



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.497 OF 2013
BETWEEN
JANE OCHIENG MUKHOLI.....PETITIONER/APPLICANT
AND
THE IEBC.....1ST RESPONDENT
NEW FORD KENYA.....2ND RESPONDENT
DORIS NEKESA NANYOKIA.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Jane Ochieng Mukholi, is/was a member of the New Ford Kenya Party and was in that Party's list presented to the 1st Respondent, the Independent Elections and Boundaries Commission, under **Article 90(1)** as read with **Article 177(1)(c)** of the Constitution for purposes of filling the special seats necessary to ensure that no more than two-thirds of the membership of a County Assembly are of the same gender. The County Assembly for which her name had been presented was the Bungoma County Assembly.

2. In her Petition dated 10th October 2013 she has claimed that her rights under **Articles 2(1), 4, 10, 47(1)** and **50(1)** of the **Constitution** were violated by the 1st Respondent and that she is therefore entitled to the following orders;

“(a) A Declaration that the Petitioner’s fundamental rights and freedoms including but not limited to Articles 27(1)(2); 28; 29(c)((d)(f); and 50(1) as enshrined in the Constitution of Kenya 2010, have been denied, violated, threatened, and infringed upon.

(b) A declaration that the 1st Respondent’s Committee did not comply with the Order and directive of the Court contained in the judgment of Judicial Review Cause No.217/2013 delivered on the 12/7/2013.

- (c) A declaration that owing to the foregoing, the 1st Respondent was and is in contempt of Court, and should be punished for the same.***
- (d) A declaration that the “hearing” conducted by the 1st Respondent’s Committee was farcical and the same was conducted by the 1st Respondent for its own sake.***
- (e) A declaration that the 1st Respondent’s Committee’s ruling of 16/7/2013 was unreasonable, unfair, malicious and was against the weight of evidence placed before the said Committee.***
- (f) A declaration that the Petitioner’s right to protection of legitimate expectation under Article 10 of the Constitution have been denied, infringed, violated and or threatened.***
- (g) A declaration that the 1st Respondent’s Gazettement of the 3rd Respondent of 17/7/2013 was and is illegal and unlawful and therefore a nullity in law.***
- (h) A declaration that the Petitioner has been subjected to psychological torture and the 1st Respondent’s Committee has treated her in a cruel, inhuman and degrading manner.***
- (i) A declaration that the 3rd Respondent was not registered with the 2nd Respondent, and therefore was and is not legible for nomination by the said 2nd Respondent.***
- (j) A declaration that the Petitioner complied with the nomination rules, and was and still is the bonafide 2nd Respondent’s gender-top up nominee for Bungoma County.***
- (k) An order of Judicial Review in terms of Certiorari do issue to call into the Court for purpose of quashing the decision of the 1st Respondent dated 16/7/2013.***
- (l) An order of Judicial Review in terms of Certiorari do issue to call into the Court for purpose of quashing the Gazette Notice No.9794 published on the 17/7/2013 containing the 3rd Respondent’s name in the County Assembly ward nomination list.***
- (m) An order of Judicial Review in terms of Mandamus do issue compelling the 1st Respondent to publish and Gazette the Applicant’s as the validity nominated 2nd Respondents’ Gender top up nominee for Bungoma County.***
- (n) An order of compensation be made in favour of the Petitioner herein.***
- (o) Costs of this Petition be provided for.***
- (p) Such other orders as this Hon. Court shall deem fair and just securing and protection of the Petitioners fundamental rights and freedoms.***
- (q) The Respondent’s do pay the cost of this Petition in any event.”***

Petitioner’s Case

3. Relying on her Petition aforesaid, a verifying Affidavit (there is no Supporting Affidavit and all annexures relied on are actually annexed to the Supporting Affidavit annexed to a Notice of Motion dated 10th October 2013), a Supplementary Affidavit with annexures sworn on 18th March 2014 as well as Submissions filed on 1st July 2014, has made out her case as shall be detailed herebelow.

4. That having met all the requirements for nomination as the top-up member of the Bungoma County Assembly, she was surprised when the 1st Respondent instead gazetted the 3rd Respondent, Doris Nekesa

Nanyokia, as the New Ford Kenya party special member of the Bungoma County Assembly. That no lawful reason or explanation was given for that decision.

