



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL (ELECTION PETITION) NO. 2 OF 2014

NARC KENYA PARTY :.....: 1ST APPELLANT

MUHOBO OMAR :.....: 2ND APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION :.....: 1ST RESPONDENT

FATUMA MOHAMED :.....: 2ND RESPONDENT

J U D G M E N T

Introduction

Article 90 of the Constitution bestows upon the Independent Electoral and Boundaries Commission (IEBC) the responsibility for the conduct and supervision of elections for seats provided for, *inter-alia*, the members of the county assembly under Article 177 (1) (b) and (c), which shall be on the basis of proportional representation by use of party lists. Following the conclusion of the General Elections held on 4th March 2013, the IEBC (the 1st Respondent herein) allocated the 1st Petitioner (the 1st Appellant herein) one slot for nomination to the County Assembly of Garissa. The IEBC, as is required by law, published in the Daily newspapers the names of the nominees of the County Assemblies containing the name of the 2nd Respondent herein as the nominee of the 1st Appellant for the County Assembly of Garissa.

This publication did not auger well with the 1st Appellant who averred that its nominee of choice was the 2nd Appellant and not the 2nd Respondent as published by the IEBC. The 1st Appellant averred that they lodged written complaints to the 1st Respondent raising the anomaly with the publication of the names. Further that they filed a complaint with the police alleging fraud on the part of the 2nd Respondent by using electronic signatures to forge a letter of nomination. The Appellants also filed a complaint with the Dispute Resolution Committee of the IEBC and an application for Judicial Review at the High Court. The Appellant finally instituted a suit at the lower court to adjudicate, *inter-alia*, the eligibility of the 2nd Respondent for nomination as a member of the County Assembly of Garissa and whether she was lawfully and duly nominated by the 1st Appellant. The learned magistrate dismissed the petition finding that the 2nd Respondent was validly nominated by the 1st Appellant as a member of the County

Assembly of Garissa.

Appellants' case

It is against the Judgment of the lower Court, Hon. C.A. Otieno, delivered on 13/2/2014, that the Appellants have filed an amended memorandum of appeal dated 12/5/2014 seeking that the same be set aside on grounds that:

1. ***The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by failing to find, contrary to the evidence on record that the 2nd Respondent was not eligible for the nominations by the 1st Petitioner as a member of the County Assembly of Garissa, in line with Sections 34(8) and 43(5) of the Elections Act.***
2. ***The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by failing to find that the 2nd Respondent was not a member of the 1st Appellant and as such could not be nominated by the first Appellant to the County Assembly of Garissa, a finding that was contrary to the uncontroverted evidence on record in line with Section 34(8) of the Elections Act.***
3. ***The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by finding that the Appellants had not discharged the burden of proof as by law required of election petitions and failing to consider the evidence adduced by the Appellants and finding that the Appellants had not discharged the burden of proof to the required standard and thus the burden of proof to that extent shifted to the Respondents, especially as the 2nd Respondent has not filed an affidavit in line with Rule 15(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013.***
4. ***The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by failing to find that the matter before the court was distinct and or unique in nature and so the Appellants had proved their petition to the required standard and no evidence in rebuttal was adduced by the Respondents.***
5. ***The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by failing to find that the 2nd Respondent was a civil servant and therefore could not be eligible for the nomination to the County Assembly of Garissa at the material times or the effective date, in line with Section 43(5) of the Elections Act.***
6. ***The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by failing to appreciate and interpret the provisions of the Elections Act, 2012 together with Rule 54 of the Election (General) Regulations, 2012 and find that the 2nd Respondent could only be eligible to be nominated if she would stand elected if the party were to be entitled to all the elective posts in the County Assembly of Garissa.***
7. ***The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by failing to take into consideration the Petitioners' supporting affidavit to the petition both inclusive of Amb. Mwanyengela Ngali as well as that of the 2nd Appellant and further failing to consider viva voce evidence of Amb. Mwanyengela Ngali to the effect that there was sufficient evidence called to prove that the 2nd Respondent forged her name and nomination forms into the purported nomination list, in line with Rule 12 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.***

- 8. The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by failing to find that the 2nd Petitioner's affidavit explicit and exhibits and or acknowledges the fraud that had been committed was against the 1st Appellants, in line with Section 107 of the Evidence Act.**
- 9. The learned Magistrate erred both in law and fact by dismissing the Appellants' petition by failing to make consideration to the 1st Appellant's evidence in complaints made to the 1st Respondent which were made in time and were never considered at all.**

