



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 147 of 2013

THE NATIONAL GENDER AND EQUALITY COMMISSION  
(NGEC) .....PETITIONER

AND

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

AND

ASSOCIATION OF THE PHYSICALLY DISABLED OF KENYA ..... 1<sup>ST</sup> INTERESTED  
PARTY

INTERNATIONAL FEDERATION OF WOMEN LAWYERS (FIDA) .... 2<sup>ND</sup> INTERESTED  
PARTY

KENYA PARAPLEGIC ASSOCIATION ..... 3<sup>RD</sup> INTERESTED PARTY

THE NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES .... 4<sup>TH</sup> INTERESTED  
PARTY

RONGAI ENVIRONMENTAL ACTION INITIATIVE (RENACTI) ..... 5<sup>TH</sup> INTERESTED  
PARTY

RULING NO. 2

1. When this matter came up for hearing on 21<sup>st</sup> March 2012, counsel for the petitioner, Mr Arwa, drew our attention to reports that IEBC has gazetted members of Parliament pursuant to the provisions of **Article 90**. Mr Mungai, counsel for the IEBC, confirmed that the IEBC had indeed sent the names of the proposed party nominees for Parliament to the Government Printer for publication. Counsel confirmed that no action has been taken in respect of the party allocation lists for members of the County Assemblies. In view of these developments, the parties agreed to address us on whether we should issue the conservatory orders sought in the petitioner's Chamber Summons dated 5<sup>th</sup> March 2013.

2. In the Chamber Summons dated 5<sup>th</sup> March 2013, the petitioner seeks the following conservatory orders *"The honourable court be pleased to issue a temporary prohibitory injunction restraining the respondents from proceeding to allocate special seats to political parties under Article 90 of the Constitution on the basis of the party lists so far submitted by the political parties under Article 90 of*

*the Constitution pending hearing and final determination.”*

3. The principles governing the grant of conservatory orders were set out by Justice Musinga in **Centre For Rights Education And Awareness (CREAW) & Other v Attorney General Nairobi Petition No. 16 of 2011 (Unreported)** where he stated that, “*At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.*”

4. It is not in doubt that this matter raises substantial issues relating to interpretation of constitutional provisions governing representation through party list under **Article 90** and the responsibilities of the IEBC. It is in light of this fact that the Chief Justice constituted the Bench hearing this matter under **Article 165 (4)**. Without going into the merits of the application, we are satisfied that the issues raised in the petition are substantial and merit consideration by the Court.

5. What we are required to consider at this stage is whether, unless the court grants the conservatory order, there is real danger that the petitioner or indeed the public will suffer prejudice as a result of the violation or threatened violation of the Constitution.

6. The petitioner, a commission established under **Article 59(4)** of the Constitution and the **National Gender and Equality Act, 2011**, contends that the IEBC has failed in its constitutional responsibility of supervising and conducting party elections for purposes of electing members whose names appear on the party lists as required by **Article 90** of the Constitution. It brings the petition dated 5<sup>th</sup> March 2013 against the Independent Electoral and Boundaries Commission (IEBC) seeking declarations and relief relating to the implementation of **Articles 97(1)(c), 98(1)(b), (c) and (d) and 177(1)(b) and (c)** which in essence deal with the allocation of party list in Parliament and County Assemblies.

7. The interested parties support the petitioner’s application for conservatory orders. In essence the petitioner’s case is that the IEBC has failed in its responsibility and obligation to ensure that political parties complied with provisions of the Constitution in preparing party lists for members of the Senate, National Assembly and County Assemblies. The petitioner’s argument hinged on **Article 90** which deals with “**Allocation of Party list seats**” and it provides as follows;

90. (1) Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.

*(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—*

*(a) 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 to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;*

*(b) except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and*

*(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.*

*(3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.*

8. The petitioner’s case is that **Article 90** imposes an obligation on the IEBC to conduct and supervise elections for the party list seats in Parliament and the County Assemblies. According to the petitioner the

IEBC failed to conduct and supervise the election that led to the preparation and submission of party list and it is therefore in breach of the Constitution. The petitioner's submitted that in view of the non-compliance with the provisions of the Constitution by the IEBC, it is only proper that a conservatory order be issued to enable the Court consider the issues raised for determination.

9. The interested parties in support of the conservatory orders noted that the matter for determination went to the heart of our democratic system and it was important that the Court addresses the issue as the IEBC had not acted in accordance with Constitution.

10. The application was opposed by the IEBC and the Attorney General. The IEBC contends that the petitioner has not established a prima facie case with a probability of success as it had complied with the Constitution by setting guidelines for the generation of party lists and that the ultimate responsibility for the generation of those lists was with the political parties in accordance with the **Political Parties Act (Act No. 11 of 2011)**. Counsel representing the Attorney General added that the public interest demanded that the process of implementation of the party lists should proceed as the petitioner and any aggrieved party had the opportunity and avenue in law to contest the same.

11. We have considered the pleadings, depositions and submissions in this matter. We think that, given the issues raised and the importance of the matter on our democracy, it is important for the Court to pronounce itself on the matter. Counsel for the IEBC informed us during the hearing that no step had been taken towards gazettelement of party list members of the County Assemblies.

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 gazettelement 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. **Article 105** provides as follows;

Determination of questions of membership.

**105. (1)***The High Court shall hear and determine any question whether—*

*(a) a person has been validly elected as a member of Parliament; or*

*(b) the seat of a member has become vacant.*

*(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.*

*(3) Parliament shall enact legislation to give full effect to this Article.*

13. In the case of **Kones v Republic and Another ex-parte Kimani wa Nyoike and Others (2008) 3 KLR EP 29**, the Court of Appeal considered the whether the nomination of Hon. Kones to Parliament under the former Constitution could be challenged by way of proceedings of judicial review. The Court held that, *"We think we have said enough to show that a seat in the National Assembly can only be declared vacant under the circumstances stated in the Constitution and through the processes set out therein. That has always been the position taken by the courts in previous decisions. There is, first the case of THE SPEAKER OF THE NATIONAL ASSEMBLY VS. THE HON. JAMES NJENGA KARUME, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported)..... But the Court of Appeal, consisting of KWACH, COCKAR & MULLI, JJA did state as follows in their Ruling dated 29<sup>th</sup> May, 1992. "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."*The Court concluded that, *"The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in*

*detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, **Chapter 26** of the Laws of Kenya and in **Order 53** of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular.'*

14. The Constitution has not changed this position. 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.

15. Members of the County Assemblies nominated based on party lists have not been gazetted. In view of the fact that the matter is now ready for hearing, it is important that the Court preserves the status quo so that it can satisfy itself of the legality of the process of selection and nomination based on the party lists.

16. In the circumstances we order that pending the hearing and determination of the petition the Independent Electoral and Boundaries Commission (IEBC) shall not gazette the nomination of County Assembly Representatives based on the Party Lists submitted to it by Political Parties.

**DATED and DELIVERED at NAIROBI this 25<sup>TH</sup> DAY OF MARCH 2013**

**I. LENAOLA**  
**JUDGE**

**M. NGUGI**  
**JUDGE**

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