



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT OF AT KISII

ELECTION PETITION NO. 10 OF 2017

**IN THE MATTER OF VIOLATION OF THE NON INCLUSION OF TH EPERSONS WITH
DISABILITIES IN THE KISII COUNTY ASSMEBLY CONTRARY TO ARTICLES 54 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF THE SUPREMACY OF THE CONSTITUTION VIDE ARTICLE 2(1) OF
THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ADHERING TO NATIONAL VALUES AND PRINCIPLES OF
GOVERNANCE IN LINE WITH ARTICLE 10 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF NON INCLUSION OF MINORITIES AND MARGINALIZED PERSONS
IN THE KISII COUNTY ASSEMBLY CONTRARY TO ARTICLE 56 OF THE CONSTITUTION
OF KENYA 2010**

AND

**IN THE MATTER OF NON IMPLEMENTATION OF THE FIVE (5) PERCENT OF THE
MEMBERS OF THE PUBLIC IN ELECTIVE AND APPOINTIVE BODIES BEING DISBALED
PERSONS CONTRARY TO ARTICLE 54(2) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF WHETHER MUSLIMS ARE MINORITY OR MARGINALIZED GROUP
WITHIN KISII COUNTY VIDE THE DEFINATION OF MINORITY, MARGINALIZED AS
USED IN ARTICLE 56 OFTHE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF EQUALITY AND FREEDOM FROM DISCRIMINATION AGAINST
THE DISABLES, MINORITIES AND MUSLIMS TO THE KISII COUNTY ASSEMBLY
CONTRAY TO ARTICLE 27 OF THE CONSTITUTION OF KENYA 2010**

JUDGMENT

The Petitioner herein in his Petition dated 6th September 2017 seeks the following orders:-

1. That this honourable court be pleased to issue and order restraining the 1st and 2nd respondents from swearing in the 3rd respondents until the requirements of the Constitution are satisfied pursuant to article 54 and 56 of the Constitution of Kenya 2010.
2. That this honourable court be pleased to revoke the Kenya gazette No. 8380 dated 28th August 2017 in the section only dealing with special seats to Kisii county assembly and an order directing the 5th respondent to bring on board persons with disabilities and minority as required by the Constitution of Kenya 2010.
3. That the honourable court orders the 4th respondent to prove that he is a marginalized person and that his area of residence is Kisii.
4. That the honourable court do issue a declaration that the Kisii county assembly is unconstitutionally constituted due to lack of inclusion of the persons with disabilities and minorities to the Kisii county assembly as required by the Constitution of Kenya.
5. That the honourable court be pleased to issue any other reliefs it may consider just.

The 4th respondent, Mokumi Edmond Anthony filed his replying affidavit dated 12th October 2107. The 5th respondent filed its response to the petition and replying affidavit dated 25th January 2018 and 22nd of January 2016 respectively.

The petition was scheduled for pre-trial conference on 9th of January 2018 in the presence of only the petitioner's advocate and the 4th respondent's advocate. There being satisfactory service upon the other respondents it was agreed that the petition would be canvassed through written submissions which the parties duly filed and exchanged as directed.

The petitioner's case

The petitioner went to the High court at the first instance to challenge the irregular and un procedural process through which the 4th respondent, a non member of the Jubilee party was nominated in to the Kisii county assembly leaving out the petitioner who had been nominated by the Jubilee party in Kisii. The petitioner averred that the 4th respondent had not been nominated by the Jubilee party leadership from Kisii county and that his name was not in the list forwarded by the chairman of Jubilee party, Kisii county, senator Christopher Obure and the Mp for Nyaribari Chache constituency Richard Tongi. The petitioner avers that the 4th respondent is not a voter in Kisii county and he cannot represent special interest in a county where he is not a voter.

The petitioner avers that the Kisii county assembly as currently constituted is unconstitutional as there is no person with disability, minority or marginalized group as required by Articles 54 and 55 of the Constitution. Further that the nomination process of the 4th respondent was flawed since the 4th respondent did not disclose where he had cast his vote, his voter's card number and station. The 4th respondent was unknown by the Jubilee party leadership in Kisii.