The Appellants pray for orders that:

- a. A declaration that the 1st Respondent exceeded its powers by failing to have due regard to the 1st Appellant's original party list submitted on 30/4/2013 and consequently, irregularly and illegally omitting to gazette as nominated the 2nd Appellant's name.**
- b. A declaration that the Appellant's rights as envisaged under Article 177 of the constitution have been grossly infringed and violated by the Respondents and to revoke and remove the 2nd Respondents name from the gazetted list for Garissa County.**
- c. A declaration that the purported removal of the 2nd Appellant's name from the nomination list of Garissa County Assembly was unlawful, null and void ab initio.**
- d. An order revoking the decision and/or nomination as a member of the County Assembly of the 2nd Respondent in the Garissa County Assembly and further order directing the 1st Respondent to gazette the 2nd Respondent.**
- e. A declaration and an order that the 2nd Appellant is the 1st Appellants duly nominated member for Garrisa County Assembly – special seat as submitted by the 1st Appellant for the 1st Respondent on the 30/4/2013 and that her nomination be finalized.**
- f. A declaration and order that the costs and interests thereon of the Petition and this appeal be borne by the Respondents.**

Submissions

The Appeal was prosecuted by way of written submissions which were orally highlighted in court on 17/6/2014.

Appellants' Submission

C.N. Kihara & Company Advocates for the Appellants filed submissions dated 27/5/2014. With respect to the eligibility of the 2nd Respondent to be nominated by the 1st Appellant, counsel submitted that the 1st Appellant had demonstrated that the 2nd Respondent was not eligible for reasons that, first, she was not a registered member of the 1st Appellant as she did not avail a membership card or any credible evidence that she had paid membership fees. Secondly, there was no evidence to support the 2nd Respondents assertions that she had resigned from civil service employment on 4/2/2013. It was counsel's submission that the learned magistrate's interpretation of Section 43(5) of the Elections Act was only applicable to persons seeking to contest an election and not those seeking nominations for special seats is an error. He submitted that the provision could not be read in isolation of Article 90 of the Constitution and Rule 54 (1) of the Election (General) Regulations 2012. It was also submitted for the

Appellants that the learned magistrate erred by failing to find that it is only the 1st Appellant being a political party with the authority to nominate a member to the county assembly. Counsel submitted that the 1st Respondent usurped the 1st Appellant's role of nomination when it failed to act on the 1st Appellant's complaint and proceeding to publish the 2nd Respondent's name as the nominee despite the protest. In the foregoing, it was submitted for the Appellants, that the 2nd Respondent was not eligible to be nominated.

Counsel also submitted that the 2nd Respondent did not file an affidavit in response to the Petition, which, by virtue of Rules 14 and 15 of the Elections (Parliamentary and County Election) Rules 2013, signifies that she did not intend to call witnesses. The effect, counsel submitted, was that the affidavits sworn by the Appellant's witnesses were not controverted by the 2nd Respondent.

1st Respondent's Submissions

Murugu, Rigoro & Co. Advocates for the 1st Respondent filed submissions dated 11/6/2014. Counsel submitted on the jurisdiction of the court that Section 75(4) of the Elections Act limits jurisdiction of this court in entertaining an appeal from the lower court to matters of law, only. The section reads:

An appeal under subsection 1A shall lie to the High Court on matters of law only and shall be –

- a. Filed within 30 days of the decision of the Magistrate's Court; and***
- b. Heard and determined within six months from the date of filing of the appeal.***

It was counsel's submission that the memorandum of appeal as filed is, in view of Section 75 of the Elections Act, fatally defective and therefore should be struck out in its entirety. In support of this submission, counsel cited Court of Appeal decisions in **IEBC & another v Stephen Mutinda Mule & 3 Others (2014) Nairobi Civil Appeal No. 219 of 2013 eKLR** where their lordships stated:

....It is therefore quite strange and improper that each of the seventeen grounds, without exception commences with a standard expression, "the judge erred in fact and law" or "the learned judge erred in law and in fact". Clearly the drafters of the memorandum did not have the legal provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal.

