



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**JUDICIAL REVIEW APPLICATION NO. 2 OF 2013**

REPUBLIC.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .....1ST  
RESPONDENT

UNITED REPUBLICAN PARTY .....2ND RESPONDENT

AND

ESTHER WANGUI GITAU .....INTERESTED  
PARTY

AND

ZEDY CHEROTICH ROTICH .....EXPARTE  
APPLICANT

**RULING**

Zedy Cherotich Rotich, the exparte Applicant herein, took out the summons dated 19th June, 2013 in which she sought for the following orders:

- a). That this honourable court be pleased to grant leave to the applicant to file a motion on Judicial Review for orders;
- i. That an order of certiorari do issue forthwith bringing unto this court the 1st Respondent's decision dated 7th June, 2013 in respect of the county assembly gender top-up list for nomination for Kericho County and all the subsequent processes including any intended gazettelement in the Kenya gazette.
  - ii. That an order of prohibition do issue prohibiting the 1st Respondent from forwarding the name of the Interested Party for gazettelement in the Kenya Gazettee and if already forwarded not to act on the list till the applicant's application is heard and determined.
  - iii. That an order of mandamus do issue compelling the 1st Respondent to include the applicant's name in the County Assembly gender top-up list.
  - iv. That the leave so granted to operate as a stay of the respondent's decision dated 7th June, 2013 and all subsequent proceedings arising therefrom.
  - v. That the cost of the application to abide the outcome of the substantive motion.

On 21st June, 2013, the Applicant appeared before the Honourable Mr. Justice Emukule and was granted

leave to commence judicial review proceedings for orders of certiorari to bring to this court for quashing the decision of Independent Electoral and Boundaries Commission, the 1st Respondent herein, dated 7th June, 2013 in respect of the County Assembly gender top-up list for nomination for Kericho County and all other subsequent processes including any intended gazette in the Kenya Gazette. The honourable judge deferred the prayer seeking to have the order of leave to operate as a stay to another date for hearing. This ruling is the outcome of the aforesaid portion of the application. The applicant subsequently obtained leave to enjoin United Republican Party as the 2nd Respondent. It is noted that though the applicant was given leave to take out judicial review proceedings in the nature of certiorari, she has now filed the Substantive Motion where she has sought for orders of certiorari plus prohibition and mandamus. The record shows that though the applicant had applied for leave to apply for the remedies of prohibition and mandamus, she was not given such leave. Some of the orders sought in the amended Notice of Motion therefore cannot be given for want of leave. I expected learned counsels appearing in this matter to point out the anomaly but none did so.

It is the submission of Mr. Orina, learned advocate for the applicant that the order of leave should operate as a stay. It is argued that unless the order is given the applicant is likely to have the slot meant for her to have been filled thus rendering these proceedings as a mere academic exercise. It is said that the applicant will be able to show at the substantive hearing of the motion that her name was wrongly omitted as a nominee as a member of the Kericho County Assembly. Mr. Mutai, learned advocate for the 2nd Respondent, did not oppose the applicant's application. On the other hand, Mr. Ochieng, learned advocate holding brief for M/S Kambuni for the 1st Respondent opposed the application by relying on the grounds of opposition in which the 1st Respondent basically stated that if the order is given it will affect other parties who have not been enjoined to these proceedings. Mr. Orina, agreed with the submissions of Mr. Ochieng to the extent that there is need to enjoin those parties who are likely to be affected by the orders sought.

I have considered the rival submissions over the issue. It is not in dispute that the applicant had applied to be nominated to serve as a member of the County Assembly on the basis of gender top-up list. It is also not in dispute that she was omitted from the list of those nominated because her gender was erroneously indicated to be male. It is the applicant's submission that candidates who were below her in ranking on the list were picked because of that error. One of those people who ranked below her is Esther Wangui Gitau, the Interested Party herein. The 1st Respondent acknowledged through its nomination dispute Resolution Committee that

the applicant was wrongly locked out vide its decision of 7th June, 2013. That committee claimed its hands were tied as it had no jurisdiction to correct the error hence it dismissed the applicant's complaint. That decision prompted the applicant to take out these judicial review proceedings. I am convinced on my part, that there is need to preserve the *status quo* pending the final hearing and determination of the Substantive Motion by directing which I hereby do that the order for leave to operate as a stay of execution of the 1st Respondent's decision of 7th June, 2013. The 1st Respondent's only complaint is that some parties not party to these proceeding, may be affected by the order. With respect agree with the 1st Respondent. However, that cannot be a good reason to deny the applicant the order since those parties cannot be prejudiced because they can still be enjoined to these proceedings and will have an opportunity to present their side of the story when the motion comes up for substantive hearing. This court is given the power under **Order 53 rule 3(2)** of the **Civil Procedure Rules** to order that all persons directly affected by the order to be served. Consequently, I issue an order directing the applicant to serve all the persons listed in the gender top-up list attached to her supporting affidavit and marked as '**Z.C.R.4**' within 10 days from the date hereof. Those parties should be enjoined as interested parties. Costs of the application to abide the outcome of the Substantive Motion.

***Dated, signed and delivered in open court at Kericho this 26th day of July, 2013***

**J.K. SERGON**

**JUDGE**

**In the presence of**

Miss Mitey holding brief for Kambuni for 1st Respondent

Mutai holding brief for Orina for applicant

N/A for Mutai for 2nd Respondent

N/A for the Interested Party

Mr. Korir – Court Clerk