



REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATES COURT AT KAPSABET

PETITION NO. 2 OF 2013

KENNEDY KEMBOI LEL.....PLAINTIFF

VERSUS

SINGOEI PAULINE1ST RESPONDENT

SALLY LELEI.....2ND RESPONDENT

MILKA CHEROBON CHUMBA.....3RD RESPONDENT

THE INDEPENDENT ELECTORIAL &

BOUNDARIES COMMISSION.....4TH RESPONDENT

THE ATTORNEY GENERAL5TH RESPONDENT

RULING

Mr. Magut counsel for 1st, 2nd and 3rd respondent in the petition filed by one Kennedy Kemboi Lel has filed a Preliminary Objection dated 12.9.13. Mr. Yego counsel for 4th Respondent also did file a Preliminary objection to the petition herein the same is dated 6.9.13. before any directions as to how the trial herein would proceed, the court considering the objections raised ordered that 2 Preliminary Objection be heard first before the court could give further orders on this petition. The grounds of the 2 Preliminary Objections were as follows:-

- a. *That the Petition is incompetent and fatally defective as it has been instituted by someone lacking locus standi.*
- b. *That the Petition has no basis in law as the issues in dispute are exclusively within the jurisdiction of the 4th Respondent in terms of the Provisions of Article 88(4) of the Constitution and section 74 of the Elections Act Regulation 99(2) of Election (General) Regulations 2012.*
- c. *That the Petition has been overtaken by events as the 1st, 2nd and 3rd Respondents have already been sworn into office.*
- d. *That the Petition has been brought in bad faith.*
- e. *That the Petition is resjudicata.*
- f. *That the Petition is fatally defective for joiner and non-joiner of parties.*
- g. *That the Petition is incurably defective for non-compliance with the provisions of section 78 of the Elections Act as no deposit for security had been paid.*
- h. *That the Petition is defective for lack of service of the Petition the Petition was not served within the prescribed period as per the Provisions of section 77 of the Elections Act.*

Mr. Nyamweya appeared for the Petitioner/Respondent to the objection. Mr. Magut addressed the court first on the Preliminary Objection raised by him. Counsel told the court that the petitioner herein had no direct interest to the party nominations. He was not one of the people to have been nominated neither was he a member of the Political party which did the nominations. He said the petitioner did not show his interest to the matter since he was neither an official of U.R.P or K.A.N.U political parties that were involved in the nominations. And the counsel also wondered how he got the information in his Petition him not having been involved. It was counsel's submission that if the parties had a problem with the list of those people gazetted they should have moved to court or the appropriate body themselves to challenge that. Counsel said that the Commission (I.E.B.C) did publish a list of complaints in the newspaper and the same were resolved on 4.6.13. Parties were satisfied with decisions and none of parties appealed. Mr. Magut stated section 74(2) of Elections Act which provides:

“ Pursuant to Article 88(4) (e) of the Constitution, the Commission shall be responsible for the 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”.

And that section 88(4) of Constitution of Kenya 2010 provides:

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution and any other elections as prescribed by an Act of Parliament and in particular for:-

- a.
- b.
- c.
- d. e)***he Constitutionn 74(2) of Elections Act which provides:***
- d. ***and the same were resolved on 5.6.13. Parties were satisfied with d***
- e. ***The settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes sub sequent to declaration of election result”.***

Mr. Magut submitted that once the Commission determined the disputes if the parties were aggrieved they should have moved to the High Court and in this petition none of the parties went to High Court. Mr. Magut said that the 1st, 2nd and 3rd respondents have already been sworn in to office thereby the Petition herein has been overtaken by events. The issue of service was raised. Mr. Magut told court they were not served as required by section 77 of E llections Act and yet the service should have been done within 14 days of filing the petition as provided by Rule 13 of Rules or if at all they served there ought to be an affidavit of service on record. It was also his contention Petitioner should pay security for costs for 3 members whom he is challenging their nomination since this is what law contemplates. He also said the Petitioner deposited the security late almost 2 months after filing the Petition which renders the Petition incompetent.

