



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MERU

ELECTION PETITION NO. 2 OF 2017 IN THE MATTER OF THE

CHALLENGE OF THE VALIDITY OF THE MERU COUNTY ASSEMBLY SPECIAL INTERESTS GROUP 2017

AND

IN THE MATTER OF ARTICLES 1, 2, 10, 21, 27, 38, 47, 48, 81, 87, 90, 100, 177 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 36, 75, 78 AND 80 OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF SECTIONS 8, 12, 28, AND 29 OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES 2017

MOHAMED ABASS SHEIKH..... PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

3. ESTHER KARIMI NJERU.....2ND RESPONDENT

4. KINOTI ROBERT KINYUA.....3RD RESPONDENT

JUDGMENT

The Petition

The Petition filed on the 13th day of September 2018 wherein the Petitioner states he is an adult male of sound mind, a citizen of Kenya, residing and working for gain in Meru County and alleges he has been denied his constitutional right under article 171 (1) of the Constitution to be validly nominated as representing the Minority in the County Assembly of Meru as the 1st Respondent has unlawfully gazetted the nomination of the 2nd and 3rd Respondents as representing Minorities in Meru. He contests the validity of their nomination *vide* Kenya Gazette Notice Number 8380 dated 28th August 2017. He is aggrieved with the nominations of the aforesaid 2 Respondents alleging their nomination is laced with

illegality as the two are from Meru ethnic community, which is dominant in community in Meru County, and as such, they cannot be said to be representing the minority. He adds that the 2nd Respondent is from Laikipia while he is from the Murulle community which is a minority within Meru and he is therefore the proper candidate as had been nominated by the Jubilee Party.

He prays for this court to make declarations that

1. The nomination of the 2nd and 3rd Respondents as representatives of the Ethnic Minority in the County Assembly of Meru as contained in the Gazette Notice Number 8380 dated 28th August 2017 be declared null and void.
2. The Petitioner is the proper and valid nominee representing the Ethnic Minority of the County Assembly of Meru.
3. That an order do issue to the 1st Respondent directing it to gazette the Petitioner as duly nominated to the County Assembly of Meru representative of the Ethnic Minority in place of the 2nd and 3rd Respondents.
4. Costs
5. Any other relief

This Petition is supported by his affidavit sworn on 8th September 2017 in which he depones that he responded to an invitation by the Jubilee Party under Section 41.1 of the Jubilee Party Nomination Rules, 2016 and applied for consideration in the selection of the Special Interest Groups to the Party List, and he was short-listed in Special Interest Groups and the Ethnic Minority Lists. The list was presented to the 1st Respondent and after the elections held on 8th August 2017, the Jubilee Party was entitled to 2 nominees and the list was submitted to the 1st Respondent who published list of the names of the 2 nominees under the aforementioned Gazette Notice under the Special Interests Group and the Ethnic Minority. He reiterates his averments that the 2nd and 3rd Respondents, being from Meru ethnic community, do not qualify to either category, especially the 2nd Respondent, who is a registered voter in Laikipia.

He goes further in paragraph 12 to state that his advocate on record had advised him that the 1st Respondent had manipulated the Nomination List, which is illegal and against the express provisions of the Constitution, statute and the regulations.

At paragraph 13, he adds tht the 1st Respondent nominating ineligible candidates will disenfranchise the minorities within Meru as they will lack representation within the County Assembly.

Annexed to the said affidavit were:

1. Kenya Gazette Special Notice dated 28th August 2017 with a Party Nomination List at page 4991 Meru County – 12 **Marginalized List**
2. IEBC Publication contained in an extract from the Kenya Gazette Notice dated 28th August 2017 at page 4998 for **Gender Top-Up List**
3. An excerpt from a Publication on **Minorities and Marginalized Minorities in Meru** page 45 with a table indication the Minority in Meru as Indian, Somali, Ndorobo and Kamba, and the Minority & Marginalized as Turkana and Borana.

RESPONSES

1st Respondent

The 1st Respondent admitted it received the Jubilee Party List for Meru County and included the Minority Category where the Petitioner was listed as number 8 and the same was published in the Nation and the Standard of 23rd July 2017. That the Respondent was bound by the order of priority in the list as submitted by the Jubilee Party and it published the names of the 2nd and 3rd Respondents as duly nominated members under the Ethnic Minority Special Interest Group.

The Commission adds that for one to be eligible as a Nominee, one only needs to be a Registered Voter, and not a Registered Voter in any specific county.

That the nominations of the 2nd and 3rd Respondents was conducted in accordance with the Party List presented by the Party and in conformity with the governing law, and it did not manipulate Jubilee Party List as it is the party's prerogative under article 90 of the constitution to nominate candidates for Party Lists and to submit the same to the Commission. Further, tht the Commission is not required to conduct an enquiry into ethnicities of those included in Party Lists as that is the duty of the political party.

The commission further states that on 21st July 2017(sic), it published notices in the Nation and The Standard Newspapers inviting aggrieved persons to file their complaints before the Commission and the PPDT for purposes of settling any disputes, and it was the responsibility of the Petitioner to have challenged the list published on 23rd July 2017 in Nation and Standard but no complaint was raised, and they pray the Petition be dismissed with costs.

2nd Respondent

She filed her Response with 4 supporting affidavits. Her Response was that she was nominated as the Ethnic Minority in conformity with the Kenya Gazette Notice of 28th August 2017. She is a permanent resident of Kangeta Ward and a registered voter in Igembe Central Constituency of Meru County. Her mother is a Borana and her father a Chuka, and that the Chuka and Borana were minorities in Igembe within the larger Meru. It was because of this that the Jubilee Party nominated her to represent the Ethnic Minorities, as well as the consideration for gender balance. She denied being a resident of, or a registered voter in, Laikipia. She added that her education and stay in the United States should not be used against her, and, if anything, were beneficial to her nomination and beneficial to the people she was representing. She averred the Petitioner lacked the *locus* to bring this Petition adding he was bent on perpetuating the 'male dominance syndrome' in Meru. She added that the Petitioner had failed to seek any interventions prior the filing of this Petition as required by law and prayed his Petition be dismissed with costs.

Her 1st Affidavit was by herself and reiterates her Response, deponing that she was nominated by the Jubilee Party to represent the Ethnic Minority in the County Assembly of Meru, had moved in Igembe when she was 2 years' old and was half Chuka and half Borana, both minorities in Igembe.

