



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATES COURT AT NAIROBI

ELECTION PETITION NUMBER 8 OF 2017

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTION FOR THE COUNTY ASSEMBLY REPRESENTATIVE

OF NAIROBI COUNTY

AND

IN THE MATTER OF GAZETTE NOTICE VOL. CXIX – NUMBER 124 OF 2017

AND

IN THE MATTER OF THE RULING OF THE IEBC TRIBUNAL OF

AND

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

BY THE ORANGE DEMOCRATIC PARTY

BETWEEN

ASHA ADBIPETITIONER

AND

BOUNDARIES
INDEPENDENT ELECTORAL AND

COMMISSION1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

NAIROBI COUNTY ASSEMBLY3RD RESPONDENT

JUDGMENT

The petitioner contests the nomination of members of County Assembly Nairobi County *under Article*

177 (1) b and c of the Constitution. Her case against the 1st respondent is that it failed to scrutinize the party list forwarded to it by the 2nd respondent in order to ensure that the list complied with the constitution, Election Laws and Regulations and that it failed to ensure that the special interest groups were represented.

The petitioner's case against the 2nd respondent is that it failed to comply with the provision of Section 25(1) of the Election Act by nominating unregistered voters. That it failed to comply with provision of Article 90 (2) (c) of the constitution by nominating candidates outside the county for which the post were created. It is also stated that the 2nd respondent failed to nominate and provide a list of members to the 1st respondent in the category of party lists and in accordance with section 34 of the Elections Act. It is further alleged by the petitioner that the 2nd respondent failed to adhere to the Party Election and Nomination Rules and the Constitution and failed to comply with its own nomination rules. It is pleaded that the 2nd respondent failed to comply with orders issued by the 1st respondent disputes resolution committee and failed to review its party list as directed by the said committee and thus failed to nominate the petitioner who is its life member and a member a marginalized group. Lastly it is alleged that the second respondent nominations are tainted with discrimination, tribalism and nepotism and deliberately locked out deserving members including the petitioner.

The petitioner prays that;

- a) This Honourable Court be pleased to declare that the Nomination of Member for County Assembly, gender posts submitted by the Orange Democratic Movement as gazetted vide Vol. CXIX – No. 124 of the Kenya Gazette dated 28th August, 2017 be declared null and void for failure to comply with the order of 26th July, 2017 by the 1st Respondent Special Tribunal, the Constitution, Election Laws and Nomination rules.
- b) The Court does declare that the 1st respondent also failed to carry out its duty of ensuring that all persons on the respective party lists are qualified candidates as required by Regulations 54 (5) of the Election (General Regulations, 2012)
- c) This Honourable Court be pleased to make an order directing the 3rd respondent to recall the Nominated Members for County Assembly, gender posts by the Orange Democratic Movement as gazetted vide Vol. CXIX No. 124 of Kenya Gazette dated 28th August, 2017 and sworn in on 6th September 2017.
- d) The 2nd respondent be ordered to re-submit a party list that is compliant with the orders of 28th July, 2017 by the 1st Respondent's Special Tribunal, the Constitution, Election Laws and Nomination Rule.
- e) That this honourable Court be pleased to issue mandatory orders to compel the 1st Respondent to elect the Petitioner as a representative of members of marginalized groups in Nairobi County to the County Assembly pursuant to **Article 171 (1) (c)** of the Constitution by publishing a Gazette Notice electing the Petitioner to the Nairobi County Assembly.
- f) This Honourable Court be pleased to make an order directing the 3rd Respondent to conduct a fresh swearing in ceremony of nominated members for county assembly of Nairobi on gender posts by the 2nd Respondent pursuant to a list in compliance with the Constitution, Election Act, Elections (General) Regulations 2012 and Nomination Rules.
- g) The costs of this Petition be awarded to the Petitioner.
- h) Any other relief that this Honourable Court may deem just and fit to grant.

The petitioner filed a supporting affidavit and attached documents she intended to rely on in support of the petition.

