



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT MAKADARA

ELECTION PETITION NUMBER 11 OF 2013

NATIONAL VISION PARTY.....1ST PETITIONER

SARAH MOHAMED ALI.....2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

NESTEHE BARE ELMI.....2ND RESPONDENT

JUDGMENT

1. INTRODUCTION

The petitioners, National Vision Party and Sarah Mohamed Ali, have come to court seeking the following declarations and orders:

- A declaration that the 1st respondent exceeded its powers by failing to have due regard to the 1st petitioner's original list as submitted on 24th January, 2013 and again on 12th March 2013 and consequently irregularly and illegally omitting the 2nd petitioner's name whose name was forwarded to the 1st respondent.
- A declaration that the 2nd petitioner's right to legitimate expectation was violated by the 1st respondent when the latter illegally and irregularly omitted her name which was contained in the original list forwarded to it on 24th January 2013 and subsequently on 12th March 2013.
- A declaration that the original list submitted by the 1st petitioner on 24th January 2013 and subsequently on 12th March 2013 as one of the qualifying political parties for purposes of allocation to the Mandera County Assembly special seats was the only list the 1st respondent ought to have used when allocating the said seats.
- A declaration that the 1st respondent ought to have only used the re-submitted list from political parties only for purposes of addressing inadequacies or gaps in the original list.
- A declaration that the 1st respondent ought to have only used the original lists as submitted by political parties and draw names from the re-submitted lists where the original list was exhausted or did not have qualifying nominees.
- A declaration and order that the 2nd respondent was illegally and irregularly nominated as the 1st petitioner's representative for the Mandera county assembly special seat.
- A declaration and order that the 2nd petitioner is the 1st petitioner's duly nominated representative

for the Mandera County Assembly special seat as submitted by the 1st petitioner to the 1st respondent on 24th January 2013 and re-submitted on 12th March 2013.

- A declaration and order that the costs of this petition be borne by the respondents.

2. A SUMMARY OF THE 1ST AND 2ND PETITIONER'S CASE

It is the 1st petitioner's claim that they twice forwarded a list of party nominees to the County Assembly for special seats in respect of Mandera County to the 1st respondent. On both occasions, the 2nd respondent's name was contained in the lists. However, on 21st April, 2013, the 1st respondent caused to be published in the daily newspaper a gender top-up list in which they indicated that the position reserved for the 1st petitioner was vacant. On 19/05/13 the 1st respondent proceeded to publish a different list in the Sunday Nation newspaper where the name of the 2nd respondent was published as the special seat nominee to the 1st petitioner. Again on 21/05/13 the 1st respondent published another list in the Daily Nation Newspaper where the name of the 2nd respondent was published as the special seat nominee for the 1st petitioner. The 1st petitioner subsequently proceeded to gazette the name of the 2nd respondent in the Kenya Gazette Issue number 9794 on 17/0/13.

3. A SUMMARY OF THE 1ST RESPONDENT'S CASE

According to the 1st respondent political parties submitted lists for their nominees pursuant to the constitution, the Election Act and The Election Regulations, 2012. The 1st petitioner re-submitted its nomination list on or about 12/03/13. However, the list was only for marginalised groups and not a gender top up list. As such the 1st petitioner's slot for gender top up was declared vacant. Due to the proportion of the number of seats won by the 1st petitioner in the County Assembly elections (one elected member out of thirty), the 1st petitioner was not entitled to any seat among the marginalised special seats but rather to one seat in the gender top-up special seat. The 1st petitioner, through a letter signed by the Secretary General, nominated the 2nd respondent as the gender top-up candidate for Mandera County. The 1st respondent maintained that it fulfilled its mandate and is not a party in what appears to be party wrangles within the 1st petitioner.

4. A SUMMARY OF THE 2ND RESPONDENT'S CASE

The 2nd respondent's contention is that the 1st petitioner submitted a marginalised group list on 24/01/13 and re-submitted the same on 12/03/13. There was no list for gender top-up that was submitted to the 1st respondent on the two occasions. Subsequently the Secretary General of the 1st petitioner as an authorised officer of the party, submitted the name of the 2nd respondent as the nominee for the gender special seat for Mandera County. It is the contention of the 2nd respondent that the 2nd petitioner was at all material times a nominee for the marginalised group special seat. Since the 1st petitioner was not allocated any seat in the marginalised group, it was unable to nominate the 2nd petitioner to the Mandera County Assembly.

5. ISSUES FOR DETERMINATION

During the pre-trial conference held on 17/09/13 and by the consent of all the parties on record, the following issues were identified for determination:

- i. Whether the 1st petitioner submitted a list of party nominees prior to the elections in compliance with the law
- ii. Whether the 1st respondent being dissatisfied with the list in (i) above called for another list in compliance with the law

- iii. Whether the 1st petitioner submitted its membership list to the 1st respondent prior to the general elections in compliance with the law
- iv. Whether both the 2nd petitioner and the 2nd respondent are eligible to be nominated under the party rules and under the law
- v. Whether the 1st petitioner is properly on record.