Her 2nd Affidavit was by KARIRI MUCHEKE, an ex-chief at Kangeta, and a neighbour to her father, who affirmed her parentage and reiterated she was a minority in the Igembe region.

Her 3rd Affidavit was by her father, DESDERIO NJERU MUCHIRI, who deponed he moved to Igembe Central in 1989 upon his transfer as teacher, his wife was a Borana and the 2nd Respondent was their daughter.

Her 4th Affidavit was by JULIAS KITHIA NAITULI, the retired Chief of Muringene, who affirmed her father was Chuka and her mother Borana, and they had settled in Igembe in 1989, and that they were both immigrants comprising of less than 2% of the population while Igembes, Imentis and Tigantias comprised over 90% of the population.

3rd Respondent

His Response was filed on 16th October 2018 states he is the Ethnic Minority nominee in Meru County

Assembly. He was born in Meru North Imenti, Karware village Nyaki in Giaki, and moved to Katheri in Timau. He was issued with his identify card from Laikipia near Umande Ward. That he had vied for Jubilee nominations but lost and he had consequently not contested for any seat. He adds that the names of the nominees were published in the Nation and the Standard of 23rd July 2017, and neither the Petitioner, nor any other person, had never any objection to the same. He termed the Petition as an afterthought as the Petitioner had failed to seize the earliest opportunity to make any interventions before filing this Petition.

He further stated that the Petitioner had filed a case with the Political Parties Dispute Tribunal (hereinafter referred to as the 'PPDT') case no. 499/2017 where he never raised any complaints the 3rd Respondent's qualifications and ability to be nominated but only complained about his position in the list tht he was number 8 of 8 instead of number 1.

He added that the 1st Respondent must have taken into account the requisite constitutional considerations before nominating him as he was the only male in the list, and the rest were women.

Terming the Petitioner as a busy-body with no legitimate claim and appearing in a court without jurisdiction, he prayed the Petition be dismissed with costs.

The Response was supported by the affidavit of Salome Oyugi who reiterated what was in the Response, and also highlighted the applicable law on Political Party Lists, from guidelines on their submission (LN 6735 of 12/6/17), the legal regime governing their submissions and review by the Commission (S34(6A)), their publication in the press and the Commission's Website (Regulation 54(8)), IEBC's restricted mandate *vis a vis* the prerogative of the Political Party to develop their lists (S35 and Article 90), the number of seat for Marginalized Category (S56(2) and the mandate of the Commission to handle disputes relating to, or arising from, nominations (Article 88(4)9(e) and S 74).

She also reiterated that the Petitioner's name was forwarded for Minority Category at No. 8 on the list, while those of the 2nd and 3rd Respondents were Nos. 1 and 2 respectively and were in the Ethnic Minorities Category.

For the record, let me point from the outset that the Petitioner was greatly opposed on the reliance of this Affidavit by the 1st Respondent as its evidence in chief. The thrust of the affidavit, is in my view, more of a summary of the applicable law relating to Party Lists.

RESPONSE BY PETITIONER

The Petitioner filed a further affidavit on 4/12/2017 in response and deponed that he had deposited the Security on 13/9/2017 when filing this Petition; that he had served the Respondents in time i.e. 20/9/2017 by publication in the Standard Newspaper and the Respondents' notices of appointment were filed on 21/9/2017. He reiterated he was aggrieved by the 2nd and 3rd Respondents' nominations and that they were the beneficiaries of a flawed process to his disadvantage.

In response to the 1st Respondent, he averred that the fact he did not present a complaint to the Commission did not take away his right to this Petition, and urged the court not to aid the Commission in committing an illegality or hiding behind the Jubilee Party as they have a duty and responsibility over and above publishing names to ensure the rights of marginalised and ethnic minorities are protected.

THE EVIDENCE

PW1 was the Petitioner Mohammed Abas Sheikh from Maua, Igembe South, and a businessman. He relied his Petition and the supporting Affidavit filed on 13/9/2017 and on the annexures to the said Affidavit which are

On cross-examination by Mr. Gichunge, he testified his name was forwarded for nominations in as

contained in Exhibit 3 for Special Category. He was to represent the Minority and not Special Interest and he was number 8 on the list. He stated he is a Somali Registered to vote in Maua Ward, But he did not have this in his list of documents. He added that the law says Minority because Somalis are a Minority and that Article 190 (c) of the Constitutions defined on who should be nominated. He added that the party gave a list of 8 and he was 8th on the list. He had wanted to be placed as number 1 to 7 but this was ignored. He conceded that since he was the last on the list, IEBC was not required to omit the first names in favour of the last. He acceded that many people were left out and that only 2 of the 8 in the list were picked and six were left out and he didn't know if they had filed cases except him.

On cross-examination by Mr. Ndubi, he stated that he was the Petitioner, he was Form four-leaver and to represent the Minorities he had to know Swahili and some English to represent all people. That his is an Islamic name and also a Somali name, although he did not file any documents to show he was a Somali. He went on to state he wanted to represent the ethnic Minority as there were more than Somalis just as there other ethnic Minorities including Boranas and Indians and he was able to represent the Minorities.

Regarding his Affidavit, he affirmed that the same does not state whether he is a Somali nor that he's from the Murulle sub-community of the Somalis. Referred to PExh 2, his name is the 8th but does not state he's a Murulle. He attributed this to fraud by Jubilee Party. He acknowledged that IEBC has list for Ethnic Minorities and also that PExh 3 showing the Ethnic Minorities in Meru. The Table in the said PExh 3 at Page 2 showed the Minority and Marginalized in Meru are Turkana and Boranas, while Somalis were indicated as a Minority but Mrulle was not listed. He conceded that he had no evidence to show Mrulle are part of Somalis.

In reference to Paragraph 6 of his Petition that stated he's stated he was a paid-up member of Jubilee Party but he had not filed any documents to this effect.

In reference to Paragraph 7 of the Petition he stated that he is a permanent resident of Igembe East but he had no evidence to support this, adding that this was a mistake as there is no Igembe East and he was from Igembe South, but he still had no evidence to this effect, nor was there any amendment to his Petition. He added that he works in Maua Cereals Board, but had no evidence attached to his document to so show this.

