



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KIMILILI**

**PETITION NO. 2 OF 2017**

**JUSTINE CHEMTAI ..... PETITIONER**

**VERSUS**

**WINNIE ATIENO NYAMBOK**

**(FEDERAL PARTY OF KENYA PARTY LEADER ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL BOUNDARIES COMMISSION..... 3<sup>RD</sup> RESPONDENT**

**R U L I N G**

JUSTINE CHEMTAI hereinafter, called the Petitioner filed a Petition on the 6.9.2017 against WINNIE ATIENO NYAMBOK , FEDERAL PARTY OF KENYA PARTY LEADER and INDEPENDENT ELECTORAL BOUNDARIES COMMISSION ( sic) hereinafter called the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively.

The petitioner is challenging the gazettelement of the 1<sup>st</sup> Respondent as a member of Bungoma county in the Gender top up lists. The Petitioner's contention is that the 1<sup>st</sup> Respondent was not a resident of Bungoma County and neither is she married within Bungoma County.

The petitioner contented that the acts of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent prejudiced her. She sought orders to have the Respondent expunge and degazette the name of the 1<sup>st</sup> Respondent as a member of the Bungoma County Assembly and that the same be replaced with the names of lawful nominee from Kimilili sub county, Bungoma county.

The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed responses to the petition. The advocate for the 1<sup>st</sup> Respondent successfully sought to enjoin the Federal party of Kenya as an interested party to the petition. There was no response from the 2<sup>nd</sup> Respondent .

The 3<sup>rd</sup> Respondent raised a preliminary objection dated 20.9.2017 challenging jurisdiction of the court to determine the matter.

The parties appeared before court on the 10.11.2017 for pretrial conference. At the pretrial conference, the issue of security of costs was raised by the advocate for the 1<sup>st</sup> Respondent. It is not in dispute that the petitioner has not deposited security for costs as is mandatorily required under Section 78 of the Electoral Act. At the pretrial conference, the parties agreed to file skeleton submissions with regard to the preliminary objection on jurisdiction and on the issue as to whether failure to deposit security for costs by the petitioner would invalidate the petition. The 1<sup>st</sup> and 3<sup>rd</sup> respondent indeed filed their

skeleton submissions as a greed. The petitioner filed her submissions on the 10.11.2017. I also note that amongst the documents filed by the 3<sup>rd</sup> Respondent is a decision by the political parties Tribunal in complainant No. 469 of 2017 between the petitioner and the interested party in which the tribunal amongst others made the following orders.

(a) “A declaration be and is hereby issued that the Respondent (read interested party ) lists of gender top up nomination to Bungoma county Assembly does not reflect the ethnic diversity of the people of Bungoma county.

(b) The Respondent ( read interested party ) is directed to reconstitute its lists of gender top up for nomination to Bungoma county Assembly to include the claimant ( read petitioner’s ) name as a person to represent gender balance within 48 hours from the delivery of the judgment.

(c) .....

(d) A copy of the judgment be transmitted to the Independent Electoral and Boundaries Commission for necessary action.”

(e) .....

On the 30.10.2017 the petitioner through her advocate filed an application under certificate of urgency seeking extension of time within which to furnish security. The court delivered a ruling on the 7.11.2017 dismissing the plea to deposit security out of time. The parties agreed by consent to rely on the submissions filed in support of their respective positions regarding the twin issues.

### **1<sup>st</sup> Respondent and the interested parties submissions.**

The 1<sup>st</sup> respondent and interested party in their written submissions urged that the court lacks jurisdiction to determine matters arising out of nominations. That the petitioner ought to have invoked the jurisdiction of the 3<sup>rd</sup> respondents Committee on Disputes Resolution pursuant to Section 74 of the Elections Act, Regulation 99 of the Election ( General ) Regulations and the rules of procedure on settlement of disputes made under the regulations.

The 1<sup>st</sup> Respondent and interested party referred court to Articles 84 and 88(4) of the constitution of Kenya. On the issue of security the 1<sup>st</sup> Respondent and Interested party submitted that because security for costs was not made the petition should be struck out with costs.

### **3<sup>rd</sup> Respondents submissions.**

On the issue of security for costs the 3<sup>rd</sup> Respondent submitted through its advocate that the failure to deposit security as stipulated in section 78 (1) of the Elections Act invalidates the Election Petition. That the issue of security goes to the root of Jurisdiction of the court to entertain the dispute. He submitted that the court ought to strike out the petition.

On the issue of jurisdiction the 3<sup>rd</sup> Respondent submitted that the court lacks jurisdiction to entertain this petition pursuant to Article 88 (4) (e) of the Constitution of Kenya, Section 74 of the Election Act and Rule of 99 of the Rules of procedure or settlement of disputes.

The 3<sup>rd</sup> Respondent relied on the provision of Article 88(4) , of the constitution, section 74 of the Election Act and rule 9 of the Rule of procedure on settlement disputes. The 3<sup>rd</sup> Respondent relied on the several decisions including the case of David Ogoga Oyugi and Another -vs- Muslimi dide & 2 others ( 2016) e KLR and Francs Geituu Palsimei -vs – The National Alliance Party.