It was agreed that the fifth issue required to be determined at the preliminary stage, by way of an interlocutory application. This court, for reasons stated in its ruling of 21/11/13, found that the first petitioner was not properly on record and was struck out accordingly. As such the matter proceeded on the 2nd petitioner's case only.

6. THE FACTS AND THE EVIDENCE

The 2nd petitioner has stated that a list of special seats party nominees for Mandera County was forwarded to the 1st respondent by the National Vision Party (NVP) on or about 24/01/13 which list contained the 2nd Petitioner's name. The said list was not annexed as evidence. Nevertheless this fact has been admitted by both respondents and as such the same is not in dispute.

The 2nd petitioner has also stated that NVP (formally the 1st petitioner herein) re-submitted its nomination list to the 1st respondent. This fact has also been admitted by both respondents. Further, the said list has been annexed as evidence and I have perused it. I have noted that the name of the 2nd petitioner appears as a nominee for Mandera County, under the heading '*County Assembly (Marginalised Group) Party list.*'

It is the 2nd petitioner's argument that the 1st respondent erroneously indicated that the gender top-up position reserved for NVP was vacant despite the fact that NVP had twice submitted a list of nominees. I have seen the newspaper cutting from the Weekend Star newspaper of 20/21 April 2013 where the 1st respondent has stated that the NVP did not submit a gender top-up list in respect of Mandera County. The 1st respondent has admitted to making the said publication.

It is the 2nd petitioner's contention that the 1st respondent ought to have picked a name for the gender top up seat from the said list. To counter this argument, the 1st respondent has stated that the 1st petitioner had failed to submit its nominee for the Gender top-up seat and that is why it was declared vacant in the newspaper publication of 21/05/13. It is as a result of this declaration that the secretary general of NVP forwarded the name of the 2nd respondent in a letter dated 29/04/13. I have seen the said letter which is on a National Vision Party letterhead. It is signed by Hon. Marere Wamwachai who is identified as the acting secretary general. The letter bears the name of the 2nd respondent as the gender top-up nominee.

The question that arises from this argument is this: 'Is the 1st respondent bound (whether in law or practice) to pick a name from the party lists submitted to it to fill whatever position that is deemed to have fallen vacant or is it at liberty to call for a specific list for the specific position that is vacant?' It is my considered opinion that the answer to this question lies within the provision of the Election Act which I shall be exploring shortly.

I have also seen the newspaper cutting of the Daily newspaper of 15/05/13 which contains a publication by the 1st respondent of political parties list. The publication is headed '*IEBC FIRST SUBMISSION OF POLITICAL PARTIES LIST*'. I have noted that the name of the 2nd petitioner appears on the list of nominees from Mandera County and that she is the only female nominee on the said list.

I have seen the newspaper cutting for the Sunday Nation Newspaper of 19/05/13 which contains a

publication by the 1st respondent. The publication is headed 'IEBC RESUBMITTED POLITICAL PARTIES LIST'. Beneath the heading is a brief explanation offered by the 1st respondent stating:

"The lists submitted by the qualifying political parties for purposes of the allocation of the County Assembly special seats (Marginalised or Gender Top-up special seats). There are 44 political parties that are qualified to at least one of these special seats. IEBC will be publishing the original lists submitted by the political parties and subsequently publish the resubmitted lists by the political parties (which were intended to address inadequacies or gaps in the original lists.) In the allocation of the names, IEBC resolved to first use the original lists and to draw names from the resubmitted list where the original list was exhausted or did not have qualifying nominees."

I have noted that this second publication by IEBC contains the name of the 2nd respondent as a gender top-up nominee for Mandera County. It is also indicated that the resubmitted list from NVP was received by IEBC on 29/04/13. I have also noted that the 1st respondent was fully aware of the need to rely on the original list unless it was exhausted or did not have qualifying nominees. From the evidence adduced in court, I find that the 1st respondent has failed to demonstrate their reason for resorting to the resubmitted list when it is clear that the original list had a female nominee for Mandera County. If the 1st respondent determined that NVP did not qualify for marginalised category slot, why did they not settle for the names already provided to identify a candidate for gender top up" Better still, why didn't the 1st respondent ask NVP to suggest a name for gender top-up amongst the names appearing on the original list"

I have seen the newspaper cutting from the Daily Nation newspaper of 21/05/13 which contains a publication by the 1st respondent. I have noted that the name of the 2nd respondent is listed under the Gender top up list of NVP for Mandera County. It has also been indicated that the NVP was allocated only one gender top-up seat.

