IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MWERA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 179 OF 2013

BETWEEN

BEATRICE NYABOKE OISEBE……...APPELLANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION……..…..1ST RESPONDENT

MUSLIMA DIDA……...…….2ND RESPONDENT

AND

UNITED DEMOCRATIC FORUM PARTY…….....…..…INTERESTED PARTY

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mumbi Ngugi, Majanja & Korir, JJ.) dated 12th July, 2013

in

JR CASE NO. 215 OF 2013)

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JUDGMENT OF THE COURT

The appeal herein based on 4 grounds, followed judgment of the High Court (Ngugi, Majanja, Korir, JJ.) delivered on 12th July, 2013 after hearing a judicial review case – JRC.215/2013 filed by appellant ***Beatrice Nyaboke Oisebe*** against the two respondents. The United Democratic Forum Party (UDFP) appeared as an interested party. In paraphrase, the grounds were as follows:

i. ***the learned judges and the Nomination Disputes Resolutions Tribunal erred in basing their judgment on the 1st respondent's (IEBC) non-existent party list;***

ii. ***the said judges and tribunal erred in arriving at a decision that the name of the 2nd respondent was in the 1st respondent's first submission of political parties list to Kisii County Assembly***

when in fact such a name did not feature;

iii. ***both the judges and the Tribunal failed to analyse the evidence on record;***

iv. ***the judges and the Tribunal did not read the law to arrive at a just conclusion.***

Basically the appellant was complaining that she and not the 2nd respondent (***Muslima Dida***) ought to have been nominated to the Kisii County Assembly.

The brief background to this kind of proceedings is that the 2010 Constitution, Article 90 provides for election of members of the County Assemblies under Article 177 1(b) (c) – gender top-ups members and representatives of marginalized groups – on the basis of proportional representation by use of party lists. Those people who find their way into county assemblies may be said to occupy "***special seats***."

Article 90(2) of the Constitution further provides that the Independent Electoral and Boundaries Commission (IEBC) shall be responsible for the conduct and supervision of elections for seats provided for under Article 90(2) and shall ensure that parties submit lists of qualified candidates which alternate between male and female candidates in the priority in which they are listed.

In the run-up to the general elections held on 4th March 2013, IEBC requested political parties to submit party lists under Article 90 in respect of the Senate, the National Assembly and the County Assemblies. Based on these party lists, and the result of the general elections published on 13th April 2013, IEBC published the allocation of nominees to county assembly special seats.

Thereafter a constitutional reference, ***Petition No.147/2013*** was filed: ***The National Gender & Equality Commission vs the IEBC, the Hon. The Attorney General*** challenging the manner in which IEBC had allocated the said special seats. The High Court delivered a ruling which ordered that IEBC do put in place mechanisms to resolve any disputes concerning the lists in accordance with Article 58(4)(e) of the Constitution as read with Section 74 of the Elections Act, 2011. This was to ensure that while dealing with the disputes touching on the said lists IEBC was discharging its constitutional responsibility to satisfy itself that the lists met constitutional criteria. IEBC had also been ordered to publish the party lists in respect of Special Seats for the county assemblies in accordance with Regulation 54 of the Elections (General) Regulations 2012 and the list of allocations derived from the said party lists submitted for the parties that had qualified as per Article 90(3) for membership of the county assemblies under Article 77 of the Constitution. Such lists were published on 13th April 2013. After that some 588 complaints/disputes were filed by people aggrieved by the party lists presented to IEBC. Accordingly, IEBC set up the dispute Resolution Committee, as per the High Court order, to resolve those complaints/disputes. This Committee is also referred to as a tribunal. It dealt with the appellant's complaint – IEBC/NDRC/PL/130/2013 – Beatrice Nyaboke vs UDF, thus:

> ***"The complainant claims that she was in the list that was submitted by her party UDF. She however claims that IEBC nominated Muslima whose (name) was not submitted by the UDF party for nomination. The advocate for the party submitted that Muslima is number 1 in the Gender top-up list*** (underlining added.)
>
> ***Committee: Judgment/Decision***
>
> ***After hearing the parties the complaint is dismissed as the respondent is rightly on the list taking into consideration the priority in the party list as was submitted by the Political Party."***

Not being satisfied with the above decision, the appellant filed the judicial review reference (above) which the High Court heard.

