



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLANEOUS ELECTION PETITION NO. 3 OF 2017

**IN THE MATTER OF : ARTICLES 82(1) (b), 90(2) (c), 177(1) (b) AND 177 (2) OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: SECTIONS 6(2) (c), 40(1) (b) AND SCHEDULE (d) OF THE
POLITICAL PARTIES ACT NO. 11 OF 2011**

AND

**IN THE MATTER OF SECTION 34,36 AND 109 OF THE ELECTIONS ACT NO. 24 OF 2011
AND REGULATIONS (GENERAL) REGULATIONS 2012**

AND

**IN THE MATTER OF: THE PURPORTED NOMINATION AND SUBSEQUENT GAZETTING
OF MEMBERS OF MEMBERS OF COUNTY ASSEMBLY OF
LAIKIPIA COUNTY UNDER THE GENDER TOP-UP LIST VIDE GAZETTE NOTICE NO 8380
DATED 28TH AUGUST 2017**

-BETWEEN-

JANE CHEMUTAI KOSKEI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

JUBILEE PARTY OF KENYA..... 2ND RESPONDENT

JUDGMENT

INTRODUCTION AND BACKGROUND

1. The Petition filed by **JANE CHEMUTAI KOSKEI** on 4th September, 2017 vide Affidavit filed on 4th September, 2017 and Further Affidavit filed on 21st December, 2017.

2. The Petitioner seeks for ;-

1. Declaration that the purported publication of **Laikipia County Assembly**, Gender Top-up list gazetted on 28/8/2017 vide Gazette Notice Number 8350 is illegal and goes against Political Parties Disputes Tribunal as contained in the Judgment of 27th July, 2017.

2. That the 1st Respondent be directed to Gazette the Laikipia Gender Top-up list, failing to comply with Political Parties Disputes Tribunal directives.

3. An order be directed that 1st Respondent do gazette a new Laikipia County Assembly Gender Top-up list with Petitioner's name included as ordered by the Political Parties Disputes Tribunal.

3. The Petitioner applied to be included in the party list for nomination as member of County Assembly Laikipia County. This is vide annexure "JCK" dated 25th May 2017 annexed to the Petitioner's affidavit. The Petitioner's name was included in the First Top-up Gender List as exhibited in "JCK 2" as Number 17 at page 55. Later the name of the Petitioner was removed from the party list as exhibited in "JCK 3". The Petitioner's name as a nominee was missing. The Petitioner lodged a complaint which was Complaint Number 337/2017. The complaint was lodged to Political Parties Disputes Tribunal which was filed on 23rd July 2017 as exhibited in "JCK 4".

4. The **Political Parties Disputes Tribunal** heard the complaint and entered **Judgment** in the Petitioner's favour **on 27th July, 2017** as exhibited in "**JCK 5(a)**" at **paragraph 4**. Jubilee Party was directed to reconstitute its Gender Top Up List and it was to do so **48 hours** from the date of the Judgment. In paragraph (c) the Respondent was directed to include the Petitioner's name in the First Slot. The Petitioner further avers that Judgment was served upon the First Respondent (Independent Electoral and Boundaries Commission) and upon the Jubilee Party (2nd Respondent) herein on 31st July, 2017. They were both served with the decree which is annexed as "**JCK 5 (b)**".

5. The 2nd Respondent never complied with the orders contained in the judgment of the Political Parties Disputes Tribunal.

The 2nd Respondent went ahead and reconstituted a party list without the name of the Petitioner, the Petitioner has annexed the list as "**JCK 6**".

The Petitioner's contention is that the judgment of the Political Parties Disputes Tribunal is equivalent to the judgment of the Court, and the Respondent never appealed against the same.

The Petitioner urged the Court to allow the Petition with costs to be paid by both Respondents.

6. The Petitioner told the Court that upon perusal of the response by the Respondents, she argued that the First Respondent's response should be expunged from the Court record as the same was filed outside the duration granted by the Court. That the 1st Respondent was granted leave of **seven (7) days** from **12/1/2018** to file their response, but the same was filed on 21/1/2018.

Secondly, that the 1st Respondent framed four (4) issues only, but in its submissions introduced the issue of jurisdiction which was not in the framed issues.

The Petitioner referred the Court to the case of **MOSES MUGESI AGNES AND 8 OTHERS -VRS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 12 OTHERS - MIGORI CMC, E/P 3/17**.

Held: ***“The Election Act confers jurisdiction upon the Magistrate’s Court to determine the validity of the election of a member of County Assembly”***. Section 75(1A) of the said Act provides;

“A question as to the validity of the election of a member of the County Assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice”.

The same **section 75** of the Election Act lists down the appropriate remedies that the Election Court may grant which are:-

- a. A declaration of whether or not the candidate whose election is questioned was validly elected;
- b. A declaration of which candidate was validly elected.
- c. An order as to whether a fresh election will be held or not.

7. The 1st Respondent in its response adopted the affidavit and also stated that vide the Ruling on 12th January 2018, the 1st Respondent was granted leave of seven (7) days to file its response and they duly filed the same on 21/1/2018. The 1st Respondent urged the Court not to expunge the response from the Court record. The 1st Respondent further stated that as per the provisions of section 34(6) of the Election Act No. 24 of 2011; Party lists submitted to the Commission under this section shall be in accordance to the Constitution or Nomination Rules of Political Parties concerned.