Counsel also referred to **Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others Malindi Civil Appeal No. 36 of 2013 (2014 eKLR)** where the Court observed:

In addition to the above guidance, this appeal being a first appeal to this court, it is important to keep in mind the principles to be followed in a first appeal as reflected in Peters v Sunday (1958) EA and Selle v Associated Motor Boats Company Ltd (1968) EA 123 that although the court has jurisdiction to reconsider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal as the one before us where the right of appeal is limited to matters of law only, because the jurisdiction of this court to draw its own conclusions can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts, and only interfere if two conditions are met. Firstly, that the conclusions are conclusions of law, and secondly, that the conclusions of law arrived at cannot be reasonably be drawn from the findings of the lower court on the facts.

On the burden of proof, counsel made reference to the case of **Joho v Nyange (2008) 3 KLR EP**

submitting that the same lies on the Appellants to prove all the allegations brought forth and also that the evidence they are to produce in support of the allegations should be cogent, credible and consistent. It was submitted for the 1st Respondent that the Appellants failed to tender evidence to show that the 2nd Respondent is not a member of the 1st Appellant party and therefore not eligible for nomination by the 1st Respondent. It was further submitted that the 1st Appellant, being a political party is mandated to keep a record of all its members pursuant to Article 7(2) (f) of the Political Parties Act. Counsel submitted that the 1st Appellant failed to avail to court such record to demonstrate that the 2nd Respondent was not among its members, neither did the Appellants take initiative to liaise with the office of the registrar of political parties to inquire whether the 2nd Respondent was indeed a member of the 1st Appellant party. Counsel further submitted that the generation of party list is purely a preserve for the political party under Section 34(6) and Regulation 55(1) of the Election (General) Regulations, 2012 and thus the 1st Respondent cannot nominate a member of a special seat.

On the allegation that the 2nd Respondent was still a public officer at the time she was nominated as a County Assembly Representative of Garissa, it was counsel's submission that the duty roster produced in evidence to prove the allegation was not cogent on the basis that: it was not authenticated as a true copy of the original contrary to section 81 of the Evidence Act; it contains several alterations that are unexplainable hence creating doubt as to its authenticity; it is incomplete as it only shows the first page. Counsel also submitted that the roster did not contain Identification Numbers or Badge Numbers which are unique to each officer, and would prove that the Fatuma Mohammed appearing in the said list was indeed the 2nd Respondent.

On the issue of non-filing of witness affidavit(s) by the 2nd Respondent as provided under Regulation 15(1) of the Elections (Parliamentary and County Elections) Petition Rules, it was counsel's submission that the regulation was applicable in instances where a party to an election petition intended to call a witness. Counsel submitted that the advocate of the 2nd Respondent did not intend to call any witnesses and clearly indicated as much during the pre-trial conference.

2nd Respondent's submissions

Kibungei & Company Advocates for the 2nd Respondent filed submissions dated 16/6/2014. Counsel reiterated that the 2nd Respondent is member of the 1st Appellant and also that as at the date of her nomination on 24/2/2013 she had already resigned from the civil service on 4/2/2013. Counsel cited Articles 177 (b) and (c) and 90 of the Constitution submitting that nomination of members to the County Assemblies shall be on the basis of proportional representation by use of party lists. As to the suitability for the nomination, the criteria is specified under Section 25 of the Elections Act which provides that, unless disqualified under section 25(2) a person qualifies for nomination as a member of a County Assembly if he is a registered voter, satisfies the educational, moral and ethical requirements prescribed in the Constitution and the Act and is either nominated or an independent candidate supported by at least 500 registered voters in the ward concerned. It was counsel's submission that the 2nd Respondent qualifies at law as defined.

Counsel submitted that no evidence has been led to rebut the 2nd Respondent's evidence as to her membership of the 1st Appellant as well as her resignation from public service on 4/2/2013 prior to the nominations. Further that the 1st Appellant is mandated under Section 17 (1) (a) of the Political Parties Act to maintain an accurate and authentic record of a register of its members. Therefore the 1st Appellant position as a holder of records would easily demonstrate the 2nd Respondent's membership details. Additionally, counsel submitted that the tabling of a duty roster showing one Fatuma Mohamed stationed in Garissa as evidence to show non-resignation on the part of the 2nd Respondent is misplaced since it is a gross misconception that similarity of names would automatically refer to the 2nd

Respondent. Counsel submitted that the 2nd Respondent is a citizen identifiable by an Identity Card, particulars of which are with the 1st Appellant.

