



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**JR NO. 266 OF 2013**

**BETWEEN**

**VERONICA WANGARI MAINA ..... APPLICANT**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION DISPUTE**

**RESOLUTION COMMITTEE ..... 2<sup>ND</sup> RESPONDENT**

**NAOMI WANGECHI GITONGA ..... 3<sup>RD</sup> RESPONDENT**

**SPEAKER OF NYERI COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

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

**REGISTRAR OF POLITICAL**

**PARTIES ..... 2<sup>ND</sup> INTERESTED PARTY**

**UNITED REPUBLICAN PARTY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The *ex-parte* applicant, Veronica Wangari Maina, has moved this court by a Notice of Motion

dated 23<sup>rd</sup> July 2013 in which she seeks the following orders;

1. *That an order of certiorari do issue quashing the decision of the 1<sup>st</sup> respondent dated 7<sup>th</sup> June 2013 purporting to nominate the 3<sup>rd</sup> respondent as nominee of the 1<sup>st</sup> interested party to the County Assembly of Nyeri.*
2. *That an order of mandamus do issue directed at the Respondents to:-*
  - a. *The 4<sup>th</sup> respondent to stop swearing in of the 3<sup>rd</sup> respondent.*
  - b. *The 5<sup>th</sup> respondent to cause expungement or degazettement of the 3<sup>rd</sup> respondent from the Kenya Gazette.*
3. *That an order of Mandamus do issue directing the 1<sup>st</sup> respondent to gazette or cause to be gazetted the name of Veronica Wangari Maina ID No. 1410279 as the nominee of the 1<sup>st</sup> interested party to the Nyeri County Assembly in place of the 3<sup>rd</sup> respondent.*
2. According to her verifying affidavit her grievance is that on 12<sup>th</sup> July 2013, the High Court in **Petition No. 349 of 2013, Veronica Wangari Maina v IEBC and Another** issued an order directing the Independent Electoral and Boundaries Commission Dispute Resolution Committee ("the Committee") to rehear her complaint being **Complaint No. 134 of 2013**. Pursuant to the said order the IEBC published the list of complaints that had been referred back to the Committee in the Daily Nation of 15<sup>th</sup> July 2013 but her name was missing from the list of the matters to be considered.
3. She further depones that on 16<sup>th</sup> July 2013, she attended the Committee where she heard Nyeri matters being called and her name was also called out. She states that one of the Commissioners, Mr Alawi, informed her that she had withdrawn her case. She states that she was denied audience thereby defeating the object of the High Court order and denying her the right to be heard. She later came to learn that the names of the County Assembly members had been gazetted.
4. At the hearing the applicant, who appeared in person, addressed the court at length on her grievances. She stated that the person nominated in her place, the 3<sup>rd</sup> respondent, was a member of the Republican Congress party as such was not qualified to be a TNA nominee. That she was the proper person nominated by TNA and she was therefore entitled to the seat. From the outset these are not matter for my consideration as they deal with the merits of the case which was referred back to the Committee and it was the duty of the Committee, as the court held, to address those grievances.
5. As the matter dealt with conduct of the Committee, I asked Mr Kibicho, learned counsel for the IEBC, to furnish the court with the proceedings and decision of the Committee. The cause list for the Committee on day of hearing was duly furnished and it has the applicant's complaint listed for hearing. The Committee reconsidered the complaint and on 16<sup>th</sup> July 2013, it held as follows, *"The complainant alleges that the nominee, Naomi Wangeci Gitonga is not a member of TNA and thus not qualified to be nominated. No evidence was however adduced to prove this allegation. In any event, the complainant ranks much lower in the TNA list than Naomi Wangeci Gitonga in order of priority. The nominee Naomi Wangeci Gitonga is properly nominated and the complaint is hereby dismissed."*
6. Even if the applicant was not heard the gazettement of members of the County Assemblies changes the tenor of these proceedings. In the judgment in **Petition No. 349 of 2013**, the court directed as follows, *"[6] We therefore order the 1<sup>st</sup> respondent to hear and determine the petitioner's complaint within 14 days from today's date. The 1<sup>st</sup> respondent with thereafter gazette the name of the selected nominee. There will be no order as to costs."*
7. The IEBC duly gazetted members of the County Assembly vide **Gazette Notice No. 9794** issued

on 17<sup>th</sup> July 2013 after the decision was made. The import of gazettelement was clearly stated in the case of ***National Gender and Equality Commission v Independent Electoral and Boundaries Commission (Ruling No. 2) Petition No. 147 of 2013 [2013] eKLR***. The court stated as follows; “[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. .... [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.” The principle applies with equal force to members elected to the County Assembly by dint of **Article 87** and **section 75** of the ***Elections Act, 2011***. What the applicant is required to do is to use the avenue open to her to challenge the validity of the election of a member of the County Assembly by lodging an election petition in accordance with ***Elections (Parliamentary and County Election) Petition rules, 2013***.

8. In light of what I stated above, the applicant’s Notice of Motion dated 23<sup>rd</sup> July 2013 is dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 24<sup>th</sup> July 2013

**D.S. MAJANJA**

**JUDGE**

Veronica Wangari Maina, the ex-parte applicant, in person.

Mr Kibicho instructed by J.K. Kibicho and Company for the 1<sup>st</sup> respondent.

Mr Makolwal, Advocate, instructed by the Registrar of Political Parties.