In its response to the petition, the 1st respondent stated that the 2nd respondent forwarded its party list to it as required under **Section 35 of the Election Act**. That it published the said list on the 23rd July 2017. That complaints were raised regarding the party list and after its dispute resolution committee heard and determined the said disputes and upon being satisfied that the 2nd respondent breached its party rules directed it to review the list.

The 1st respondent stated that the 2nd respondent complied with the directive and resubmitted a revised list. It's further contended that the 1st respondent complied with **Section 36 (4) of the Elections Act** and nominated 14 members from the 2nd respondent's party list gender category and that the petitioner was not qualified pursuant to provisions **of Regulation 56 (2) of the Elections General Regulations 2012**.

The 1st respondent has asked the Court to dismiss the petition with costs. In support to the petition the 1st respondent through its legal officer Salome Oyugi filed an affidavit and attached documents intended be relied on by the said party.

In its response to the petition the 2nd respondent contended that it complied with the directions given to it by the 1st respondent dispute resolution committee, the Constitution, Election and Nomination Rules. Its further contended that **Article 90 (3) and 177 (2)** of the Constitution vests exclusive powers in a political party to nominate its member to the County Assembly and that it submitted to the 1st respondent a party list that complied with the Constitution and its Party Nomination Rules. That its nominations were conducted in a free and fair manner. It is stated that the petitioner's name was included in the party list but due to limited slots was not nominated to the County Assembly.

The response is supported by the affidavit of Olga Karani the Deputy National Treasurer of the 2nd respondent and chairman of the 2nd respondent's national nominations committee.

The 3rd respondent did not file any document in response to the petition.

The petitioner in her testimony told the Court that she is a loyal life member of the 2nd respondent for over 10 years. She said that she has all along participated in the 2nd respondent activities. Her testimony is that her complaints arose when the 2nd respondent forwarded its party list to the 1st respondent and the same was published on the 23/07/2017. She testified that she discovered that the 2nd respondent had included in its party list members who were not registered voters, others were registered in counties outside Nairobi, were not life members of the party and that others were related to the 2nd respondent party officials.

She further said that she and others, lodged a complaint with the respondent dispute resolution committee. That the complaint was heard and 1st respondent was satisfied that the 2nd respondent had failed to comply with its own Nomination Rules while constituting its list. That the list was taken back to 2nd respondent and later re-submitted to 1st respondent. She admitted that she was placed position 55 in the final list submitted to 1st respondent on 10/08/2017. She testified that the 2nd respondent failed to comply with its rules by incorporating in its party lists names of persons who did not qualify for the post of Member of County Assembly. She told Court that she took issues with the following names in the nomination list:

1. Hamsa Mohamed Khalif who she alleges comes from Garissa.
2. Catherine Akinyi who she alleges is a relative of member of the 2nd respondent nomination committee.

3. Emily Odege Odour who is alleged to be the wife of the 2nd respondent executive director.
4. Nimo Omar Haji who she alleges is a registered voter in Wajir.
5. Jackline Apondi who she says is a relative of the said director.
6. Emily Wanjiku Waithaka who she alleges is registered voter in Kiambu.
7. Malenya Eve who she alleges was not in the list published by 1st respondent on the 23/07/2017.

She then told Court that the 1st respondent did not scrutinize the list resubmitted to it on 10/08/2017 to confirm that it complied with the directions.

The 2nd respondent witness Oglia Karani told Court that she is a member of her party executive committee. She told court that she was in charge of preparation of the 2nd respondent party lists and was appointed by the National Executive Committee to act as such. She told Court that the party drew its rules in accordance with the nomination and party lists as provided by the law. She told Court that the party's county committees nominated their members and forwarded their list to the National offices. That the party's national office considered the list and after being satisfied forwarded the same to the 1st respondent for publication. That several complaints arose as a result of which the list was reconstituted and resubmitted to the 1st respondent on 7th August 2017. She told Court that the party has its directorate of membership and that all the nominees are its life members. She told court that the 2nd respondent complied with direction given to it by the 1st respondent and reconstituted and submitted the list to the 1st respondent. She told Court that her committee had absolute discretion to constitute its party list in accordance with the constitutional laws and party rules. She said that the said discretion was properly exercised. She told Court that the petitioner did not apply to be included in the marginalized group.