Mr. Yego for the 4th Respondent also addressed the court on his points to elaborate his Preliminary Objection. He associated himself with submissions of Mr. Magut and stated that the Petition was defective and ought to be struck out with costs as it relates to a complaint for nominees for gender top up as provided by section 177 of Constitution. Mr. Yego said this court lacked jurisdiction to determine the dispute since it's clearly a nomination dispute between members of political parties. It ought to have been instituted in I.E.B.C tribunal or Political Parties Tribunal. That resolution of such disputes is provided for under section 40 of Political Parties Act. And from it section 41 (2) provides an appeal from thereof shall lie with High Court. Mr. Yego said this court is nether High Court or Political Parties Disputes Tribunal to exercise original jurisdiction. Counsel relied on section 74 of Elections Act and section 88 (4) of Constitution which I earlier quoted in this ruling. Counsel further relied on the Provisions of Regulation 99(2) of The Elections (General) Regulations, 2012 which provides:-

“All disputes emanating from Political Party Nominations shall be resolved by the Commission at least seven days to the day designated for submission to the Commission by Political Parties of the names of

their respective candidates”.

This he said further buttresses his point that this court has no jurisdiction to hear the Petition herein. Mr. Yego said the Commission had complaints on nominations but none had been filed by Petitioner herein and no appeal was preferred by any of candidates therein. Counsel relied on the authority of **Anthony Salau & Another versus I.E.B.C & 2 Others Nairobi High Court Petition No. 321 of 2013** Where the 3 bench judge found that the Petitioners did not first file their complaints before the I.E.B.C Dispute Resolution Committee but chose to approach the High Court to challenge decisions in respect of nominations. The court dismissed Petition for failure to be filed before the I.E.B.C Disputes Resolution Committee and also further found issues relating to tampering with party lists are internal party complaints and can be resolved within party mechanisms or through the tribunal under section 39 of Political Party Act. And counsel further relied on the authority of **Dr. Billy Elias Nyonje vs National Alliance Party of Kenya & I.E.B.C Nairobi High Court Judicial Review Number 61 of 2013.** Where Justice Lenaola held that:-

“ it is only after I.E.B.C mechanism has been exhausted that a party may come before the court to challenge the process and only on matters of procedure and not on merit of each dispute”.

Which he said meant a party has to exhaust internal mechanism and then one can challenge the procedure of the same in the High Court. In **Wilkister Keubo Mosomi vs Independent Electoral & Boundaries Commission Nairobi High Court Judicial Review No. 206 of 2013.** The three judge bench of Justice Majanja, Mumbi and Korir, found the approach taken by the I.E.B.C Dispute Resolution Committee to be reasonable on issue of identity of Nominee and they found no basis had been laid for the court to interfere.

Mr. Yego submitted that the petitioner lacked Locus Standi to institute this petition. Since the Petitioner from his description is a man and not female and couldn't by chance be nominated for position reserved for women. On issue of Locus counsel relied on the authority of :- **Kituo Cha Sheria Vs. John Ndirangu & I.E.B.C Nairobi High Court Election Petition No. 8 Of 2013** where the judge, Justice Kimondo found the Petitioner had no Locus to bring Petition to court and it couldn't stand. He said one called Julia Jepkosgei Koriri who had appeared before I.E.B.C Dispute Resolution Tribunal is the only one who would have appealed on procedure and this makes any other person a busy body. Mr. Yego said that the Petition was defective for non-joinder and misjoinder . Complaints are directed at U.R.P and K.A.N.U and none has been sued as the Respondents. The Attorney General has been sued yet he had no role to play in it.

Further Mr. Yego submitted the Petition did not comply with provisions of section 78 of Elections Act as no deposit was paid under the Act. The payment of security for costs should have been made within 10 days of filing the petition. He relied in the authority of **Kimutai Vs Lenyongopeta & 2 Others Nairobi Civil Appeal 273 of 2003** where the judges held that failure to deposit the security within time was not a mere irregularity which could be waived by the parties. The counsel further emphasized that section 78 (3) provided where the security is not deposited matter can be dismissed. On issue of service Mr. Yego submitted the petition was not served. They had to get photocopies of pleadings from registry. Despite the law being liberal and even allowing service by advertisement this was not done. The counsel relied on the decision in **Kumbatha N. Cidi Vs I.E.B.C Malindi High Court Election Petition 13 of 2013.**

Where justice Muchemi held:-

“ Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Services of a pleading accords the opposite party the party the chance to be heard. It is my considered opinion that this Petition is a petition that never was.”

Counsel asked Petition to be dismissed. Mr. Nyamweya for Respondent said that under section 75 (1) (a) of Elections Act this court has jurisdiction to determine validity of Election as it has been so designated by Chief Justice. That this court is clothed with Statutory Provision, no submissions had been made how

that jurisdiction was taken away. Counsel distinguished the Antony Silabe vs I.E.B.C. case with this one saying in it parties went to court when dispute resolution was going on unlike in this case where the Respondents have been sworn in as Member of County Assembly and that this makes matter not to be within I.E.B.C. Dispute Resolution Committee. And that this is now a matter of Petition as envisaged under section 75. Election Act.

