



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

ELECTION PETITION NO.16 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-

BISHOP JOHN NDUATI.....PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

INTRODUCTION AND BACKGROUND

1. The Petition has been filed by **Bishop John Nduati** who is a member of Jubilee Party. He has sued the Respondent **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)** whereof he is praying for the foregoing relief;

(1) A declaration that the list of Nominees gazetted on **28th August, 2017** by the Respondent is a nullity as it consists of names of people not qualified to be nominated to the Nairobi County

Assembly and/or a declaration the names

- 1) Margaret Wanjiru Mbote.
- 2) Elizabeth Nyambura Kuria.
- 3) Joyce Muthoni Kamau
- 4) Kariuki Wanjiru

Be nullified and/or revoked as members of the Nairobi County Assembly and

(2) The name of the Petitioner Bishop John Nduati be gazetted as the nominee of the Nairobi County Assembly.

(3) Costs of the petition.

2. The Petition is premised on Constitution of Kenya 2010 and on Article 90 of the Constitution which provides inter alia that:

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

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections 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 persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1) within the time prescribed by National Legislation.

3. The Petition is further pegged on sections 34 of the Elections Act, 2011 which deals with qualification for one to be nominated to the County Assembly where **Section 25 states'**-

1) Unless disqualified under subsection (2), a person qualifies for nomination as a member of a County Assembly if the person;-

(a) Is registered as a voter.

(b) Satisfies any educational, moral and ethical requirements prescribed by the Constitution and this Act.

(c) Is either nominated by a political party or

(ii) An Independent candidate supported by at least five hundred registered voters in the ward concerned.

4. The Petition was opposed vide the response to petition by the Respondent dated 26th September 2017 and filed on the 26th September 2017 who contended that "IEBC" published all names as received from Jubilee Party and gazetted names of nominated members to the respective County Assemblies on 28th August, 2017.

Further that pursuant to the order in **Political Parties Disputes Tribunal case No. 387** Jubilee Party submitted the reconstituted list to the Respondent on 17th August, 2017. That the same list was used in gazetting persons elected to County Assemblies on the Party lists.

The Respondent further avers that he followed the law in gazetting as duly elected the various candidates based on the party lists presented to it by various parties and the criteria for nomination was that the candidates would be picked from a party list in the order presented by the party until the slots such a party was entitled to were exhausted.

The Respondent urged the Court to dismiss the petition arguing that the same had not been proved as per the required standard of proof and lacks any merit.

5. At the close of the pleadings, the Petitioner testified in Court and was cross-examined by counsel for the Respondent.

The Respondent did not call any witness and decided to adopt the response to the petition and the supporting affidavit deponed to by the representative of the Respondent.

6. ISSUES FOR DETERMIANTION:

- 1) Whether the petitioner was eligible for nomination to the County Assembly in accordance with rules set out in various election laws.
- 2) Whether the Respondents violated the Election Act or the Constitution in failure to exercise due diligence.
- 3) Whether the party list submitted to the Respondents by Jubilee party for purposes of section 34(4) of the Elections Act was valid.
- 4) Whether section 34(4) of the Elections Act can be amended during the term of the County Assembly for which the candidates were elected.

The law is quite explicit on the procedure for nomination to the County Assembly on the basis of party list. The same is governed by;-

- (a) The Constitution of Kenya 2010.
- (b) The Elections Act No. 24 of 2011.
- (c) The County Government Act No. 17 of 2012.

Article 90(1) of the Constitution of Kenya provides interalia “Elections for seats in parliament provided for under **Article 97(1) (c) and 98 (1) (a) (b) (c) and (d)** and for the members of County Assemblies under **177 (1) (b) and (c)** shall be on the basis of proportional representation by use of party lists.

7. The Petitioner when he testified in Court stated that, through his advocates, he wrote to the Respondents to confirm the registration status of all nominees to the Nairobi County Assembly. The Respondent replied vide its letter dated 26th September 2017 and confirmed that;-

- (i) Particulars of two nominees could not be found. This were;
 - (a) Joyce Muthoni Kamau.
 - (b) Kariuki Wanjiru.
- (ii) Of the particulars given of the other two nominees one was from Nakuru County and one was from Kajiado County.

Elizabeth Nyambura Kuria was from Nakuru County and Margaret Wanjiru Mbote was from Kajiado County.

The Respondent is the body that is mandated by **Article 90(2)** of the Constitution of Kenya 2010 to supervise the conduct of party nominations. **Section 7(2) of the County Government Act** requires parties nominating persons to the County Assembly to ensure that the community and cultural diversity of the County is reflected in the County Assembly and that there is adequate representation to protect minorities within the County in accordance with Article 197 of the Constitution.

Section 34(6) of the Elections Act provides for the lists submitted to IEBC to comply with the Constitution and nominations rules of the respective party. The Respondent has to ensure that there is compliance with the Constitution and statutory guideline for party list nominations.

