



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KERICHO

ELECTION PETITION NO 2 OF 2017 CONSOLIDATED WITH PETITION NO 3 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 (L.N. 128 OF 2012 AND
L.N. 72 OF 2012**

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

AND

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

BETWEEN

LORNA CHEMUTAI.....1ST PETITIONER

EVANS KURGAT.....2ND PETITIONER

TERESA CHEPKEMEI.....3RD PETITIONER

ERICK KIPYEGEON KOECH.....4TH PETITIONER

EVERLINE CHEMUTAI.....5TH PETITIONER

VERSUS

THE INDEPENDENT, ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE NATIONAL EXECUTIVE COMMITTEE

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

AND

WINNY CHEPKOECH LANGAT1ST INTERESTED PARTY
BII CHERUIYOT2ND INTERESTED PARTY
MILKA WANGARE NJUGUNA3RD INTERESTED PARTY
KASSIM ABDULRASHID NASSIR4TH INTERESTED PARTY
ANNA CHEBET TONUI5TH INTERESTED PARTY
CHELANGAT PRISCA KIPKOECH6TH INTERESTED PARTY
KOECH CHEMUTAI GRACE BETTY ..7TH INTERESTED PARTY
CHERONO ANN 8TH INTERESTED PARTY
HELLEN CHEPKIRUI 9TH INTERESTED PARTY
TONUI BEATRICE CHEPKEMOI 10TH INTERESTED PARTY
ANN KOSKEY CHELANGAT 11TH INTERESTED PARTY
TANUI ESTHER CHEPKORIR 12TH INTERESTED PARTY
SOI CAROLINE CHEPKOECH 13TH INTERESTED PARTY
EDITH KAPTICH CHEPKOECH 14TH INTERESTED PARTY
RECHO EMILY CHEPKEMOI 15TH INTERESTED PARTY
CHEBET JACKLINE 16TH INTERESTED PARTY
TUMM ANN CHEPKORIR 17TH INTERESTED PARTY

JUDGMENT

Introduction

1. The 1st, 2nd and 3rd Petitioners filed petition no. 2 of 2017 whereas Petitioners 4th and 5th filed petition no. 3 of 2017. The Petitions herein were filed alongside Applications that sought suspension of the swearing-in of the all the interested parties as county assembly members and/or from executing duties or from drawing any benefits from their respective public offices. The Application was however spent by the time the election court was appointed via gazette notice on 06/10/17.

2. The 2 petitions were consolidated during the pre-trials and the same were dealt with simultaneously in court. Parties through respective counsels in court consensually agreed to have the Petitions disposed of by way of written submissions and case law.

The Petitioners' Contention

3. The Petitioners in their pleadings and affidavits advanced main contentions as summarized;

a) that the nomination of the interested parties breached Articles 177 of the constitution as well as sections 34,35,36,& 37 of the Elections Act and regulations 54 & 55 thereof,

b) that the 1st Respondent failed to conduct and/or supervise the nominations per law provided,

c) that the party-list in issue did not prioritize nor have any person with disability or the marginalized group,

d) that the 1st Respondent abdicated its responsibility to ensure a law-compliant party-list in the circumstances,

e) that 2nd Respondent's list remained impugned at the Political Parties Disputes Tribunal vide complaint no. 338//2017 which declared violation of the Constitution and rules,

f) that the 1st Respondent despite having satisfied itself in the illegality of the list herein, failed to require amendments in compliance with the law.

4. These Petitioners therefore prayed for declaration orders of court in terms;

- that the Petitioners met nomination criteria;
- that the respondents failed refused or neglected discharge of their respective mandates in law,
- that the Respondents flouted the Constitution,
- the Election Act and Rules, that the Petitioners were duly nominated and ought to be gazetted as members of the county assembly,
- that the gazette notice no. 8380 of 28/08/17 therefore be revoked and finally
- that the costs of the Petition be awarded to the Petitioners.

5. With leave of court, the Petitioners swore further affidavits in support of the Petition on 14/11/17 and filed on the same day in court. In these further affidavits, the Petitioners alleged that;

a) The nomination list was skewed towards some constituencies and wards such that regional balancing as envisaged in section 7 of the County Government Act was not achieved,

b) That some of the interested parties herein applied for nomination under a different category from that which they were finally nominated under i.e. 6th, 4th that some were not members of the 2nd respondent i.e. 7th, that some didn't apply for nomination i.e. 3rd, that some used other person's identity cards to apply for nomination i.e. 5th, that some were not in the party short list but appeared in the published list in the dailies, that some of the nominees did not meet the nomination criteria and that others did not come from the County of Kericho.

c) That the 2nd Respondent's own rules of nomination and distribution of available slots were flouted,

d) That the 4th Respondent's name was changed from his application to represent the marginalized and finally put in the gender top up list as no.4.

