



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 53 of 2013

IN THE MATTER OF THE PROVISION OF THE POLITICAL PARTIES ACT 2011

AND

IN THE MATTER OF THE ALLEGED BREACH OF PARAGRAPH 9B OF ELECTORAL CODE OF CONDUCT

BETWEEN

MOSES KAUNI MASAKI..... PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC).....1<sup>ST</sup> RESPONDENT

THE NATIONAL ALLIANCE (TNA).....2<sup>ND</sup> RESPONDENT

REASONS FOR THE DECISION

1. The Petitioner herein, **Moses Kauni Masaki**, vide his Petition dated 31<sup>st</sup> January 2013 sought the following orders:

- a. **A declaration that the Deputy Governor for TNA Nairobi County is not qualified within the meaning of Article 180(2)(5) of the Constitution.**
- b. **An order prohibiting the IEBC from accepting the nomination of the TNA Deputy Governor for Nairobi County Mr. Robinson Nyangau Achoki who is not qualified as he is not eligible for election as a Member of the County Assembly for Nairobi County as required by article 180(2)(5) of the Constitution.**
- c. **The Court do make a pronouncement of law whether a person registered as a voter in Nyamira County is qualified to contest for the post of Governor or Deputy Governor of Nairobi County within the meaning of Article 180(2) of the Constitution.**
- d. **Any other order the Court may deem fit in the circumstances of this matter**

2. On 1<sup>st</sup> February, 2013 we dismissed the said Petition with no order as to costs. We now give our reasons for the said decision.

3. According to the Petitioner, the 2<sup>nd</sup> respondent chose **Mr Robinson Nyangau Achoki** as the Deputy Governor for Nairobi County to deputise the 2<sup>nd</sup> respondent's candidate for the said County. However, the said **Mr. Achoki** is a registered voter in West Mugirango Constituency in Nyamira County hence not qualified to hold the Deputy Governor's position of Nairobi County within the meaning of Article 180(2) (5) of the Constitution which according to him, makes it mandatory that for a person to qualify to be elected as a County Governor, the person must be eligible as a member of the county assembly hence **Mr Achoki** does not meet the constitutional threshold as contemplated by article 180(2)(5) of the Constitution.
4. On the 2<sup>nd</sup> respondent it was contended that the Petitioner has not made evidence to prove the allegations in the petition as required under Section 107 of the Evidence Act. According to it the dispute ought to have been heard within the party dispute resolution process.
5. On behalf of the 1<sup>st</sup> respondent it was argued that the dispute herein is between the petitioner and the party and the Court ought not to entertain the same. Further there is no evidence to support the allegations made.
6. We considered the material on record. We agree that there is no iota of evidence to support the petitioner's contention that the said Deputy Governor Nominee is registered elsewhere assuming, without deciding that it is a requirement that a candidate for the said position must be a registered voter within the county for which he intends to vie for the same position. The burden was upon the petitioner under section 107 of the Evidence Act to prove the said allegation.
7. We further agree that the issue herein was a party issue that ought to have been dealt with at the party level before the court's jurisdiction could be invoked. Accordingly, we agree that the matter was not properly before the Court and secondly there was no merit in the said allegations hence the decision to dismiss the same.

**Dated at Nairobi this 5<sup>th</sup> day of February 2013**

**D S MAJANJA**

**JUDGE**

**W KORIR**

**JUDGE**

**G V ODUNGA**

**JUDGE**