Secondly, that the party list has to conform to the provisions of **Article 90(2) (c), Article 177 (1) (b)** of the Constitution of Kenya 2010; **Section 34 (6) (A) and (B)** of the **Elections Act No. 24 of 2011**.

The 1st Respondent went ahead to cite the case of;

NATIONAL GENDER AND EQUALITY COMMISSIONER –VERSUS-INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND ANOTHER (2013) eKLR.

Held: “We therefore find and hold that Article 90(2) does not deal with elections leading to constitution of party list nor concern itself with the manner in which the parties came up with the name of the lists.....

The party list contemplated under **Regulations 54 (The lists under Article 90(1) of the Constitution)** shall be prepared in accordance with the Rules of the Political Party”. That (Independent Electoral & Boundaries Commission) 1st Respondent does not direct the manner in which the lists are prepared as this are matter within the jurisdiction of the parties but in considering the lists, the Independent Electoral & Boundaries Commission must nevertheless be satisfied that the lists meet constitutional and statutory criteria.

8. The 1st Respondent further argues, the party has a right to go for redress to the Political Parties Disputes Tribunal but as provided by **Section 40(1) of the Political Parties Act** it is incumbent upon the Tribunal to ensure that before invoking its jurisdiction, the Petitioner should have complied with the requirement of Section 40(2) of the Political Parties Act which provides interalia;

“Notwithstanding **subsection(1)** the tribunal shall not hear or determine a dispute under **paragraphs (a), (b) and (c) or (e)** unless the dispute has been heard and determined by the Internal Political Party Disputes Mechanism”.

I find this argument misplaced because the 1st Respondent if aggrieved by the Political Parties Disputes Tribunal Judgment should have appealed against the same.

The reasoning that the Political Parties Tribunal has no jurisdiction to entertain the Petitioner’s complaint is not viable at all.

9. The 1st Respondent argues that the Petitioner had the onus to prove her case by adducing cogent, credible and consistent evidence as provided for by section 107(2) of the Evidence Act Chapter 80 Laws of Kenya which provides interalia;-

“when a person is bound to prove the existence of any fact. It is said the burden of proof lies on that person”. He who alleges must prove.

10. IS THE PETITION FATALLY DEFECTIVE:

The 1st Respondent contends that the Petition is fatally defective as the same violates the provisions of **Section (2) of Elections (Parliamentary and County Elections) Petition Rules 2017** which define the Respondent to mean;

- a. A person whose election is complained of;
- b. Returning officer.
- c. Commission.
- d. Any other person whose conduct is complained of in relation to an election that the Petitioner failed to enjoin persons duly nominated under the gender Top-up list to fill the special seats at the Laikipia County. That the same was a grave violation of Article 25 (c) and 50(1) of the Constitution of Kenya 2010.

The 1st Respondent argues that it was not privy to the judgment of 27th July 2017 by the Political Parties Disputes Tribunal. That even no evidence has been lead as to the service of the Political Parties Disputes Tribunal Judgment.

11. The 2nd Respondent filed its submissions on 16th February, 2018 vide which it maintained that the 2nd Respondent conducted the nominations in accordance with the constitution, Election Laws and all attendant written laws. That the Petition as filed lacks any substance as the contentions of the Petitioner are based on a nullity arising from incurable defective petition and a waste of Court’s time.

The 2nd Respondent contended that on 23rd July, 2017 it submitted to the 1st Respondent both the gender top up list and marginalized group party list. The same contained the individuals nominated to be members of the County Assembly of Laikipia. The Party list was disputed. The dispute went before the Political Parties Dispute Tribunal. 1st Respondent admits that the Jubilee Party was directed to reconstitute the list to reflect ethnic diversity following which on 17th August, 2017 the 2nd Respondent resubmitted its party list as directed by the Political Parties Disputes Tribunal.

Further that after the General Elections of 8/8/2017, the 2nd Respondent garnered huge numbers of nomination slots in the County Assembly and hence nominated members in consideration of the slots in which it applied the rule on priority, and forwarded list to the 1st Respondent.

That the 1st Respondent used the list to fairly come up with nominated members transparently and without prejudice.

In a nutshell, the 1st Respondent avers that the Petitioner has not provided justifiable evidence to show that she qualified under Section 36 of the Elections Act and Regulation 56(2) of the Election General Regulations.

12. Upon considering the submissions filed by the Petitioner, the 1st Respondent and the 2nd Respondent and the authorities cited in support of the submissions;

The issues that are not contested are that; The Petitioner submitted her name to be nominated in the Gender Top Up list in the County Assembly of Laikipia. Her name was in the list that 2nd Respondent submitted, but when the names were gazetted by the 1st Respondent, her name was missing.

She filed a complaint with the Political Parties Disputes Tribunal which was **Complaint Number 337/2017**. The same complaint was filed on **23rd July 2017** as exhibited in annexure **“JCK 4’**.