In setting out the judgment the learned judges stated the complaint of the appellant thus:-

> ***"The applicant is aggrieved by the nomination of the 2nd respondent as the special interest (minorities) nominee for Kisii County. <u>She asserts that the nominee does not come from Kisii and should not have been the nominee for the United Democratic Forum Party</u> in Kisii."*** (Underlining added.)

Stopping here for a moment to look at the appellant's complaints before the committee and the High Court, it is manifestly clear that the bases differ. While before the Committee she claimed that IEBC nominated Muslima (2nd respondent) whose name was not submitted by UDF, in the High Court, her assertion is that the 2nd respondent does not come from Kisii and so she should not have been nominated. We observe that the appellants' complaint before the committee – No.IEBC/DRC/PL/130/2013, gave rise to the judicial review proceedings in the High Court yet the basis of moving to each forum is not the same. The Judges further said that before the committee or tribunal the appellant sought the removal of the 2nd respondent from the list of nominations. Her complaint was dismissed because the 2nd respondent was placed at No.1 in the gender top-up list. Her nomination was based on gender and it was supported by the interested party (IEBC). The High Court concurring with the Committee's reason to dismiss the appellant's complaint added:

> ***"The list was submitted by the party which had the core mandate to prepare the lists for party nominations."***

And with that the appellant's reference was dismissed by the High Court with no order as to costs – hence this appeal.

Mr. Osoro, learned counsel for the appellant, repeated the plea by his client that IEBC nominated the 2nd respondent whose name was never in the list UDF presented to it. The appellant's name did appear. Citing provisions of Section 34 of the Election Act, we heard that it is the party to give lists of nomination on priority basis to IEBC. IEBC had no mandate to amend that list and Article 90 of the Constitution was clear on this. The High Court had confirmed the illegal act of IEBC and so this court should overturn that confirmation.

Mr. Somane, learned counsel for the 1st respondent, referred to the provisions of Article 177(1)(c)(d) of the Constitution regarding the marginalized groups and gender top-up. IEBC was supplied with such lists. Referring to the list contained in the supplementary record of appeal, the appellant appeared as number 1on the ***"Marginalized List***" for Kisii County while the 2nd respondent featured as number 1 on the "***Gender top-up List***" for the same County. The list was received on 22nd February, 2013 as per the rubber stamp, from UDF. UDF was given by IEBC only one slot in the top-up list and so the same went to the 2nd respondent (gender). As for the marginalized list UDF had no slot allocated by IEBC. The total of 5 slots went to: TNA (1), ODM (2) and Ford-P (1). This is where the appellant could have benefitted. The committee had all these facts before it and it concluded that the 2nd respondent had been properly nominated. The High Court confirmed that. The decision should not be disturbed.

The 2nd respondent (Muslima Dida), appearing in person, supported the stand by the IEBC. M/S Petronilla Were, CEO of UDF addressed us that 3 lists were submitted to IEBC for nominations for:

a. ***Marginalized groups***
b. ***Gender Top-Up (Male)***
c. ***Gender Top-up (Female)***

Seemingly, not much was done with (b). No slot was given to Kisii County for the marginalized group where the appellant was number 1. Only one slot was given for gender top-up and the 2nd respondent, who was number 1 on that list got nominated. It was a valid nomination. Then in reply we heard Mr. Serem holding brief for Mr. Osoro. Now follows our determination.

