 5 and 21(i) of the Elections Parliamentary and County Elections) Petition Rules, the petition is properly in court.*
- 5. Regulation 99(2) of the Election Regulations ceased to have effect.*
- 6. Pursuant to Kenya Gazette No.147, 6.10.17 the court has jurisdiction.*

2ND RESPONDENT SUBMISSIONS

The firm of Kaptich & Co. Advocates filed written submissions stating Article 88 (4) (e) of the Constitution states that settlement of Electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results, shall be the responsibility of the Independent Electoral and Boundaries Commission. The same provision is replicated in Section 74(i) of the Elections Act.

It was submitted that the petitioner should have filed a complaint with the Independent Electoral and Boundaries Commission Disputes Resolutions Committee. The issue should have been raised with the County Speaker to degazette the nominee. Reference was made to the case of

• **ISAIAH GICHU NDIRANGU VS IEBC PET.83/2015.**

INTERESTED PARTIES SUBMISSIONS

The firm of Z. K. Yego & Co. Advocates filed written submissions stating that Under the Constitution, it's the Independent Electoral and Boundaries Commission responsible for settlement of disputes arising from nomination.

Under Section 39 of the Political Parties Act the Political Parties Disputes Tribunal is established to deal with nomination disputes. According to Counsel, the petitioner should have exhausted the disputed mechanisms. Reference was made to several case like

- **Dr. Nyonje vs TNA JR 61/2013.**
- **Beatrice Nyaboke vs IEBC 2013 Elkr**
- **Isaiah Gichuu Ndirangu vs IEBC (2016 Elkr**

PETITIONERS SUBMISSIONS

It was submitted that the gazette of party lists was created, the disputes and was subsequent to the declaration of results, hence Independent Electoral and Boundaries Commission cannot resolve.

Under Section 75(1A) of the Election Act, a Resident Magistrate Court is designated by the Chief Justice to determine the validity of the disputes of Member of County Assembly and the Chief Justice did gazette the court.

Reference was made to the cases of

- **Katiba Institute vs IEBC.**
- **Milka Masungu vs Robert Wekesa (2013) Elkr**
- **Moses Mwicigi VS IEBC (2016) Elkr.**

ANALYSIS AND DETERMINATION

The court record shows that the petition was filed seeking to challenge the nomination of the 1st – 17th interested party on account of failing to take into account persons with disability. It is filed as an Election Petition.

Under Section 75(1A) of the Election Act, a dispute as to the Election of a Member of County Assembly, is to be heard by the Resident Magistrate Court as designated and gazette by the Chief Justice. The gist of the preliminary objection by the respondents is that if the Petitioner was aggrieved by the nomination process, she should have filed a complaint with the Independent Electoral and Boundaries Commission as provided by the Constitution and Elections Act, and also with the Political Parties Dispute Tribunal as provided by the Political Parties Act.

Under Articles 88 (4)(e) of the Constitution and Section 74(i) of the Elections Act, the Independent Electoral and Boundaries Commission shall be responsible for the settlement of Electoral disputes including those arising from nominations.

In the cases of Dr Nyonje and Antony Salan referred to earlier on, an applicant should exhaust the internal dispute mechanism. In the Isaiah Nyonje case the Court of Appeal heard that a party aggrieved by the nomination should raise the issue with the Independent Electoral and Boundaries Commission Dispute Resolution Committee or the Political Parties Disputes Tribunal and if dissatisfied move to the High Court on appeal. The Petitioners response is that the Court is properly seized of the dispute basing on the gazette notice issued by the Chief Justice. It is not in dispute, when the petition was filed, the Chief Justice gazetted the court to determine this dispute Under the Elections Act. The court did not take it upon itself to admit this petition but it was assigned by the Chief Justice. The respondents have not

challenged the power bestowed on the Chief Justice to designate this court to determine the dispute. They should have sued the Chief Justice if they thought the gazette notice was ultra vires as provided Under the Elections Act and sought for invalidation of the gazette notice. Given the hierarchy, this court cannot overrule a legal direction given by the Chief Justice. Apart from the authorities cited by the parties, I do consider other authorities bearing on party list nominations in the case of

- **Rose Wairim Kamau vs IEBC and 3 others No.365(i)** Justice Mayanya made reference to the case of –
- **National Gender vs Commission (147/13)** and held that after County Assembly Nominees had been gazette, the court cannot entertain the petitioner’s complaint upon such gazette, they become members of the respective assemblies and questions of determination of membership can only be determined by way of an Election Petition. The above means that, upon gazette, party list nominees becomes member of the County Assembly and a challenge on the Election of a Member of County Assembly is dealt with a Magistrate Court. In a most recent case
- **Abdi Noor AG Vs. IEBC (2017) Elkr** Justice Mativo referred to the case of **Moses Mwicigi Vs. IEBC** in which the Supreme Court ruled that the entire process of nomination of special seats as an integral part of the election process. The gazette notice signifies the completion of the election through nomination and the evidence of the mandate by the Independent Electoral and Boundaries Commission and shifts any consequential dispute to the election courts.

Basing on the evidence, since disputes concerning the Member of County Assembly, are vested in the Magistrate Court.

It is apparent that the Elections Court under the Elections Act refers to the Magistrates’ Court.

Since the court is duly gazette as an Election Court, it follows that the court has jurisdiction to determine the petition.

Having considered the preliminary objection and rival submissions, I am satisfied that this Court is properly gazetted to determine this petition and has jurisdiction. The preliminary objection on jurisdiction as raised by the 2nd respondent and the interested parties lacks merit and is dismissed with costs. Right of appeal within 30 days.

Signed

C. Obulutsa CM.

13.11.17

Mr. Kipkorir for Petitioner

Mr. Baraza for 2nd respondent

Mr. Yego for interested parties.

I seek leave to file response to the petition.

Mr. Kipkorir: We have a pending application and seek leave to file a further affidavit to the petition.

Mr. Baraza: I seek to file response to the petition. We seek to file further documents.

Court: We can take the days to file and serve the application and response.

Order: Mention on 29.11.17 for pre-trial and filing of any interlocutory application.

SIGNED

HON. C. OBULUTSA CM.

13.11.17