The Petitioner avers that he qualifies for nominations as per part II of the Jubilee Party Nomination Rules which provides the rules for eligibility of one to be nominated in a political seat, he should be a registered party member. He is a registered voter.

The Petitioner further stated that Section 25 of the Elections Act 2011 expounds on the qualifications for nominations as a member of County Assembly which conditions he satisfied.

The Petitioner in his submissions stated that the two unregistered nominees were not qualified for nomination and that the other two were registered in other Counties hence not qualified for nomination to Nairobi County Assembly.

In support of the later limb of Petitioner's reasoning that the two were registered in other Counties, he cited Article 177(2) of the Constitution which provides interalia:-

“The members contemplated in clause 1(b) and (c) shall in each case be nominated by Political parties in proportion to the seats received in that election in that County by each Political Party, under paragraph (a) in accordance with Article 90”. That the reading of the foregoing completes that the number of seats are to be allocated to the parties in each particular County. “That particular County” for qualification for nomination.

8. That there is no preclusion that the Petitioner fell into any of the categories listed above so as to stand disqualified. That the Respondent went ahead and gazetted members to the County Assembly, members who were not legible as per the afore cited provisions.

9. The Respondent adopted the affidavit filed herein and did not call any witness. They also relied on their response to the Election Petition. The Respondent contends that the commission conducted the said nomination in accordance with the Constitution and Election Laws and Regulations. That the Petitioner had not tendered evidence to warrant the nullification of the list of nominees gazetted on 28th April, 2017 and his inclusion as a nominee to the Nairobi County Assembly. The Respondent relied on the Replying Affidavit of Salome Oyugi sworn on 26th September 2017 whereof she deponed that the Commission published guidelines on submission of party lists vide Gazette Notice Number 5735 which is annexed as “S.O1”. That on 26th June, 2017 the Jubilee Party presented its party list for nomination for members of County Assembly and the said list did not include the Petitioner's name as is evident in annexure “S.O.2” to Salome Oyugi's Replying Affidavit.

That the commission reviewed the list submitted by the party pursuant to section 34(6A) of the Elections Act 2011 and requested the Jubilee Party to resubmit the list upon compliance with the relevant regulations.

The party submitted the final party list on 19th July, 2017 and still the Petitioner's name was not in the list as shown in annexure “S.O.3”

The Respondent proceeded on 23rd July, 2017 to publish all party lists in the Sunday Nation and Standard as required by regulation 54 (8) of the Election (General) Regulations 2012.

10. The Respondent further submits that subsequently pursuant to Political Parties Tribunal Complaint No.387 of 2017; SUNCTUS G. NDEGWA & OTHERS –VS- JUBILEE PARTY

The Jubilee Party was directed to reconstitute its Nairobi list. The Party accordingly resubmitted the reconstruction list on 17th August 2017. It is the Respondent's submissions that its mandate is not to alter party lists as the same is the prerogative of the party under section 35 of the Election Act, 2011 and Article 90 of the Constitution.

Further that allocation for candidates to be nominated is subject to Section 36 of Elections Act 2011 which requires the Commission to designate special seat members in order of priority as submitted by the party.

That the Commission (Respondent) on 28/8/2017 duly gazetted the names of people who had been duly elected as members of County Assembly.

The Respondent contends that the Petitioner has not proved his petition on the required standard hence the same should be dismissed with costs to the Respondent.

11. The issues I have to consider are:

- a) Is the Petitioner a Registered Voter and does he belong to the Jubilee Party?
- b) Was the nomination conducted in the proper legal manner?
- c) Is the Petitioner entitled to the reliefs he is seeking?

Who is to bear costs?

(a) It is not in dispute that the Petitioner is a bonafide registered voter and member of the Jubilee Party as deduced from annexure "JN-1". The same is the Nairobi Jubilee Party list (member of County Assembly). The said document was forwarded to the Respondent by the Jubilee Party. Article 90 (2) of the Constitution mandates the Respondent to consider qualified persons to the National Assembly. The list gazetted by the Respondent contained names of persons who were not qualified. The Respondent had on 26th September 2017 written a letter confirming they did not have particulars of Joyce Muthoni and Kariuki Wanjiru.

The Respondent has not disputed this particular letter and the contents therein. The Respondent availed the summary of the data that had been requested by the Petitioner vide the Petitioner's letter to the Respondent dated 18th September 2017. Part of the letter reads;-

"Please note two (2) persons namely Joyce Muthoni Kamau and Kariuki Wanjiru were not identified. The same letter was written by **EZRA CHILOBA, COMMISSION SECRETARY/CEO** hence I agree with the Petitioner's submissions that the two unregistered nominees were not qualified for nomination. The Respondent in their submission did not respond to this issue. They only responded to the issue of the two nominees who were registered in other counties.