As regards the burden of proof, counsel submitted that Section 107 of the Evidence Act is emphatic that he who asserts any legal right or liability dependent on the existence of facts must prove that those facts exist and that when a person is bound to prove the existence of facts, the burden of proof lies on that person. In support of this submission counsel referred the Court to the Supreme Court decision in **Raila Odinga & Another v IEBC** where the Court held:

...an election cause is established much in the same way as the civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with 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.

Determination

I have carefully read the amended memorandum of appeal and the submissions in support and opposition thereto. I have also considered the authorities cited by counsel of all the parties. The first point of determination is the issue of the jurisdiction of this court in adjudicating an appeal of an election dispute. Counsel for the Appellant submitted that this being a first appeal, the Court is called upon to reconsider the evidence, evaluate it and make its own conclusions. On behalf of the 1st Respondent it was submitted that the court's jurisdiction to entertain an appeal of this nature is limited by the provision of statute, **Section 75(4) of the Elections Act**, to matters of law only. In further support of this submission, the Court was referred to a number of Court of Appeal decisions. The jurisdiction of an appellate court in election disputes is not only provided in statute, but was also litigated upon at the Supreme Court which determined that the appellate court shall only determine aspects of law. See the case of **Frederick Otieno Outa v Jared Odoyo Okello and 4 Others Petition No. 10 of 2014**.

On what exactly is matter of law and that of fact, our Supreme Court in the **Frederick Otieno Outa case (supra)** cited with approval the holding of the Supreme Court of the Philippines, in **Republic v. Malabanan, G.R. No. 169067, October 632 SCRA 338, 345** and **New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan; G.R No. 161818 (2008)** that:

We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation.

Guided by the foregoing, the mandate of this court will be to distinguish the grounds of appeal and reconsider whether the law as applied by the learned magistrate was the correct application. From the outlined grounds of appeal, the following are, in my view, issues for determination:

- 1. Eligibility of the 2nd Respondent for nomination of a special seat**
- 2. Witness Affidavits.**

Eligibility of the 2nd Respondent for nomination of a special seat

a. Whether the 2nd Respondent was a member of the 1st Appellant

The Appellants contended that the 2nd Respondent was not a registered member of the 1st Appellant and therefore could not be eligible to be nominated in view of the provision of Sections 34(8) of the Elections Act. The 2nd Respondent in response to the petition averred that she is a member of the 1st Appellant and in possession of Membership Card No. NK11NG357664. In submissions, counsel submitted that the 1st Appellant was enjoined by law under Section 17(1)(a) of the Political Parties Act, to maintain an accurate and authentic record of a register of its members. Consequently, that such record would demonstrate the 2nd Respondent's membership. Therefore, devoid of such record, the Appellants' allegation was unsubstantiated. The court was referred to Section 107 of the Evidence Act which places the burden of proof on he who alleges. The learned magistrate faulted the Appellants for making averments without adducing documentary evidence that the 2nd Respondent was not a member of the 1st Appellant. The Court acknowledged that in some instances, the evidential burden could shift to the Respondent. It was the Court's view that the instant petition was not such a situation as the Petitioners, the Appellants herein, had not laid prima facie evidence on this issue.

I agree with the reasoning and finding of the learned magistrate, as there is no documentary evidence on the court record to rebut the 2nd Respondent's averments as to membership.

b. Whether Section 43(5) of the Elections Act is applicable to nominative position.

The 2nd Respondent in response to the Petition averred that she was until her resignation on 4/2/2013 an Administration Police Constable. It was submitted on her behalf that since the law was silent on when a public officer vying for a nomination seat should resign, her resignation on 4/2/2013 before her nomination on 24/4/2013 was sufficient time. It was further submitted that there was no law to bar the nomination of the 2nd Respondent even if she were still in public service. The learned magistrate found that the provision of Section 43(5) of the Elections Act as to the resignation from civil service was applicable to public officers seeking to contest in an election and not otherwise. The Appellants' submission to this finding is that the learned magistrate erred by reading Section 43(5) of the Elections Act in isolation from Article 90 (2) (a) of the Constitution which reads:

...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 entitled to all the seats provided under clause 1, within the time prescribed by national legislation.

This provision is reiterated in Regulation 54 of the Election (General) Regulation

Evidently, Section 43(5) of the Elections Act requires resignation by public officers who seek elective posts. As regards nomination of members to special seats, it is my considered opinion that Article 90(2) of the constitution places a threshold, that is, persons nominated and forming part of the party list should ordinarily qualify to be elected had there been availability of seats in the National Assembly, Senate or the County Assembly. The threshold thus takes us back to Section 25 of the Elections Act wherein sub-section (2) (a) disqualifies a state officer or other public officer from being elected a member of a county assembly, unless such officer has resigned from office at least 7 months to the date of elections, as per Section 43 (5) of the Elections Act.