It is submitted that the 4th respondent did not satisfy the conditions laid down in Article 177(1)b and c of the Constitution and rule 4 and 5 of the Election petition rules. He cited the case of **Marbury vs Madison** 5 Us where it was held *that an unconstitutional act is not law, it confers no rights, it imposes no protection, it creates no office, it is illegal contemplation. It is inoperative as though it had never been passed.*

The petitioner submitted that he did not file this dispute before the Political Party disputes tribunal

because the tribunal is not mandated to handle constitutional, legislative and regulative issues such as the ones raised by the petitioner. He cited the case of **Kakuta Hamisis vs Peris Tobiko and 2 others Election Petition No 5 of 2013** where the court held that:-“ *I find that there must be a fair and level playing ground so that no party or court lose time it is entitled to and no extra burden should be imposed on a party as a result of omissions or inadvertences which were foreseeable or could have been avoided. The election court has power to enlarge time and to set time for the filing of proposed affidavits.*”

He pointed out that that 1st, 2nd, 3rd, 5th, and 6th respondents though duly served did not file any responses to the petition. He submitted that the 4th respondent had failed to show how he was nominated by the Jubilee party or that he was the 1st on the Jubilee party nomination list.

The petitioner denied the 4th respondent’s allegation that he is a member of Kenya patriots’ party. It is submitted that the leadership of the Jubilee party in Kisii county had disowned the 4th respondent through a letter that was filed in court and it was thus upon him to prove otherwise.

It is also submitted that the 4th respondent did not qualify to be nominated under the marginalized group but that the petitioner did. He pointed out that **Article 10** of the constitution lists the national values which the IEBC failed to observe. The petitioner submitted that he had proved that there were irregularities in the nomination of party lists which was unconstitutional and as such the 4th respondent’s name should be removed and a new list comprising of the petitioner be resubmitted by the Jubilee party.

The 4th respondent’s case

The 4th respondent submitted that he was a duly registered member of Jubilee party and that he applied to be nominated as a member of the Kisii county assembly. Further that he was a duly registered voter within Kisii county in Bonchari Constituency Bogiakumu ward. His Jubilee party registration number is JP 171627. He raised issue that the Jubilee party had not been sued to enable it respond to allegation against it thus denying it the right to be heard.

It was submitted that all political parties were to select the best suited candidate through an individual’s party machinery.

The Jubilee party prepared its list and presented it to the IEBC for gazette considering the names in priority basis. The 4th respondent was the first on the said list while the petitioner was the third on the list. It was stated that the 5th respondent was right to gazette the 4th respondent since his name was the first on the list and had priority to the others. The 5th respondent had no powers to re-arrange the names to suit a specific nominee.

The 4th respondent further submitted that the 5th respondent put up an advertisement in the two mainstream newspapers publishing the proposed names and invited any members of public unsatisfied with the list to make a formal complaint to the party concerned or to the IEBC dispute resolution committee. It is submitted that the failure by the petitioner to file any complaint only meant that he was satisfied with the list published.

It is also submitted that the failure by the petitioner to exhaust all legal avenues available to him over the party list nomination means that it is too late in the day for him to come to complain in court over the same. Further that the court lacks the jurisdiction to handle the matter. That the petitioner is asking the court to nullify all nominations of the members of the Kisii County assembly, who stand to be affected if the orders sought are granted despite them not being parties to the suit. The 4th respondent submitted that his nomination was done by the 5th respondent in accordance to **section 38(8) of the Elections Act and Article 177(1)(c) of the Constitution** and cannot therefore be faulted by this court.

The 4th respondent raised issue with the affidavit filed by Christopher Obure on 9th November 2017 on

behalf of Jubilee party which was not even a party to these proceedings. It is submitted that the said affidavit should be expunged from the court record since the deponent swears that he is the Jubilee party chairman of Kisii county and yet the said Jubilee party is not a party in these proceedings. Lastly, it is submitted that the petition should be dismissed with costs of Kshs 250,000/= to the 4th respondent.

The 5th respondent's case

It was submitted that the 4th respondent's seat could only be contested by way of an election petition and not through revocation of gazette notice No 8380 of 28th August 2017. The case of **Moses Mwicigi & 14 others vs IEBC & 5 others(2016)** was relied on where at paragraph 117 the court stated that:-

“ It is clear to us that the Constitution provides for two modes of election. The first is election in the conventional sense of universal suffrage; the second is “election” by way of nomination, through the party list. It follows from such a conception of the electoral process that any contest to an election, whatever its manifestation is to be by way of an election petition”

The 5th Respondent submitted that the petitioner ought to have moved the court by way of an election petition and not a constitutional petition like the one filed herein.