Combining 2 first grounds for determination to go together the appellant contended that the Nomination

Dispute Resolution Committee/Tribunal and the High Court based their decision on non-existent party list and that the 2nd respondent's name did not appear on the party's first submission of the nominees list. We went over what the appellant termed IEBC's First Submission of Political Parties List. It bore the name of the appellant as number 1 among fifteen others. Mr. Osoro argued that list was for Kisii County. But it was nowhere there stated for what nominations: marginalized, youth, disabled or gender top-up. The source of this list was not disclosed. The appellant appended another document, presumably to act as the source of the aforementioned First Submission List. There was no evidence that it originated for the interested party (UDF). It was merely headed:

KISII COUNTY

RECOMMENDED NOMINEES,

and under Bonchari, the name of the appellant featured as number 2. This list was said to have been prepared and signed by two people – Y. K. Obiro – Chairman and C. M. Nyachieo, Returning Officer. It was dated 26th February, 2013. We could not figure out for which body these two were officials and where their list was headed to or whether it was received there.

On the other hand the IEBC and UDF exhibited part of a list with the address of the UDF. It had names of the appellant, proposed on marginalized list and that of the 2nd respondent proposed for gender top-up. It was received by IEBC and date-stamped 22nd February, 2013. This is the list IEBC said that it acted on. Kisii County was not given a slot for the marginalized group. So IEBC could not nominate the appellant who was on that list. But when one slot was given to that County for gender top-up, it was given to the 2nd respondent who had been recommended by UDF for such nomination. From the foregoing we were satisfied that UDF availed a list to IEBC for the purpose of nominations with the 2nd respondent for gender top-up. She was thus duly and validly nominated. These two grounds therefore fail. But before we leave them, we refer to the High Court's statement that UDF had the core mandate to prepare lists for party nomination.

Article 177(1)(b)(c) of the Constitution provides for membership of County assembly and particularly nomination for special seats:

> ***"177. (1) Any county assembly consists of -***
>
> a. **……..**
> b. ***the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.***
> c. ***the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament."***

Parliament passed the Elections Act 2011. Referring directly to the part dealing with nominations to the county assembly, Section 34 says:

> ***"34. (1) … (2) …(3) …***
>
> ***(4) a political party which nominates a candidate for election under Article 177(1)(a) shall submit to the Commission a party list in accordance with Article 177(1)(b) and (c) of the Constitution."***

Article 177(1)(a) applies to nominees to be elected by voters, while (b) and (c) refer to nomination for special seats. In sum it is the party, and it alone, which proposes a list for party nominations which is submitted to IEBC in order of priority. Such lists are not subject to amendment during the term of Parliament or County Assembly. It was not demonstrated that there was any default in the nomination process or IEBC amended the list submitted to it, hence our conclusion that the 2nd respondent was validly nominated. The committee found so and so did the High Court. We agree with them.

The third and fourth grounds charged that both the High Court and the Disputes Resolution Committee did not analyse the evidence on record or properly appreciate the law to arrive at a just conclusion. No material was placed before us to support either ground. But we appreciate that before the committee, each side was entitled to place as much material as it had to prove or oppose the complaint. We are not told that any party was denied that. So we can but conclude that the appellant laid before the committee, documents to show that she was the only nominee and yet Muslima Dida was given the slot when there was no list submitted bearing her name. We also believe that to file a judicial review reference in the High Court, the parties presented the materials they placed before us.

The committee concluded:

> ***"After hearing the parties the complaint is dismissed as the respondent was rightly on the list…"***

The list must have been part of the evidence on record. And for the learned judges, they said:

> ***"Having read the pleadings by the applicant and the respondent, and heard their submissions…"***

With this, it cannot be rightly claimed that the two organs failed to consider evidence before it. They did.

On the issue of the law, the 2 decisions may not have quoted specific provisions of the statutes and the Constitution but the import of the law is clear in their decisions including the remarks by the High Court that it is only political parties which have the core mandate to prepare lists for nominations (Section 34, Elections Act). Again these two grounds lack merit.

And before conclusion, we repeat what we stated earlier that the appellant had 2 different bases to present her complaint, first to the committee and then to the High Court. They had no nexus or consistency. We say no more.

In the result, this appeal is dismissed. The High Court dismissed the appellant's reference with no order as to costs. But we are of the view here that the appellant do pay costs to the respondents.

Dated and delivered at Nairobi this 11th day of October, 2013.

D. K. MARAGA

…….....

JUDGE OF APPEAL

J. W. MWERA

…….....

JUDGE OF APPEAL

J.
MOHAMMED

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

/jkc