



REPUBLIC OF KENYA

SENIOR PRINCIPAL MAGISTRATES COURT

AT WAJIR

ELECTION PETITION NO. 6 OF 2017

SHAMSHA ISSA JIMALE.....PETITIONER

Vs.

1. IEBC.....1ST RESPONDENT

2. PARTY FOR DEVELOPMENT AND REFORM....2ND RESPONDENT

3. THE CLERK, WAJIR COUNTY ASSEMBLY.....3RD RESPONDENT

AND

4. ASHA HUSSEIN DAYIB.....INTERESTED PARTY

JUDGMENT

SHAMSA ISSA JIMALE, the petitioner herein filed this petition on 6th September 2017 against the Respondents and the interested Party and prayed for: -

- (a) A declaration that the interested party was not validly nominated and gazetted as a member of the Wajir County Assembly.
- (b) An order of certiorari to move into this honorable court and quash the gazette notice published on 28th August, 2017; vide Gazette Notice No. 8380, Vol.CXIX – No. 124, in respect to marginalized members to the County Assembly list of Wajir County.
- (c) An order of Mandamus directing the 1st respondent to gazette the petitioners name as the duly nominated member of Wajir County Assembly in the marginalized list category to represent the youth.
- (d) Costs of this suit.

All the respondents entered appearance and filed their respective responses save for the 3rd respondent who later successfully applied to be removed from these proceedings. At the pre-trial conference held before me in the presence of counsel for all parties, it was agreed that the matter would be canvassed by way of written submissions. All the parties filed their submissions and appeared before me for highlighting of the same on 12.01.2018.

THE PETITIONER'S CASE

The petitioner stated in her pleadings that she is a member of the 2nd Respondent herein being member no, 015PDR000612. As such, she had applied for nomination by the 2nd respondent as a member of the Wajir County Assembly in the marginalized group category to represent the youth. In the list published by the 1st Respondent in its website and the Sunday nation newspaper on 23rd July, 2017, the petitioner appeared as number one (top) in the list of the members to be nominated in the marginalized group category. She thus expected to be gazetted in the final list of the nominees that were to be nominated by the 2nd respondent in that category. However, when the final list was published, she discovered that her name had been replaced with that of the interested party (IP) herein, whose name had been submitted under the Gender Top Up category. She contended that the gazette of the interested party as the duly nominated member for Wajir County Assembly failed to meet the governing principles established under Article 10, 38, 47, 81, 82, 90 and 177 of the Constitution of Kenya, the Elections Act as well as the regulations made thereunder. She further stated that the failure by the 1st and 2nd respondents to comply with the provisions of the Constitution and the law breached the petitioner's legitimate expectations to be nominated and sworn in as

a member of Wajir County Assembly.

1ST RESPONDENT'S CASE

The 1st respondent's case was that indeed, the petitioner's name appeared in the list presented by the 2nd respondent as pleaded and was published in the Daily Newspaper. She would have qualified for nomination as her name was top in priority.

However, before gazette, the 1st respondent (IEBC) was served with an order from the Political Parties Disputes Tribunal (PPDT) requiring it to receive a new list from the party. A new list was submitted to it and on that list, the name of the petitioner was missing. IEBC had no option but to comply with the order of the Tribunal. They could therefore not be blamed for breaching any law.

2ND RESPONDENT AND INTERESTED PARTY'S CASE

The position taken by the 2nd Respondent and the IP is similar. The IP contended that before the list was forwarded by the 2nd Respondent, it had been agreed upon through consensus. In that list, her name was number one in the gender top up category. However, when the names were published, she discovered that her name had been removed and other people introduced in the new list. She wrote a letter (AHD-4) to the 2nd respondent protesting that move. When the party delayed in responding to her, she filed complaint No. 563 at the PPDT. That matter was determined in her favour by way of a consent order. In agreeing with the IP, the party (2nd Respondent) contended before court that the petitioner herein has never been its member and has never applied to it for any nomination in any of the categories. It also agreed with the IP that she had been given a slot in the Gender top up category and not the marginalized group category which is being claimed by the petitioner. The 2nd respondent (the party) gave the reasons why the original published list was changed. Like the IP, it stated that the original list had been arrived at through consensus after wide consultations between party members, stakeholders and the community. After that, the proposed list was given to the ICT officer of the party, one Kiptala Kosgei for onward transmission to the IEBC. When the final list was published, the party was shocked to discover that it had been altered without the Party's knowledge. They blamed the said ICT Manager for that and opted to sue him at the PPDT. That claim was rejected but the IP herein filed her own complaint which was determined by way of a consent. The party was allowed to present a new list as agreed earlier.

