



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 305 OF 2012

BETWEEN

AMIN ALI MOHAMMED 1ST PETITIONER
ABDI NASSIR ABDULLAHI2ND PETITIONER
THADAYO WATOYA MASIBO 3RD PETITIONER
EVA MASEGHE 4TH PETITIONER
JOICE MWAZOKA 5TH PETITIONER
PHILISTER AUMA MESO..... 6TH PETITIONER
HILDABEDA KHAYELE LUKULU..... 7TH PETITIONER
EMILY MBASHO..... 8TH PETITIONER
CHRISTINE MASIYOI LEMEIN..... 9TH PETITIONER
ZEINAB SABRIA ABDULLAHI..... 10TH PETITIONER
SARAH JEMUTAI 11TH PETITIONER
ABDI IBRAHIM..... 12TH PETITIONER
SALOME JEMUTAI RUTO..... 13TH PETITIONER
MIRIAM WANJIRA GITHAIGA 14TH PETITIONER
ALICE WAHITO MWANGI NDEGWA 15TH PETITIONER
FATUMA DHAHABO HASSAN 16TH PETITIONER

MIRIAM WANGECHI KIRONGO 17TH PETITIONER

DENNIS MATHENGE 18TH PETITIONER

MARY NYAMBURA GACIGWA 19TH PETITIONER

MARY AROOT OKEDI 20TH PETITIONER

PETER NYAKONA NYAKONA 21ST PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

ORANGE DEMOCRATIC

MOVEMENT PARTY (ODM) 2ND RESPONDENT

UNITED REPUBLICAN PARTY (URP) 3RD RESPONDENT

THE NATIONAL ALLIANCE (TNA) 4TH RESPONDENT

UNITED DEMOCRATIC FORUM (UDF) 5TH RESPONDENT

THE ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

1. The petition before us is lodged by the 21 petitioners is an omnibus petition challenging various party lists submitted to the IEBC in terms of **Article 90** of the Constitution as read with **sections 34 and 35** of the *Elections Act, 2011*.
2. At the commencement of the hearing Mr Ondieki, learned counsel for the petitioner addressed us on the broad issues governing the allocation of party list seats under the Constitution. In our view, it is not necessary to go down that path as those issues are exhaustively dealt with in the case of *National Gender and Equality Commission v Independent Electoral and Boundaries Commission and Another Nairobi Petition No. 147 of 2013 [2013]eKLR*. The judgment in that case gave the petitioners and members of the public the opportunity to challenge any aspect of the party lists before the IEBC Dispute Resolution Committee (“the Committee”).
3. The petition has been opposed by the 1st and 6th respondents. The 1st respondent relies on the affidavit of Moses Kipkogei sworn on 4th July 2013 in which he deals with each case. The position of the IEBC was adopted by the Attorney General. We also heard from several interested parties who opposed the petition.
4. We have taken into account the depositions and submissions and in the circumstances, we shall now proceed to consider each petitioner’s case and make our findings thereon.

Amin Ali Mohamed

5. The petitioner filed **Complaint No. 182/2013** against Orange Democratic Movement (ODM) challenging all the lists on constitutional grounds. He challenged the nomination of one Sara Ilikwe Kaatho. He claimed that she was a Teachers Service Commission (“TSC”) employee and was not interested in the seat. The Committee dismissed the complaint on the basis that the law was not breached and there was no proof that Sarah Kaatho was a TSC employee.
6. The decision of the Committee cannot be faulted as it was entitled to reach a decision based on its appreciation of the evidence. As a Court of review, we cannot substitute our view of the evidence. Furthermore, we decline to intervene in the matter as Sarah Kaatho, a party directly affected, is not party to these proceedings.

Abdi Nassir Abdullahi

7. According to **Complaint No. 319/2013** the petitioner complained that the Migori County List for ODM contains names of persons who were not from marginalised groups, that there were no Muslims on the list and that the right nominees ought to have been included. The complaint was dismissed on the ground that the list submitted to the IEBC by ODM complied with the law.
8. The petitioner has now raised the same issues before us. We have reviewed the decision and on the basis of the list submitted by ODM to IEBC, we find no reason to interfere with the list.

