



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
JR NO. 252 OF 2013

BETWEEN

NARC KENYA.....1ST APPLICANT
HON MARTHA WANGARI KARUA2ND APPLICANT
AMB MWANYENGELA NGALI.....3RD APPLICANT
MUHUMBO OMAR AHMED.....4TH APPLICANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT
FATUMA MOHAMMED2ND RESPONDENT
INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT
THE ATTORNEY GENERAL4TH RESPONDENT

JUDGMENT

1. The applicants have moved the court by a Notice of Motion dated 19th July 2013 where they seek the following orders;
 1. *An order of Certiorari do issue quashing the decision of the 1st respondent dated 7th June 2013 which purported to nominate the 2nd Respondent as the nominee of the 1st Applicant to the County Assembly of Garissa under the Gender Top-up category.*
 2. *The Honourable Court be pleased to grant a prohibitory order restraining the 2nd respondent from taking or having the oath of office administered upon her by anyone whatsoever pursuant to Gazette Notice No. 9794 Vol CXV-No. 105 date 17.7.2013.*
 3. *That a mandamus order do issue directed at the 1st respondent or the 4th respondent requiring*

- them to degazette and or expunge the 2nd respondent from Gazette Notice No. 9794 Vol CXV-No. 105 dated 17.7.2013 as nominee for the 1st Applicant to the Garissa County Assembly.
4. That a mandamus order do issue directed at the 3rd and 4th respondents to arrest and arraign the 2nd respondent in a court of law and charge or cause the 2nd respondent to be charged with:
 - i. Making a false document being a letter dated 24.4.2013 Ref NK/GE/AA/3 purporting it to have been made by the 1st applicant contrary to section 347(a) of the Penal Code as read with section 349 of the Penal Code.
 - ii. Forgery of the signatures of the 2nd and 3rd Applicants contrary to section 345 of the Penal Code as read with section 349 of the Penal Code.
 - iii. Uttering a false document being the letter in (i) above, to the 1st respondent contrary to section 353 of the Penal Code.
 - iv. Attempting to secure a nomination as MCA Garissa County through fraudulent means and or by false pretences.
 5. That a mandamus order do issue directed at the 1st respondent to gazette the name of Muhubo Omar Ahmed of ID No. 10360874 as the nominee of Narc Kenya to the County Assembly of Garissa.
 6. That the cost of this application be provided for.
 7. Any other relief this Honourable court may deem fit and just to grant.
2. The gist of the applicants' case is that the 4th applicant is the bona fide nominee for the NARC Kenya Party to the Garissa County Assembly. They assert that in the published **Gazette Notice No. 9794** issued on 17th July 2013 in which the names of nominated members of the County Assembly Ward omitted her name and instead published the name of the 2nd respondent.
 3. The 4th applicant filed **Complaint No. 203/2013** before the Independent Electoral and Boundaries Commission Dispute Resolution Committee ("the Committee"). On 7th June 2013, the Committee dismissed the complaint. The applicant thereafter filed an application for Judicial Review namely; **JR Case No. 203 of 2013** which was dismissed on 12th July 2013.
 4. Mr Mogaka, learned counsel for the applicant, submitted that the court should now intervene to stop the perpetration of an illegality on the ground that it is alleged that the letter which caused the nomination is a false document and a complaint has been laid before the police hence they seek orders of mandamus to compel the police to act to arrest the 3rd and 4th respondents.
 5. The response to the arguments by the 1st respondent that the court lacks jurisdiction to intervene and set aside the nomination as duly gazetted, the applicants' urge the court to adopt a robust view of its jurisdiction to intervene in what is otherwise an illegality.
 6. I have considered the depositions and arguments on both sides and I must find that this application cannot lie. For purposes of **Article 90** as read with **sections 34 and 35** of the **Elections Act, 2011** once persons who are entitled to party seats are duly gazetted, they are deemed to be elected to their respective positions. (See generally **National Gender Commission v Independent Electoral and Boundaries Commission and Another Nairobi Petition No. 147 of 2013 [2013] eKLR** paragraphs 36 - 44).
 7. In terms of **Article 87(1)** of the Constitution, "Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes." Parliament has now enacted the **Elections Act, 2011** which provides that the manner in which an election is to be challenged and for that purpose the **Elections (Parliamentary and County Election) Petition rules, 2013** have been enacted.
 8. It is now settled that where the Constitution and Parliament establish a specific procedure to

address a specific grievance then that procedure must be utilised. This principle is particularly appropriate within the election cycle where the dispute resolution mechanisms are underpinned by the Constitution (See *Francis Gitau Parsimei & Others v National Alliance Party and Others. Nairobi Petition No. 356 of 2012 (Unreported)* *The Speaker of The National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported)*, *Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291, Wanyoike vs Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43.*”)

9. The applicants have not been denied the opportunity to address their grievance. What they are required to do is to use the avenue open for them to challenge the validity of the election of a member of the County Assembly by lodging an election petition in accordance with the applicable rules.
10. In light of the foregoing, the application is incompetent and must be struck out with no order as to costs.

DATED and DELIVERED at NAIROBI this 23rd July 2013

D.S. MAJANJA

JUDGE

Mr Mogaka instructed by Musyoki and Mogaka and Company Advocates for the *ex-parte* applicants.

Mr Murugu, instructed by Murugu, Rigoro and Company Advocates for the 1st respondent.