In reference to paragraph 8, he stated that he did not specify he wanted to be considered as a Minority or Marginalized member although there he knew there are 4 specialized categories and that the Jubilee Party had nominated him and the 2nd Respondent. He had no evidence that he was not a paid up member or that before the list went to IEBC, it was up to the Jubilee Party to ensure compliance and had IEBC chosen the 2nd and 3rd Respondents. He conceded that Jubilee Party was not a party to the Petition saying the Respondents made no mistake and are not liable as he had he been nominated, he would have had to work with Jubilee Party. He went on to add that he had heard complaints that the Murulle's interests were not taken care of but he had no evidence to this claim, and he had not heard Jubilee Party say Murulle are not well-represented but there is nothing he could have done about it.

In reference to his Paragraph 11 of the Petition that read that he is a registered voters in Igembe East he acceded that this was a non-existence constituency.

In his evidence in chief, he stated that the Jubilee Party nominated him and that he knew that Article 100 distinguishes Ethnic and Marginalized Minorities. He didn't know what category the 2nd Respondent had applied for, but he knew that she got the Minority appointment nomination she applied for. He understood that there were seats reserved for Gender and also Elderly, Youth etc. that needed special consideration and the number of men nominated were 4 men and 4 women; that the Jubilee Party had 2 slots for Ethnic Minorities and one was to be a man of these were 2nd and 3rd Respondents but he did not want to take 2nd Respondent place. He didn't know if any woman had challenged the 2nd Respondent's nomination to the County Assembly of Meru which, he said he now knew, had 23 are women members and this was in compliance with the 1/3 Gender Rule and if he was appointed, it would upset the balance.

In reference to paragraph 11 and 16 of the Petition which referred to the 2nd Respondent as a “he” though she is a lady, he said it was his lawyer’s fault who had failed to amend these errors.

He admitted save for the allegation the 3rd Respondent was a resident of Laikipia and a Registered Voter at Kulalu Social Hall he had no evidence in support of this allegation, e.g. the list of registered voter for Kulalu Registration Centre.

Referring to Paragraph 17 of his Petition, the Petitioner averred the law on Minorities was breached but acceded that he knew the minimum requirements which are that one must be:

- 1) Kenya Citizen
- 2) Registered voter
- 3) County Resident

He knew of Chapter 4 requirements but he didn’t have a Certificate of Good Conduct. He also admitted that he knew the names proposed must alternate between male and female, and also that his first choice of raising complaint was to have gone to the PPDT but he did not, but only went regarding his age and tribe in PPDT 499/2017. He admitted that the complaints made against the Jubilee Party were similar to those made in the present Petition. He wanted be placed as No. 1 in the Party Nomination List instead of No.8 but this was rejected by the PPDT. He did not follow up on the appeal, and denied having filed the present Petition as an appeal. He had not enjoined the 2nd and 3rd Respondents in the PPDT as he thought the IEBC would comply. He admitted to being satisfied with the Tribunal’s decision that he was No. 8 and not No.1. He went on to admit that he had not brought any new evidence as in the Tribunal case in this Petition.

He also admitted that the 2nd and 3rd Respondents could not nominate themselves and were not to blame but that they were enjoying the benefits of their nominations. He had not presented the Tribunal’s case decision to this court and admitted this was a material non-disclosure, although he did not intend to keep information from the court.

In regard to Exhibits 1 and 2, they did not have his names but had the names of 2nd and 3rd Respondent. His prayers were for his names to be replaced with those of 2nd and 3rd Respondents. He said he knew only 2 names could have been accepted but ***‘I want take the two seats including the Women nominee’*** even though he is a man.

On Cross-examination by Ondari, in reference to Paragraph 3 of his Affidavit, he admitted there same was incorrect as there is no constituency called Igembe East. His voter’s card was not in the List of Documents nor did he have evidence of being paid-up member of the Jubilee Party, or that the 3rd Respondent was not a paid-up member of Jubilee Party.

In reference to paragraph 4, he admitted he had applied for Special Interest Groups as a Somali.

In reference to paragraph 5, there were 8 nominees and PExh. 2 showed he was No. 8 while the 2nd and 3rd Respondents were Nos. 1 and 2 respectively and he would have been nominated if the 2 Respondents had not been nominated.

In reference to PExh 1, the Kenya Gazette Marginalized Lists had the 2nd and 3rd Respondents names as he had applied for nomination in the Minorities Category.

He admitted that he had filed a reference to the Political Parties Tribunal where he prayed for:

- 1) Age rectification 47 from 34

2) Ethnicity to Murulle from Meru.

3) The replacement of his name from No.8 on the list to No. 1

4) Notice to IEBC

This was after IEBC had published their Notice. He had sued Jubilee but the PPDT did not uphold his bid to be listed as No. 1 as there was no evidence that he was No. 1 and not No. 8 and, thus, the Tribunal made no orders and he did not appeal.

In reference to paragraph 11 of the Affidavit, he deponed that the 3rd Respondent was from Laikipia but no evidence filed to support this claim in court. Before going to Tribunal, he had never complained to Jubilee Party.

On cross-examination by Ondieki, he said he had voted in the last elections, and he was a registered voter in Maua. He had applied for nomination as a Minority nominee. Murulle is a sub-tribe of Somali, and he is am Somali.

Regarding Paragraph 11, the 2nd Respondent is a Meru living in Kangeta and is not a Minority. It is the 3rd Respondent who is from Laikipia and not 2nd Respondent. He did not apply for 2 Gender top-up per Exhibit 2, and he had filed Petition as nominations was done not just. He didn't want to deny Jubilee Party representation. Mr. Ondieki closed the Petitioner's case.

Mr. Gichunge for the 1st Respondent relied on the Affidavit of Salome Oyugi filed on 23/10/2017 and sworn on 17/10/2017 with the annexures attached thereto and closed their case.

The 2nd Respondent was Esther Karimi Njeru, from Igembe Central and a nominated Member of the County Assembly of Meru representing Ethnic Minority under Jubilee Party. She relied on her Response to the Petition and to her Affidavit as her evidence in chief. She disputed the Petition as set out in her pleadings and documents.

On cross-examination by Mr. Ondieki, she said she was nominated as Ethnic Minority. She is of a mixed-race as her father is a Chuka and her mother a Borana both of who are Ethnic Minorities among Igembe in the larger Meru. She denied being a Meru.

On cross-examination by Mr. Gichunge, she testified she was nominated by Jubilee Party and referred to PExh 1 which showed her names as No.1 in the list of the Ethnic Minority Nominees while the Petitioner was No. 8 in the list. The Minority category is a different one, and there were many categories.