5. Dissatisfied, she instituted **J.R. No.217 of 2013** and having heard the parties to it, Mumbi Ngugi, Majanja and Korir JJ referred the dispute to the IEBC with the further direction that it should hear the dispute afresh and allocate the slot on a priority basis to the person whose name appears in the list submitted to it by the New Ford Kenya Party in accordance with **Section 35** of the **Elections Act, 2011**. That this should have been done within 14 days of the judgment and name of the nominee picked by the Respondent to be gazetted thereafter. That in compliance thereof, the IEBC heard the dispute and determined that no sufficient evidence had been tendered by the Petitioner and found that **“the nominee [the 3rd Respondent] is therefore validly nominated as she appears in the Original Party List submitted by NFK Party”**. The Petitioner’s complaint was thereafter dismissed and she contends that the decision to gazette the 3rd Respondent as a member of the Bungoma County Assembly was reckless and illogical.

6. In addition, that the IEBC’s Dispute Resolution Committee proceedings were farcical, an exercise in “raw imaginary power” was carried out for the sake of it; was devoid of civility, fidelity to the rule of law and the Ruling delivered in the absence of the Petitioner and without notice to her was irrational, confounding, intriguing and an affront to the Constitution 2010.

7. On specific allegations of violation of the Constitution, the Petitioner claims that she was denied the right to a hearing under **Article 50(1)** of the **Constitution** and was denied the right to equality before the law contrary to **Article 27(1)**.

8. Further, that the 1st Respondent breached **Section 34(8) of the Elections Act, 2011** and para **4(e)** of the **IEBC Act**.

9. Relying on the decision in **KNEC vs R Ex Parte Geoffrey Njoroge & Anor, C.A 266 of 1996**, the Petitioner submitted that it was entitled to an order to quash the decisions of the IEBC’S Dispute Resolution Committee. Similarly, relying on the decision in **R vs Homes Secretary ex-Parte Venebles (1981) AC 407, Re Racal Communications Ltd (1981) AC 383, and O’Reilly vs MacMann [1983] AC 273**, she submitted that where a decision is irrational, unreasonable and made mala fides, a Court can intervene and right any injustice committed.

10. I should note here that none of the above decisions were submitted to this Court as is expected of any diligent litigant and Counsel. In any event, for the above reasons the Petitioner prays that the orders elsewhere set out above should be granted as prayed.

1st Respondent’s Case

11. The 1st Respondent, IEBC, file a Replying Affidavit sworn on 5th November 2013 by Moses Kipkoge, its Senior Legal Officer. It also filed written submissions on 11th July 2014.

12. It is its case firstly, that this Court has no jurisdiction to determine the present Petition in view of the provisions of **Section 75(1A)** of the **Elections Act** which confers on the Chief Justice the authority to appoint a Resident Magistrate to determine election disputes relating to elections to County Assemblies. Reliance in that regard has also been placed on the decision of the Court of Appeal in **Rose Wairimu Kamau & Others vs IEBC Nbi C.A 169 of 2013**.

13. Secondly, that in determining the question whether the Petitioner was properly nominated as a member of the Bungoma County Assembly, the 1st Respondent had to follow the directions of the High Court in the case of **National Gender and Equality Commission vs IEBC & Others Petition No.147 of 2013, [2013] eKLR** where the Court *inter-alia* ordered it to publish the party lists submitted by Political Parties and which were the basis for nominations of members of County Assemblies under **Article 90(3)** as read with **Article 177** of the **Constitution**. That having done so, it also resolved the

dispute between the Petitioner and the 3rd Respondent and the Petitioner thereafter came back to the High Court in **J.R.217 of 2013**, the dispute was resolved afresh and the 3rd Respondent was thereafter gazetted as duly nominated.

14. It is the 1st Respondent's contention therefore that it acted within the law and direction of the High Court and that it could not, without breaching **Section 13** of the **Elections Act**, purport to amend new Ford Kenya's Party List and substitute the 3rd Respondent's name with that of the Petitioner as the Petitioner wanted it to do.

