



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**ELECTION PETITION NO. 5 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT (NO.9 OF 2011)**

**IN THE MATTER OF THE ELECTION ACT (NO.24 OF 2011)**

**IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS (LN 128 OF 2012 & LN NO. 72 OF 2012)**

**IN THE MATTER OF THE ELECTION (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017**

**-AND-**

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017**

**-BETWEEN-**

**TRUFOSA JELAGAT KUTTO.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT**

**ROP PHILIPMON.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION AND BACKGROUND**

1. The Petition filed by **TRUFOSA JELAGAT KUTTO** on 5<sup>th</sup> September 2017 seeking for a declaration;-

(a) That the said **ROP PHILIPMON** was not duly nominated for member of County Assembly and the selection was void under Article 90 of the Constitution.

(b) A declaration that the 3<sup>rd</sup> Respondent was not validly selected as member of County Assembly on women's members nominated to County Assembly list for Jubilee Party pursuant to Article 90 of the Constitution.

(c) A declaration that the Gazette Notice No.8380 published on 24<sup>th</sup> August 2017 is *void abinitio* to the extent that it provides and specifies that the 3<sup>rd</sup> Respondent stands validly nominated or selected to the County Assembly on the Jubilee Party list of women members nominated to the County Assembly following the General Elections held on 8<sup>th</sup> August, 2017.

(d) An order quashing and/or invalidating Kenya Gazette Notice No.8380 published on 24<sup>th</sup> August, 2017 to extent that it specifies

that the 3<sup>rd</sup> Respondent is validly nominated or selected as a member of County Assembly submitted by Jubilee Party for the General Election held on 8<sup>th</sup> August, 2017 pursuant to Article 90 of the Constitution.

(e) An order be made by this Court that the 1<sup>st</sup> Respondent gazette the Petitioner as the person duly selected on 8<sup>th</sup> August, 2017 to the County Assembly on the Women's members nominated to the County Assembly on Jubilee Party list submitted to 1<sup>st</sup> Respondent pursuant to Article 90 and 177 (1) (b) of the Constitution.

2. The Petition was opposed vide the response to the petition, by 1<sup>st</sup> Respondent whereof they stated that the 1<sup>st</sup> Respondent is only mandated to supervise elections based on the list they receive from the Political Party. That the Political Party in the instant petition Jubilee Party (2<sup>nd</sup> Respondent) presented the list to the 1<sup>st</sup> Respondent which they verified in some instances, it returns to the Political Party within 45 days.

The Respondent averred that party lists were submitted on 19<sup>th</sup> July, 2017 and published on 22/7/2017 in both the Nation and Standard Newspapers. That the 1<sup>st</sup> Respondent has no power to alter names on lists presented to it as is provided for vide section 36 (7) of the Elections Act.

The 1<sup>st</sup> Respondent annexed 'SO1' being the final list submitted to 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent admits that in the said party list, the Petitioner is rated as male and 3<sup>rd</sup> Respondent as female but the commission contends that mistake of 2<sup>nd</sup> Respondent should not be borne by the 1<sup>st</sup> Respondent, that the 1<sup>st</sup> Respondent during verification cannot differentiate between male and female. The Petitioner in a recap to the 1<sup>st</sup> Respondent's submission stated that, after publication, the Petitioner took steps of visiting the offices of 1<sup>st</sup> Respondent and swore an affidavit and clarified the issue of gender, but 1<sup>st</sup> Respondent did not take any action to correct the error. That

if 1<sup>st</sup> Respondent would have taken action, she would have been the qualifying nominee.

In paragraph 27 of the 1<sup>st</sup> Respondent's response, it admits that if the same (mix-up of gender) is the position, then the seat should be allocated to the next qualifying female who in this case is the Petitioner.

The 2<sup>nd</sup> Respondent never filed its response to the petition. the 3<sup>rd</sup> Respondent also did not file his response to the petition.

3. In this petition, the issues the Court has to consider are:-

a) Does the Petitioner qualify to be nominated in the County Assembly as the female Representative?

b) Was the 3<sup>rd</sup> Respondent who is male validly elected as member of the County Assembly Nandi County within the meaning of Article 177 of the Constitution as read with Article 90 of Constitution?

c) Who should bear costs.