On cross-examination by Mr. Ondari, she said that according to Paragraph 7 of her Affidavit, her mother is Borana and which fact was not controverted by any documents filed. The 1st Respondent asked and she had said she was listed No.1 of Ethnic Minorities Nominees by her party, Jubilee Party, and she didn't know if this was challenged at the party level.

With that, Mr. Ndubi closed the 2nd Respondent case.

The 3rd Respondent Kinyua Kinoti Robert testified he was a Nominated Member of the County Assembly representing the Marginalized Minority Ethnicity in Meru, and relied on his Affidavit filed on 16/10/2017 as his evidence in Chief.

On cross-examination by Ondieki, he testified he presented myself for election under Jubilee Party in Umande Ward in Laikipia East County. He voted at Kolalu Secondary. He was nominated for Marginalized Minority.

On cross-examination by the 1st Respondent, he said he was an MCA nominated by Jubilee Party who

forwarded my name his name. Referring to PExh 2, he was No.2 in a list of 8 people here the Petitioner was No. 8. Where the Petitioner wanted to be nominated in the Minority while he was in the list of nominees for the Marginalized. There are different categories.

On cross-examination by Mr. Ndubi, he testified that he got his Identity Card in Laikipia, where he is a registered voter.

On re-examination, he said he was a registered voter in Umande Ward, in Laikipia, but added that he did not run for an elective post in that particular County nor in any other. And with that, Mr. Ondari closed the 3rd Respondents case.

SUBMISSIONS

The Petitioner's submissions

The Petitioner submitted that he is a registered voter Cereal Board polling station in Igembe South Constituency, of the Somali tribe, Murulle clan which is among the ethnic minorities within Meru County and was nominated under the Ethnic Minority by the Jubilee Party to which he is a member. He did testify that the pleading indicating that he was from Igembe East was an error.

That the Petitioner has got the *locus* to present this case but also, it being in relation to nominations with authority derived from Article 22(1)(2) of the Constitution. He cited **MUMO MATEMU CASE** and **OKIYA OMTATA OKOITI VS THE BOARD OF DIRECTORS, ATHI WATER SERVICES AND 6 OTHERS.**

That this court has jurisdiction to hear and determine this Petition as under Rule 27 of the Elections (Party Primaries and Party Lists) Regulations, 2017 the Party and Tribunal mandates ends before the commencing of a general election, hence by operation of the law this becomes part of electoral Petitions after gazetting of the electoral results.

The 1st Respondent affidavit sworn by Salome Oyugi was allowed despite Petitioner's protests, and the Petitioner's submits that the affidavit cannot be of any probative value pursuant to Rules 12 (6), (7), (8), (12) and (13) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. An objection having been raised, the necessary implication, and what follows, is that the affidavit has been abandoned and its evidence is inadmissible. Consequently, it was also the Petitioner's Submission that the complaints made as against the 1st Respondent have not been rebutted.

That the 2nd Respondent was the only one who testified in response to the Petition. Having filed three witness affidavits, it also thus followed that under Rules 12 (6), (7), (8), (12) and (13) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 the affidavits of Kariri Muccheke, Desderio Njeru Muchiri and Julius Kithia Naituli were abandoned and of no probative value and they stood expunged from the record.

In addition, the 2nd Respondent is registered as a Meru by tribe a fact she has pleaded in her affidavit. Meru has the dominant community as the Ameru people to which she belongs hence it is deceptive and indeed illegal to purport to be and to represent a minority.

In the Government Publication titled, **'Who and Where?-Unmasking Ethnic Minorities in and Marginalised Communities in Kenya'** which was annexed to the Petitioner's affidavit in support of the Petition and produced as exhibit 3 it clearly shows that the Ameru community are not marginalized in Meru County and Court ought to take judicial notice of the fact that Kenya has got 70 ethnic groups and none of which the 2nd Respondent has ascribed herself., and her nomination was contrary to paragraphs (h), (k) and County Assembly (Marginalised Group) Party List clause (4) of the Elections (Party Primaries and Party Lists) Regulations, 2017, Sections 34(6), and 36 (f) of the Elections Act and Articles 100 and 177(1) (c) of the Constitution and ought to be immediately revoked.

That the 3rd Respondent only filed a Response to the Petition but did not file any supporting affidavit to the response. He admitted to being from the Ameru Community which is not an Ethnic Minority in Meru and reiterated the submissions made above in respect of the 2nd Respondent. He is a permanent Resident and a registered member in Umande Ward within Laikipia East Constituency within Laikipia County and he is neither a resident nor a registered voter within Meru County. He had been nominated to vie for a seat as a Member of the County Assembly in Umande ward within Laikipia County and not validly nominated as alleged.

The Petitioner submitted that since there was no supporting affidavit to the Response filed on 16th October 2017, the allegations by the Petitioner are unchallenged by him and court ought to deem the 3rd Respondent as not having participated in the proceedings by offering any defence and this is in express contravention of Rule 12 (5) (6) (7) and (12) hence the response and purported testimony fall by the wayside. His nomination is in contravention of the express provisions of the General Requirements of paragraphs (h), (k) (n) and County Assembly (Marginalised Group) Party List clause (4) of the Elections (Party Primaries and Party Lists) Regulations, 2017, Sections 34(6), (9) and 36 (f) of the Elections Act and Articles 100 and 177(1) (c) of the constitution and his the nomination should be nullified.

The Petitioner's submitted that the allegation that the issues herein had been heard and determined at the Political Parties Dispute Tribunal was incorrect. The Petitioner testified that he complained about his age and tribe. The complaint before this honourable court is that the people who have been gazetted are not eligible and or validly nominated in the stated categories. It is thus clear that the Petition is competently before court and this is supported by the ruling of the tribunal which was supplied to the court.

The Petitioner also submits that the parties are bound by their pleadings and the court ought not to entertain unpleaded matters to be canvassed through or to be disguised as issues for determination.

The 1st Respondent's Submissions

The 1st Respondent stuck to the law in their submissions citing Articles 177 and 90(2) which they submitted was their guiding law in ensuring constitutional compliance on the Party Lists of nominees adding they did not compile the same.

They also submitted on the lack of jurisdiction of this court submitting the correct fora were them, the Political parties' internal mechanisms and the PPDT.

They also submitted the Petitioner lacked *locus* to lay a claim on a category he did not seek consideration for, noting the Petitioner, in his pleadings, evidence, exhibits and submissions, had admitted that he sought to be nominated in the Minority Category. The 4 categories of Special Interests Group which include the Marginalized-Ethnic/Ethnic Minority, Persons With Disability, Youth Category and Minority Category of which Jubilee was allocated 2 seats for the Ethnic Minority Category.