The Political Parties heard the complaint and entered judgment in the Petitioner’s favour on **27th July 2017 as exhibited in “JCK 5(A)” at page 4**. The Tribunal ordered at page 4 that;-

- a. A declaration be/and is hereby issued to the effect that the Respondent’s Gender Top Up Party List as well as the list of Marginalized Person for nomination to the Laikipia County Assembly does not reflect the ethnic diversity of the people of Laikipia County and is therefore null and void and of no effect in law.
- b. The Respondent is hereby directed to reconstitute its gender top up party list as well as the list of Marginalized persons for nomination to the Laikipia County Assembly to reflect the ethnic diversity of the people of Laikipia County within 48 hours from the delivery of this judgment.
- c. The Respondent is further directed to include the complainant’s name in the first slot on the gender top up list in light of her minority status within the County.
- d. The Respondent is directed to afford a hearing and to supply all affected persons with the reasons of any decision made in complying with the order in (b) above,.

The Petitioner avers that both Respondents were served with the Political Parties Disputes Tribunal Judgment on 31st July 2017 and the decree. The decree is annexed as (JCK 5B).

The 1st and 2nd Respondents never complied with the orders in the judgment and or decree of the Political Parties Disputes Tribunal. The 2nd Respondent went ahead and reconstituted a party list without the name of the Petitioner. The list is annexed as “JCK 6”. The Petitioner’s name is not there.

This Court is alive to the fact that a judgment of the Political Parties Disputes Tribunal is a judgment properly so called and has the effects like any other judgment (Civil or Criminal case) and has to be complied with. If the Respondents were not satisfied with the said judgment, they should have appealed against it. The scenario is so disturbing as the Respondents never complied with the orders of the Political Parties Disputes Tribunal and they never appealed against the same.

The reasoning by the 1st Respondent that it was not privy to the judgment does not hold any water and is not viable at all, this is because 1st Respondent was served with the Judgment hence knew what it contained and the orders therein.

The 1st Respondent when it was served with the reconstituted list by the 2nd Respondent, upon verifying the same should have noted the anomaly and returned the reconstituted party list to the 2nd Respondent to reconstitute the party list as per the specification in the judgment of the Political Parties Disputes Tribunal.

13. The Petitioner’s pleading and submissions are hinged on the above Political Parties Dispute Tribunal judgment which judgment still stands and the 2nd Respondent disregarded the express orders emanating from the said judgment thus the gazettment of the party list which did not contain the Petitioner’s name.

The upshot of the foregoing is that the Tribunal made express orders which I have tabulated in the body of the judgment which judgment was duly served upon the Respondents and which judgment was not executed as ordered. The Petitioner was not slotted in the reconstituted party list as ordered hence the 1st

and 2nd Respondent went against the order of the Political Parties Disputes Tribunal Judgment.

They were duly served with the decree but went ahead to gazette other nominees minus the Petitioner.

CONCLUSIONS:

14. The Petition thus succeeds in the following terms;-

- a. The publication of Laikipia County Assembly Gender Top-up list gazetted on **28/8/2017** vide gazette Notice Number 8350 is illegal as it goes against the orders of the Political Parties Disputes Tribunal as contained in the judgment of 27th July, 2017.
- b. The 1st Respondent is directed to degazette the Laikipia Gender Top Up list as it failed to comply with the Political Parties Disputes Tribunal directives.
- c. The 1st Respondent is ordered **within 45 days** hereof to gazette a new Laikipia County Assembly Gender Top up list with Petitioner's name included as ordered by the Political Parties Disputes Tribunal.

COSTS:

15. **Section 84** of the Election Act provides that;

“An Election Court shall award costs of an incidental to a Petition and such costs shall follow the cause. Such costs are to follow the event and the Court has broad discretion to determine costs.

Rule 30(1) of the Rules provide as follows;-

Section 30(1) - The Court shall at the conclusion of an election petition make an order specifying;

- a. Total amount of costs payable and;
- b. The person by and to whom the costs shall be paid.

Section 31 (3) – The Election Court may direct that the whole or part of any money deposited by way of security shall be applied in payment of taxed costs.

16. DISPOSITION

- a. Taking all the fact I have outlined above, I herewith award costs to the Petitioner to be paid by both Respondents (1st and 2nd Respondents) capped at **Kshs.200,000/= (Two hundred thousand shillings only)**.
- b. A certificate of this determination in accordance with Section 86(1) of the Election Act 2011 shall issue to the Independent Electoral and Boundaries Commission.

**DATED, SIGNED and DELIVERED at MILIMANI COMMERCIAL COURT AT NAIROBI
THIS 27TH DAY OF FEBRUARY 2018.**

HON.G.A.MMASI (MRS)

SENIOR PRINCIPAL MAGISTRATE

27/2/2018

IN THE PRESENCE OF:

ODOYOADVOCATE FOR PETITIONER

ORAREADVOCATE FOR 1ST RESPONDENT

OMBASAADVOCATE FOR 2ND RESPONDENT

MUTUA – COURT ASSISTANT

HON.G.A.MMASI (MRS)

SENIOR PRINCIPAL MAGISTRATE

27/2/2018