Resignation from public office 7 months in advance of the election was aptly discussed by Justice Lenaola in **Charles Omanga & another v Independent Electoral & Boundaries Commission & another & another NRB Petition No. 2 of 2012 [2012] eKLR**, where the Learned Judge agreed with the submissions made by the Respondents that ***public officers need to be restricted in their political***

activities so that while in office they should not be seen to be engaged in partisan political activities and which may impede the objective discharge of their duties. That the requirement that they should resign from public office seven months before the date of elections is therefore reasonable and Section 43(5) and (6) are not in contravention of the Constitution. The Judge observed that **the impartiality of public servants is a cardinal value enshrined in Article 232(1)(a) of the Constitution which provides that the public servant and service must be “responsive, prompt, efficient, impartial and equitable” in the provision of services.** These principles, in his view, would not be espoused by an officer if he were allowed to remain in office until the election date.

No doubt, the decision in the **Charles Omanga case** is in respect to state officers or public officers who wish to vie for elective seats. It is my view that nominated members of a political party irrespective of whether the position is elective or nominative are active members of the said party who engages actively in party politics. A state or public officer, may not promote the principles outlined in Article 232 (1) (a) of the Constitution, if they have, in the words of Lenaola J., **one leg in public service and another at the political arena.**

It is my considered opinion that the 2nd Respondent ought to have resigned from public service per Section 43(5) of the Elections Act. I therefore find and do hold that the 2nd Respondent was not eligible for nomination for membership of the County Assembly of Garissa under the Gender Top-Up Category.

c. Whether the 2nd Respondent was nominated by the 1st Appellant

The issue whether the 2nd Respondent was duly nominated by the 1st Appellant was discussed at length by the learned magistrate in the Judgment, subject matter of this appeal. The learned Magistrate faulted the 1st Appellant for failing to go the extra mile to prove that the letter dated 24/4/2013, which the IEBC relied on to gazette the 2nd Respondent was a forgery. The 1st Appellant was also faulted for not leading evidence regarding its nomination rules as well as not presenting to court a copy of the minutes of the National Executive Council (NEC) which the 1st Appellant claimed to be its decision making body. This evidence, the learned magistrate stated, would enable the court to make a proper finding as to whether the 2nd Respondent was indeed nominated in accordance with the rules of the 1st Appellant.

It is the 1st Appellant's contention that the 2nd Respondent was not their nominee for member of County Assembly of Garissa under the gender top-up category, and further that it is its mandate as the political party and not the IEBC to nominate a member for the special seat. It was also the Appellants' contention that the 1st Respondent declined to act on the 1st Appellant's letters of protests and proceeded to gazette the 2nd Respondent as the nominated member thereby usurping the power of the political party. In response, the 1st Respondent refuted the Appellants' claim submitting that it published in the Kenya Gazette the names of the nominees as received from the political party, in accordance with the rules.

The 1st Respondent admitted that the generation of party list is purely a preserve for the political party under Section 34(6) and Regulation 55(1) of the Election (General) Regulations, 2012 and thus the 1st Respondent cannot nominate any person. It was the 1st Respondent's submission that the publication of the party list was not meant to allocate any person a seat but that the same was meant for information to the public to facilitate those aggrieved to challenge the list. It was further submitted that calling for further party lists was not for purposes of substituting the original list but for purposes of filing in the gaps in the original lists in compliance with Section 34 (10) as read with Section 37(2) of the Elections Act, 2011.

The learned magistrate in finding that the 2nd Respondent was duly nominated by the 1st Appellant did so on the basis the letter dated 24/4/2013 is said to have been endorsed by use of electronic signature of

the National Chairperson and the Secretary General. The learned magistrate was more convinced when the 1st Appellant admitted that in some occasions, the electronic signatures were used. However, it is evident from the Judgment that the learned magistrate, failed to take into consideration the letters addressed to the IEBC by the 1st Appellant denouncing the letter dated 24/4/2013, one of which, dated 21/5/2013 was signed by the Secretary General whose electronic signature was used. The chronology of events leading to the publication of the 2nd Respondent as the nominated member will shade more light as to why the letters by the 1st Appellant were crucial and worth considering.