They also drew the court's attention to the requirements of the two-thirds Gender Rule submitting that the 2nd Respondent fulfilled this requirement.

The 2nd Respondent's Submissions

The 2nd Respondent submitted that the court has no jurisdiction and this does not require to be pleaded and may be raised at any stage of the proceedings and even of its own motion, a Court of Law can move to either down its tools or strike out a pleading once its jurisdiction appears to be at stake.

That the Petitioner having not demonstrated that he comes from an ethnic Minority community in the context of Meru County lacks the *locus* to bring the Petition and cannot challenge what to is a lawful nomination of the 2nd Respondent.

That the Petitioner's case is that he had been listed as No.1 in the Jubilee party list but was short-changed to position 8. The 2nd Respondent did not prepare the party list and only offered herself for nomination. The Petitioner ought to have sued Jubilee party if he had any issues with the nomination of the 2nd Respondent as it is Jubilee party that nominated the 2nd Respondent and forwarded the nomination list to the 1st Respondent. The 1st Respondent's role was merely supervisory. Without having sued Jubilee Party in these proceedings, the Petition cannot see the light of day owing to lack of evidence.

That it had only emerged from cross examination that the Petitioner had filed complaint No. 499/2017 against Jubilee party at the Political Parties Disputes Tribunal at Nairobi claiming inter alia that his name had been moved from position No. 1 to 8 but that claim was dismissed on account of lack of evidence. That Judgment is annexed to the 3rd Respondent's replying affidavit. The same complaint was dismissed by the political parties Disputes Tribunal for lack of evidence. The Petitioner ought to have appealed to the High Court if he was for any reason dissatisfied with the Tribunal's decision. This court was the wrong forum and cannot sit on an appeal of the Political Parties Disputes Tribunal when the court's jurisdiction is concurrent with that of the Political Parties Disputes Tribunal. The Petitioner never appealed the decision of the Political Parties Disputes Tribunal as provided for under section 41(2) of the political parties Act 2011.

Further, the non-disclosure of the said case is fatal and renders the entire Petition *Res Judicata*. It was The Respondents who brought this crucial fact to the Court's attention. The Petitioner is an insincere and soiled litigant who does not deserve any equity from the Court. He who seeks equity ought to not only do equity but equally ought to come to Court with clean hands.

That Article 90 (2) of the constitution Jubilee party was entitled to two slots under the Ethnic Minority Category, by law to be occupied by a man and a woman. The 2nd and 3rd Respondents' nomination squarely meets this constitutional criteria.

Granting this Petition would be in vain given the provisions of Articles 90,100 & 177 of the Constitution and the Petitioner cannot take the place of the 2nd Respondent. The Law provides that if the 2nd Respondent's office were to fall vacant on account of resignation death etc, during the life of the current Meru County Assembly, then that vacancy can only be filled by a person of the same gender.

Further, the Petitioner submits parties are bound by their own pleadings and the Petition cannot succeed on account of the fact that at Paragraph 16 of the Petition where the Petitioner has given a very misleading and wrong description of the 2nd Respondent and which was totally contradicted in cross-examination.

On the submission that the 2nd Respondent did not call the three deponents to the three other supporting affidavits, it was submitted that it was optional for the 2nd Respondent to call or not to call those deponents as she has nothing to prove before the Honourable Court and the burden of proof never shifted to her to prove anything the Petitioner having not filed any supplementary affidavit(s). And expunging or not expunging the said three affidavits will not in any way cure the Petitioner's already dead case as that in itself shall not shift the burden of proof which is by Law bestowed upon the Petitioner (and which he has desperately failed to discharge) against the 2nd Respondent.

The 3rd Respondent

The 3rd Respondent succinctly submitted the fatal flaw of want of amendment of the a Petition, the meaning of Marginalised Communities, the lack of jurisdiction of this court as disputes on nominations are strictly the reserve of the PPDT and the prior proceedings in PPDT case No.499 of 2017, lack of evidence to support the Petition, the effect of the 3rd Respondent not filing a replying Affidavit, and whether the 3rd Respondent had not participated in the General Election for an elective seat, which they submitted in the negative.

In conclusion, he prayed the Petition be dismissed with costs.

Lists of Authorities

The Petitioner relied on the following authorities:-

MUMO MATEMU

OKIYA Omutata vs the Board of Directors, Athi Water Services Board & 6 Others

Philemon Chepkwony Lotodo –vs- IEBC & 2 Others (High Court Kitale) and John Oyoo Oyioaka –vs- IEBC (High Court –Kisii)

The 1st Respondent relied on the following authorities:-

Election Nomination HC Appeal No 30 of 2017 Jubilee Party of Kenya vs Farah Mohammed Manzoor [2017] eKLR

Peter Ochara Anam & 3 Others vs Constituency Development Fund & 4 Others Kisii HC Petition No 3 of 2010

Isaiah Gichu Ndirangu & 2 Others vs the Independent Electoral and Boundaries Commission & 4 Others [2016] eKLR

Election Petition No 13 of 2013 Dubat Ali Amey vs the Independent Electoral and Boundaries Commission & 4 Others [2014] eKLR

The 2nd Respondent relied on the following authorities:-

High Court (Nairobi) Petition No. 83/2015 Isaiah Gichu Ndirangu & 2 Others –vs- IEBC & 4 Others (at pages 15-19)

Court of Appeal (NBI) Civil Appeal No. 179/2013 Beatrice Nyaboke Oisebe –vs- the IEBC & 2 Others (at pages 24-25)

High Court (Migori) Petition No. 8/2015 Silas Owiti –vs- Anne Mikooyo & 6 Others (at pages 35-36)

SC Petition No. 1 of 2015 Moses Mwigigi & 14 Others –vs- IEBC (at page 59)

And

The Owners of Motor Vessel “Lillian S” vs Caltex Oil Kenya Ltd [1989] KLR 1

The 3rd Respondent referred me to the case of **Isaiah Gichu Ndirangu & 2 Others vs the Independent Electoral and Boundaries Commission & 4 Others [2016] eKLR** where Lenaola J.(as he then was) dismissed a Petition for want of jurisdiction as the same arose from Party Lists Nominations.

ISSUE FOR DETERMINATION

A number of issues were crafted by each of the Parties hereto, but the most fundamental and critical issue that this court must first address before all else is that of jurisdiction.

