



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 363 OF 2013

BETWEEN

HON PETER KALUMA

JUDITH AKINYI OMOGI

TERESA ACHIENG NICHOLAS

AMINA OSMAIL HILLOW

HANNIGTON OLUOCH OWUOR

BERNARD ONYANGO KONGOMA

(Suing on their own behalf and on behalf of Inhabitants of Homa Bay Town
Constituency).....**PETITIONERS**

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ORANGE PARTY OF KENYA.....2ND RESPONDENT

LABOUR PARTY OF KENYA.....3RD RESPONDENT

WIPER DEMOCRATIC MOVEMENT.....4TH RESPONDENT

FEDERAL PARTY OF KENYA.....5TH RESPONDENT

FORUM FOR

RESTORATION OF DEMOCRACY.....6TH RESPONDENT

PEOPLES DEMOCRATIC PARTY7TH RESPONDENT

AND

JOHANES MUMI.....1ST INTERESTED PARTY
JARED OKEYO.....2ND INTERESTED PARTY
RUTH AUMA ABONGO.....3RD INTERESTED PARTY
CHARLES ATE MCOTSIRO.....4TH INTERESTED PARTY
LAURA OGADA ORUKO.....5TH INTERESTED PARTY
RAEL POLO.....6TH INTERESTED PARTY
MONICA AMOLO.....7TH INTERESTED PARTY
ELSA AOKO MIRAMBO.....8TH INTERESTED PARTY
RUTH ANANYAGO OMBURA.....9TH INTERESTED PARTY
BENTAR AUMA SAOKE.....10TH INTERESTED PARTY
LILLIAN ACHIENG ONYANGO.....11TH INTERESTED PARTY
CARREN ACHIENG OGADA.....12TH INTERESTED PARTY
IMELDA JANE O NYABWA.....13TH INTERESTED PARTY
MARY AKINYI ODERO.....14TH INTERESTED PARTY
ESTHER AGENGO.....15TH INTERESTED PARTY
ROSE ACHIENG WANJARA.....16TH INTERESTED PARTY
MARY AKINYI ODERO.....17TH INTERESTED PARTY
BEATRICE ACHIENG OKOTH.....18TH INTERESTED PARTY
CAROLYNE OCHIENG OWIDHI.....19TH INTERESTED PARTY
MARY PATRICIA OUMA.....20TH INTERESTED PARTY
CELESTINE ADHIAMBO OCHUODHO.....21ST INTERESTED PARTY
MARY AKINYO OLOO.....22ND INTERESTED PARTY

JUDGMENT

1. By a petition dated 22nd June 2013 and filed on 21st June 2013, petitioners filed this petition on behalf of the inhabitants of Homa Bay Town Constituency alleging that the party lists submitted

by the political parties contravened the provisions of the Constitution in that the parties failed to consider marginalised groups within the county, that Homa Bay Town Constituency was denied due representation and participation in the County Assembly and that certain persons on the party lists were not qualified for various factual and legal reasons.

2. In the said petition, the petitioner seeks the following reliefs;
 - a. *The Honourable Court be pleased to find and declare that Wiper Democratic Movement, Federal Party of Kenya, Forum for Restoration of Democracy – Kenya and Peoples Democratic Party do not qualify to nominate persons to serve as members of Homa Bay County Assembly.*
 - b. *The Honourable Court be pleased to find and declare that the number of seats allocated to the Labour Party of Kenya is in excess of the Party’s nomination entitlement in Law.*
 - c. *The Party List presented by the Orange Democratic Movement party to the Independent Electoral and Boundaries Commission on 29th January 2013 be declared unrepresentative of the County, unlawful, invalid, null and void.*
 - d. *Ruth Anyango Ombura being a public servant as a Teacher employed by the Teachers Service Commission be ordered disqualified from nomination as member of Homa Bay County Assembly.*
 - e. *Ruth Anyango Ombura, Charles Ate Mcotsiro, Esther Ageng’o, Celestine Adhiambo Ochuodho, Mary Akinyi Odero and Beatrice Achieng Okoth be struck off the list of nominees for Homa Bay County Assembly.*
 - f. *Teresa Achieng Nicholas, Judith Akinyi Omogi, Amina Osmail Hillow, Hannington Oluoch Owuor and Bernard Onyango Kongoma be nominated as members of Homa Bay County Assembly.*
 - g. *In the alternative to (a), (b), (c), (d), (d), (e) and (f) above all party lists presented by the respondent Political Parties and the List of nominees published by the Independent Electoral and Boundaries Commission in respect of Homa Bay County Assembly be declared invalid, null and void for want of compliance with the Constitution and the law.*
 - h. *Costs.*
3. The issues raised by the petitioners were exhaustively considered in the case of ***National Gender Commission v IEBC and Another Nairobi Petition 147 of 2013 [2013] eKLR***. In that case, the Court directed the IEBC to publish the lists to give parties and the public to file any disputes before the IEBC Dispute Resolution Committee (“the Committee”) for consideration. Parties were also given a limited time within which to lodge claims in court. It is apparent from the depositions herein that all the disputes concerning Homa Bay County party lists were dismissed by the Committee. From the prayers sought by the petitioners’ it is clear that the petitioners seek to nullify the party lists presented to the IEBC by the political parties in respect of Homa Bay County Assembly.
4. After hearing various challenges to the decisions by the Committee filed in court, in ***Magdalene Mboogori & Others v IEBC Nairobi Petition No. 319 of 2013 (Unreported)***, the Court (Mumbi Ngugi, Majanja and W. Korir JJ) made the following orders;
 - a. *That the Independent Electoral and Boundaries Commission is directed to gazette the names of all the County Assembly members nominated in accordance with the provisions of sections 34 and 35 of the Elections Act, 2011 except the names affected by the cases filed in the High Court on or before the close of business on 4th July 2013 and subject to pending decisions of the High Court on 12th July 2013.*
 - b. *The Independent Electoral and Boundaries Commission is directed to publish this order in at least two newspapers of national circulation.*
 - c. *There shall be no order as to costs.*
5. Pursuant to the orders, the IEBC duly gazetted members of the County Assembly vide ***Gazette Notice No. 9794*** issued on 17th July 2013. 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) (Supra)***. The court (Lenaola, Mumbi Ngugi and Majanja JJ) 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 20th March 2013 by **Gazette Notice No. 3508**. Upon such gazette 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**.

6. In the circumstances, this petition having been filed after the time limited by the order issued in **Petition No. 319 of 2013** and County Assembly members having been gazetted, it follows that the petition is incompetent. It is struck out with no order as to costs.

DATED and DELIVERED at NAIROBI this 23rd day of July 2013

D.S. MAJANJA

JUDGE

Ms Samba instructed by Nyauke and Company Advocates for the petitioner.

Mr Somane instructed by Garane and Associates Advocates for the 1st respondent.

Mr Kisera instructed by Omonde Kisera and Company Advocates for the 1st, 6th, 7th, 12th, 13th, 14 and 16th interested parties.

Ms Kinyua instructed by Kenyatta Odiwuor and Company Advocates for the 5th and 8th interested parties.