It goes without saying that **Rop Philipmon** is male. **Article 177 (1) (b)** of the Constitution provides interalia that:-

"The number of special seat, members necessary to ensure that no more than two-thirds of membership of the assembly are of the same gender. **Article 90** of the Constitution deals with allocation of party list seat. **Article 90(1)** provides:-

*"Elections for the seats in Parliament provided for under Article 97(1) (c) and 98(1) (b) (c) and (d) and for the members of the County Assemblies under Article 177 (1) (b) and (c) shall be on the basis of proportional representation by use of party lists".*

**Article 90 (2) (b)** provides:-

"Except in case of seats provided under **Article 98(1) (b)** each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed.

**Article 177 (1) (b) and (c)** which provides interalia.....for members of County Assemblies shall be on the basis of proportional representation by use of party lists. **Article 21 (3)** of the Constitution recognizes women as vulnerable groups within society.

The seats filled through Elections on the basis of proportional representation by use of party lists are constitutionally reserved for women and representatives of special interests. The 3<sup>rd</sup> Respondent is male but his gender was listed as female on gazette Notice Number 8380 published on 28<sup>th</sup> August, 2017 and on the list published by the 1<sup>st</sup> Respondent in the Sunday Daily Nation of 23<sup>rd</sup> July 2017.

The 3<sup>rd</sup> Respondent's election was on the basis that he was female and intended to meet the gender rule.

4. The gender Top Up list is a preserve for women hence the 3<sup>rd</sup> Respondent did not qualify for nomination under Article 90 of the Constitution of Kenya 2010. 3<sup>rd</sup> Respondent was not validly elected as member of Nandi County Assembly as Women's members nominated on the Nandi County Assembly list for Jubilee Party pursuant to Article 90 (1) of the Constitution of Kenya 2010 and under the

Regulations and the Election Act. The 3<sup>rd</sup> Respondent's gender in the list as female was erroneous hence occasioning an erroneous nomination.

5. The other issue the Court has to grapple with, is whether the 3<sup>rd</sup> Respondent was validly elected as a member of County Assembly of Nandi in line with the provisions of Article 177 (1) of the Constitution as read with Article 90 of the Constitution.

The 1<sup>st</sup> Respondent is mandated to conduct and supervise referendum and general elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament. This is provided for by **Article 88 (1) (4)**.

**4(d)** The 1<sup>st</sup> Respondent regulates the process by which parties nominate candidates for elections;

**(k)** The monitoring of compliance with legislation by Article 82(1) (b) relating to nomination of candidates by Parties”.

the import of the foregoing is that; the 1<sup>st</sup> Respondent is responsible of ensuring that the lists submitted by Political Parties conforms to the requirements of the Constitution of Kenya and the Elections Act and Regulations pertaining to nomination and election.

Further the 1<sup>st</sup> Respondent was/is mandated upon receipt of the party list form the political party to verify the same, and if any anomaly is detected, 1<sup>st</sup> Respondent has to return the list to the political party to normalize the anomaly within 45 days and resubmit the list to the 1<sup>st</sup> Respondent.

It is also worthy to note that the 1<sup>st</sup> Respondent has no mandate to interfere with the party list.

6. The Election of the 3<sup>rd</sup> Respondent was done under Article 177 (1) (b) as read with Article 90 of the Constitution and was to be on the basis of proportional representation by use of party list.

7. As per the party list submitted by Jubilee Party, the 3<sup>rd</sup> Respondent's gender was correctly listed as male whereas that of the Petitioner as female, and the Petitioner ranked in priority over the 3<sup>rd</sup> Respondent. The 1<sup>st</sup> Respondent had no power under the Constitution of the Elections Act 2011 to alter a party's list or vary the order of priority in the list after the General Elections.

8. The 1<sup>st</sup> Respondent's only response to the foregoing is that, it only acts on the party list that is handed to it by the Political party and does not interfere with the same hence it could not have known that Trufosa is female and Rop Philipmon is male yet **Trufosa's** gender was reading male and **Rop Philipmon's** gender was reading female.

I find this argument not convincing, even after the Petitioner raised the concern on the mix-up of the gender still the 1<sup>st</sup> Respondent gazetted the 3<sup>rd</sup> Respondent and yet he is male. The slot is meant for a female representative. In effect the 3<sup>rd</sup> Respondent contravened the provisions of Article 90(2) of the Constitution and Section 34 (7) of the Elections Act 2011.

9. The 1<sup>st</sup> Respondent interfered with the priority of the party list hence the wishes of the people.

The upshot of the foregoing is that the gazettement of the 3<sup>rd</sup> Respondent as a member of the County Assembly- Nandi is a violation of the Constitution as it allocates a man a position that is meant for a woman.