The 5th respondent further submitted that the dispute herein should have been determined by the IEBC in accordance to **Article 88(4) (e) of the Constitution** and that this court lacks the jurisdiction to hear and determine the matter herein.

He also submitted that the petitioner did not prove that the dispute had been heard and determined by the internal political party dispute resolution mechanisms and that **section 40(2) of the Political Parties Act** provides that the political parties disputes tribunal shall not hear or determine a nomination dispute unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms. He cited the case of **Patricia Cherotich Sawe vs IEBC & Another(2014) eKLR** where the court appeal sitting in Nairobi held:-

“On this point we wish to echo the finding of this court in Civil appeal No. 169 of 2013 in their holding that where the complaint giving rise to the appeal was lodged with the IEBC or any of the other tribunals before the gazette of the names, then the court has jurisdiction to determine the matter. In this case, the complaint had been lodged with the IEBC long before gazette.”

The 5th respondent submitted since the petitioner neither raised the instant complaint with the Jubilee party nor the IEBC disputes tribunal before the gazette of the 4th respondent then this court has no jurisdiction. On this submission he cited the cases of **Samuel Kamau Macharia(supra)** and **Owners of the motor vessel Lillian S vs Caltex Oil(Kenya) Ltd(1989) KLR 1**.

The 5th respondent submitted that it has the constitutional mandate under **Article 90** of the Constitution to conduct and supervise elections for the allocation of seats on the basis of proportional representation through nomination of candidates by political parties by use of party lists. The 5th respondent accordingly reviewed the party lists to ensure that persons with disability, the youth and the marginalized are represented in the list submitted by each political party. It was submitted that the 5th respondent did not have power to make alterations to the lists submitted by political parties.

The Jubilee party submitted names of seven nominees namely; Mokumi Edmond Anthony under the marginalized category, Anyieni Esther Okenyuri under the youth category, Musa Juma under the minority category, Wambui Wanjiku Joycd under the minority category, Rambeka Evans Nayoga under the youth category, Valencia Bosibori Monumbe representing persons with disability and Samwel Getiro Ngare representing persons with disability.

The 5th respondent submitted that it could only gazette one out of the seven nominees of Jubilee in Kisii

county in proportion to the number of the 9 elective seats won by the said party as provided for under **section 36(9) of the Elections Act**. The 5th respondent was guided by the priority of the names listed by the Jubilee party and hence the 4th respondent was selected as he was the first on the list.

The 5th respondent submitted that the prayer to stop the swearing in of the 5th respondent cannot be granted since it had been overtaken by events. Further that the prayer to cancel gazette notice number 8380 dated 28th August 2017 could only be granted within the confines of an election petition and not in the instant petition. In addition if the court granted the orders sought in the petition and ordered a fresh nomination process, there would be a violation of the strict statutory provision that requires party lists to be submitted to the 5th respondent at least 45 days before the general election as provided under **section 35 of the Elections Act**. The 5th respondent prayed that the petition is dismissed with costs.

Analysis of issues and the findings

The parties herein framed the issues for determination which I have looked at and narrowed down as below:-

1. Whether the petition herein qualifies as an election petition or a constitutional petition?
2. Whether the 5th respondent's response to the petition and its replying affidavit filed herein and dated 25th January 2018 and 22nd January 2018 respectively are properly on record?
3. Whether this court has jurisdiction to hear and determine this election petition?
4. Whether the nomination of the 4th respondent and his subsequent gazettement was in accordance with statutory and legal requirements?
5. Who shall bear costs of this petition?

Issue number 1

The petitioner herein at the onset moved the High court via constitutional petition number 6 of 2017. The honourable judge upon perusing the petition made the following orders on 11th September 2017:-

“ As this is a petition challenging the party list in a county assembly and given that the members of the county assembly have already assumed office, it is now deemed to be an election petition and the same shall await the designation of a magistrate to deal with the same further.”

Consequent to the above order this court was gazetted by the Chief Justice as the election court for purposes of the disposition of the petition herein through **gazette notice No. 12539 dated 19th December 2017**.

Under **Article 165(1) (d) of the Constitution**, the jurisdiction to hear any question in respect to the interpretation of the Constitution vests in the High court. This court will therefore not address the petition prayers that relate to interpretation of constitutional issues but will only address the Jubilee party listing nomination dispute for the seat of nominated member of county assembly, Kisii.