The 1st Respondent's Case

6. The 1st Respondent (IEBC) in response to the petition and by affidavits in support including ground of opposition dated 20/09/17 reiterated full compliance of the electoral laws on its part and averred that the Petition is fatal for reasons that it is unknown if the same is presented in the Petitioners' individual or representative capacity. It contented to have duly received and confirmed compliance of the Party List as done by the 2nd Respondent; that it merely picked the Interested Parties from the List as prioritized in respect of the slots that became available to the Party.

7. In reply to the Petitioners' subsequent averments with leave of court, the 1st Respondent made further reply through an affidavit dated 21/11/17 by one Winny Chepkoech Langat the 1st Interested Party herein. In her own capacity and on behalf of the other Interested Parties, she reiterated that they were duly nominated as members of the County Assembly of Kericho without any slightest evidence of contravention of the law.

The 2nd Respondent & Interested Parties' Case

8. The 2nd Respondent and Interested Parties in response to the Petition and in the affidavit of its *Elections Director* one Peter M. Karanja filed on 20/10/17 averred that it made its Party List and submitted the same for nominations legally and constitutionally. It acknowledged that all the Petitioners were indeed applicants for nominations and that their names appeared but in positions which could not be reached due to limited slots available. They prayed for dismissal of the Petition with costs.

9. The 2nd Respondent however filed its response to the Election Petition file no. 2 of 2017 on 22/11/17 which the Petitioners took issue and sought to be expunged from the record for delay. In the same response the 2nd Respondent and Interested Parties merely replicated its response on 20/10/17 under Election Petition file no. 3 of 2017, in terms of content and style. Counsel further regretted that the same was an oversight caused with no prejudice to any party. He said the oversight arose due his understanding that the 2 Petitions were already consolidated at the pre-trial stage. In this issue, I promised Counsels present in court then to put the issue into consideration and decide it on merit in this judgment rather than drastically decide the fate of a party's pleadings on record before trial.

The Parties' Submissions

10. Parties finally filed and highlighted their respective written submissions in open court on 15/12/17. The Petitioners' in their submissions proposed only 3 main issues for determination as;

- i. Was the nomination process herein done per the Constitution, Electoral Laws, Rules and Regulations?
- ii. Are the Petitioners entitled to the orders sought?
- iii. Who is to bear the costs?

11. According to the Petitioners, the 1st Respondent failed in its responsibility to ensure that persons with disability and who had applied for nomination were nominated in the end whereas the 2nd Respondent erred for non-inclusion of persons with disability in its list and instead listed non-party member, non-voter in the County and non-applicants in its list. The Petitioners also took issue with the nomination of the 3rd and 4th Interested Parties under the marginalized group yet as they know, the 2 do not come from the marginalized community within the County. They relied in the decisions of the Superior Courts in *Moses Mwicigi & 14 others v IEBC & 5 others [2016]eKLR*, *Aden Noor Ali v IEBC & 3 others [2017]eKLR* and *National Gender & Equality Commission v IEBC & another [2013]eKLR*.

12. The 1st Respondent in its submissions came up with 3 issues as;

- i. whether the 1st Respondent flouted the Constitution or any other law,
- ii. whether the Interested Parties were duly and validly nominated as MCAs for Kericho County and
- iii. whether the nomination of the Interested Parties should be revoked.

13. In its preliminary point, the 1st Respondent felt the Petitioners did not each plead its case with

sufficient specificity and that all relied on an affidavit by only one of them who neither pleads the case for the others nor presents the petitions in a representative capacity. It relied on the decision of **Michael Mungai v Housing Finance Co. Ltd & 5 others [2017]eKLR** on this point. On the further affidavits by the Petitioners, the 1st Respondent felt that the Petitioners introduced new information and material which is akin to filing a fresh petition out of time as in the case of **IEBC & another v Stephen Mutinda Mule & 3 others [2014]eKLR**, **Martha Wangari Karua & another v IEBC & another [2017]eKLR** and **Raila Odinga & others v Uhuru Kenyatta & others [2013]eKLR**.

14. In respect to the issues proposed the 1st Respondent contents that it merely nominated the interested parties from the party list in the order given and that it ensured that the list carried alternate names of male and female with inclusion of 2 persons with disability, 2 youth and 2 representatives of the marginalized group. It reiterated that it is not its duty to impose priority of names in the party list and that issues to do with the party list have not only been raised belatedly but that the same ought to be litigated upon at the Political Parties Tribunal or the 1st Respondent's Committee. It concluded that the Petitioners are mere disgruntled Party members, settling Party internal scores albeit in a wrong forum and outside judicial time.

15. The 2nd Respondent and 1st to 17th interested parties summarized issues into 2;

- i. whether the Party List in these proceedings was legally compliant and
- ii. whether the Petitioners are entitled to orders as sought.