It has been argued by the 2nd petitioner that as at the time that the 2nd respondent's name was published as a gender top-up nominee for Mandera County, she (2nd respondent) was not a member of NVP and that she was in fact party less. I have seen a letter dated 21/05/13 addressed to the advocates for the 2nd petitioner and signed by Lucy K. Ndungu, the registrar of political parties. The reference of the letter is political parties membership and it goes further to state that NESTEHE BARE ELMI is partyless. The 2nd respondent has disputed this fact by annexing as evidence a copy of NVP membership registration card. I have seen the same and noted that it bears the name of the 2nd respondent and was issued in the month of August 2012. Her membership number is indicated as 342014.

The 2nd respondent has also annexed as evidence a copy of the Kenya Gazette Notice number 9794 volume CXV-NO 105 dated 17/07/13 to demonstrate that she was duly nominated to the County Assembly of Mandera. I have seen the same.

I have also considered the oral testimony of the witnesses called on behalf of the respective parties to the suit.

5. THE APPLICABLE LAW

I have consulted the relevant laws governing election petitions generally as well as the constitution of the NVP. I shall therefore analyse the applicable law in respect of each issue identified for determination.

i. Whether the 1st petitioner submitted a list of party nominees prior to the elections in compliance with the law

Section 28 of the Election Act requires that a political party shall submit to the commission (read IEBC) a party membership list at least three months before the nomination of the candidate. This provision is couched in mandatory language. Both the petitioner and the 1st respondent are in agreement that NVP complied with this requirement. It is not in dispute that the name of the 2nd respondent DID NOT feature in the original list. Nevertheless, it did appear in the re-submitted list. (as published by the 1st respondent). The important question here is:- were the lists submitted at least three months before the nomination"

The 2nd respondent has produced a letter by Marere Wa Mwachai dated 29/04/13 nominating the 2nd respondent as the candidate for the gender top-up category. In effect, the 2nd respondent was nominated on 29/04/13. It must be demonstrated that three months prior to 29/04/13, there existed a list, in the possession of IEBC, that contained the name of the 2nd respondent. It is evident from a careful perusal of all documents produced in court that no such list existed. The 2nd petitioner has produced as evidence a list of political party members for NVP for Mandera County. I have carefully perused the list and noted that the 2nd petitioner's name appears as item number 13. However, the 2nd respondent's name does not appear at all. Both respondents did not challenge the correctness of this document even though they had an opportunity to.

Similarly, section 35(1) of the Election Act requires that a political party shall submit its party list to the commission on the same day as the day designated for submission to the commission by political parties of nominations of candidates for an election. This was supposed to have taken place 45 days prior to the elections. In other words, the NVP ought to have submitted its party list sometime in the beginning of the month of January 2013. The petitioner has produced as evidence a party list of nominees forwarded by Marere Mwachai to the IEBC on 18/01/13. The name of the 2nd petitioner appears in this list but that of the 2nd respondent does not. Both respondents have not challenged this document.

ii. *Whether the 1st respondent being dissatisfied with the list in (i) above called for another list in compliance with the law*

Section 34 of the Elections Act requires that political parties shall submit party lists to the commission in respect of nomination of candidates representing special interests. Further, Section 34(6) requires that the party submitted to the commission shall be in accordance with the constitution of nomination rules of the political party concerned. It is the contention of the 1st respondent that it was not satisfied with the list submitted by the NVP as it did not contain a nominee for the gender top-up category. However, the 1st respondent failed to demonstrate where it derives authority to call for an extra list where the original list has not been exhausted. From a reading of section 28 and section 34 of the Elections Act, it is evident that the law makers required that if the party had omitted to indicate their preferred candidate for the gender top-up category, the commission ought to have pointed out this omission to the party and directed it to name one FROM THE EXISTING LIST. Section 36(7) Election Act expressly requires the 1st respondent to select the gender top up candidate from the original list submitted to it. It was therefore irregular for the 1st respondent to have admitted the 2nd respondent's name yet it is clear from the outset that her name did not feature in the original list submitted by NVP.

iii. *Whether the 1st petitioner submitted its membership list to the 1st respondent prior to the general elections in compliance with the law*

The same provisions of law advanced in issue (i) above apply. I am satisfied that the 2nd petitioner has demonstrated that indeed a party list was submitted to the 1st respondent prior to the general elections.

iv. *Whether both the 2nd petitioner and the 2nd respondent are eligible to be nominated under*

the party rules and under the law

Paragraph 19 of the second schedule to the Political parties Act requires that every party must have nomination rules and regulations with respect to election of the party and rules governing the preparation of party lists.

Section 27 of the Election Act expressly directs that a political party shall submit its nomination rules to the commission at least six months before the nomination of its candidates.