It follows that out of the 85 Members of County Assembly, only 18 qualified and even in the list of 18 that were gazetted, the same contained names of Joyce Muthoni Kamau and Kariuki Wanjiru who were not identified as per the letter by the Secretary dated 18th September, 2017, therefore it is evident that the Respondent did not adhere to the provisions of the Elections Act in regard to who qualifies for nominations.

12. Secondly, the Respondent never offered any evidence and or called the deponent Salome Oyugi who had deposed to the Replying Affidavit which the Respondent entirely relied upon.

The Petitioner submits that the gazetted list annexed to the affidavit of Salome was done before the Election. That in the list not all that were gazetted qualified as nominees of Nairobi members of County Assembly.

The deponed Salome Oyugi should have come to Court to shed light on what she had deponed to in her affidavit. The petitioner avers that during the time the matter was for pre-trial directions, the Respondent never intimated that they were going to adopt affidavit of Salome Oyugi. That adopting Salome's affidavit without giving viva-voce evidence is of no value.

Further that no reason has been advanced as to why the Petitioner's name was missing. It is trite law that fairness and transparency must be adhered to in all stages of the Electoral Process (Nomination, campaigns, voting and counting of votes) the Electoral Commission must consider and determine election disputes speedily and fairly. This was considered in the case of: **DR. KIIZA BISIGYE -VS- YOWERI KAGUTA MUSEVENI ELECTORAL COMMISSION PET 1/2001.**

In the instant petition, the process of nomination was marred from the word go. This is because the Respondent openly admitted in the letter dated 26th September, 2017 that the names of Joyce Muthoni Kamau and Kariuki Wanjiru their particulars could not be found hence they were not Registered Voter, yet the Respondent went ahead to gazette them as nominees for members of County Assembly of Nairobi. The whole process was void ab initio. This cannot be said to be a technicality as the same goes to the core of the petition.

13. The Respondent's witness who should have shed light on the same the deponent Salome Oyugi was never called to adduce evidence, instead her affidavit evidence was adopted which adoption the Petitioner faults arguing that the Respondent never intimated the said adoption of her affidavit evidence at the pre-trial stage.

The Respondent submitted that failure to have the deponent testify does not make what she deponed to inadmissible. It is trite law that he who asserts is required to prove by adducing credible evidence. If the party fails to do so, its case will fail.

This was held in the case of **BUHARI -V- OBASANJO (2005) CLR TK.**

This Court is alive to the fact that any party disputing nomination of a candidate has a duty to follow the dictates of the Constitution as set out in **Article 88(4) (e), Section 74 of the Election Act 2011** and Regulations 99(2) of the Elections (General) Regulations 2012.

I herewith find the Respondent were outrightly negligent by infringing on the constitution, (the nomination process) as in one vein they stated that the two namely Joyce Muthoni Kamau and Kariuki Wanjiru were not identified in the voters Register as voters. In the next vein, they were being gazetted as bonafide nominees.

CONCLUSION:

14. In his submissions, counsel for the Petitioner contended that the entire nomination process was flouted and persons who were not to be nominated were nominated hence Article 177(1) (c) of the Constitution of Kenya and the Election Act were violated. From the evidence on record and the evidence as adduced by Petitioner which evidence is unshaken, the Petitioner's right to be nominated was infringed as it was held in the RAILA case (2013) (Supra). This Court echoes the principle that:-

“An Election Cause is established much in the same way as Civil cause. The legal burden rests on the Petitioner but depending on the effectiveness within which he or she discharges this, the evidential burden keeps shifting. Ultimately of course, it falls to the Court to determine whether a firm and unanswerable case has been made.

The totality of the findings I have made is that the Petitioner has proved his case against the

Respondent. The Petition therefore succeeds and is allowed. **The list of nominees gazetted on 28/9/2017 is herewith nullified. Petitioner's name to be included as a nominee to Nairobi County Assembly.**

COSTS

15. Section 84 of the Election Act provides that:

“An election Court shall award costs of and incidental to a petition and such costs shall follow the cause. Such costs are to follow the event and the Court has broad discretion to determine costs. Rule 30(1) of the Rules provide as follows:-

Section 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() 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.

DISPOSITION

16.

- (a) Taking all the facts I have outline above, I herewith award costs to the Petitioner.
- (b) Instructions fees for Petitioner capped at Kshs.100,000/=.
- (c) A certificate of this determination in accordance with **Section 86(1) of the Election Act 2011** shall issue to the Independent Electoral and Boundaries Commission.

Dated and delivered at Milimani Commercial Court at Nairobi this 16th day of February, 2018.

HON.G.A.MMASI (MRS)

SENIOR PRINCIPAL MAGISTRATE

16/2/2018

NYABERI ADVOCATE- For Petitioner.

HASSAN ADVOCATE – For Respondent.

Mutua – Court Assistant.

HON.G.A.MMASI (MRS)

SENIOR PRINCIPAL MAGISTRATE

16/2/2018