



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES COURT AT KISII
ELECTION PETITION NO. 8 OF 2017
IN THE MATTER OF ELECTION ACT NO. 24 OF 2011

AND

IN THE MATTER OF ELECTIONS (GENERAL) REGULATIONS, 2012

AND

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

AND

IN THE MATTER OF NOMINATION OF A MEMBER OF COUNTY ASSEMBLY WARD

AND

IN THE MATTER OF THE PETITION OF ROSE MOTURI MWENE

BETWEEN

ROSE MOTURI MWENEPETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

THE JUBILEE PARTY2ND RESPONDENT

HARRIET KERUBO ONGERA3RD RESPONDENT

KISII COUNTY ASSEMBLY4TH RESPONDENT

JUDGMENT

1. Introduction;

The Petitioner Rose Moturi Mwene filed her Petition dated 18th September 2017 where she sought for the

following orders:

- a) **A declaration that the Petitioner was properly and lawfully elected as a Member of Kisii County Assembly.**
- b) **A declaration that the deleting of the Petitioner's name and replacing it with the name of the 3rd Respondent was wrongful, unlawful, unconstitutional, null and void for all purposes.**
- c) **A declaration that Kenya Gazette Vol. CXIX No. 132 of 8th September 2017 as regards the deletion of the Petitioner's election as a Member of Kisii County Assembly is a nullity.**
- d) **This honourable court do proceed to direct the clerk to Kisii County Assembly not to swear in any other person as a member of Kisii County Assembly purporting to replace the Petitioner herein until the Parliamentary term of 5 years which started after the General Elections of 2017 is over.**
- e) **This honourable court do find an offences have been committed by the 1st and 2nd Respondent and direct the Deputy Public Prosecutor to investigate the same and those who would be found to have committed the same be punished.**
- f) **This court be pleased to order that the Kenya Gazette (Special Issue) Vol. CXIX – No 132 as Kisii County 42. Gender Top Up List page 5006, second column, row 13 in respect of deleting the Petitioner's name as an elected/nominated Member of Kisii County Assembly is completely unconstitutional.**
- g) **An order for costs that the respondents pay the Petitioner the costs of this Petition.**
- h) **Such other or further relief(s) as this Honourable Court may deem fit and proper to grant in the circumstances of this case.**

2. The Petition was supported by her sworn affidavit where she stated that the 2nd Respondent forwarded her name to the 1st Respondent as one of the nominees for the special seat in Kisii County Assembly as required by Section 34 of the Elections Act No. 24 of 2011. That she was sworn in on 7th September 2017 as Member of Kisii County Assembly and issued with a certificate duly signed by the said clerk and she fully participated in the proceedings of the electing of Kisii County Assembly Speaker. Later as she was preparing to travel to Mombasa for her induction, it was brought to her attention that Kenya Gazette (Special Issue) Vol. CXIX – No. 132 of 8th December 2017 deleted her name and replaced her with the 3rd Respondent. She relied on the exhibit marked RMM1 – RMM9 in support of her case.

3. 1st Respondent's Case;

The 1st Respondent herein referred to as IEBC filed their replying affidavit dated 29th September 2017 in response to the Petition. They relied on Section 35 and 36(e) of the Elections Act No. 24 of 2011 which required the 2nd Respondent to submit a list in the Gender Top List to the Commissioner under Regulation 56(2) of the Elections (General Regulations) 2012. The 2nd respondent was entitled to 5 seats under the Gender Top Up Category in order to give effect to Article 177 (1) (b) of the Constitution. That the list submitted pursuant to Section 34 (4) and (6) listed the 3rd Respondent as number (2) while the Petitioner was listed as number (11) eleven (Refer to Exhibit marked S01 and S02).

4. That while allocating the special seat members, under Section 36 (7) of the said Act, the Commission noted that the 3rd Respondent had been referred to as 'male' in the list that was submitted by the 2nd Respondent (Refer to S02). As a result the seat was allocated to the Petitioner (refer to S03). That later the 2nd Respondent corrected the anomaly vide its letter dated 31st July 2017 which showed the gender of

the 3rd Respondent as female (Refer to SO5). That pursuant to Article 90, 2(a) of the Constitution, the Commission caused the publication of the Corrigenda No. 8847 (S05). They urged this court to dismiss the Petition with costs.