The second respondent witness Salome Oyugi told Court that she petitioner was nominated by her party under gender top up but could not qualify as a member of county Assembly as her party managed only 14 seats under that category. She told Court that the 1st respondent allocated the seats per the party priority after it confirmed that all the members were registered voters. The witness told Court that the 1st respondent had scrutinized the first list submitted to it and sent it back to the party to comply with the law which the party did. That the list was published on 23/07/2018, that it heard complaints arising from the published list, sent it back to the party with direction to reconstitute and comply with the law and that it finally gazetted names of nominees.

The parties filed separate issues. After close of evidence each party filed its submissions and appeared before Court for highlighting. The Court shall consolidate the several issues drawn by the parties into only five.

1. Whether the 1st respondent discharged its mandate under the law regarding the party list forwarded to it by the 2nd respondent.
2. Whether the 2nd respondent complied with the law, its nominations rules and guidelines in the constitution of its party list and whether it complied with the 1st respondent disputes resolution committee directions.
3. Whether the gazetted members of the County Assembly under gender top up were validly nominated
4. Whether the petitioner qualified to be a representative of members of marginalized groups in Nairobi County.
5. Costs.

What is the mandate of the 1st respondent regarding party list under the law? **Article 90 (1)** of the Constitution creates party list for seats provided for under **Article 177 (1) (b) and c**. **Article 177 (1) b** provides for gender seats while 177 (1) c for marginalized groups. **Article (90) 1** provides that elected member of County Assembly under **Article 177 (1) b and c** shall be by way of party list on the basis of proportional representation. **Article 90 (2)** of the constitution then creates 1st respondent mandate regarding party list.

90 (2) “the Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of the election for seats provided for under clause 1 and shall ensure that

- a) Each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided under clause 1.
- b) Except in the case of the seats provided for under Article 98 1 (b), each party list comprises the appropriate number of qualified candidates and alternate between male and female candidate in the priority in which they are listed”.

Section 36 A of the Election Act provides that the 1st respondent has a duty to review a party list to ensure compliance before publishing it. If it is satisfied that the party list does not comply with the law and party rule and regulation, it has a duty to direct the party to amend the list and ensure compliance.

Article 88 (4) (e) of the Constitution and **Section 74 (1)** of the Elections Act bestows upon the 1st respondent mandate to settle disputes relating to or arising out of nomination..

Regulation 21(2) of the Party Primaries and Party Lists Regulation 2017 mandate the 1st respondent to scrutinize a party list and where it is of the opinion that it does not conform to the requirements of the provision of the Constitution including **Article 177 (1) (b) and (c)** the Act and the said Regulation require a political party to review and amend the list so that it conforms to the requirement of the law.

Under **Regulation 26(2)** if the 1st respondent rejects a party list or a nominee on the party list, the committee shall require the political party to resubmit the party list or nominee within such period on the commission may satisfy.

Section 35, 36, and 37 of the **Election Act and Regulation 55 (2)** of the General Regulation provide for the role of 1st respondent as created vide Article 90 (2) of the constitution.

On the Other hand the 2nd respondent has a duty to observe the guiding principles for party nomination of party list as provided under regulation 4 of Election Party (Primaries and party List) Regulations 2017. It provides “the conduct of party primaries and party nomination of party list shall

- a) Be democratic, free and fair.
- b) Provide equal opportunity for all eligible candidates.
- c) Not discriminate against any eligible candidate.
- d) Be inclusive and participatory.
- e) Be open, transparent and accountable
- f) Be credible and
- g) Be peaceful.”

