



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 175 of 2013**

**THE NATIONAL ALLIANCE PARTY.....1<sup>ST</sup> PETITIONER**

**LYDIA MATHIA.....2<sup>ND</sup> PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT**

**RULING**

1. The petitioners have moved the court by a petition dated 25<sup>th</sup> March 2013. In the petition they seek the following reliefs;

*(a) That a declaration be issued that the respondent's list of Women Members nominated to Senate for The national Alliance party (TNA) contained in Gazette Notice No. 3508 published in the Kenya Gazette dated 20<sup>th</sup> March 2012 violates Articles 90 and 98 of the constitution.*

*(b) That a declaration be issued to declare that the respondent has no power to re-organise or tinker with the order of priority indicated in the First petitioner's final list of Women Members Nominated to the Senate.*

*(c) That a declaration be issued to declare that the first petitioner's rights and freedoms enshrined in and protected by Articles 27, 36, 38, 47 and 50 of the Constitution have been violated by the decision of the respondent contained in the Gazette Notice No. 3508 published in The Kenya Gazette dated 20<sup>th</sup> march 2013.*

*(d) That an order of certiorari be issued to bring into this court and quash Gazette Notice No. 3508 published in a special issue of The Kenya Gazette dated 20<sup>th</sup> March 2013 to the extent that it concerns the Women Members Nominated to the Senate.*

*(e) That an alternative to prayer (d) above, an order of certiorari be issued to bring into this Court and quash Gazette Notice No. 3508 published in a special issue of The Kenya Gazette dated 20<sup>th</sup> March 2013 to the extent that it concerns the Women Members nominated to the Senate by the National Alliance Party (TNA).*

*(f) That a declaration be issued to declare that the decision of the respondent contained in Gazette Notice No. 3508 published in a special issue of The Kenya Gazette dated 20<sup>th</sup> March 2013 violates the rights, privileges and power of the First Petitioner enshrined in Articles 36, 38, 90 and 91 of the First petitioner.*

(g) That a declaration be issued that the second petitioner was the third woman elected on 4<sup>th</sup> March 2013 as one of the first petitioner's four successful candidates on its list of women members nominated to the Senate.

(h) That a declaration be issued to declare that the decision of the respondent to exclude the second petitioner from the first petitioner's list of Women Members Nominated to the Senate on the grounds that she is a Kikuyu amounts to gross abuse of her rights to equality and freedom from discrimination and Human Dignity protected by Articles 27 and 28 respectively of the Constitution.

(i) That a declaration be issued to declare that the respondent has violated the second petitioner's rights under Articles 36, 38 and 47 of the Constitution in excluding the second petitioner from the first petitioner's list of Women Members Nominated to the Senate in Gazette Notice No. 3508 published in a special issue of The Kenya Gazette dated 20<sup>th</sup> March 2013.

(j) That an order of mandatory injunction be issued to compel the respondent to gazette the election of the second petitioner as a woman member nominated to the Senate by the first petitioner in accordance with the TNA party's valid list of the First petitioner during the General Elections held on 4<sup>th</sup> March 2013.

(k) That the costs of this petition be borne by the respondent.

2. The petition was accompanied by a Chamber Summons dated 25<sup>th</sup> March 2013, in which the petitioners seek the following orders;

*[2] THAT pending the hearing and determination of this Application/Petition the Honourable Court be pleased to grant an order of stay of Gazette No. 3508 published in the Kenya Gazette dated 20<sup>th</sup> March 2013 to the extent that it concerns and specifies the Women Members Nominated to the Senate by the various political parties.*

3. The facts leading to the petition are set out in the supporting affidavit of Johnson Sakaja sworn on 25<sup>th</sup> March 2013 and were briefly outlined by Mr Mungai, counsel for the petitioners. The 2<sup>nd</sup> petitioner applied to The National Alliance party ("TNA") to be considered as a nominated Member of Parliament. She was duly selected by the party and in the list submitted by it to the Independent Electoral and Boundaries Commission ("IEBC") on the 29<sup>th</sup> January 2013, she was listed as the third person on the party list. Under **Article 90**, party seats are allocated based on the proportion of seats the party wins after the election. After the General Election, TNA became entitled to four seats in the Senate and since the 2<sup>nd</sup> petitioner was third on TNA party list, she expected to be nominated.

4. When the IEBC published **Gazette Notice No. 3508** setting out members elected based on the party lists, the 2<sup>nd</sup> petitioner's name was missing. The petitioners aver that the removal of her name was on the basis that she was a Kikuyu and she was removed to ensure regional and ethnic balance amongst the persons nominated to the Senate.

5. Mr Mungai argued that the removal of the 2<sup>nd</sup> petitioner from the party list was a breach of her fundamental rights and freedoms protected under **Article 27** of the Constitution. He argued that the IEBC lacked authority to alter or change the names of the persons appearing on the party lists. That by so doing, the 2<sup>nd</sup> petitioner's rights were taken away arbitrarily and without due process.

6. Mr Mungai submitted that this matter was not an election petition but a petition filed to enforce fundamental rights and freedoms. It was also a petition challenging the power of the IEBC and the court in both cases had jurisdiction to deal with the petition under the provisions of **Article 165**.

7. Mr Rigoro, counsel for the IEBC, in response to the application submitted that the matter before the Court was in the nature of an election petition and should have been filed as such. The respondent relied

on the notice of preliminary objection dated 26<sup>th</sup> March 2013. Simply stated that the objection is that the Chamber Summons violated the provisions of the Constitution, the ***Election Act, 2011*** and the ***Elections (Parliamentary and County) Petition Rules, 2013*** as the petition is not filed in accordance therewith. Counsel submitted that the gazetting of Members of Parliament brought the electoral process to its logical end and the persons elected are expected to subscribe to and take the oath of office in accordance with the Constitution. The respondent relied on the case of ***National Gender and Equality Commission v Independent Electoral and Boundaries Commission Nairobi Petition No. 147 of 2013 (Unreported)*** as authority for the proposition that this matter can only be determined through a petition filed in accordance with the ***Elections (Parliamentary and County) Petition Rules, 2013***.