5. 2nd Respondent's case:

The 2nd Respondent herein referred to as “**Jubilee Party**” filed their response to the Petition dated 20th November 2017. That they received numerous applications from thousands of interested party members for consideration and it was therefore obvious that not all applicants would be successful. The discretion was on the 2nd Respondent to come up with a criteria on how best they could pick the nominees. That the Petitioner was never guaranteed any nomination slot as alleged as all the aspirants would be subjected to a fair process where all had equal and fair chances and the best would be picked democratically. That the selection of the party list was in accordance with Electoral Laws, Rules and Regulations and the Petitioner was not unfairly left out as alleged.

6. 3rd Respondent's Case:

The 3rd Respondent herein referred to as Harriet Kerubo Ongera filed her replying affidavit dated 28th September 2017. In response to the Petition, that she is a member of the 2nd Respondent and therefore nominated pursuant to Article 177 of the Constitution and Section 34 of the Elections Act, 2011. She was number (2) in the list forwarded to the 1st Respondent. That after the completion of the last general elections, the 1st Respondent was obligated to nominate a candidate from the gender top up list and the Petitioner was nominated refer to (RMM03).

7. That the publication of the name of the Petitioner was carried out under the mistaken belief that the person whose name was listed as number 2 in the gender top up list was male and hence the bypass of the said person. That the mistake was noted and the 2nd Respondent notified. The 2nd Respondent wrote to the 1st Respondent on the anomaly and it led to the publication of the Corrigenda dated 8th September 2017. She relied on the exhibit marked HKO1 – HKO4.

8. That following the publication of the Corrigenda, the Petitioner's name was deleted and she therefore ceased to be the duly nominated member of the Kisii County Assembly. That the Petition should be dismissed with costs. The 4th Respondent herein referred to as Kisii County Assembly did not file their response to the petition, though they had filed their memorandum of appearance on 21st September 2017.

9. When the matter came up for pretrial directions, the parties agreed to proceed by way of written submissions. The Petitioner, 1st Respondent, 3rd Respondent and 4th Respondent filed their respective written submissions. The 2nd respondent never filed their written submissions.

10. Petitioner's submissions:

The Petitioner in her submissions raised 6 issues for determination;

1) Whether or not the Petitioner was legally procedurally, lawfully, constitutionally and validly nominated as a Member of Kisii County Assembly (Gender Party List) to represent gender in the said authority.

2) Whether or not the 1st Respondent had any legal basis whatsoever to delete the Petitioner's name and insert the 3rd Respondent's name as the Kisii County Assembly representative vide Gazette Notice Vol. CXIX – No. 132 of 8th September, 2017.

3) Whether or not the Petitioner should be a Member of Kisii County Assembly till the expiry of the parliamentary term of five (5) years is over.

4) Whether or not this court shall declare the Kenya Gazette Notice Vol. CXIX No. 132 of 8th September 2017 wrongful, unlawful, unconstitutional, null and void.

5) Whether or not the Petitioner is entitled to her prayers set out in the Petition.

6) Who bears the costs of this Petition?

11. On issue 1, the Petitioner relied on Article 90, 177 (1) (b), (c) of the Constitution. Sections 34, 35, 36 and 37 of the Elections Act No. 24 of 2011, Regulations 54, 55 and 56 of the Elections (General Regulations) 2012 Regulations 20 and 21 of the Elections (Party Primaries and Party Lists) Regulations 2017. That the 2nd Respondent generated a party list of Kisii County Assembly. The 3rd Respondent gender in the list was indicated as 'male' and 2nd Respondent qualified for (5) five slots in the Gender Top Up List in Kisii County. The 1st Respondent picked No. 1, 3, 5, 8 and 11. The Petitioner was No. 11 and it was her submission that she was validly nominated and gazetted as per the Kenya Gazette Notice No. 124. She was later sworn in and started discharging her duties.