The 2nd respondent's guidelines were exhibited by the petitioner as published by the 2nd respondent. They are:

1. An applicant must be a registered voter.
2. Must be a life member of the party
3. Must have language proficiency in English and Kiswahili languages.
4. Must demonstrate loyalty and active participation in party programs for at least six months prior to seeking nomination provided that the National Executive Committee (NEC) may for cause which shall be specifically documented, subject to any condition it may deem fit.
5. Meet the minimum requirement for County Assembly candidates as spelt out in Law and IEBC.

The 2nd respondent party nomination rules and procedures pursuant to regulation 6 of the (Party Primaries and Party List) 2017 were not exhibited before Court.

The petitioner has taken issue with the 1st respondent mandate under **Article 90 (1) (a)** stating in that the 1st respondent failed to ensure that the 2nd respondent submitted its party list. During the testimony the petitioner readily admits that the said list was indeed forwarded to the 1st respondent and was published in the dailies on the 23rd July, 2017. The other issue taken up by the petitioner regarding the 1st respondent mandate is that it failed to scrutinize the lists forwarded to it to ensure that it complied with the Constitution, Election Laws, and Party's own Regulations. It is submitted that the respondent failed in its mandate and set out above and as emphasized in the decided case **MOSES MWICIGI & 14 OTHERS VERSUS IEBC AND 5 OTHERS (2016) eKLR**. From the evidence before this Court it is not disputed that the 1st respondent received a party list from the 2nd respondent on 24/06/2017, scrutinized it and sent it back to the 2nd respondent to comply with the law and its regulations. The list was submitted to the 1st respondent and published on the 23/07/2017 following which several complaint including one by the petitioner were raised regarding it. The 1st respondent submits that its dispute resolution committee heard the dispute and returned the list to the 2nd respondent with directions for reconstitution of the same in accordance with the 2nd respondent guidelines. The 1st respondent submits that it was satisfied that the reconstituted list complied with the Law and the Party Regulation. The 2nd respondent submits that it reconstituted the list as directed by the 1st respondent. The petitioner submits that no reconstitution of the list was effected. It is however, not is disputed that the final list incorporated some changes. It is not in dispute that some names in the list published on the 23/07/2017 were omitted and new ones introduced. In the decided case **NATIONAL GENDER & EQUALITY COMMISSION VERSUS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND ANOTHER (2013) eKLR**. The Court held that the 1st respondent responsibility to conduct and supervise elections under Article 90 (2) of the constitution includes duty to confirm that persons that appear on the list are duly qualified for elections. Under the provision of **Section 34 (8) of the Election Act**, a person nominated by a political party shall be a person who is a member of the political party on the date of submission of the party list by a political party. I have looked at the decision in the 1st respondent disputes resolution committee complaint 13 of 2017. The petitioner was one of the complainant. Her specific complaint was not against any name that appeared on the published list. Her complaint was that she was placed in an unfavorable position. She wished to be moved to the marginalized category which she said was not prioritized. The committee did not direct that her wish be fulfilled. I have also noted that the committee did not point out any specific persons who were unqualified in the published list. It only stated generally that the respondent was in breach of its own rules without specifying any and directed that a review be carried out in accordance with the parameters of the party guidelines. It was therefore upon the 2nd respondent to reexamine the list and find out where the issue was. The 2nd respondent has demonstrated that it complied with directions and reconstituted the list.

The party itself required that its nominees must be registered voters who are life members of the party. The petitioner submitted that Nimo Omar Haji who is a nominee is not a registered voter. The respondent stated that she is. The petitioner has not supplied a certificate on the said nominee status to prove her allegation. The petitioner has submitted that Hafsa Mohamed Khalif and Emily Wanjiru Waithaka are registered voters outside Nairobi County. I have found no provision under the Constitution, Election Act, and the Parties Regulations and Guidelines that states that a nominee must be registered voter in the county they wish to be nominated. The Court agrees with decision of the 1st respondent disputes resolution decision regarding that issue in complaint 13 of 2017. All the party requires is that a nominee must be a registered voter. I find this allegations lacks merit.