16. In addressing the issues, they contended that the Party List was made according to the Constitution and other laws; that in the Jubilee Party Nomination Rules or in any law there is no requirement that a nominee must be a voter in the subject County, that 'special interests' ought not to be restrictively read in terms of particularized groups as youths, persons with disabilities or workers and on this score relied on **Micah Kigen & 2 others v AG & 2 others [2012]eKLR**, that in any case Counties are exempted from strict regional or ethnic representation in the Constitution of Kenya and that there is no possibility at all that the Jubilee Party would elect or nominate any person who is a non-Party member or persons who do not qualify in its Constitution. In distancing itself from any allegations of discrimination of its Party members, the 2nd Respondent cited the case of **Githunguri Dairy Farmers Co-operative Society Ltd. v AG & 2 others [2016]eKLR**.

Issues for Determination

17. From the foregoing pleadings, averments and submissions; this court is called to determine the Constitutionality and legality of the nomination of the Interested Parties in this case. In so doing, the court will ask itself questions such as;

18. What is the scope of an election petition court in as far as Political Parties' Nomination processes are concerned? Is it the duty of this court to initially interrogate issues or processes of Political Parties nominations and composition of Party Lists? Can this court primarily decide whether non-members or non-voters appeared in the List? Can it then address issues of rankings in Political Parties Lists after gazette? Whether the Petition herein must succeed or fail in the end and, at whose costs?

The Analysis

19. I looked at various precedence existing in relation to issues before me as well those cited in the submissions by counsels but I found the case of **Isaiah Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others [2016] eKLR** by Lenaola J. (as he then was) most comparable and in all fours with the present case. The same is quite instructive in this determination.

20. The case against the 1st Respondent is that it failed grossly in its mandate under **Article 90 of the Constitution** as well as **sections 35, 36 & 37 of the Elections Act including Regulations** thereto. In

essence, all the Parties accept and appreciate that the 1st Respondent indeed have a clear mandate given to it under the Constitution and in particular sections 35, 36, 37 & 74 to give guidance, receive Nomination Party Lists, ensure compliance of law, settle disputes of nomination processes or give redress thereof as may be ***moved by any party***, only before the declaration of the final election result or gazette of nominees. The election court has jurisdiction to hear and determine disputes after gazette of members of the County Assembly.

21. So did the Petitioners primarily utilized the above mechanisms, complained or otherwise sought redress for their grievances during the nomination process? Did the 1st Respondent then failed in its Constitutional or legal role? These 2 questions answer the case against the 1st Respondent.

22. The Petitioners in this case gave no evidence of any action by them in moving their Political Party or the IEBC Tribunal before the declaration of the election result despite having been aggrieved with its own Party's misconduct during the nomination process. They did not move the IEBC Tribunal either but chose to ride on one **Tribunal complaint no. 338 of 2017** that was lodged by one of them- the 5th Petitioner, in which this particular petitioner succeeded on 29/07/17! As to whether the 5th Petitioner thereafter executed the PPDT decree or otherwise sought to enforce the same, no evidence is put forth in this Petition. As it is, she chose not to enforce the same.

23. In ***Isaiah Gichu Ndirangu & 2 others*** (supra) the court, while addressing similar issues rendered itself in part thus;

“49. My understanding of the laws that I have cited above is that the Legislature intended to enact legislation to govern electoral matters and the resolution of any related disputes therein. Section 74 (1) of the Elections Act and Section 4 of the Independent Electoral and Boundaries Commission Act as reproduced above makes it explicit that the Commission shall be responsible for settling disputes arising from or relating to nominations. It therefore follows that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the Commission. The next question then that begs for an answer is whether the Petitioners utilized the Commission’s dispute resolution port as required of them before approaching this Court....”

50. I appreciate the Petitioners’ contentions in that regard but I am however in disagreement with their reasoning. I agree that indeed this Court has unlimited jurisdiction in civil and criminal matters and further the jurisdiction to determine the constitutionality of anything alleged to have been done under the Constitution. I also appreciate that Article 258 of the Constitution grants every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. I however take the view that Parliament in its wisdom, being well aware of the existence of the judicial arm of the Government, enacted statutes that made provisions for settling disputes arising from or relating to nominations and elections. In the said enactments, the Legislature anticipated the existence of such disputes and that is why it created necessary and specialized dispute resolution fora.

“57. I have deliberately set out the above decisions with a view to highlighting the approach the courts have taken, which I believe is the correct one, in addressing disputes in regard to nominations pertaining to election matters. In the above cited decisions, I note that the parties alleged violation (s) of the Constitution and the various electoral laws in regard to the nominations and in that regard, their first port of call was the Commission’s Dispute Resolution Committee. Being dissatisfied with decision of the Committee, they thereafter approached the Courts. It is thus clear that the parties did not bypass the Commission’s dispute resolution avenue as the Petitioners have now done.