12. On issue 2, they submitted that the action of the 1st respondent to delete the Petitioner's name and inserting the 3rd Respondent's name in the Kenya Gazette No. 132 was unlawful and unconstitutional. That the 1st Respondent did not have any legal capacity whatsoever to delete her name.

13. On issue 3, they submitted under Section 34 (7) (10) of the Elections Act No. 24 of 2011, a final list submitted can never be amended during the terms of parliament as the Petitioner had already assumed office and she can only be removed by an order of an Election Court.

14. On issue 4, they submitted that after 1st Respondent published the names of all the nominees of the political parties in the two newspapers and subsequent gazetting the final list, its business came to an end and they relied on the authority of **Moses Mwicigi & 14 Others -vs- IEBC Petition No. 1 of 2015**. That 1st Respondent had no mandate to publish Kenya Gazette No. 132.

15. On issues 5 and 6, they submitted that the Petitioner was procedurally nominated and she is therefore entitled to the reliefs sought.

16. 1st Respondent's Submissions:

The 1st Respondent in their submissions raised the following issues;

1) Whether there was an apparent error when the 1st Respondent allocated the seat to the Petitioner (owing to a misrepresentation of the 3rd Respondent as 'male'.

2) Whether the 1st Respondent has powers to correct an anomaly and publish a 'corrigenda' by which the correct name of the aspirant for the political seat is published.

3) Whether the 1st Respondent was fulfilling its constitutional and statutory mandate under Sections 35, 36(e), 36(7) of the Elections Act No. 24 of 2011 and Article 90 of the Constitution.

4) The Petitioner's authority cited in her submission, that is Petition No. 1 of 2015 Moses Mwicigi & 14 Others -vs- IEBC & Others is distinguishable from the facts herein and therefore is not applicable.

17. On issue 1, they submitted that the 3rd Respondent was in priority position to the Petitioner pursuant to Section 36(7) of the Elections Act No. 24 of 2011. That due to an error, the 3rd Respondent was referred to as 'male' in the party list that was submitted by the 2nd Respondent. The 2nd Respondent later corrected the anomaly vide its letter of 31st July 2017 and the commission corrected the anomaly through

corrigenda Kenya Gazette No. 8847 dated 8th September 2017. That the 3rd Respondent was selected lawfully and legally in the manner provided for under Article 90(2) (a) of the Constitution.

18. On issue 2, they submitted that Regulation 54(5) of the elections (General Regulations) 2012 authorize the Commission to reject a nominee who has been submitted by a political party for any elective post if that nominee is not qualified to be elected to the office for which the office is sought. That in correcting the anomaly and publishing the corrigenda, the Commission was ensuring that it adhered to the priority of nominees as submitted in the party list pursuant to Section 36(8) of the Elections Act.

19. On issue 3, they submitted that they fully complied with Section 35, 36(e) of the Elections act No. 24 of 2011, Article 177, 1(b) of the Constitution, Regulations 56(2) of the Elections (General) Regulations 2012. That the 3rd Respondent was selected lawfully and legally and the Commission discharged its mandate under Article 90(2)(a) of the Constitution.

20. On issue 4, they submitted that the authority is distinguishable as the current case involved Petition whereas the **Mwici**'s case involved appeals arising from decisions made initially by the IEBC Disputes Tribunal and not a correction of name by the IEBC owing to an error from the party lists as submitted by the nominating political party.

21. **The 3rd Respondent's submissions:**

The 3rd Respondent raised the following issues for determination;

(1) Whether the name of the Petitioner and 3rd Respondent were duly proposed in the party list (Gender Top Up) Kisii County Assembly as published by the 1st Respondent and who ranked first.

(2) Whether the election of the Petitioner to the County Assembly vide Gazette Notice Vol. CXIX No. 124 dated 28th August, 2017 was on basis of proportional representation by use of party list pursuant to provisions of Article 90 and 177 of the Constitution 2010, Section 34, 35 of the Elections Act No. 24 of 2011 Rules 54 and 55 of the Elections (General) Regulations, 2012.