Thadaya Watoya Masibo

9. The petitioner presented **Complaint No. 107 of 2013** in which he alleged that one of the nominees Sammy Chemweyi to the Bungoma County Assembly is not a youth though he is disabled and works in Eldoret. Mr Masibo contends that he was No. 2 on the priority list but was left out in preference for Sammy Chemweyi who was No. 8.
10. The Committee dismissed the complaint on the basis of lack of evidence. We are requested to review the matter on the grounds that re-submitted list was unfair, unjust and unreasonable as it ignores the principles of justice, equality and fairness.
11. We have reviewed the decision and we decline to intervene as no error has been demonstrated. Moreover, Samuel Chemwenyi whose nomination is impugned has not been joined to these proceedings.

Eva Maseghe

12. The petitioner has challenged the ODM list in Mwatate Constituency. She states that her name was No. 5 in the list delivered to IEBC on 23rd January. She states that IEBC wrongly and arbitrarily considered youth to the detriment of the Women top-up list and introduced the name of Hope Sanguli Mwakio who was not on the original list.
13. According to the records before us the petitioner filed a complaint before the Committee, **Complaint No. 224/2013** where she alleged that her name was left out by the party in the final list. The Committee in its decision held that the matter was an internal party matter and as such it could not interfere. We agree with this position and further hold that Hope Sanguli Mwakio cited is not a party to these proceedings. The case is dismissed.

Joice Mwazoka

14. The petitioner claims that she was first on the ODM Gender top up list for Taita Taveta County. Her name was later removed without justification and she was placed down to No. 13. She complains that one Hope Sanguli was not on any list yet she was nominated.
15. This claim is unsupported by any material deposition and there is no indication that a claim was

filed before the IEBC Dispute Resolution Committee. It is dismissed.

Philister Ouma Meso

16. The petitioner presented ***Complaint No. 243 of 2013*** on the basis that she is an ODM member and her name was left out of the ODM marginalised list yet she applied. She contended before the Committee that Malindi Constituency was marginalised and that one Grace Kavekwe Mwangome should be on the list.

17. The Committee considered the matter and held that the issue raised by the petitioner was one concerning party nomination which is the preserve of the party. It also held that nomination is not necessarily based on the Constituency and therefore the law was not breached. In our view, the Committee was right to come to that conclusion in light of the fact. We decline to intervene and besides, Grace Kavekwe Mwangome, is not a party to these proceedings hence we decline to consider the matter further.

Hildabeda Khayela Ukulu

18. The petitioner's ***Complaint No. 234/2013*** was that her name was omitted from the Bungoma top up list after applying for the position. That her name was left out and that of a stranger, Benedita Haisa was added to the list.

19. In its decision, Committee removed Benedetta Husa from the top-up list as it was clear that she was not known to the parties. She was replaced by Ruth Mwenya who was next in priority on the party list submitted by ODM.

20. We have no reason to depart from the Committee's decision as it was based on the material before it. Furthermore, any intervention would, prejudice Ruth Mwenya who is not a party to these proceedings.

Emily Mbasho

21. The petitioner complains that she was No. 5 in the first party list published by the IEBC for the Taita Taveta County Assembly but her name did not appear on the revised list of 20th April 2013. Four youth were transferred to the gender top-up list therefore denying her priority. She also complains that one Hope Sanguli who was No. 15 on the first list appeared No. 5 on the list. She seeks that her name be removed.

22. We have perused the petitioner's deposition and it does not show that the complaint was filed before the Committee for consideration. We also note that Hope Sanguli whose name she seeks to expunge is not a party to these proceedings. For these reasons her case is dismissed.

Christine Masiyoi Lemein

23. The petitioner states that she was No. 1 on the ODM party list for Narok County. According to her, her name was pushed back to No. 3 in the list being No. 2 in the Zebra categorisation. She states she was removed from the final nomination list.