In the context of jurisdiction, Nyarangi J in THE OWNERS OF MOTOR VESSEL “LILLIAN S” VS CALTEX OIL KENYA LTD [1989] KLR 1 a constant and resounding reminder to every court is aptly summed up as follow:-

“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

Further, in MACHARIA AND ANOTHER VS KENYA COMMERCIAL BANK LTD AND 2 OTHERS CIVIL APPLICATION NO. 2 OF 2011 The Supreme Court further stated thus:

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”

FINDINGS

Does this Court have the Jurisdiction to Determine the Instant Petition?

The most fundamental of all the issues raised is that of the jurisdiction of this court to determine this Petition. All The 3 Respondents have submitted that in the instant Petition, this Court has no jurisdiction to grant the Petitioner the orders sought because the Petitioner did not exhaust all available legal mechanisms and avenues, and he ought to have filed his claim with the Political Parties Disputes Tribunal (PPDT), the IEBC (1st Respondent's) Elections Disputes Committee established under Section 40 of the Elections Act 2011 and/or the Jubilee Party's Internal Disputes Resolution Committee. Depending on the outcome therefrom, the Petitioner would then appeal to the High Court and, as such, a subordinate Court has no jurisdiction to handle disputes arising from Party Nomination Lists as the Petitioner did not utilize the statutory remedies.

The Petitioner is of a contrary view having submitted that the allegation that the issues herein had been heard and determined at the Political Parties Tribunal as incorrect. The Petitioner testified that he complained about his age and tribe. The complaint before this honourable court is that the people who have been gazetted are not eligible and or validly nominated and the stated categories.

The genesis of the Petitioners' case herein revolves around the question of nominations to Meru County Assembly and alleges violation of the Constitution and the Elections Act among others.

In his Petition the 1st Respondent has unlawfully gazetted the nomination of the 2nd and 3rd Respondents as representing Minorities in Meru and he contests the validity of the nomination done vide gazette notice number 8380 dated 28th August 2017.

He is aggrieved with the nominations of the aforesaid two Respondents alleging the same is laced with illegality as the two are from Meru ethnic community which is dominant in community in Meru County, and as such, they cannot be said to be representing the minority. He adds that he is from the Murule community which is a minority within Meru and he is therefore the proper candidate as had been nominated by the Jubilee Party and he attributed this to fraud by Jubilee Party. By his own admission, the Petitioner is disgruntled with the Jubilee party for, one, not putting his name on top of the list at No. 1, and instead putting those of the 2nd and 3rd Respondents in the first and second positions respectively; and two, for the said party nominating the two, and for the 1st Respondent publishing their names. He admitted at cross-examination that before going to PPDT, he had never complained to Jubilee Party.

He further admitted at cross-examination, that he had failed to make a material disclosure to this Court that he had appeared before the PPDT on a question the very same issue, and more specifically, that his name be first on the list of nominees. The Tribunal, in their wisdom, opted to grant him this wish. He has now come to this court seeking the very same orders.

The judgment of the said case **MOHAMMED ABASS SHEIKH VS JUBILEE PARTY [2017] eKLR** dated 3rd August 2017 was an annex to the 3rd Respondent's Response and read in part

“There is however no evidence on record that the Claimant's name was moved from position 1 to 8 on the list since the earlier version of the list placing his name at position (sic) was not availed to us.”

Despite his denial and covert efforts to keep this critical evidence from this court, the same has come to light and he has conceded that indeed he did subject himself to the jurisdiction of an alternate adjudicating body, the PPDT, prior to lodging this Petition.

He goes further and admits that he did not appeal this decision and denied the Petition is an avenue for redressing the very same complaint made in the PPDT.

At Paragraph 18 of his Petition, he accuses the 1st Respondent of manipulating the list of nominees and at Paragraph 19 states being a Murulle, he is the proper nominee.

The Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly with Section 75 (1A) of the Act providing that:

“A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.”

The law relating to disputes revolving around questions of nominations to County Assemblies is contained in Article 87 of the Constitution provides that:-

“(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

(3) Service of a Petition may be direct or by advertisement in a newspaper with national circulation.”

The above position is also reiterated in the Independent Electoral and Boundaries Commission Act which was established as an Act of Parliament to make provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by Article 88 of the Constitution, and for connected purposes. Section 4 thereof provides that:-

“The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-

- a) The continuous registration of citizens as voters
- b) The regular revision of the voters' roll
- c) The delimitation of constituencies and war

- d) The regulation of the process by which parties nominate candidates for elections;**
- e) The settlement of electoral disputes relating to or arising from nominations but excluding election Petitions and disputes subsequent to the declaration of election results;**
- f) The registration of candidates for election**
- g) Voter education**
- h) The facilitation of the observation, monitoring and evaluation of election**
- i) The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;**
- j) The development of a code of conduct for candidates and parties contesting elections; and**
- k) k) The monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.”**

Parliament has consequently enacted legislation on elections among them the Elections Act and the Political Parties Disputes Tribunal Act. The Elections Act was enacted as

“an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.”

Part VII of this Act is titled **“Election Disputes Resolution”** and Section 74 provides that:

“(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes *relating to or arising from nominations* but excluding election Petitions and disputes subsequent to the declaration of election results.

(2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined.”

Other than the Elections Act and the Independent Electoral and Boundaries Commission Act, the Political Parties Act was enacted as an Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes. On this basis, Section 39 (1) of the Act establishes a Tribunal to be known as the Political Parties Disputes Tribunal. The jurisdiction of the Tribunal is provided for under Section 40 of the said Act as follows:

“The Tribunal shall determine—

- a) disputes between the members of a political party;**
- b) disputes between a member of a political party and a political party;**
- c) disputes between political parties;**
- d) disputes between an independent candidate and a political party;**

e) disputes between coalition partners; and

f) appeals from decisions of the Registrar under this Act.

Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”

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, as the Petitioner in the instant does, the port of first call is ideally as set out hereabove.

Whether the Petitioner utilised the Commission’s dispute resolution port as required of them before approaching this Court cannot be gleaned from the pleadings and the Petitioner’s submissions before this Court was that the instant Petition has been filed not as an election dispute but rather that the jurisdiction being invoked herein is the one under Articles 165 and 258 of the Constitution and no more.