(3) Whether the 1st Respondent was vested with the mandate to publish the corrigenda and thereby correct the mistake pertaining and/or leading to the gazettelement of the Petitioner.

(4) Whether the Petition discloses any reasonable cause of action.

(5) Whether the Petitioner is entitled to relief sought.

22. On issue 1, they submitted that it is the mandate of the 2nd Respondent to generate a party list with proposed names of its members as to various seats in the County Assembly. The 2nd Respondent was to adhere with the constitutional threshold under Article 90 and 177 of the Constitution 2010 when compiling the said list. That the 2nd Respondents were guided by provisions of Section 34 of Elections Act No. 24 of 2011 together with Rules 54 and 55 of the Elections (General) Regulations, 2012. The list submitted indicated the 3rd Respondent as '**male**' instead of '**female**' and she was position two (2). That the anomaly was noticed and the 2nd Respondent notified. The same was corrected but not on time as her name was skipped on the gender top up list and the Petitioner who was in position 11 was nominated and gazetted as an elected member of County Assembly.

23. It is the 3rd Respondent's submission that her name was second in terms of priority in the gender top up list and she stood a high chance of being elected as the member of Kisii County Assembly in accordance with Article 177 of the Constitution.

24. On issue 2, they submitted that the 2nd Respondent is legally bound to nominate its members and that it is the duty of the 1st Respondent to accept the list unless the same contravenes the provisions of the Constitution. That the election of the Petitioner as a Member of the Kisii County Assembly does not reflect the wishes of the 2nd Respondent.

25. That her nomination was due to an error which was highlighted even before the Gazetting of the Petitioner as an elected member of the Kisii County Assembly. That it is through the party list that political parties demonstrate the spirit of the Constitution as envisaged in Article 90 of the Constitution and Section 34, Regulation 54 and 55 of the Election (General) Regulations 2012, gives political parties the free will of generating nominees on the party list. That the 3rd Respondent is a victim of circumstances in terms of a typo error which referred her gender to male. She is the rightful person to have been elected to the County Assembly.

26. On issue 3, the 3rd Respondent submitted the issue of gender was a dispute which the 1st Respondent has been mandated by the Constitution to handle under Article 88(e) of the Constitution as read with Section 74 of the Elections Act No. 24 of 2011. That the only way to correct the gender was by way of a corrigenda deleting the name of the Petitioner whose name appeared position 11 on the party list of the 2nd Respondent and inserting the name of the 3rd Respondent whose name appeared 2nd on the party list.

27. On issue 4, they submitted that the Petitioner did not disclose that the 3rd Respondent stood a higher priority in the party list submitted to the 1st respondent. That the 1st Respondent was mandated by law to nominate the nominees in the party list on priority basis (Section 34(5) of the Elections Act).

28. On issue 5, they submitted that the Petitioner being position 11 on the party list submitted to the 1st Respondent could not have been rightfully nominated a Member of County Assembly. That the 1st Respondent was acting within the law in resolving a dispute on issue of omission of the correct gender of the 3rd Respondent which was lodged before the nomination.

29. **4th Respondent's submission:**

The 4th Respondent raised the following issue for determination in their submissions;

1) Whether this Honourable Court has jurisdiction to hear and determine this matter.

2) Whether the 4th Respondent's client acted lawfully or otherwise in swearing in the Petitioner as Member of County Assembly.

3) Whether the Petitioner's prayer in respect of costs to the 4th Respondent can be granted.