15. Regarding the role of the 2nd Respondent in the dispute, the 1st Respondent contended that it failed to present such credible evidence and at the right time so as to lawfully sway the 1st Respondent to change the Party List. In any event, the 1st Respondent has and had no role in the internal management of the said Political Party on its nomination criteria. Relying on the decision in **Kiptoo vs IEBC & 2 Others [2013] eKLR**, it added that a dispute relating to nominations by Political Parties ought to be initially settled at the Political Parties Tribunal and not at IEBC or this Court. It also relies on the decision in **Beatrice Nyaboke Oisebe vs IEBC & 2 Others [2013] e KLR** for the same proposition.

16. Lastly, that since the Petitioner's name did not appear in the original Party List provided to the IEBC by New Ford Kenya with regard to the Bungoma County Assembly, upon allocation and gazette of those seats, the 3rd Respondent was one of four women gazetted as such and to gazette the Petitioner would be against **Article 90(2)(b)** of the **Constitution**.

17. For the above reasons, the 1st Respondent prays that the Petition be dismissed with costs.

2nd Respondent's Case

18. Col. Benjamin Muema, the Secretary General of New Ford Kenya in an Affidavit sworn on 6th November 2013 deponed that the Petitioner is **"the bonafide nominee"** for the Party and not the 3rd Respondent. The reason for so stating was that the Petitioner **"was the 1st nominee in the original list submitted by the Party to the IEBC"** and this was after she was subjected to thorough vetting and verification by the party.

19. Further, he deponed that when the Party discovered that the IEBC had published the 3rd Respondent's name in place of the Petitioner, he immediately took up the issue and pointed out the anomaly to IEBC. An investigation as to whether the 3rd Respondent was a member of New Ford Kenya was also initiated and by a letter dated 22nd May 2013, the Registrar of Political Parties confirmed that the 3rd Respondent was not a member of any registered political party.

20. It is the 2nd Respondent's further case that despite New Ford Kenya's continued protestations, the 1st Respondent went on and published the **"name of the 3rd Respondent as the 2nd Respondent's gender top-up nominee for Bungoma"**

21. Lastly, that the 2nd Respondent wholeheartedly supports the Petition and all the Prayers sought should be granted as prayed.

3rd Respondent's Case

22. Although a major player in the dispute at hand, the 3rd Respondent did not participate in these proceedings at all and therefore I cannot tell what her response to the Petition is.

Determination

23. What is the Petition herein about? It is in summary seeking the determination whether the Petitioner

was entitled to nomination as a member of the Bungoma County Assembly and whether therefore the decision dated 16th July 2013 and Gazette Notice No.9794 of 17th July 2013, to the contrary and indicating the 3rd Petitioner as nominee, should be quashed. Further, whether the 1st Respondent should be compelled to publish the Petitioner's name as the gender top-up nominee to the Bungoma County Assembly. All other issues raised in pleadings and submission are corollary and peripheral to these.

24. Having said so, the 1st Respondent raised the question whether this Court has the jurisdiction to determine the above issues. I must therefore begin from there and if I find that this Court has no jurisdiction then my judicial tools must be put down and the matter comes to an end. If I find that there is indeed jurisdiction, then I shall move on to determine the substantive issue(s) raised in the pleadings.

25. In taking the above approach, I need not repeat the words of Nyarangi J.A in **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (K) Ltd [1989] 1 KLR 14** to that effect but I was also pointed out to the decision of the Supreme Court in **Re: The Matter of the interim Independent Electoral and Boundaries Commission [2011] eKLR**, where it stated thus;

"The Lillian 'S' case established that jurisdiction flows from the law and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."

26. In that context, what was the status of each Party by the time this Petition was filed on 11th October 2013? It cannot be contested that the New Ford Kenya Party List for nominees to the Bungoma County Assembly was for purposes of gender top up in accordance with **Article 177(1)(b)** of the **Constitution** after the 2013 General Elections held on 4th March 2013. It cannot also be contested that the original Party List had the name of the 3rd Respondent and not the Petitioner and that by his letter dated 8th May 2013, nearly two months after the General Elections, Col. Benjamin Muema wrote to the Chairman of the IEBC and stated as follows;

"Dear Sir,

RE: GENDER TOP UP LIST – BUNGOMA COUNTY

It has been brought to our attention that DORIS WEKESA NANYOKA ID.NO.22907360 who was earlier nominated in the above mentioned list is not a member of the party.