- i. On 24/4/2013 the 1st Appellant wrote to IEBC Ref. NK/GE/AA/3 stating that its nominee for county assembly for Garissa is the 2nd Respondent.**
- ii. On 30/4/2013, the 1st Appellant wrote to the IEBC Ref NK/IEBC/PL/4 wherein the letter contained a list of two categories: (a) Gender Top-Up List and (b) Marginalized List. The Gender Top-Up List comprised of nine nominees for various counties including the 2nd Appellant for County Assembly of Garrisa. The letter on the court record has a receiving stamp indicating that the letter was received by the IEBC on 2/5/2013.**
- iii. On 7/5/2013 the 1st Appellant wrote to IEBC notifying it that the letter dated 24/4/2013 did not originate from its offices. The letter further instructs the IEBC to make reference to the 1st Appellant's letter of 30/4/2013 for purposes of noting the bona-fide nominee of the county assembly of Garissa. The copy on the court record shows that IEBC received the letter on 8/5/2013.**
- iv. On 19/5/2013 IEBC publishes in the Daily Nation newspaper, under the title "IEBC Re-submitted Political Parties List" which contained the name of the 2nd Appellant being No. 68 as the nominee for the County Assembly of Garissa.**
- v. On 21/5/2013 IEBC publishes a subsequent list, under the title – "an Amendment Allocation of Nominees to the County Assembly Special Seats pursuant to the Committee Judgment delivered on 4/5/2013". This list contains the name of the 2nd Respondent as the nominee for the County Assembly of Garissa.**
- vi. On 21/5/2013 the 1st Appellant wrote to IEBC reiterating its position in its letter dated 7/5/2013 stating that the letter of 24/4/2013 is a forged document which is under investigation. The 1st Appellant also reiterated that its nominee was the 2nd Appellant.**
- vii. On 22/5/2013 the 2nd Appellant formally filed a complaint with the IEBC Dispute Resolution Tribunal.**
- viii. On 28/5/2013 the 2nd Appellant filed a complaint with the Police which is acknowledged by a letter dated 4/6/2013.**
- ix. On 7/6/2013 the IEBC Dispute Resolution Tribunal dismissed the 2nd Appellant's Complaint.**
- x. On 14/6/2013 the 1st Appellant wrote to IEBC requesting the Dispute Resolution Committee to furnish it with grounds for dismissal of its complaints for the county assembly of Garissa.**
- xi. On 17/7/2013 the 2nd Respondent is placed in the Kenya Gazette Notice No. 9794 Vol. CXV – No. 105 as the nominee of the 1st Appellant for the county assembly of Garissa.**

From the chronology of events, the IEBC published the name of the 2nd Appellant as the nominee on 19/5/2013 as per the 1st Appellant's letter of 30/4/2013. The publishing of the 2nd Respondent's name as the nominee on 21/5/2013 is what prompted the 2nd Appellant to file a complaint with the IEBC Dispute Resolution Committee/Tribunal. It is noteworthy that even before the IEBC published the names on 19/5/2013, the 1st Appellant had already written to IEBC in respect to the letter dated 24/4/2013 denouncing the same and issued express instructions to IEBC to act accordingly by ensuring that the nominee for County Assembly of Garissa is properly captured as **Muhobo Omar**, the 2nd Appellant herein. The 2nd letter from the 1st Appellant was one of protest informing the IEBC that its publication of the 2nd Respondent as the nominee of the 1st Appellant was an error and called for IEBC to rectify the same. It is clear from the letters on the court record that they were received by the IEBC. I have perused the affidavits on record together with the submissions and observed that at no instance did the IEBC deny receipt of these letters. It also did not make any representation on them.

The 1st Respondent reiterates that their duty was to fill gaps in the original list and not to make substitutions. I have perused the court record which does not contain the original list referred to by the IEBC and which it used to fill gaps. As is evident from the chronology of events, the 2nd Appellant appears in the list published on 19/5/2013 but is substituted with the 2nd Respondent in the list published on 21/5/2013, despite letters from the 1st Appellant categorically informing the IEBC on who among the 2nd Appellant and the 2nd Respondent was its nominee to the county assembly of Garissa. Moreover, this communication was well in advance, even before the 2nd Appellant lodged a complaint with the dispute tribunal, as well as before the IEBC published the name of the 2nd Respondent as the nominee for County Assembly of Garissa in the Kenya Gazette. In that regard, the provision of Section 34 (10) of the Elections Act would not have been flouted if IEBC were to make the appropriate changes, as communicated by the 1st Appellant, before publishing in the Kenya Gazette, since such publication signifies the commencement of a representative's term. Whereas Section 34(10) is categorical that the party list submitted shall not be amended during the term of the county assembly, it is my view that such term commences upon publication in the gazette. In that regard, therefore, any time before publication in the gazette, is available for IEBC to make appropriate changes as communicated by the political party.