The mandate of any election Court is to ensure that the true manifestation of the Constitution as well as the electoral laws with respect to any particular elective position is upheld. This was stated in the Court of Appeal case of **Mumo Matemu –vs- Trustee Society of Human Rights Alliance & others C.A No 290 of 2013** where the court held that, “*The court is entitled to review the process of appointments to state or public officers for procedural infirmities as well as for legality .A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the*

Constitutional requirements”

From the foregoing, I find that the petition before me qualifies as an election petition and I will proceed to consider the same on merit. In determining this election petition this court must be guided by the Constitution which is the supreme law, the Elections Act, 2011, the Elections (General) Regulations, 2017, Political Parties Act and all other relevant and enabling legislation. This court has been implored to consider the interpretation of the Constitution in a holistic approach as guided in already decided cases.

Issue Number 2

Pre trial directions in this matter were taken before me on 9th of January 2018. The 5th respondent's response to the petition and its replying affidavit were filed on 22nd January 2018 and 22nd January respectively, after directions on the hearing of the petition had been taken.

Although this issue was not raised I would wish to pre-empt the same. **Rule 11 (1)** of the Rules provides that;- “ *Upon being served with a Petition in accordance with rule 10, a respondent may oppose the petition by filing a response to an Election Petition within 7 days.*”(Emphasis mine).

The above rule in my view gives this court discretion to enlarge the time for filing a response to petition and the accompanying replying affidavits. I accordingly exercise my discretion pursuant to **section 80 of the Elections Act, rule 5(1), Rule 11(1), rule 19(1) of the Rules and Article 159(2)(d) of the Constitution** and deem the 5th respondent's response to the petition and its replying affidavit dated on 25th January 2018 and 22nd January 2018 respectively as properly filed in these proceedings.

Issue number 3

The 4th and 5th respondent submitted that the petitioner ought to have lodged the dispute with the IEBC since **Article 88(4)(e) of the Constitution** confers jurisdiction upon the IEBC to hear and determine nomination disputes. **Article 88(4)(e) of the Constitution** provides as follows:-

“ 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; 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.”(Emphasis mine). This provision is reiterated in **section 74 of the Elections Act**.

The 5th respondent also submitted that **section 40(2) of the Political Parties Act** provides that a Political Parties Dispute Tribunal shall not hear or determine a nomination dispute unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms. It was submitted that the petitioner did not prove that he exhausted the dispute resolution mechanism within the Jubilee party as required and that the petition was prematurely before the court.

The 4th respondent submitted that the petitioner did not sue the Jubilee party and that as such the petition lacks merit since it seeks to nullify nominations which were done by Jubilee party which has not been given a chance to defend itself.

The 4th respondent referred this court to the judgment in **Kisii Chief Magistrate's Court Election petition 9 of 2017** where my learned colleague dealt with a strikingly similar case in a similar petition. At pages 11 and 12, the court held that;

“The 1st respondent had been gazetted on 28th August 2017 and had already assumed office and the only way the petitioner would ventilate her issue was by filing an election petition like the instant one and the issue raised touches on the constitutionality of the nomination process by the 3rd

respondent.”

The 4th respondent herein was gazetted as a nominated member of the county assembly of Kisii on 28th August 2017.

I am persuaded by the findings of my learned colleague. I am also guided by the findings in the decision of **National Gender and Equality Commission vs IEBC and Another (2013) eKLR** where it was held that *where persons included in a party list have assumed the relevant office, their nomination can only be challenged by way of an election petition.*

I make the finding that this court is vested with the jurisdiction to hear and determine this election petition.

Issue number 4

It's the petitioner's case that the 4th respondent had not been nominated by the Jubilee party leadership from Kisii county and that his name was not in the list forwarded by the chairman of Jubilee party, Kisii county. Further that the 4th respondent is not a voter in Kisii county and he cannot therefore represent special interest in a county where he is not a voter.

The petitioner was categorized under the youth group as the 3rd nominee on the list. It is the petitioner's case that he was the best suited nominee and not the 4th respondent.

I have looked at the evidence presented by both the petitioner and the respondents.

In his evidence, the petitioner relied on newspaper advertisements by the IEBC published on 23rd August 2017 of the names of party nominees as exhibit MJ 1 and a gazette notice of the party nominees as exhibit MJ 1.