We have therefore decided to replace her name in the, list with that of JANE OCHIENG MOKHOLI ID NO.8431607.

Note that the only signatory to the party is COL.BENJAMIN MUEMA SECRETARY GENERAL. Any other communication not bearing his signature is illegal, null and void.

Please disregard only other communication on the matter.

Yours faithfully,

Signed

Col. Benjamin Muema

SECRETARY GENERAL"

27. The 3rd Petitioner was nonetheless gazetted as duly nominated vide Gazette Notice No.9794 published on 17th July 2013, close to three months before the Petition was filed.

28. Without going to all other issues raised in the Petition and noting that the matter is essentially a dispute relating to the electoral process, does this Court have jurisdiction to interrogate the dispute herein? The 1st Respondent has submitted that this Court lacks such jurisdiction but the Petitioner and the 2nd Respondent failed to address that issue at all.

29. On my part, I have perused two Court of Appeal authorities on the subject. In **Patricia Cherotich Sawe vs IEBC & Anor C.A 178 of 2013** the Court of Appeal stated as follows;

“The second issue is whether indeed, the nomination in question could only be challenged by way of an election Petition since the nominated persons have already been gazetted. On this point, we wish to echo the finding of this Court (Maraga, Mwera & J. Mohammed JJ.A) in Civil Appeal No.169 of 2013 in their holding that where the complaint giving rise to the appeal was lodged with the IEBC or any of the other tribunals before the gazettelement of the names, then the Court has jurisdiction to determine the matter. In this case, the complaint had been lodged with the IEBC long before the gazettelement. Indeed, the Petition before the High Court was determined on 12th July 2013 ...”.

30. Further, in **Rose Wairimu Kamau & 3 Others vs IEBC C.A 169 of 2013**, the Court of Appeal stated thus;

*“In reaching this conclusion, we are alive to the fact that once the nominees to Parliament and to the County Assemblies under Articles 97(1)(c) and 177(2) respectively have been gazetted, as the High Court correctly observed in **The National Gender and Equality Commission vs The IEBC & Others, Petition No.147 of 2013; [2013] eKLR**, they are deemed to be elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election Petitions under Article 105 of the Constitution or Part VII of the Elections Act as the case may be. That, however, does not apply here as the complaint giving rise to this appeal was lodged with the IEBC and a Constitutional Petition filed in the High Court before the nominees were gazetted. We are therefore entitled to make the orders we have made.”*

31. From the above decisions, for this Court to have jurisdiction in a matter of a dispute relating to Political Party Lists for nominations to membership of a County Assembly, the following conditions must be met;

i. The proper manner to challenge the membership of any member of a County Assembly whether elected or nominated is by way of an election Petition under the relevant law, in this case **Parts III and IV of the Elections Act, No.24 of 2011**

ii. Where a complaint giving rise to the dispute was lodged with the IEBC or the High Court before gazettelement of the nominees, then the need for an election Petition would be dispensed with.

32. What is the history of the present complaint in that context? It is obvious that subject to what I shall say later, the initial complaint before gazettelement was made of the 3rd Respondent as nominee on 17th July 2013 because the following actions were taken prior to that date;

a. Upon the directions and orders of the High Court in **Petition No.147 of 2013**, the IEBC published the names of all nominees in the original Party Lists and commenced the resolution of 588 complaints. One of those complaints was the Petitioner’s and it was dismissed forcing her to institute **J.R No.217 of 2013**.

b. The High Court heard **J.R. No.217 of 2013** and on 12th July 2013 referred the dispute back to the IEBC for rehearing afresh.

c. A fresh hearing was conducted on 16th July 2013. The Petitioner’s complaint was again dismissed.

d. On 17th July 2013, Gazette Notice No.9774 was published and the 3rd Respondent was retained as a nominee.

e. The Petitioner took no further action until the filing of the present Petition.

33. Has the Petition met the test that was set by the Court of Appeal and summarized elsewhere above? It is difficult, to my mind, not to find otherwise because although the Petition seeks orders that the 3rd Respondent should be removed from office, it is also true that the same Petition questions the conduct of the IEBC prior to the gazettelement of the 3rd Respondent as New Ford Kenya's nominee and also questions the conduct of the IEBC's Dispute Resolution Committee prior to gazettelement. In addition, there are questions whether the Petitioner's constitutional rights were violated prior to the gazettelement aforesaid.