24. The Committee considered her ***Complaint No. 72/2012*** and concluded that the priority rule was complied with and therefore dismissed it. We have considered the parties depositions and it is correct that in the Narok County list sent to the party, she appeared as No. 1 but in the list submitted by ODM to IEBC, she was No. 3 on the list. As ODM was only entitled to two seats she lost out. We would not interfere with the re-ordering of the party lists as this is within the preserve of the party absent any violation of the law. Consequently, we also find no basis to review the decision. It is dismissed.

Zeinab Sabria Abdullahi

25. The petitioner claims that she applied to be considered for the party list for ODM, Tana River County Assembly. She was initially listed but her name was removed to give the position to a non party member. She claims that she belongs to the Munyo Yahaya Community.
26. There is no evidence in the deposition that her complaint was presented to the Committee for resolution quite apart from the fact that her affidavit does not show she is a party member. The petitioner's case is dismissed.

Sarah Jemutai

27. Sarah Jemutai claims that she applied to be nominated for a position on the United Republican Party (URP) list for Nandi County. She was therefore surprised that her name did not appear on the list but instead names of other nominees who did not qualify were listed as some of them were teachers in the employment of Teachers Service Commission. She also contended that representation in the County was not proper.
28. The Committee considered her **Complaint No. 265 of 2013** and it found that, *"the complaint has no merit and was made up of generalised complaints that do not found a basis to change the list."* Likewise, having reviewed the deposition on either side, we find no error in the Committee's decision and its appreciation of the evidence. We dismiss the case.

Abdi Ibrahim

29. Abdi Ibrahim challenged the URP list for Uasin Gishu County Assembly. His complaint was against one of the youth nominees Cheruiyot Maritim whom he alleged was over 35 years. He also contended that all applicants come from the Kalenjin Community and as such they cannot be classified as a special interest as there are other communities in the County.
30. The Committee in its decision stated that the petitioner had not on the evidence proved his case against Cheruiyot Maritim as the copy of the ID produced was not certified. On the 2nd issue it was noted that under **Article 90**, the County was specifically excluded from regional and ethnic balance.
31. We have reviewed the material before us and we do not find fault in analysing of evidence regarding the position of Cheruiyot Maritim as the Committee was entitled to reach the decision it did on the evidence before it. Besides, we cannot make a contrary finding without hearing the said Cheruiyot Maritim who is not a party to these proceedings.
32. As regards **Article 90(2)(c)** we agree that the Constitution clearly states that there shall be no requirements that special seats reflect the regional and ethnic balance of Kenya. However, we add that the element of diversity is imposed by **Articles 10** and **27** and **Section 97** of the **County Governments Act (No. 17 of 2012)** which provides that inclusion and integration of minorities and marginalized groups as a core principles to govern the county governments. The National values such as 'inclusiveness', 'non-discrimination', 'fairness' and 'representation of the marginalised and minority groups' are infused throughout the Constitution and must also apply to the process governing the preparing party lists. Whether there has been compliance with this provisions is a matter of evidence. However on the basis of the material before us and the case before the Committee we decline to intervene in the matter.

Salome Jemutai Ruto

33. The petitioner contends that she applied to be nominated on the URP list from Nandi County. She paid the requisite fee to the party. It appears that there was a dispute before the Political Parties Tribunal but it is not clear from her deposition the nature of the dispute. She also complains that

most person on the party list who come from Nandi Hills constituency are still employees of the Teacher Service Commission hence they are not qualified.

34. It is not apparent from the deposition the nature of the error to be corrected as the petitioner has not demonstrated that the Committee made any decision affecting her rights. The petitioner's case is dismissed.

Miriam Wanjira Githaiga

35. The petitioner states that she applied to be nominated as a member of the Laikipia County Assembly Gender Top Up list. She complains that according to the list published on 16th May 2013, her name was missing on the two nominees belong to other parties. According to her deposition, in her **Complaint No. 315/2013** she stated that nomination slots for URP were given to persons hailing from Laikipia North Constituency in total disregard to Laikipia West. The complaint was dismissed by the decision of the 7th June 2013.

36. The decision of the Committee, with which we agree, is that the petitioners claim is essentially a party matter regarding how URP constitutes its lists. Moreover, the parties directly affected by the decision have not been joined to these proceedings. The petitioner's case is therefore dismissed.