10. In the case of :-

#### **MUMO MATEMU –VS – TRUSTEE SOCIETY OF HUMAN RIGHTS ALLICANCE AND OTHERS - C.A. NO. 290 OF 2013**

**Held:** *“The Court is entitled to review the process of appointment 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 enquiry to ensure that the person appointed meets the Constitutional requirements”.*

In the instant petition, the process mentioned in the above cited case was flouted by the same appointing authority which in this case is the 1<sup>st</sup> Respondent.

11. The issue at stake is, was the 3<sup>rd</sup> Respondent validly elected? And was his election in accordance with **Article 177(1)** of the Constitution? This Court is alive to the Notion that he who alleges must prove, hence the burden of proving an electoral breach misconduct and or irregularity lies squarely upon the Petitioner.

The Petitioner has adequately demonstrated to the satisfaction of this Court that the 1<sup>st</sup> Respondent gazetted the 3<sup>rd</sup> Respondent who is male instead of gazetting the Petitioner who is female. The Petitioner in this petition has adequately dispensed this burden by demonstrating vide her evidence and documentary evidence availed that the election of the 3<sup>rd</sup> Respondent offends the principles set out in **Article 177(1) (b) of the Constitution**. Further that the nomination of the 3<sup>rd</sup> Respondent was erroneous and based on the mistaken belief that the 3<sup>rd</sup> Respondent was female as his name appeared as the fourth female on the Jubilee Party list designated as special seat for fourth female qualifying nominee to the exclusion of the petitioner who is actually female and who ranked in priority to 3<sup>rd</sup> Respondent. The same amounts to a factual error.

12. The 3<sup>rd</sup> Respondent never entered appearance and or filed a response to the petition. The 2<sup>nd</sup> Respondent did not file any response to the petition hence did not object to the petition and it is presumed to have admitted to all what has been alleged and presented by the Petitioner.

The 1<sup>st</sup> Respondent served the 2<sup>nd</sup> Respondent with a detailed answer to petition and a replying affidavit but still no reply was filed, hence it is evident that the 2<sup>nd</sup> Respondent did admit the mistake and should be penalized for the same.

It is my considered view that the Petitioner has proved her case on the required standard as it is explicit that the 3<sup>rd</sup> Respondent is male and the gender top up seat was intended for a female in enforcement of the Gender Equity Rule. The upshot of the foregoing is that:

(a) The Court herewith declares that the said **ROP HILIPMON** was not duly nominated for member of Nandi County Assembly as the election was void under Article 90 of the Constitution of Kenya 2010.

(b) The Court further declares that the 3<sup>rd</sup> Respondent was not validly elected as member of Nandi County Assembly Women's members nominated on the Nandi County Assembly list for Jubilee Party pursuant to Article 90 (1) of the Constitution of Kenya 2010.

(c) The Court further declares that Gazette Notice Number 8380 published on 24<sup>th</sup> August, 2017 is *Void Abinitio* to the extent that it provides and specifies that the 3<sup>rd</sup> Respondent stands validly nominated to the Nandi County Assembly on the Jubilee Part list of women members nominated to the County Assembly following the General Elections held on 8<sup>th</sup> August 2017.

13. The 3<sup>rd</sup> Respondent's election as nominated member for Nandi County Assembly is herewith nullified.

#### 15. COSTS

**Section 84** of the Elections Act provides that;

*“An Election Court shall award costs of and incidental to a petition and such costs shall follow the cause and or the event.*

The Court has wide discretion to determine costs.

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

**Rule 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 any part of any money deposited by way of security shall be applied in the payment of taxed costs.

#### 16. DISPOSITION

(a) Taking all the facts I have outlined above, I herewith award costs to the Petitioner to be paid by both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The same capped at not more than 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 & Boundaries Commission**.

**DATED and DELIVERED at MILIMANI COMMERCIAL COURT AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2018.**

#### **IN THE PRESENCE OF:**

SINANI - ADVOCATE FOR PETITIONER.

NYOKABI - ADVOCATE FOR 1<sup>ST</sup> RESPONDENT.

N/A - ADVOCATE FOR 2<sup>ND</sup> RESPONDENT

N/A - 3<sup>RD</sup> RESPONDENT

Mutua –Court Assistant.

**HON.G.A. MMASI (MRS)**

**SENIOR PRINCIPAL MAGISTRATE**

**23/2/2018**