34. In a nutshell, I am unable to find that this Court has no jurisdiction to determine the dispute before it but as to the merits of the Petitioner's case, that is a matter to be shortly determined.

35. Having held as above, the remaining issues for determination are the following;

i. Whether the 1st Respondent violated the law in gazetting the 3rd Respondent as New Ford Kenya's nominee for the gender top up position in the Bungoma County Assembly.

ii. Whether the 1st Respondent in any way violated the Petitioner's rights under **Articles 27(1)(2), 28, 29(c)(d)(f), 47 and 50(1) of the Constitution.**

iii. Whether the Petitioner is entitled to the Reliefs sought.

Issue No.(i); Whether the 1st Respondent violated the law in gazetting the 3rd Respondent as New Ford Kenya's nominee for the gender top up position in the Bungoma County Assembly.

36. On this issue, the Petitioner has submitted that the 1st Respondent had no lawful reason to gazette the 3rd Respondent as a member of the Bungoma County Assembly, a position shared by the 2nd Respondent. The 1st Respondent on the other hand submitted that the dispute between the Petitioner, the 2nd and 3rd Respondents was not within the ambit of its mandate and that it only followed the law and the directions of this Court in **J.R No.217 of 2013** as well as **H.C Petition No.147 of 2013** in effecting the impugned Gazette Notice.

37. In addressing this issue, two matter of fact must be settled;

a. The New Ford Kenya Party is the one that submitted the name of the 3rd Respondent to the IEBC in its Party List under **Article 90(1)** as read with **Article 177(1)(b) of the Constitution.** The lame excuse by Col. Muema that the Party did not and does not know where her name came from is not borne out by the evidence on record. I say so because his letter aforesaid was explicit that the 3rd Respondent "**had earlier [been] nominated in the above-mentioned list**" but was found not to be a member of the Party and that was the only reason for the changes proposed by the Party.

b. The New Ford Kenya Party introduced the Petitioner's name to the Party List vide letter dated 8th May 2013. This was contrary to **Section 35** of the Elections act which provides thus;

“(1) 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 before the nomination of candidates under Article 97(1)(a) and(b), 98(1)(a) and 177(1)(a) of the Constitution.”

38. In the above context, what did the IEBC do? It heard the Petitioner's complaint and dismissed it

forcing her to file **J.R. No 217 of 2013**. In that case, the High Court ordered as follows;

“(a) This matter is returned to the Respondent to hear this dispute afresh and allocate the slot on priority basis for the Gender Top up category for NFK Party in Bungoma County to the person whose name appears in the list submitted to it by the party in accordance with Section 35 of the Elections Act, 2011. This should be done within 14 days from today’s date. The name of the nominee picked by the Respondent to be gazetted thereafter.

(b) There will be no order as to costs” (Emphasis added)

39. Who was the **“person whose name appears in the list submitted to it by the party in accordance with Section 35 of the Elections Act, 2011?”** Obviously the 3rd Respondent and not the Petitioner.

40. Upon hearing the complaint, IEBC dismissed it and complied with the above order by gazetting the 3rd Respondent as the duly nominated gender top up member for Bungoma County Assembly.

41. In acting as it did, the IEBC was also following the orders of this Court in the **National Gender & Equality Commission Case (supra)** where the Court ordered as follows;

“(i) The IEBC shall within 5 days from the date hereof publish in accordance with regulations 54 of the Election (General) Regulations, 2012 the party lists submitted for the parties that have qualified in accordance with Article 90(3) for membership of the County Assemblies under Article 177 of the Constitution in at least two newspapers of national circulation.

ii. The IEBC shall immediately put in place mechanisms to resolve any disputes concerning the list in accordance with Article 88(4) of the Constitution as read with Section 74 of the Elections Act, 2011 upon publication of the party lists.

iii. The IEBC shall finalise settlement of all disputes submitted to it in respect of the party list within 7 days from the date of publication of the party lists stated in (i) above.

iv. The final list of nominees shall be gazetted 7 days after the determination of any disputes.

v. We direct the IEBC to develop a program, in conjunction with constitutional and statutory commissions and political parties, to develop policies and measures geared towards increasing the participation of women, youth, persons with disabilities, marginalized groups and other vulnerable persons to effectively participate in political processes.

vi. Each party shall bear its own costs.”