### **The petitioner’s submissions**

The Petitioner submitted that the court has jurisdiction to hear and determine the petition. The petitioner's argument is that the 3<sup>rd</sup> Respondent's Committed on Dispute Resolution has jurisdiction only before gazetting of the nominated members of County Assembly.

On the issue of security for costs, the 3<sup>rd</sup> Petitioner submitted that the payment of security for costs is merely procedural and not substantive. That the Petitioner is willing and able to deposit security for costs given a chance.

### **Issues For Determination**

From the preliminary points raised and the submissions filed the following issues fall for the courts determination;

- (a) Whether this court has jurisdiction to entertain the petition
- (b) Whether failure to deposit security for costs invalidates the petition.
- (c) Whether the court has jurisdiction to entertain the petition

The issue of jurisdiction is central in this petition. It is settled law that without jurisdiction a court has no business entertaining a matter before it

“NYARANGI’ J A in the case of The owners of the motor vessels Lilians –vs- Caltex Oil Kenya Ltd KLR, (as he then was ) held as follows;

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a constitution of proceedings pending other evidence. A court of law draws tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction”.*

The preliminary issue of law of jurisdiction as raised by the 3<sup>rd</sup> Respondent, 1<sup>st</sup> Respondent and Interested Party is premised on Articles 88 (4) (e) of the constitution and Section 74 of the Elections.

Article 88 (4) (e) of the constitution provides;

*“ The Commission ( IEBC ) is responsible for conducting or supervising referendum and elections to any elective body of office established by this constitution, and any other elections prescribed by an act of parliament and in particular for;*

*( e )The settlement of electoral disputes, including disputes relating to and arising from nominations but excluding Elections petitions and disputes subsequent to the declaration of election results (emphases added.)*

Section 74 (i) of the Election Act provides;

*74 (i) 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 elections petitions and disputes subsequent to the declaration of election results (emphasis added).*

There is no dispute that what is before court is an Election Petition. In the case of David Ogege Oyugi - Vs- Muslim Dida & 2 Others ( 2016 eKLR Okwany W.A J. held.

*“Election Petitions includes such petitions which challenge the outcome of the electoral process and in my humble view nominating members to the National Assembly ( County Assembly ) is also part of the electoral process”.*

In said David Ogega case ( supra) the court quoted with approval the decision in Republic -vs- County Returning Officer, Taita Taveta & 2 others Nairobi HCCC NO. 96 of 2013 (JR) where the court had held;

*“We reassert as we previously did that the only valid way of challenging the outcome of the electoral process and for that purpose nominating members of the National Assembly ( read County assembly ) as part of the Electoral process is through an Election petition, as provided in the constitution and the National Assembly and Presidential Elections Act (emphasis added).*

This being an election petition, the Independent Electoral and Boundary’s Commission and any other body has no jurisdiction. Only the court should be seized of the matter. It is further not in dispute that this is a dispute arising subsequent to the declaration of election results. It is therefore my finding that the petition is properly before this court. The preliminary objection on jurisdiction is without merit and the same is dismissed.

#### **(b) Whether failure to deposit security for costs invalidates the petition**

There is no dispute that no security for costs was deposited by the petitioner. It is further common ground that an application seeking extension of time to deposit security was disallowed. Can the petition stand without security being furnished. In the case of Fatuma Zainabu Mohamed -vs Ghali Derrita & 10 others ( (un reported) Kisii Election Petition No. 6 of 2013 Murithii J held.

*“ Accordingly security for costs whether it is required by statutory provision and order of the court, must be taken as going to the root of the jurisdiction of the court to entertain the dispute. If no security for costs is deposited, then the petition or other proceedings though validly lodged before court in accordance with the applicable procedure rules cannot proceed to hearing and determination as further proceedings are prohibited . As such, the provision for security for costs is , in my view I substantive requirement underlining the jurisdiction of the court to deal with the dispute to the proceeding in which the security for costs is required and is based on the sound principle for the protection of the defendant from unrecoverable costs”*

In the case of Evans Nyambeso Zedekha & Another -vs- IEBC and others 2013 EKLJ JUSTICE SITATI N.S. held;

*“ My understanding of section 78 (1) of the Act is that no further proceedings shall be heard on the petition where;*

*(a) A petitioner does not deposit security as required by the section &*

*(b) If an objection is allowed and not removed”.*

Having earlier declined to extend time with which to deposit security, the only logical conclusion is that the petition must be struck out for non compliance with the provisions of section 78 of the Elections Act and Rule 11 of the Elections Rules requiring security by deposit of money to be made within the ten ( 10) days of the date of the filing of the petition.

#### **Costs**

Having struck out the petition the court should make a determination on the issue of costs. I have considered the circumstances of this petition including that it was filed by the petitioner in person. I have considered the issues raised in the petition and the fact that earlier when the petitioner sought orally to withdraw the petition even after the parties had filed their submissions, the Respondents did not demand

costs. I have further considered that the petition has not been heard on merits. In the premises I order that the case be struck out with no order as to costs.

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2017**

**D. O. ONYANGO,**

**SENIOR PRINCIPAL MAGISTRATE,**

**KIMILILI.**

**16.11.2017**