30. On issue 1, they submitted that the court has jurisdiction to hear and determine this matter in line with the Elections (Parliamentary and County Election Petitions) Rule 2017. They relied on the authority of **Moses Mwigigi & 14 Others IEBC & 5 Others [2016] EKL.R.**

31. On issue 2, they submitted that the 4th Respondent is guided by the Constitution, Acts of Parliament and any Rules of business that may be from the time be decided by the members. That the 4th Respondent was guided under standing order No. 3 (2) (c) which states that on the first sitting of a new County Assembly after general elections, the Clerk shall administer the Oath or Affirmation of Office to all members present. That on 7th September 2017 at 9.00am, the 4th Respondent's clerk administered the oath to the Petitioner as was the case of the 68 other members duly elected and nominated. That the 4th Respondent did not in any manner act irregularly or illegally in so swearing in the Petitioner herein as the same was proper and irregular.

32. On issue 3, they submitted that the prayers cannot issue and they urged this court that each party bears

its own costs.

33. Court Analysis and Determination:

I have carefully considered the Petition, the Replying Affidavits and responses to the Petition. I further considered the written submissions by parties and I summarize their issues for determination as follows:-

1) Whether or not the Petitioner and the 3rd Respondent qualified to be nominated under the gender top up list?

2) Whether or not the 2nd Respondent had the mandate to amend its party list after the Petitioner had already been sworn into office.

3) Whether or not the 1st Respondent had exceeded its legal mandate to publish the Corrigenda.

4) Whether or not the reliefs sought in the Petition can be granted.

34. Issue No. 1:

The process of nomination under the party list is laid out in Section 34, 35, 36 and 37 of the Elections Act No. 24 of 2011, Article 177, Article 90 and Regulation 54, 55 and 56 of the Elections (General) Regulations 2012. The Petitioner and the 3rd Respondent are members of the 2nd Respondent. Both were nominated for the gender top up list by the 2nd Respondent who proceeded to forward their names to the 1st Respondent in line with Regulation 54. The 1st Respondent did not reject their names and as a result published the final list as required by Regulation 54(8). Refer to exhibit marked RMM1. The Petitioner was number 11 and the 3rd Respondent was number 2 in the final list. This position of member of County Assembly is provided for under Article 193, 1 (c) (i) of the Constitution where the Petitioner and the 3rd Respondent fall under. In essence they qualified by nomination by their political party.

35. Section 36(2) provides that:

“A party list submitted under subsection 1(a), (c), (d), (6) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.”

I note that the final list published in RMMI indicated the 3rd respondent gender as ‘male’ and the nominees in the Gazette Notice No. 124 by the 1st Respondent selected No. 1, 3, 5, 8 and 11 in accordance to Section 36 above.

36. To this stage the process was accordingly conducted within the law and the 3rd Respondent was left out as her gender was indicated as ‘male’. The Petitioner was accordingly sworn into office on 7th September 2017. On 8th September 2017, the 1st Respondent published Kenya Gazette No. 132 Corrigenda deleting the Petitioner’s name and inserting the 3rd Respondent’s name as a result the Petitioner filed the current Petition.

37. Issue No. 2 and 3:

From the Petition, the Petitioner had already assumed office on 7th September 2017 and the submission by the Respondents that she ought to have lodged her complaint with the Political Parties Tribunal pursuant to Section 74 of the Election Act and Section 40 and 41 of the Political Parties Act was clearly settled in the preliminary objection where this court had already pronounced itself on the issue, Article 88, 4(e) excludes Election Petitions. This was further settled in the case of **National Gender and Equality Commission (NGEC) -vs- IEBC Constitutional Petition No. 147 of 2013.**

38. The 1st Respondent in their replying affidavit dated 27th October 2017 paragraph 12 stated:

“That owing to the description of the 3rd Respondent as ‘male’ in the party list (and notwithstanding the 3rd Respondent was listed as the second female while the Petitioner was listed as sixth female in the party list) the Commission allocated the seat to the Petitioner. As a consequence, the Petitioner was on 28th August, 2017 vide Gazette Vol. CXIX, Gazette Notice No. 8380 at page 5006, item No. 12 Gazzetted as a nominated Member of County Assembly of Kisii County representing the 2nd Respondent (‘Refer to SO2’)”

In paragraph 13 it is stated that the 2nd Respondent later corrected the anomaly vide letter dated 31st July 2017 which showed the gender of the 3rd Respondent as female refer to ‘S03’.