42. Having complied with **Section 35** aforesaid and the orders of the High Court in both of the above cases, it is very difficult to find fault in the way the IEBC conducted itself in addressing the Petitioner’s complaint and I so find.

Whether the 1st Respondent in any way violated the Petitioner’s rights under Articles 27(1)(2), 28, 29(c)(d)(f), 47 and 50(1) of the Constitution.

43. It is now trite that a Party alleging violations of Constitutional rights ought to plead such violations with a measure of particularity i.e. the right violated and how it was violated (See – **Annarita Karimi Njeru vs Republic (1976-980) 1 KLR 1272** and **Trusted Society for Human Rights Alliance vs Mumo Matemu. (2013) eKLR**).

44. This is also why **Rule 10** of the **Constitution** of Kenya (**Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides as follows;

“(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- a. applies or interprets this Constitution;*
- b. enacts, applies or interprets any law; or*
- c. makes or implements public policy decisions.*

(2) The national values and principles of governance include—

- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
- d. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
- e. good governance, integrity, transparency and accountability; and*
- d. sustainable development.”*

45. I have perused the Petition dated 10th October 2013 and with respect, the only right which was pleaded with a measure of particularity is the right to be heard purportedly under **Articles 47(i) and 50(1)** of the **Constitution**. The complaint made in that regard is that **“the further fresh hearing ordered by the Court upon the 1st Respondent’s committee was not conducted faithfully and the same is clearly brought out by the fact that the 1st Respondent arrived at a decision that is not informed by the ‘hearing’ it purportedly conducted on 16th July 2013.”** Little of substance was said of that matter in submissions but I will address it herebelow.

46. As regards **Articles 27(1), 28 and 29(d) (f)** of the **Constitution**, all that was said in the Petition is that **“the provisions [are] under imminent threat”**. In submission, all that was stated was that **“among the constitutional breaches committed by the 1st Respondent’s Committee against the Petitioner are the right of equality before the law, and the right to be accorded equal benefit of the law as provided under Article 27(1). In reaching at its decision the way it did, Petitioner was evidently discriminated against by the 1st Respondent’s Committee.”** Nothing was said of **Articles 28 and 29(1) (d)(f)**.

47. Despite the above limitations in the Petition and Submissions, I shall address the said alleged violations in the context of the facts as I have elsewhere set out above.

Right to Equal Protection and Equal benefit of the Law under Article 27(1)

Article 27(1) of the **Constitution** provides as follows;

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

48. In the Petition, it was alleged that the above right was threatened with violation and in submissions, it was alleged that the Petitioner was discriminated against. As to how this was done, I cannot tell. In any event, in **Chaudhar & Chatuverdi’s Law of Fundamental Human Rights, 4th Edition, at page 232** it is stated that;

“Equality means equality among equals, having no implication of equality absolute in all circumstances so as to wipe out all distinctions between one person and another (B.K. Naunjundeswara Krishnayyar (Dr.) vs State of Coorg I.L.R 1955 Mys 117). It means equality of

various kinds, as civil equality, social equality, natural equality as well as economic equality. Its content is both positive and negative, meaning in the latter that special privileges of all kinds should be abolished, and that all barriers of birth, wealth, caste, creed and colour should be removed so that no one suffers from any kind of social or political disabilities and that there should be no difference between a man and man. It prevents any person or class of persons from being singled out as a special subject for discrimination and hostile legislation.” (V.G Row vs State of Madras A.I.R. 1951 Mad. 147)

49. At page 233, the learned authors then added that;

“Equality though opposed to discrimination should not be confused with uniformity” (Mohamad Hussain vs State 1954 Cr. L.J. 836)

50. I am persuaded by the above statements but where is the evidence that the Petitioner was denied equality and protection of the law as defined above?

51. She was before the IEBC, twice, and before the High Court once where she was heard and decisions made. Is dissatisfaction with that decision a basis for allegation of violations of **Article 27(1)**? I think not.