On issue of Locus Standi, he said no law was cited to buttress the issue of Locus Standi. He said a Preliminary Objection should be on clear points of Law not facts. He relied on case of: **Janendra Sha & Others Vs Mistry Mulji Mombasa Civil Appeal no. 237 of 2006** to illustrate on issue of what a Preliminary Objection is. In answer to issue of **Locus in Kituo Cha Sheria vs John Ndirangu**. Mr. Nyamweya said the case is not the same as the one herein since Kituo Cha Sheria wasn't a prisoner and hence had no interest in the case. The Petitioner being a resident of Nandi, had interest. And further that Rule 20 of the Election Petition Rules 2012 provides for extension of time. Mr. Nyamweya said the court extended time for depositing security which had been done. the fact that it was made by another person not the petitioner is immaterial. He said the court should consider the overriding objective in rules 4 and 5 of Election Petition Rules. On the object of the court in this matters. He said the Petition was proper before court and court had jurisdiction to entertain it. Mr. Magut in a rejoinder told the court section 75 (1) (a) of Elections Act talks of validity of Elections and not nominations. He also said the issue of gender is a point of law. He said the court revived proceedings herein on its own motion but no application was made for extension of time to deposit security. He said lack of service was fatal and they have not tried to demonstrate any service. He asked Petition be dismissed.

Mr. Yego also said the court had jurisdiction under section 75 (1) (a) Elections Act as amended gave court jurisdiction to hear Election Petition arising from Elections and not nomination. That nomination disputes are a reserve of I.E.B.C and if one is aggrieved they go to High Court. He said in Salau case I.E.B.C Dispute Committee had rendered decision and there was no ongoing dispute. He said the Petitioner had no Locus to sue derived under Article 258 of Constitution. He said this is a private interest and not a public interest. And that the fact that Petitioner is a man denies him the right of audience in nomination relating to women, that Petitioner lacks Locus Standi to institute Petition. He further stated the issue of service and deposit of security are under the Act not the rules. The rules can't amend Act. Hence the rule on extension isn't applicable in this case. While relying in Supreme Court Decision of Raila Odinga vs I.E.B.C & Others, he observed that the Supreme Court held Article 159 of Constitution does not aid a party to avoid procedural imperatives. The court is to promote principals and purpose of the constitution. He asked Preliminary Objections be upheld.

I have gone through the objections raised and noted submissions of Applicants. I have also noted the response of the Respondent to the objections. I have looked at the relevant Legal Provisions as well as looked at the authorities which have been quoted.

From the objection raised, I do find these are the issues for determination.

- 1. If the Petitioner had Locus Standi to file this Petition.***
- 2. If this court ha jurisdiction to entertain this Petition by virtue of Provisions of Section 74(1) of Elections Act.***
- 3. If failure to pay security deposit in time renders this Petition defective.***
- 4. If lack of service of the Petition renders it defective and for it to be dismissed.***

I will look at these issues in the sequence I have provided. Counsels for the Respondent/Applicant have extensively submitted on them quoting various authorities, however this court has to consider the Legal Provisions governing the said issues.

- 1. On issue of Locus Standi of the Petitioner to file this Petition. The Petitioner describes himself as a Kenyan Citizen resident of Nandi County and a registered voter. Article 258 (1) of our Constitution 2010 provides:-***

“1) Every person has the right to institute court proceedings claiming that this constitution has been

contravened, or is threatened with contravention.

2) In addition to a person acting on their own interest, court proceedings under clause (1) may be instituted by:

a) A person acting on behalf of another person who cannot act in their own name.

b) A person acting as a member of, or in the interest of a group or class of persons.

c) A person acting in the public interest; or

d) An association acting in the interest of one or more of its members”.

This provision in the constitution allows anyone to bring a matter to court including the Petitioner herein. The Petitioner is even allowed to bring matter to court apart from for his own self-interest even on behalf of others.

This is a petition involving nomination of women to the County Assembly, though not a woman he is entitled under the constitution to bring suit on behalf of a group for their interest. The argument by counsels for the Respondents that the Petitioner is of male gender hence has nothing to do with female representations cannot be held to be correct in view of the provisions of Article 258 of constitution. The Petitioner has described himself as a Kenyan Citizen and registered voter. It has not been disputed that he is a registered voter. As a voter it would be in his interest and in the interest of public at large in Nandi County to have representation in the County Assembly that was democratic and meritorious.

