



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 365 OF 2013

BETWEEN

ROSE WAIRIMU KAMAU.....PETITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ANN WANJIRU WANGOMBE.....2ND RESPONDENT

THE NATIONAL ALLIANCE PARTY.....3RD RESPONDENT

CHAMA CHA MWANANCHI.....4TH RESPONDENT

JUDGMENT

1. In the petition dated 16th July 2013, the petitioner complains that the 2nd respondent who has been nominated to the Nyeri County Assembly on The National Alliance Party (TNA) ticket is not a member of the party hence her nomination and subsequent gazettelement is illegal and that she is the bona fide nominee.
2. It is not disputed that the petitioner was a co-petitioner in *Rose Wairimu Kamau and Others v Independent Electoral and Boundaries Commission Petition No. 236 of 2013* which challenged **Complaints Nos 79 of 2013, 80 of 2013 and 100 of 2013** which dealt with the Nyeri County TNA Party lists. The IEBC Dispute Resolution Committee dismissed the complaint and so did the court. The Court, in the judgment dated 12th July 2013, stated, “We agree with the respondent that what the petitioners seek is a reconstitution of the list outside the time permitted by section 35 of the Elections Act, 2011... Furthermore, the issues raised by the petitioners are clearly within the mandate of the party to resolve as they concern how the lists are constituted. Furthermore, the failure to include persons from other constituencies within the county is not of itself decisive of lack of diversity in the party list.”

3. In light of the above it is clear that the issues raised by the petitioner are *res-judicata*. These are issues that were known to the petitioner and could have been litigated at the time complaints were raised before the Committee. The petition cannot be permitted to litigate piecemeal; she ought to have brought her entire case before the Committee and the Court. The doctrine of *res-judicata* covers matters which ought to have been brought before the court or tribunal.
4. Now that the County Assembly nominees have been gazetted by virtue of **Gazette Notice No. 9794**, the court cannot entertain the petitioner's complaint. The position concerning gazettelement was clearly stated in **National Gender Commission v IEBC and another (Ruling No. 2) Petition 147 of 2013** where the court (Lenaola, Mumbi Ngugi and Majanja JJ) stated as follows, “[11] 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 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 [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 & MULI, JJA** did state as follows in their Ruling dated 29th 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.” This position applies with equal force to election to the County Assemblies by dint of **Article 87(1)** of the Constitution and **section 75** of the **Elections Act, 2011**.
5. For reasons I have outlined, the petition is an abuse of the court process and 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

Mr Mogaka instructed by Musyoki Mogaka and Company Advocates for the petitioner.

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