ISSUES FOR DETERMINATION

After analyzing the submissions made before me, I have come out with the following issues for determination by this court. The parties did not have an agreed list of issues. The issues are: -

1. Whether the petitioner is a member of the 2nd respondent.
2. Whether the removal of the name of The petitioner from the list published on 23rd July, 2017 was within the law.
3. Whether the nomination of the IP was valid.
4. Whether the petitioner is entitled to the orders sought.
5. Costs.

On the 1st question, the issue of the petitioner's membership is in contention. In her petition, the petitioner stated that her membership number to the 2nd respondent is 015PDR000612. She annexed her membership card as SIJ1 where the same number is reflected. Whereas the IP and the 2nd respondent dispute her party membership status, they did not say that the said quoted number is imaginative or the card exhibited is a forgery. They also did not offer any evidence to rebut this. Their's is therefore a mere denial which cannot stand. This court therefore finds that the petitioner is a member of the 2nd respondent.

I shall address the 2nd and 3rd issue together. The petitioner is challenging the nomination of the IP herein on the grounds that the relevant law was breached. This is an allegation she had a duty to prove before this court. It is now settled in law through court decisions that the burden of proof in election petitions rests on the shoulder of the petitioner always. He discharges this burden by producing necessary evidence to support the allegations of infringement of the law. In **Lydia Mathia V Naisula Lesuuda and another (2013) ekLR**, the High Court Stated “

“It is now accepted that in an election petition, the burden of proving the allegations made in the petition lies with the petitioner.”

In the case of **Raila Odinga and others v Independent Electoral and Boundaries Commission and others (2013) eKIR**, the supreme court of Kenya expressed itself on this issue as follows: -

“where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary.”

These pronouncements by the superior courts, which are binding on this court clearly show that the focus should be on infringement of electoral laws and whether such infringement has affected the validity of the elections. It also establishes that once the petitioner has

discharged his burden to the satisfaction of the court, then the burden shifts to the respondents to prove the contrary.

Did the petitioner discharge this burden on all the relevant aspects herein? The petitioner argues that her removal from the initial list as published by the IEBC was irregular, illegal and motivated by malice. There is no dispute that the said list emanated from the office of the 2nd respondent and that the petitioner's name was listed as No. 1 on the marginalized group category. IEBC told this court that if that list was to be followed to the end, the Petitioner would definitely have been nominated. The list was scrutinized by them and they had no reason to doubt it. They believed that it was genuine until an order came from the PPDT. Once those facts were established without doubt before this court, the burden now shifted to the party and the IP to prove the contrary. The petitioner discharged her burden on the issue that her name had been forwarded to the IEBC and that she legitimately expected to be nominated.

The Court has carefully considered the explanation given by the IP and the 2nd respondent in their submissions and responses. Was the removal of the petitioner's name lawful? Did it breach her legitimate expectations?

The petitioner's position is that the list was legitimate and that it was not enough for the 2nd respondent and the IP to blame one Kiptala Kosgei who is not a party to the proceedings. He was also not a party to the proceedings before the Tribunal. His side of the story has not been heard before me or the Tribunal. I agree with her on this. It appears that the party is using the said Kiptala as a scape goat. If not so, why did they not enjoin him in the proceedings before the tribunal before recording the consent? They would even have sought to have him summoned in this court to be cross examined to establish that he indeed altered the list. The most crucial pointer to lack of good faith is the fact that whereas the party raises serious allegations of inclusion of his wife and taking of bribes, no legal action of a criminal nature has been instituted against him. These allegations, if true amount to abuse of office, corruption among others. These things allegedly occurred in July last year (2017) and as late as January this year no legal action had been taken against the said Kiptala. The party is not serious on this issue. There is no evidence that he was ever sacked which would have been the starting point. They also allege in paragraph 13 of the replying affidavit by the party chairman that the petitioner might have bribed the said Kiptala. This is a very serious allegation yet so far no report has been made to the police showing lack of good faith.

The IP and the party allege that the so called original list was arrived at through consensus. The party is the custodian of all its records. It would have been very easy to avail the evidence to that effect by way of minutes of meetings held, those present and their signatures and most important, the original list in hard copy.

I have had a look at the claim form and the supporting affidavit in claim no. 553 of 2017 (PPDT) as annexed to the response of the IP. The supporting affidavit was drawn by an advocate. It is an affidavit in support sworn by the Chairman of the Party. In that affidavit, no list is introduced to the Tribunal by the Chairman as the so called original list. What was the Tribunal supposed to rely on? Did the list really exist?