Further the issue of the correct candidate chosen by parties not being gazetted is an issue that touches on the democratic will and wish of the people through their elected leaders and an infringement or threat to infringement is a contravention or a threat to contravention of the constitution and as provided by Article 258 of the constitution any person can go to court to claim that. Article 38 of Constitution gives Political rights. The fact that party leaders are not enjoined as Respondents in this petition does not in any way oust the Locus of the Petitioner to bring this suit to court as a Citizen and a Registered Voter.

2. On second issue of whether this court is clothed with jurisdiction to hear and determine this petition.

Counsels for the Respondents correctly pointed out the provisions of Sections 74 (1) of Elections Act, Article 88 (4) (e) of the Constitution. Regulation 99 of The Elections (General) Regulations 2012, and even Section 39 of Political Parties Act. These are provisions which deal with the Electoral Dispute Resolution mechanisms which are employed by the different actors during the nomination.

The tribunal (Political Parties Disputes Tribunal) Under Section 40 (1) of the Act will deal with issues of the party, within and without the party (in relation to nomination lists) before the said list is handed over to the Independent Electoral and Boundaries Commission for gazette. Once the list has left the Political Party to the Commission without any dispute to it, the political party tribunal has no jurisdiction to adjudicate over any dispute regarding the nomination which was not raised when the nomination was done by the Political Party.

It is also true that Electoral Dispute Resolution Tribunal of the Commission will also deal with disputes presented before it regarding nomination before the date of nominations or election. Section 74 (2) provides:-

2) An Electoral Dispute under subsection (1) shall be determined within 7 days of the lodging of the dispute with the Commission.

3) Notwithstanding subsection (2) where a dispute under sub section (1) relates to a prospective nomination or election the dispute shall be determined before the date of the said nomination or election,

whichever is applicable.

The import of this is that disputes will be determined expeditiously (within 7 days) as stated in section 74 of Elections Act and the same have to be determined before the prospective nomination (as in this case).

It thus means if the Petitioner herein never had his dispute resolved by the Commissions Tribunal during nomination list receipt that does not preclude him from coming to this court to challenge the names gazetted. Although not stated by the Petitioner, as a voter he could only have become aware of the names of nominees after they were gazetted and this Petition was filed after they were gazetted. Had he been a party official may be he would have seen or known the names of nominees before gazettement. I do find that section 74 (3) doesn't envisage a situation where the Commissions Dispute Resolution Committee solves disputes regarding nominees already gazetted. And an aggrieved party in the case of member of County Assembly cannot move to High Court since it is not an appeal from the tribunal. Section 75 (1) (a) of Elections Act is clear it is this court which has jurisdiction to preside over disputes relating to representation to the County Assembly.

I do find by virtue of the nominees now already being members of Nandi County Assembly, this court has jurisdiction to hear and determine this petition.

3. The other issue regards payment of security deposit. The Petitioner herein paid the security after about 2 months of filing the Petition. Section 78 (2) and Rule 11 (1) of Elections Act provide for a deposit of security and provides the time frame within which the security is to be deposited. It is not denied that the Petitioner did not deposit the security for costs within 10 days after filing the Petition as provided by Rule 11(1). Rule 20 does provide for extension of time where a party has failed to do the required activity within the time provided in the law. It is noteworthy to note that the Petitioner never invoked Rule 20 to ask for extension of time. This court fixed this Petition for mention on 13.9.13 on it's own volition for pre-trial direction and noted that the Petitioner had not paid security. Subsequently the court fixed another mention on 24.9.13 when the Petition was found to have paid the security for costs. The matter was fixed for mention on 24.9.13 since counsels for the Respondents informed the court they intended to raise Preliminary Issues to the Petition which court allowed to be raised on 24.9.13 before pre-trial directions are taken. Hence it is not true as submitted by counsel for Petitioner that the court extended time for them to deposit security as per provision of Rule 20. If anything by 13.9.13 when matter was mentioned for pre-trial conference the time of making the deposit had already lapsed and the same had not been extended. The counsel for the Petitioner told the court that the security of costs had already been deposited and hence does not affect validity of the Petition. Rule 20 of Elections (Parliamentary and County Elections) Petition Rules 2013 gives the court power to extend time of doing an act needed under the law. And in no way does Rule 20 contradict or amend provisions of section 78 (3) of Elections Act as stated by Mr. Yego for 4th Respondent. Section 78 (3) contemplates a situation where no deposit security has been paid at all and if by the time of canvassing the Preliminary Objections herein the petitioner had not paid any deposit security the Petition could not have been cured by Rule 20 of Elections (Parliamentary and County Election) Petitions Rules 2013.