Section 34(6) Election Act requires that nomination party lists submitted to the commission shall be in accordance with the constitution or nomination rules of the political party concerned.

The 2nd petitioner has annexed as evidence the NVP nomination rules and regulations. I have perused the same. I have noted at PART VIII regulation j, that for one to qualify for nomination as a county assembly representative, she/he must have met the minimum education standards set in the Election Act (a post-secondary qualification from a recognised institution in Kenya).

Section 22(1)(b) Elections Act requires that a candidate is eligible for nomination under the Act if he/she holds a post-secondary school qualification recognised in Kenya.

During the oral testimony of the 2nd respondent, she admitted that she had only attended primary school to the level of class four. In other words she did not complete her primary education. Further, the court also noted that the 2nd respondent had difficulty communicating in Swahili language. She could neither comprehend nor speak Swahili to the basic level ordinarily expected of a person who has attained primary education to the class four level. The proceedings had to be interpreted in Somali for her benefit. It is therefore clear that the 2nd respondent did not meet the education threshold envisaged under the NVP nomination rules. However, I have seen section 2A of the Elections (Amendment)(no.3) Act and noted that the requirements for education have been exempted for the first elections. Nevertheless, it is intended that representative of such interests must have some basic education which the 2nd respondent lacks.

In the ***National Gender and Equality case (Petition 147 of 2013)***, the high court at Milimani, Nairobi held that the responsibility of the IEBC to conduct and supervise elections under Article 90(2) of the constitution includes the duty to confirm that the persons listed in the nomination lists are duly qualified for election. It was the onus of the 1st respondent herein to ensure that the candidates nominated by NVP duly qualified for the election. Even assuming that the 2nd respondent was regularly nominated, she nevertheless did not qualify for election on the ground of her education status. If the 1st respondent had been diligent in its duty, it would not have admitted the 2nd respondent from the first instance.

In the case of ***Micah Kigen [2012] eKLR*** the court held that Article 90(2) of the constitution bestows upon the IEBC the responsibility of ensuring that the party lists meet certain criteria set out in the constitution and legislation.

Regulation 54(5) of The Elections (General) Regulations, 2012 authorises the commission to reject a nominee submitted by a political party for any elective post if that nominee is not qualified to be elected to the office for which the nomination is sought as specified under the constitution or the Election Act. I therefore find that by failing to exercise this authority, the 1st respondent acted negligently. Further, had the 1st respondent been diligent in its duty, it would have noted that the name of the 2nd respondent did not appear in the party membership list submitted to it before the elections.

v. COSTS

It has become important for me to make a finding on the issue of costs. This is because the 1st respondent is a public institution relying solely on the tax payers' money for its sustenance. As such I must bear in mind the interest of the tax payer when considering the issue of costs. It is a settled principle in law that costs must follow the event. It is also fair that the successful party should be able to recoup the expenses incurred in order to make out their case in court. Having considered all these factors, I shall only make allowance for minimal and reasonable costs in favour of the 2nd petitioner as the same shall be borne by the 1st respondent. I find that it shall not be fair to condemn the 2nd respondent to costs as she did not contribute to the circumstances that caused this suit to be filed in court.

vi. ORDERS

From the foregoing I hereby find in favour of the 2nd petitioner and make the following orders:

A declaration is hereby issued to the effect that:

- that the 1st respondent exceeded its powers by failing to have due regard to the 1st petitioners' original list as submitted on 24th January, 2013 and again on 12th March 2013 and consequently irregularly and illegally omitting the 2nd petitioner's name whose name was forwarded to the 1st respondent.
- the 2nd petitioner's right to legitimate expectation was violated by the 1st respondent when the latter illegally and irregularly omitted her name which was contained in the original list forwarded to it on 24th January 2013 and subsequently on 12th March 2013.
- the original list submitted by the 1st petitioner on 24th January 2013 and subsequently on 12th March 2013 as one of the qualifying political parties for purposes of allocation to the Mandera County Assembly special seats was the only list the 1st respondent ought to have used when allocating the said seats.
- the 1st respondent ought to have only used the original lists and resorted to the re-submitted list from political parties only for purposes of addressing inadequacies or gaps in the original list, namely if there was no female nominee in the list.
- the 2nd respondent was illegally and irregularly nominated as the 1st petitioner's representative for the Mandera county assembly special seat.
- the 2nd petitioner is the duly nominated representative of NVP for the Mandera County Assembly special seat as submitted by the 1st petitioner to the 1st respondent on 24th January 2013 and re-submitted on 12th March 2013 as she was the only female candidate for Mandera County in the lists
- the costs of this petition be borne by the 1st respondents. The same is capped at Ksh 100,000.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 5TH OF FEBRUARY 2013

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