On the other hand, the 5th respondent produced a copy of a gazette notice by the IEBC to political party lists on nomination of members of national assembly, senate and county assemblies as exhibit SO1. It also produced the Jubilee party list of nominees for Kisii county assembly as exhibit SO2. A look at Exhibit SO2 reveals that the 4th respondent's name was the first one on the list whereas the petitioner was the third one on the list. The 5th respondent submitted that on 28th August 2017 it proceeded to gazette the 4th respondent as the nominee of Jubilee party as seen in its exhibit SO3. The 5th respondent submitted that, after gazetting the final list of party nominees it published the final party list by way of public notice and invited the aggrieved parties to file their complaints with the political parties disputes tribunal. The said public notice was produced by the 5th respondent as exhibit SO 4.

The 4th respondent on the other hand submitted that the petitioner was a member of Kenya Patriots Party as seen in a letter from the office of the registrar of political parties and a membership status document from the registrar of political parties produced as exhibits MEA 2a and 2b respectively. The 4th respondent also relied on similar evidence as that relied on by the 5th respondent.

From the total evidence produce I find that both the petitioner and the 4th respondents have proved that they were both members of the Jubilee party.

Article 193 (1) of the Constitution provides that a person is eligible for election for the position of member of county assembly, if the person is a registered voter, satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and is either nominated by a political party; or an independent candidate supported by at least five hundred registered voters in the ward concerned.

Article 90(1) of the Constitution provides that, elections for the seats of the members of county assemblies under **177 (1) (b) and (c)**, shall be on the basis of proportional representation by use of party lists.

Article 177(1)(c) of the Constitution provides that; “A county assembly consists, the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.”

Section 36(8) of the Election Act provides that; “For purposes of Article 177(1)(c) the commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.”

Section 36 (1)(f) of the Elections Act provides that; “a party list submitted by a political party under Article 177(1) of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group.”

Regulations 54,55 and 56 of the Elections (General) Regulations 2012 provides for nomination for party list, and the list to be in accordance with the party rules and the formula of allocation of seats.

It is my humble view that whether or not the 4th respondent is a registered voter in Kisii county is not an issue for consideration before a party nominates a candidate for the position of member of county assembly.

Both **Article 193 of the Constitution** and **Regulation 15 of the Election (Party Primaries and Party lists) Regulation 2017** have no such requirement that one must be a registered voter in the place where they are applying to be nominated. It was not disputed that the 4th respondent met the requirement that he was a registered voter as at the time of his nomination by the Jubilee party.

I concur with the 4th and 5th respondent’s submissions that the 5th respondent was not mandated to re arrange the list that had been submitted by Jubilee party.

The 5th respondent only proceeded to gazette the parties in accordance with **section 36(8) of the Elections Act**. The 5th respondent only acted within its legal mandate.

The petitioner was a candidate for nomination by Jubilee party under the minority category whereas the 4th respondent was nominated by said party and consequently gazetted under the marginalized category. There were therefore no competing interests between the two categories by the two rival parties.

Revocation of the gazette notice no. 8380 will not automatically hand over the nomination slot held by the 4th respondent to the petitioner as he had not applied for that category.

It is the finding of this court that the 4th respondent was properly nominated and the 5th Respondent fully complied with the relevant provisions of the Constitution, section 36(8) of the Elections Act 2011, Regulations 54, 55 and 56 of the Elections(General) Regulations 2012.

Consequently, the petition herein fails in its entirety and is accordingly dismissed. I find that the gazette notice number 8380 is valid and the 4th respondent was duly nominated as a member of the county assembly of Kisii under the category of marginalized group.

Issue number 5

Section 84 of the Elections Act and **Rule 30(1) of the Rules** obliges the court to award and cap costs. The 5th respondent did not specify the amount of costs whereas the 4th respondent asked court to award Kshs 250,000/=.

The petition herein was not complex and the issues raised were straight forward as is evident from the pleadings, nature of evidence on record and submissions tendered. I have considered all these factors and I direct that each party bears its own costs of the petition.

Dated, signed and delivered at Kisii this 23rd of February 2018.

S.N MAKILA

SENIOR RESIDENT MAGISTRATE

In presence of:-

Court assistant- Jael

For petitioner-Mr. Sagwe

For 4th respondent- Mr Kaburi

For 5th respondent-Mr kaburi holding brief for Mr. Kubebea