As observed by Justice Muchemi in Kambatha N. Cidi vs I.E.B.C & Others High Court Malindi Election petition 13 of 2013 that:-

“ The case of a Petitioner who deposits security out of time limit provided by the rules will be treated differently form that of a Petitioner who fails to deposit the security at all.

It has been held in several decisions that failure to deposit the security within the time allowed is not fatal to the Petitionthe court must have regard to the overriding objective in the case before it as opposed to non-compliance with the rules”.

I am guided and agree with the sentiments of the Learned Judge in this case and I do adopt the same.

4. The last but not least issue is that of service of the Election petition herein. The Respondents through their counsels contended that the Petitioner never served them with the Petition. And that even the copies they had were obtained from the registry, where they got photocopies of the pleadings. I have noted from the pleadings on record the Respondents filed their responses to the Petition on 12th September 2013. The 4th Respondents response was filed on 13.9.2013. Their responses were filed after they received a mention notice from the court asking them to avail themselves on 13.9.13 for pre-trial conference. It's logical that they may have obtained the copies then from the registry after being informed of the mention for Pre-trial Conference. This is supported by the date they filed their responses. The Petition herein was allocated to me by the Hon. Chief Justice and a gazette notice being a public document, is a way through which the Respondents knew that a Petition had been filed against them. Prompting them to instruct their counsels who came to registry saw petition and entered appearance; while awaiting service of the Petition. On 9th September 2013 when they were served with mention notices, and yet they hadn't been served with Petition. They had to get photocopies from registry which they used to prepare their responses file don 12.9.2013.

The Petitioner has not denied that he never served the Petition. Mr. Nyamweya for the Petitioner did not deny that lack of service of Petition renders the Petition hopeless and bear making it fit for dismissal. Of significance is, nothing was explained by the Petitioner of the steps he would take to breathe life into the Petition at this late hour. Having taken no action toward reviving the Petition, the Petitioner must bear the consequences of his omission.

In the Cidi case High Court Malindi Election Petition no. 13 of 2013, Justice Muchemi stated:-

“ The Petition was filed within the stipulated period but it was not served. Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. Service of a pleading accords the opposite party the chance to be heard “ and to adequately prepare for his/her case.

Emphasis mine.

The judge found the Petition in that case to be a Petition that never was. I am guided by the sentiments of the Learned Judge and I fully adopt the same herein, bearing in mind that Rule 13(1) of The Elections (Parliamentary and County Election) Petition Rules 2013, uses the mandatory word “**shall**”. It should also be noted that failure to serve the Petition herein is not a mere irregularity that can be wished away. I do find that this Petition cannot stand in view of blatant non-compliance with the law.

It is the action of the Petitioner of filing this Petition that caused the Respondents to instruct their advocates to defend the Petition. The Petitioner cannot therefore escape payment of costs. Costs follow the event and the Petitioner must take the responsibility for costs incurred by the Respondents in relation to lawful expenses incurred in regard to the Petition. The Preliminary Objection has been filed at earliest time which is ideal.

The upshot of the Ruling is that I do find the Preliminary Objection raised by 1st, 2nd, 3rd and 4th Respondent on limb of lack of service of the Petition to have merit and consequently the Petition is hereby struck out for non-compliance with the law and costs are awarded to the Respondents.

It is so ordered.

B. MOSIRIA (PM)

9.10.2013

Ruling read this 9.10.2013 in open court at Kapsabet in presence of :-

Mr. Chogo holding brief for Nyamweya for Petitioner.

Mr. Magut for 1st, 2nd and 3rd Respondent.

Mr. Yego for 4th Respondent.

N/A from the 5th Respondent.

B. MOSIRIA (PM)

9.10.2013

Mr. Yego. Since the court has not capped the costs and knowing the Petitioner had deposited security he might be tempted to withdraw the said amount. I do pray amount be stayed pending taxation of bill of costs.

Magut. I concur with Mr. Yego.

Court. I do order security deposited by Petitioner not to be released till the bill of costs is taxed.

B.MOSIRIA (PM)

9.10.2013

Court. Copies of proceedings to be availed to parties and counsels upon payment of requisite cost.

B. MOSIRIA (PM)

9.10.2013.