8. Whether and to what extent the Court will grant the orders sought by the petitioners' depends on the nature of the proceedings before the court. Is this an election petition or any other petition to enforce fundamental rights and freedoms and provisions of the Constitution? The question is not one of form but one of substance. The Court must look at the entire case and make a determination.

9. The ultimate result of the petitioners' case is clear when one appreciates prayers (d), (e), (i) and (j) of the petition. The ***Gazette Notice No. 3508*** is a declaration that a person is a duly elected member of Parliament. An order quashing the gazette notice will result in the loss of seats by persons who are Members of Parliament. Since, there are already members of Parliament by virtue of the party list, flawed or otherwise, the 2<sup>nd</sup> petitioner can only regain her seat if a duly elected Member of Parliament loses her seat and the only way the Court is permitted to intervene is through an election petition. Prayer (g) of the petition seeks a declaration that the 2<sup>nd</sup> petitioner is the duly elected third member of TNA Senate party list. This prayer is consistent with the power of the election court under **section 80** of the ***Elections Act, 2011***. In whatever manner this matter is cut, sliced and diced it is one to determine whether a person has been validly elected to Parliament and it is therefore a matter governed by **Article 105** of the Constitution.

10. Mr Mungai emphasised that this matter is one for enforcement of fundamental rights and freedoms but the fact that the issues raised by the petitioners are matters of fundamental rights and freedoms does not remove the matter from the ambit of **Article 105**. In the case of ***Dr Calvin Kodongo and Others v The Transition Authority and Others Nairobi Petition No. 174 of 2013 (Unreported)***, I observed, “[12] *[F]undamental rights and freedoms do not exist in isolation, they are part of the Constitution and must be realised within the framework set by the Constitution. It is a cardinal principle of interpretation of the Constitution that it must be read as a whole and in this respect the provisions regarding the electoral and election process cannot be isolated and sacrificed at the altar of absolute individual rights and fundamental freedoms. The fundamental rights and freedoms guaranteed under the Bill of Rights are also given effect and realised within the framework of governance. [13] Chapter Seven and Eight of the Constitution titled “Representation of the People” and “The Legislature” respectively give effect to the principle of sovereignty of the people articulated in the Preamble and Article 1. These provisions are underpinned by various fundamental rights and freedoms, which include political rights guaranteed under Article 38, which are given effect by provisions dealing with elections.*”

11. Even in determining election petition the High Court, is obliged not only to enforce fundamental rights and freedoms of the persons before it. The court is must also consider the powers exercised by the IEBC in relation to its responsibility when these powers are called in to question. The insistence on this course does not in any way prejudice the petitioners' case as the manner in which a challenge to an election is made is ordained by the Constitution itself. In ***Ferdinand Waititu v Independent Electoral and Boundaries Commission and Others Nairobi Election Petition No. 1 of 2013 [2013] eKLR***, Justice Mumbi Ngugi stated as follows; “[27] *The petitioner has submitted that the Court has jurisdiction to entertain his Petition and application on the basis of Article 165(3)(a) of the Constitution, and that this right cannot be truncated by either the Elections Act or the Rules. In my view, however, and I agree with the 4<sup>th</sup> respondent on this, the provisions of the Elections Act and the Elections Rules, which are made pursuant to Article 87 (2) of the Constitution, constitute the constitutionally underpinned Code of Laws for dealing with election petitions. The jurisdiction to hear and determine election petitions is a special jurisdiction that is conferred by the Constitution itself, and the manner in which it is to be exercised is ordained by the Constitution when it donates power to Parliament to enact the requisite laws*

and regulations for its exercise. Such truncation as there may be of the right to approach the court under Article 165(3)(a) has therefore been done by the Constitution itself.”

12. In the case of ***National Gender and Equality Commission v Independent Electoral and Boundaries Commission (above)***, the Court considered whether to grant conservatory orders to restrain swearing in of members nominated on the basis of party lists to the National and Assembly and the Senate. The court (Lenaola, Mumbi Ngugi and Majanja JJ) stated that “[12] *We have anxiously considered the position of members of the Senate and National Assembly nominated under Articles 97(c), 98(1)(b), (c) and (d) of the Constitution. They were Gazetted on 20<sup>th</sup> March 2013 by Gazette Notice No. 3508. Upon such gazettment they became members of the respective houses of Parliament. Under Article 105 of the Constitution, a question of determination of membership can only be determined by way of an election petition. .... [14] .... The provisions of Article 105 are mandatory and cannot be circumvented by a petition of the nature we have before us. In the circumstances, we are constrained to decline any conservatory orders affecting the duly gazetted members of the National Assembly and Senate.*”

13. For the reasons I have set out above, I decline the to grant the conservatory orders sought in Chamber Summons dated 25<sup>th</sup> March 2013 and consequently the application is dismissed with costs.

**DATED and DELIVERED at NAIROBI** this 27<sup>th</sup> March 2013.

**D.S. MAJANJA**  
**JUDGE**

Mr K. Mungai instructed by Kinoti and Kibe Company Advocates for the petitioners.

Mr Rigoro instructed by Murugu, Rigoro and Company Advocates for the respondent.

Mr Njoroge, Litigation Counsel, instructed by the State Law Office for the Attorney General.