Right to Human Dignity and Freedom and Security of the Person

52. **Articles 28 and 29(d) and (f)** provide as follows;

“28. Every person has inherent dignity and the right to have that dignity respected and protected.

29. Every person has the right to freedom and security of the person, which includes the right not to be—

(a) ...

(b) ...

(c) ...

(d) subjected to torture in any manner, whether physical or psychological;

(e) ...

(f) treated or punished in a cruel, inhuman or degrading manner.”

53. I have looked at the circumstances of this case, the facts as pleaded and I am completely unable to tell how the above rights have been violated and/or threatened with violation. Not to enter into the hazy waters of speculation, that is all I can say on the subject.

Right to Fair Administrative Action and Right to a fair hearing

54. **Article 47(1) and 50(1)** provide as follows;

47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

55. While the Petitioner may have pleaded, loosely, both Articles, the facts would point to the fact that the substratum of her Petition relates to the manner in which the IEBC's Dispute Resolution Committee handled her complaint. That is why in submissions, it was stated on her behalf that **“her dispute was not resolved by application of the law and the consequent decision rendered therein was not only unfair, but tellingly biased in favour of the 3rd Respondent.”**

56. In that context, in the exercise of its mandate to resolve disputes under **Article 88(4)(e)** of the **Constitution**, the IEBC (and its Dispute Resolution Committee) perform a quasi-judicial function and must therefore conform to the principles of judicial adjudication including impartiality.

57. For avoidance of doubt, **Article 88(4)(e)** provides as follows;

(4) 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) ...

(b) ...

(c) ...

(d) ...

(e) 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;

58. In submissions, Counsel for the Petitioner spent a great deal of time on matters he termed **“legislative breaches”** and stated that the IEBC Dispute Resolution Committee;

(a) had no jurisdiction to interrogate the Party Lists;

(b) Had no regard for the doctrine of *audi alteram partem* (each party must be heard in any dispute).

(c) Acted irrationally, unreasonably and mala fides.

59. To my mind, the above matters although raised outside the context of **Article 50(1)** actually go to its root. If so, how did the 1st Respondent allegedly violate this right?

60. It must not be forgotten that the 1st Respondent was ordered by the high Court in both **J.R. No.127 of 2013** and in **Petition No.147 of 2013** to resolve all disputes arising from the Party Lists and the nominations of members of County Assemblies including the Petitioner (specifically so in **J.R No.127 of 2013**). It therefore acted pursuant to a Court Order and also within its mandate under **Article 88(4)(e)** as shown above. How then can it be said to have acted without jurisdiction or *ultra vires* its mandate? That argument is hollow and cannot stand.

61. The Petitioner was also heard, twice, by the IEBC'S Dispute Resolution Committee and once by the High Court. How can the right to be heard be said to have been violated in the circumstances?

62. As to whether the IEBC's Dispute Resolution Committee acted irrationally, unreasonably and mala fides, it was submitted that the said Committee **“overlooked certain material facts”** and **“arrived at a decision without considering material facts of the case.”** On this point, it must be understood that the Committee is not a Court of Law and at the very least it only ought to give reasons for its decision(s). In

the instant case, the finding was that **“no sufficient evidence was adduced to prove the allegation”** that **“the nominee Davis Nekesa Nanyokia is not a member of NFK”** and that **“the nominee is therefore validly nominated as she appears in the Original Party List submitted by NFK party. The complaint is therefore dismissed”**

63. The above statements, in my view, are sufficient to explain the reason why the complaint was dismissed and this Court accepts it as a finding of that Committee which gave the Petitioner sufficient reason for the said dismissal.

64. Further, how can the Committee be said to have acted irrationally and unreasonably when it upheld the Party List given to it by the New Ford Kenya Party under **Section 35** of the **Elections Act** and also in accordance with the orders of the High Court in **J.R. No.127 of 2013** and **Petition No.147 of 2013** which essentially obligated it to abide by the Original Party Lists and not any other amendments to it such as was purportedly done by the 2nd Respondent in this case.

65. I am unable to find any violation of **Article 50(1)** (or even **Article 47(1)**) in the circumstances.

Whether the Petitioner entitled to the Reliefs sought?