The decision as to who gets on the political party lists rests entirely with the political party and its members and it is not a function of IEBC. By authority of **NATIONAL GENDER AND EQUALITY COMMISSION V. THE IEBC AND ANOTHER**, the IEBC does not have jurisdiction over resolution of disputes related to the process of political parties preparing their party list for nominations to Parliament and the County Assembly. The jurisdiction is vested in the Political Parties Dispute Tribunal. In the **GENDER** case it was opined that:

“Section 34(6) of the Elections Act, 2011 specifically provides that,

“The party lists submitted to the Commission under this section shall be in accordance with the Constitution or the nomination rules of the political party concerned.” This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under section 39, Part VI of the Political Parties Act, 2011 or to the High Court in appropriate circumstances...While the parties have submitted at length on the need to define the terms such as “special interest” to give clarity to the process of nomination, we are of the view that it is not necessary to do so in this case. The Constitution imposes the primary obligation to ensure that the lists are compliant with the Constitution on the IEBC. The IEBC is required to scrutinise the lists forwarded to it to ensure that the lists comply with the Constitution, laws and regulations and in each case to ensure that the special interests are represented in the said lists.”

INTERNATIONAL CENTRE FOR POLICY AND CONFLICT & 5 OTHERS V ATTORNEY GENERAL & 4 OTHERS (2013) ECLR as referred to in the case of DIANA KETHI KILONZO & ANOTHER –V- IEBC & 10 OTHERS 2013 (2013) eCLR it was stated:

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the

dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC's powers. This would be contrary to the institutional independence of IEBC granted by Article 249 of the constitution. Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted....”

The existence of Articles 165 and 258 of the Constitution is not a substitute or a means of excluding such other dispute resolution organs and agencies from exercising their statutory duties.

In **PETER OCHARA ANAM AND 3 OTHERS VS CONSTITUENCIES DEVELOPMENT FUND BOARD AND 4 OTHERS, KISII HIGH COURT PETITION NO 3 OF 2010** where the Learned Judge made the observation that:-

“Jurisdiction we all know is everything and once raised it must be confronted from the onset and if successful the court must down its tools. I have no doubt at all that under article 165(3) of the Constitution, I have unlimited and inherent jurisdiction. I am also aware that under article 23(1) of the same constitution this court has jurisdiction, in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. I also agree as pointed out by counsel for the Petitioner that any interpretation of the Constitution that seeks to curtail such wide and unfettered jurisdiction would be contrary to the spirit and letter of the constitution and would thus render itself invalid. I do not however agree that the bodies created under the provisions of the CDF such as the 1st Respondent are invalid, null and void as per the constitution. As I have already stated elsewhere in this ruling, it is not uncommon in this country for a statute to provide the procedure through which proceedings founded under the statute are to be handled. Such is section 52 of the CDF. There is nothing unconstitutional about it. The section does not deny the Petitioners the right to come to court. It only provides a procedure to be followed when dealing with the disputes under the Act, like the instant dispute. The Petitioners have a right to come to this court on whatever matter and howsoever but that must be done in the correct way. It cannot therefore be the case of the Petitioners that section 52 of the CDF is in conflict with articles 22, 23, 48 and 50 of the Constitution. Similarly, it cannot be their case that section 52 qualifies the right to access justice in this court...”

The Learned Judge went on to state:

“I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional Petition for alleged breach of constitutional rights under the bill of rights...Coming to court by way of a constitution Petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the Petitioner exhausted these remedies, in bringing this Petition, the Petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st Respondent as required by law. It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose.”

In **HIGH COURT (MIGORI) PETITION NO. 8/2015 SILAS OWITI –VS- ANNE MIKOYO & 6 OTHERS** Mrima J. cited several other decisions in which Courts have reiterated the above position.

“They include the unreported cases of NAIROBI HIGH COURT PTITION NO. 258 OF 2013

JAMES KARIUKI KAGUORA VS. ENG. JOHN KIRAGU CHEGE & OTHERS, PHILIP OMODI OGOLLA VS. HON. JOHN OLAGO OLUOCH (supra), EMMANUEL W. OUMA VS. CHRISTINE MUYOKA & OTHERS (supra) and the reported case of GEORGE MORARA MANYARA VS. HON. MAINA KAMANDA & 3 OTHERS (2014) eKLR among many others. This Court has carefully and deeply considered the law and the matter at hand and hereby adds its voice to the position that it is true the Constitution protects the Petitioner's rights under the Bill of Rights and it is also true that those rights are enforceable under Article 22 of the Constitution and further that the Petitioner has a right to access this Court under Article 22 and even under Article 258 when the Petitioner thinks that there is a threat to the Constitution. However under Article 159(2) (c) of the Constitution gives emphasis to and calls upon parties to disputes to endeavour and submit to alternative disputes resolution mechanisms. Therefore despite this Court's wide jurisdiction bestowed on it by the Constitution if it were to assume jurisdiction and deal with matters meant for the Board then the Board, which is a creature of the law, would be rendered useless. Certainly that cannot be said to have been the intention of the Constitution. I hence find that this is a perfect case where this Court has to give way to the Board to first exercise its jurisdiction.

The 1st Respondent admitted it received the Jubilee Party List for Meru County and included the Minority Category where the Petitioner was listed as number 8 and the same was published in the Nation and the Standard of 23rd July 2017. The Respondent was bound by the order of priority in the list as submitted by the Jubilee Party and it published the names of the 2nd and 3rd Respondents as duly nominated members under the Ethnic Minority Special Interest Group.

This should put to rest the Petitioner's apprehension of his constitutional rights being eroded by following the proper due process of litigating his claim.

Another important feature to note in the legal jurisprudence of election laws is that it is noteworthy that the Election Petition rules provide for who should be a mandatory Respondent in an election Petition. Rule 9 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, provides that:

“The Commission shall:

(a) be a Respondent in every Petition filed under these Rules;”

In ABOUT ALI V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 2 OTHERS [2013] eKLR, Kimaru J stated that:

“The Constitution, the Election Act and the Election Petition Rules require that the successful candidate be made a party to the Petition because such candidate is the primary target of such election Petition. He is the one who will be the first person to suffer the consequences of the nullification of the particular election result. Where the Petitioner does not include the successful candidate as a party in the Petition such Petition lacks legal substratum and is liable to be struck out.”

In HASSAN OMAR HASSAN & ANOTHER V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS MOMBASA HCEP NO. 10 OF 2017, Ochoode J. ruled that:

“... It is trite law that an omission to include a successful candidate renders a Petition defective.”