This finding me leads to Section 13(2) of the Elections Act which is categorical that the Political Party shall not change the candidate nominated after the nomination of the said candidate has been received by the Commission. The learned Magistrate also made reference to Section 31 of the Elections Act which makes provision, *inter-alia*, for the Political Party to certify that a candidate has been nominated by the party. I have carefully read these sections, which in my considered view, are in respect to nomination of candidates for elective posts and not nomination of members for special seats by the political parties. Sections 34 and 35 of the Elections Act, which are in respect to Nomination and Submission of Party Lists Members, do not require the certification of candidates by the Political Party as having been nominated. In any event, and even assuming that I have erred in the interpretation of statute, it is my finding that the 1st Appellant did not seek to make a change of its nominee from the 2nd Respondent to the 1st Appellant, but to expressly notify the IEBC of its preferred nominee to the county assembly of Garissa.

It was contended by the Appellants that the letter dated 24/4/2013 which formed the basis of the 2nd Respondent's placement in the Kenya Gazette was a forgery. Ambassador Mwanengela Ngali, in his evidence testified that the 1st Appellant filed a complaint with the Police after investigations were done and a criminal case filed wherein the 2nd Respondent is the accused person. In view of the pending criminal case, this court cannot make a determination on whether the letter dated 24/4/2013 is a forgery. The inability of this court to adjudicate over this issue, however, does not impede my finding on who the 1st Appellant nominated for the seat. I have no doubt that the 1st Appellant unequivocally expressed to the IEBC its nominated member to the County Assembly of Garissa under the Gender Top-Up category.

Witness Affidavits

Counsel for the Appellants submitted that the 2nd Respondent failed to file any witness affidavit and therefore never called any witnesses. In view of this, counsel submitted, the evidence contained in the Appellants' witness affidavits remained uncontroverted by the 2nd Respondent. In response, it was submitted that the 2nd Respondent did not file witness affidavits as she did not intend to call any witnesses which intention was stated to the court by counsel during the pre-trial conference.

Rule 15(1) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 in as far as witness affidavits are concerned requires that the same be filed where a witness shall be called. The 2nd Respondent did not file a witness statement and also did not call a witness. Does this mean that the depositions made by the Appellants and their witnesses were uncontroverted" The answer is no. Rule 12 thereof requires that the witness affidavits in support of the petition be filed together with the petition and served on the Respondents who in turn (under Rule 15) will make a response thereto and serve together with witness affidavits. The 2nd Respondent filed her response to the Petition and also responded to the witness affidavits that were served upon her. The averments and depositions made in a petition and witness affidavits can be adequately challenged by the response. It would be pointless to file unnecessary witness affidavits in the name of controverting the contents of the witness affidavits.

Findings of the Court:

Pursuant to the foregoing, the upshot is that the appeal is hereby allowed to the following extent:

- 1. The learned magistrate did not err in finding that there was no evidence to suggest that the 2nd Respondent was not a member of the 1st Appellant.***
- 2. The learned magistrate erred in finding that Section 43(5) of the Elections Act did not apply to the 2nd Respondent who sought a nominative position.***
- 3. The learned magistrate erred in finding that the 2nd Respondent was duly nominated to the County Assembly of Garissa by the 1st Appellant.***

Orders of the Court:

- 1. I direct the 1st Respondent to forthwith de-gazette the 2nd Respondent and gazette the 2nd Appellant as the nominated member to the County Council of Garissa, Gender Top-Up Category.***

Costs

Costs of the appeal shall be borne by the 1st Respondent which are capped at 500,000/-

That is the Judgement of the court.

SIGNED

E.K.O. OGOLA

JUDGE

READ, DELIVERED AND DATED AT NAIROBI THIS 1ST DAY OF AUGUST 2014

(SIGNED)

G. V. ODUNGA

JUDGE

In the Presence of:-

Mr. Wilson for Appellants

Mr. Odhiambo for 1st Respondent

No appearance for 2nd Respondent

Teresia - Court Clerk



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