The IP interestingly had a list when she moved to the PPDT vide claim number 563/17. Where did she get it from? Could there have been a conspiracy? Why were the other affected parties, including the petitioner herein, not enjoined in that matter before they moved to obtain a consent knowing very well that it would affect them? This could be a pointer to lack of good faith as argued by the petitioner through her lawyer. By failing to invite the petitioner in the process of removing her from the published list, the party treated her unfairly. They should have informed her as a matter of right. They ignored her deliberately because while submitting before me, the party's lawyer informed the court that the party did not care who was in the published list. All they wanted was to get a new one. They breached her right to fair administrative action as demonstrated in article 47 of the constitution. They should not have kept her in the dark. The surprise she got when she saw the final list in the gazette notice was a violation of her legitimate expectation. This court therefore makes a finding that the 2nd respondent breached article 47 (1) and (2) of the Constitution in the process of removing the name of the petitioner and those who were affected without involving them yet the list had emanated from the party.

The key question to answer now is whether the said breach was so unlawful to invalidate the nomination of the IP to the County Assembly of Wajir. A court order was obtained from the PPDT to effect the changes. IEBC had to comply with it. That court order has not been set aside or varied to date. It still remains valid. The PPDT is at the level of this court so I cannot review or vary their orders. It was argued that the order was given per incuriam as section 40(2) of the Political Parties Act No. 11 of 2011 was not complied with. Whereas I cannot vary their order, I am inclined to agree with the petitioner on this as there is no evidence that there was any attempt to solve the IPs complaint internally through the Party dispute resolution machinery. The consent order was also obtained without involving the other parties who would be affected, yet it was clear it would affect such. Matters to do with elections are not petty disputes. The tribunal was not shown the so called original list so the order was like a blank cheque to the party where they were at liberty to fill the names of whoever they wanted. The party chose not to resubmit the name of the petitioner. They elected to nominate the IP herein. That was purely within their discretion as it is their prerogative to choose who represents them in the house. They had a court order which enabled them to effect the changes. IEBC had to comply so long as the list complied with the law. They did so as directed. This court cannot impose a nominee on the party. Their wish is to have the IP as their member in the assembly and not the petitioner herein. There is no evidence that the list presented to IEBC after the removal of the petitioner was in breach of the relevant electoral laws save for the manner in which it was altered. The result of that election was not unlawful. The infringement does not invalidate the nomination of the IP herein. The effect of this finding is that the petitioner cannot get prayers (a), (b) and (c) as prayed in the petition. The IP herein was validly nominated. In addition, the seat she got is different from what the petitioner is claiming.

COSTS

Section 84 of the Elections Act, No. 24 of 2011 and Rule 30 of the Election (Parliamentary and County Elections) petition rules 2017 make provisions for costs in Election petitions. The respondents and the IP have prayed for costs. Their position was that the petitioner's claim was unfounded, unmerited and an abuse of the court process. Is this so? Not really. The Petitioner has succeeded in a way. She had a real grievance before she moved to court. The only place where she could get the answers to her questions was in court because the 2nd respondent and the PPDT kept her in the dark when her name was being removed from the list. As such, her claim before this court is neither frivolous nor an abuse of the court process. It will be unfair to slap her with an order for costs. If I was to order anyone to pay costs, it would be the party (2nd respondent). However, considering all factors including that the matter proceeded by way of written submissions, I order

that each party shall bear its own costs. The petitioner shall get a refund of the security for costs deposited in court.

Conclusion:

The upshot of the foregoing is that the petitioner's case fails and the same is dismissed with an order that each party shall bear their own costs. A certificate under section 86 of the Elections Act No. 24 of 2011 shall issue forthwith.

P. Mayova, SRM

23/2/2018

Judgment delivered, dated and signed at Milimani this 23rd day of February, 2018

P. Mayova, SRM

23/2/2018

In the presence of: -

1. Mr. Anyoka for Petitioner

Petitioner Absent

2. Wairegi for Interested Party

Interested Party present

3. Ngarua Ms for 2nd respondent

4. Mr. Odhiambo for IEBC

Court Assistant: Michael Onyango

P. Mayova, SRM

23/2/2018

Mr. Wairegi

I pray for a copy of the judgment.

Mr. Anyoka

I reiterate his prayer.

Mr. Anyoka

We thank the court and the staff for the way they have handled themselves with a lot of decorum.

P. Mayova, SRM

23/2/2018

Court:

The judgment to be typed and supplied to the parties right away.

P. Mayova, SRM

23/2/2018