This is to buttress that the Constitution, Statute and the case-law have amply provided that IEBC and the successful candidate in any election are mandatory Respondents in an election Petition, and omission to include them in the proceeding renders the Petition defective, and hence liable to be struck out.

The Courts have held that it is the responsibility of the IEBC to ensure that candidates nominated by way

of Party Lists meet suitability and eligibility requirements set out in the Constitution and the Elections Act, 2011, **(MOSES MWICIGI & 14 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS, SUPREME COURT PETITION NO. 1 OF 2015, MICAH KIGEN & 2 OTHERS V ATTORNEY GENERAL & 2 OTHERS, HIGH COURT (NAIROBI) CONSTITUTIONAL PETITION NO. 268 OF 2012.**

But that is as far as their mandate goes. They cannot draw up **nomination list**, so a disgruntled nominee has a clear-cut path on how to arbitrate a dispute.

The silence on is whether Political Parties fall within the category of mandatory Respondents is, to my mind, meant to reinforce the view that party-nominee conflict resolution mechanisms are amply provided for in the law, and therefore, any question touching on a dispute with a Political Party must, and, can only be, dealt with within the established frame-work of Party List Disputes as enumerated herein above. This would then leave the courts open to litigate proper election petitions *per se* as set out in Section 86 of the Election Petitions Act which reads thus

“(1) A petition—

(a) to question the validity of an election...

(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall...

(c) to seek a declaration that a seat in Parliament or a county assembly has become vacant may be presented at any time.

(2) A petition questioning a return or an election upon the ground of a corrupt practice, and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of that person or with the privity of that person or his agent may, so far as respects the corrupt practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.

(3) A petition questioning a return or an election upon an allegation of an illegal practice and alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned, or by an agent of that person, or with the privity of that person or his election agent in pursuance or in furtherance of the illegal practice alleged in the petition, may, so far as respects the illegal practice, be filed at any time within twenty-eight days after the publication of the election results in the Gazette.

(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within the time within which the petition questioning the return or the election upon that ground may be presented.”

Further the Courts have in fact specifically held that IEBC has no power to ignore, re-arrange or disregard a political party’s preferred priority of candidates as set out in a party list (**LINNET KEMUNTO NYAKERIGA & ANOTHER V BEN NJOROGE & 2 OTHERS, CIVIL APPEAL (NAIROBI) NO. 266 OF 2013.**

In both **ISAIAH GICHU NDIRANGU & 2 OTHERS VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 4 OTHERS [2016] eKLR** and **MACHARIA AND ANOTHER VS KENYA COMMERCIAL BANK LTD AND 2 OTHERS CIVIL APPLICATION NO. 2 OF 2011** Lenaola J. (as he then was) dismissed Petitions for want of jurisdiction as the same arose from Party Lists Nominations.

From all the case law cited above, there can be doubt that this is the established legal position on Party List Disputes and the Petitioner cannot run away from it.

The Petitioner's submission that he '**testified that he complained about his age and tribe**' is inaccurate and generally reflects the Petitioner's overall lack of candour, especially given their earlier unequivocal submission that:-

“It thus follows that the nomination of the 2nd Respondent was contrary to the General Requirements of paragraphs (h), (k) and County Assembly (Marginalised Group) Party List clause (4) of the Elections (Party Primaries and Party Lists) Regulations, 2017, Sections 34(6), and 36 (f) of the Elections Act and Articles 100 and 177(1) (c) of the Constitution and ought to be immediately revoked.” (Refer to the GENDER case above on S34)

Further, it has become evident that the Petitioner's intention of hiding the fact of the previous adverse outcome at the PPDT was to come before the election court seeking similar orders as he did at the first forum, and the court must be wary.

The many authorities cited above have unequivocally held that it is the responsibility of political parties, rather than the courts or IEBC, to determine which of their members should be included in a party list, in which category and in what order of priority (MOSES MWICIGI & 14 OTHERS V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 5 OTHERS, SUPREME COURT PETITION NO. 1 OF 2015; PENINAH NANDAKO KILISWA V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS, CIVIL APPEAL (NAIROBI) NO. 201 OF 2013; LINNET KEMUNTO NYAKERIGA & ANOTHER V BEN NJOROGE & 2 OTHERS, CIVIL APPEAL (NAIROBI) NO. 266 OF 2013).

Flowing from the foregoing, the court in this instance cannot, and should not, concern itself with making any orders aimed at compelling the Political Party to make the Petitioner a first nominee.

Even if the court had the jurisdiction so to do, it wouldn't help the Petitioner's case as the Political party in question has not been named a party to the proceedings, which, in effect, has already been addressed above. It is clear that the Petitioner is attempting to cleverly re-litigate the same issue that he unsuccessfully raised at the PPDT but he is barred by the rules of *res judicata*.

The Petitioner's misguided attempt to appeal this decision, which he deems unfavourable, and now clothing it as an election Petition, he is clearly barred by jurisdictional rules. Appeals from the PPDT lie to the High Court as prescribed under Section 41 (2) of the Political Parties Act. Even if the Petitioner moved to the appropriate forum, he would still have to contend with the rigours of the prescribed timelines of appeal for decisions of the PPDT.

The Petitioners' main concern is that the law was not observed by the Respondents in regard to the conduct and the final selection of the nominee. This in my mind is one such dispute in regard to nominations that the Legislature contemplated and thus created a dispute resolution body as the first port of call.

The bottom line is that the instant Petition is that relating to a dispute arising from Party Nomination: no less, no more.

Based on the foregoing, I am inclined to agree with the Respondents' submissions that this Court is not the appropriate forum for addressing the issues raised in the Petition. My reasoning is firmly grounded on the nature of the case and the matters raised herein because there is no doubt whatsoever that the dispute is in regard to nominations to Meru County Assembly by the Jubilee Party of Kenya.

From the foregoing, I have no doubt in concurring with the Respondents' submissions and I hereby hold and find that this court lacks the jurisdiction to litigate on this Petition.

DISPOSITION

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.

In light of my findings above, I hereby dismiss the instant Petition and condemn the Petitioner to pay costs to the Respondents.

Orders accordingly

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 15TH DAY OF FEBRUARY 2018

In the presence of

Court Assistant Faith

PETITIONER Mr. Ondieki

1ST RESPONDENT Ms. Waigwa holding brief for Mr. A. Hassan

2ND RESPONDENT Mr.Ndubi

3RD RESPONDENT Ms. Waigwa holding brief for Mr. Ondari

HON. MRS. L. AMBASI

CHIEF MAGISTRATE, MERU