58. I also do not agree with the contentions by the Petitioners that this Court should characterize the instant Petition as a constitutional dispute instead of a nomination/election dispute. In my view, such characterization would go against the electoral laws and the Constitution which was

tailored in such a manner that it intended to have a special dispute resolution mechanism for electoral disputes, nominations being one of them.”

24. I have found it irresistible to replicate the Judge’s views in this decision for obvious reasons; the observations and determinations made therein are not only binding in this court but actually summarizes my decision in the present Petition.

25. The Petitioners therefore unfortunately bypassed the Commission’s dispute resolution mechanisms and the 1st Respondent has no conceivable blame in law. It follows thus the Petitioners could not and cannot logically allege any breach of the law or Constitution by a body they never invited its recourse or utilized its dispute resolution services. The 1st Respondent’s grounds of opposition against the Petitions as well, would pass on this same score discussed.

26. The case against the 2nd Respondent and Interested Parties remained an amalgamation of the case against the 1st Respondent. The fault or breach allegedly committed against the Petitioners was not in any way particularized independently or in respect to each Respondent and/or Interested Parties. However from the Petitions and affidavits as availed in court, it is insinuated that all the Respondents and Interested Parties breached the same Constitutional provisions and laws in a more or less the same manner; particular in issues to do with the nomination processes as summarized so far in this judgment.

27. The Interested Parties as individuals were alleged to have been favored by the Party as against its other members/Petitioners on various bases such as; priority on rank, regional balancing and deliberate breach of the Party’s own rules of procedure in the whole nomination processes.

28. But in the same breath, the **Constitution** and the **Political Parties Act** also provide expressly, and as is known to all the Parties in this Petition, there exist an Internal Political Parties Disputes mechanism (IPPD) under **part VI of the statute**, which is primarily mandated to address any issues arising between Political Parties and/or members of the Political Party and may be engaged from time to time before finalization of the Party Lists/Nominations.

29. In the present case, it is not alleged and it is clear in the record that none of the Petitioners ever preferred any complaint to such tribunal any time during the party nominations. It is noteworthy that Political Players must under **section 35 of the Elections Act** prepare and submit respective Party Lists 45 days before elections; meaning the issues raised in this Petitions would have gone to the IPPD way back in June 2017 were any party genuinely aggrieved with the 2nd Respondent nomination affairs from the onset.

30. Other than summarily applying the same reasoning as Leneola J. above, which indeed is applicable in my view, I have made further research to find a direct precedent in respect to the case of *bypassing* the IPPD specifically.

31. In ***Gabriel Uminda Olenje & 4 others v Orange Democratic Movement & another [2017] eKLR*** Sergio J. in upholding the decision of the PPT on appeal, where a matter in the Tribunal had been summarily dismissed for failure to invoke the services of the Internal Party Disputes Resolution Mechanism by a Party member, he briefly held in part as;

“7) In its decision, PPDT expressly stated in part as follows:

“None of the disputes cited and evidenced by the 1st respondent that would otherwise amount to I.D.R.M. have been shown to have been initiated by any of the complainants herein.”

8) Pursuant to the provisions of Section 40(2) of the Political Parties Act, the Political Parties Disputes Tribunal dismissed the complaint. In my humble estimation, I think PPDT came to the correct decision therefore it cannot be faulted.” [Emphasis]

Conclusions

32. Failure of the Petitioners therefore to raise their complaints earlier during the nomination processes within their own Political Party and neither in the IEBC Disputes Tribunal rendered the present proceedings an afterthought. Sincerely, the Petitioners knew or ought to know and appreciate their respective positions in the Party List; that priority in ranking determined their probabilities of nomination. They have knowingly but belatedly come to the Election Court to challenge the whole nomination process purely on grounds that are primary the utility of a Political Party or the Political Parties Tribunal merely because this Court adopts jurisdiction after gazette of Members of a County Assembly.

In ending his decision in *Isaiah Gichu Ndirangu & 2 others* the court stated;

“59. Having answered the question of jurisdiction in the negative, I am inclined to down my tools at this juncture for this is not the appropriate forum and time to address the issues raised in the Petition.[emphasis]

60. In light of my findings above, I hereby dismiss the instant Petition but each party shall bear its own costs”.

33. For these reasons herein above analyzed, and in consideration of facts and laws applicable including the binding decisions of the superior courts quoted, the Petition(s) herein therefore fail for want of an appropriate forum and time for redress of the issues raised. The same be and are (is) hereby dismissed. The Petition(s) being unsuccessful Petition against nominations (as opposed to competitive elective positions), each party in my discretion, shall bare its own costs incurred in this trial.

DATED & DELIVERED IN KERICHO THIS 9TH DAY OF FEBRUARY 2018

HON. B.R KIPYEGON

SENIOR RESIDENT MAGISTRATE