Jackeline Apondi is said to have joined the party a month before close of application. In support of this allegation the petitioner has provided a certificate from the registrar of political parties. The 2nd respondent stated that the said nominee has been its life member and is qualified. A party's duration of membership can only be ascertained by the party itself. As was held in the decided case **SALMA FLORENCE BWOGI OCHIENG VERSUS ORANGE DEMOCRATIC MOVEMENT PARTY 2017 eKLR**. In this decided case the Court held that on the question of membership only a political party can tell when a party joined its ranks. That membership is not about when the office of the registrar of political parties was notified of that membership. In fact this cited case addresses the same issues regarding the said nominees as raised in this petition. The High Court on appeal dismissed the allegations. The petitioner did not bother to produce any authentic documents to prove her assertion. This allegation also lacks merit.

Malanya Eve is alleged not to have been in the party list published on 23/07/2017. The 2nd respondent stated that the said nominee was included in the reconstituted list. I find this in order as reconstitution of the list could have affected members who were in the list published on 23/07/2017 and could have seen new entrants like the named person. That was also the finding in Salma case. Further the constitution party guidelines and the election law does not bar a qualified member who is related to a party official from contesting for a seat. Any member of a party who is fully qualified to be nominated has a right to enjoy the benefits of such membership whether they are related to an official or not. Their membership is independent. It is not proved that both Jackline Apondi and Emily Odege Odour were favoured without merit. The 2nd respondent stated that they are its life members and qualified. The 1st respondent told Court that it was satisfied that they were registered voters.

Section 36 (7) of the Elections Act provides “For purposes of Article 177 (1) (b) of the constitution the commission shall draw from the list under subsection (1) (e), such number of special seats members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.” In the decided case **MOSES MWICIGI & 14 OTHERS VERSUS IEBC AND 5 OTHERS (2016) eKLR** the court emphasized on the 1st respondent mandate to consider a party list in order of its priority as provided for under **Article 177 (1) (b)** of the Constitution. The petitioner applied for nomination under **Article 177 (1) (b)** of the constitution and not **(177) (1) (c)**. She was nominated in the category she had applied for and in that category, she was placed number 55 in the alternate party list. The party was allocated only 14 seats under that category. The slots were limited and there was no way the petitioner would have qualified to be member of the Nairobi County Assembly. She alleges that the 1st respondent should have considered her for the category provided for under Article 177 (1) (c) of the constitution. The 1st respondent stated that was impossible as the petitioner had not applied for that slot. The Court's finding is that if that kind of practice would be encouraged it would create a lot of confusion and lack of accountability in the process of nomination by way of party list. She is not qualified under that category.

The 2nd respondent party list provided nominees for each category in order of priority. The petitioner's name appeared in the gender top up category.

In RAILA ODINGA & OTHERS VERSUS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS PETITION NUMBER 5 OF 2013, it was held that the petitioner must set out by raising firm and credible evidence of the public authorities departures from the prescriptions of

the laws. It was further held that the threshold of burden of proof in election matters should in principle be above the balance of probability though not as high as beyond reasonable doubt. No doubt the petitioner should present evidence that is beyond the balance of probability required in civil cases. From the evidence before court, I find that the petitioner case is based more on speculation and she was unable to prove her allegations with tangible evidence and thus has failed to attain the threshold of burden of proof as required. The Court is satisfied that the 1st respondent properly and adequately discharged its mandate in accordance with the provision of the law. The Court is further satisfied that the 2nd respondent adhered to its guidelines and principles for party nomination of party list and as set out under the law and that it complied with its guidelines.

In conclusion, the Court is satisfied that the nomination of the 2nd respondent member of county assembly Nairobi pursuant to Article 177 (1) (b) were validly elected. None of the prayers sought by the petitioner has merit. The petition is dismissed with costs to 1st and 2nd respondent. Costs capped at Kshs. 350,000/= (three hundred thousand) for each party.

Judgment read and dated in open Court this 9th day of February 2018.

In the presence of

Petitioner

1st respondent

2nd respondent

3rd respondent

HON E.K. USUI (MS)

SENIOR PRINCIPAL MAGISTRATE

09/02/2018