The question to be answered is whether or not the 1st and 2nd Respondents followed the laid out procedure required of them under the law?

39. Section 34(6) of the Elections Act provides that “the party lists submitted to the Commission under this Section shall be in accordance with the Constitution or nomination rules of the Political Party concerned and subsection (10) provides **“A party list submitted for purposes of sub section (2), (3), (4) and (5) shall not be amended during the term of Parliament or the County Assembly as the case may be for which the candidates are elected.”**

40. In the instant Petition, the Petitioner had already been sworn into office. The issue of gender of the 3rd Respondent cannot be attributed to either of them, that is the Petitioner or 3rd Respondent, it was a mistake by the 2nd Respondent. It was a list that was prepared and submitted by the 2nd Respondent and as I had earlier indicated the 1st Respondent in preparing the final list was guided by Section 36 (2) of the Elections Act. The 3rd Respondent would not have qualified as her gender was clearly indicated as ‘male’ and by applying the alternate principle, the Petitioner was selected instead as she also qualified for the said position.

41. It follows that the 2nd Respondent and the 1st Respondent did not comply with the law when they published the Corrigenda which deleted the Petitioner’s name and replaced it with the 3rd Respondent’s name. This step came a little bit too late and the explanation given by them is not plausible.

42. In the case of **Imelda Nafula Wanjala –vs- IEBC [2013] EKLR** it was held that **“Under the provisions of Article 177 of the Constitution and Section 34 of the Elections Act, the Respondent was required to nominate persons on the basis of priority from the list submitted to it prior to the elections and it could only come and consider other lists under Section 37(2) of the Constitution once the original list was exhausted. A failure on its part to act in accordance with these provisions would be irregular and in breach of the law.”**

This case is applicable in our current situation though the situations are different as the 1st Respondent had not rejected the name of the Petitioner as required by Regulation 54 (5) and it proceeded to publish the final list as per Regulation 54(8) and hence any attempt to change the list as they have done would be deemed irregular and breach of law.

43. The rightful procedure was for the 2nd Respondent to conduct a fresh nomination as the mistake on the list had serious implications that would not be rectified through publishing a Corrigenda. The Petitioner had already been sworn into office and an attempt to remove her would be irregular and breach of Section 34 (10) of the Elections Act. The Corrigenda deleted her name from the seat of Member of County Assembly Gender Top Up List and replaced her with the 3rd Respondent and in essence her position has already been taken. Though illegally done, this court cannot reinstate her back to her position.

44. This court cannot uphold Gazette Notice No. 8380 for reasons that if the gender of the 3rd Respondent has been indicated as female then the Petitioner would not have been nominated as she ranked number eleven (11) in the order of priority and the 3rd Respondent was number two (2). Thus she would have been disqualified pursuant to section 36 (2) of the Elections Act No. 24 of 2011.

45. I hold the nomination process in relation to the Petitioner and the 3rd Respondent null and void and revoke **Gazette Notice No. 8380** in relation to the Petitioner's nomination and **8847** in relation to the 3rd Respondent's nomination.

46. The 1st and 2nd Respondents to conduct fresh nomination for Gender Top Up List to fill the vacancy and strictly comply with Article 177, 90, Section 34, 35, 36, 37 and Regulations 54, 55 and 56 of the Elections (General) Regulations 2012.

47. **Issue No. 4:**

The reliefs sought in the Petition cannot be granted for the above reason and I direct that each party bears their own costs of the Petition.

JUDGMENT DATED and DELIVERED at KISII this 12TH DAY of FEBRUARY, 2018.

HON. V. KARANJA

SENIOR RESIDENT MAGISTRATE

In the presence of:

Mr. Momanyi Aunga for the Petitioner

N/A for the 1st Respondent

N/A for the 2nd Respondent

Mr. Nyamurongi holding brief for Mr. Oguttu for the 3rd Respondent

N/A for the 4th Respondent

Mr. Koech court assistant

HON. V. KARANJA

SENIOR RESIDENT MAGISTRATE