66. I have found that the Petitioner’s case on the law and facts is weak and unsubstantiated but I deem it necessary to address one last issue which is the subject of Prayer (i) of the Petition; whether the 3rd Respondent was eligible at all to be nominated as a member of the Bungoma County Assembly? Both the Petitioner and the 2nd Respondent have made a lot out of that issue and in fact that was the entire case by the 2nd Respondent.

67. In that regard, I have held that the 2nd Respondent cannot deny that in its Original Party List, the 3rd Respondent had been nominated as above. Later, it transpired that she was not a member of the New Ford Kenya Party as confirmed by the Registrar of Political Parties who further confirmed that the 3rd Respondent was in fact a member of no Party.

68. On this question, **Regulation 54** of the **Elections (General) Regulations 2012** provides as follows;

“(1) Each political party shall submit to the commission a party list of all persons who would stand elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with Article 90 of the Constitution and Section 34, 35, 36 and 37 of the Act.

(2) The party list referred to in sub regulation(1) shall contain the name, address, age, sex disability and category of disability, phone number, occupation, elective post sought and such other qualifications as are provided under the Constitution and the Act.

(3) A party list submitted under sub regulation (1) shall be in accordance with Sections 36 of the Act, and shall be-

(a) by signed by the authorized official of the political party submitting the party list; and

(b) be submitted in hard copy ad in electronic form.

(4) Each political party list nominee shall after nomination submit to the Commission a letter stating his or her intention to serve if nominated.

(5) The Commission may 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 Act.

(6) The rejection by the Commission of a nominee under this regulation shall not invalidate the entire party list submitted by the political party.

(7) The Commission, after making the decision to reject a nominee, shall inform the political party concerned of that decision and request that political party to submit another name within such time as the commission shall determine.

(8) The Commission shall publish the final party list in at least two newspapers with nationwide circulation.”

69. More fundamentally, **Section 13** of the **Elections Act** as read with **Section 35** of the **Elections Act** provides as follows;

“(1) A political party shall nominate its candidates for an election under this Act at least forty-five days before a general election under this Act in accordance with its constitution and nomination rules.

(2) A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission:

Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable, substitute its candidate before the date of presentation of nomination papers to the Commission.

(3) Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall not be more than twenty-one days after the date of publication of such notice.” (Emphasis added)

70. I should also mention that **Section 40** of the **Political Parties Act** provides as follows;

“(1) 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.

(2) 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.

71. The import of all the above provision is that I am unable to delve into that question at all and the issue ought to have been resolved by the Political Parties Tribunal under **Section 40(1)(d)** and neither the IEBC nor this Court can and should at the first instance resolve it. I have also not been shown any law that obligates a political party to nominate only its members to represent the special interest groups including gender in County Assemblies however convenient, logical, reasonable and attractive such an action may

sound.

72. Turning back to the prayers in the Petition, I have given sufficient reasons why the following prayers cannot be granted;

- i. Prayers (a) and (b) on alleged violations of **Articles 27(1)(2), 28, 29(cg)(d)(f), 47(1) and 50(1) of the Constitution.**
- ii. Prayer (b) on alleged non-compliance by the IEBC with the judgment in **J.R. No.217 of 2013.**
- iii. Prayer (c) on alleged contempt of Court by IEBC.
- iv. Prayers (d), (e) on the alleged illegality of the hearings conducted by the IEBC's Dispute Resolution Committee.
- v. Prayer (g) on alleged illegality of Gazette No.9947 on the 3rd Respondent's nomination.
- vi. Prayer (i) and (j) on whether the 3rd Respondent's nomination was lawful.
- vii. Prayers (k), (l) and (m) on whether orders of certiorari can issue.

73. That leaves me with Prayers (f) and (n) on compensation. My short answer is that nothing was said of the two prayers at all and I have no basis to delve into them. They too shall similarly not be granted.

74. On costs, the 2nd Respondent is as to blame for giving the Petitioner misplaced hope as is the Petitioner for chasing a misplaced claim. However she has suffered enough since 2013 in attempting to make her way to the Bungoma County Assembly. I see no reason to tax her further by an award of costs. Let each Party therefore bear its own costs.

Disposition

75. For all the above reasons, the Petition dated 10th October 2013 is dismissed.

76. Each Party shall bear its own costs.

77. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2015.

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Miss Said for 1st Respondent

No appearance for Petitioner

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

17/9/2015