Alice Wahito Mwangi Ndegwa

37. The petitioner claims that her name had been submitted by The National Alliance Party to the IEBC for the Laikipia County Assembly Gender top-up list. That her name was removed without explanation and replaced with Jennifer Koinante Kitarpei. According to her deposition, it appears that the petitioner was No. 3 on the list dated 29th January 2013 by TNA and submitted on 30th January 2013.

38. We have considered this case and we note that the position of Jennifer Koinante was challenged before the Committee in **Complaint No. 52 of 2013 (Margaret Kamau v TNA)**. The complaint was dismissed and the subsequent review before us in **HC JR No. 207 of 2013** was also dismissed. In the circumstances, we also dismiss the petitioner's case.

Fatuma Dhahabot Hassan

39. The petitioner filed **Complaint No. 14 of 2013** in which she stated that the Nairobi marginalised list contains persons who are TNA members. She prayed that the nomination of Susan Okoth be declared void.

40. Upon considering the matter, the committee stated, ***"The application is allowed to the extent that Susan Akoth is removed from the list. Therefore Susan Akoth Bolo who is 61 years on the TNA marginalised list is hereby removed as she is neither youth nor a Person with disability. She is replaced herewith with Mark Ndungu Nganga – pursuant to the consent issued in claim No. 107/2012 and who is a youth."***

41. The petitioner claims that she was illegally removed to give space to Susan Akoth. We have reviewed the depositions as against the decision, the petitioner's name on the TNA marginalised list is No. 70 and is unlikely to be affected. We dismiss the petition.

Miriam Angechi Kirongo

42. According to **Complaint No. 77 of 2013** the petitioner complained that Igwamiti Ward was not represented in the TNA party list of Laikipia County yet it is the largest ward in the county. She states that she applied to be a nominee by paying the requisite fee but her name was not on the list. She also complains that one Nelly Cheruto who was nominated was not even a resident of the county.

43. The Committee addressed the complaint as follows, ***“The complainant is not on the list but is asking to replace a nominee on the list. His prayer is untenable in law. In addition, absence of a nominee from a ward is not a basis for nullification of nomination. It is up to the party to determine their own nomination rules as provided for under section 9 of the political Parties Act.”***

44. We agree with the reasoning of the Committee and we find no error for review. We dismiss the petitioner’s case.

Dennis Mathenge

45. The petitioner is a member of TNA and he states that he is also a person with disability. He applied for and paid fees to TNA to be selected for the TNA County Assembly party list. Unfortunately his name was missing from the party list.

46. According to the record for ***Complaint No. 194/2013***, the petitioner complains that the party list was manipulated. The Committee concluded that the preparation of party lists and allegation of manipulation are internal party matters to be determined by nomination rules on the ***Political Parties Act***. Accordingly it dismissed the complaint.

47. In the petitioner’s case, the petition appears inconsistent with the case before the Committee as he now seeks to challenge the nomination of Daisy Maitho who he claims was not a party member.

48. We uphold the Committee’s decision as it is based on sound law that the preparation of party lists is an internal party issue. We decline to consider the nomination of Daisy Maitho as it is a new matter which was not before the Committee and because she is not a party to these proceedings. Consequently, the petitioner’s case is dismissed.

Mary Nyambura Gacigwa

49. The petitioner’s complaint is that she applied to TNA to be considered for membership of the Laikipia County Assembly. She paid the nomination fee and she was shocked when her name was not on the list of nominees from the party.

50. She filed ***Complaint No. 90 of 2013*** and from the record her complaint was that she is from Laikipia West and that she should replace one Jennifer Koinante Kiptaret from Laikipia East.

51. We agree with the conclusion drawn by the Committee that, ***“The Complainant confirms that indeed she was not in any list. She cannot therefore replace any nominee as her prayer is untenable in law.”*** As the matter is purely a party matter, the Committee was correct in declining relief. The petitioner’s case is dismissed.

Mary Aroot Okedi

52. The complainant filed ***Complaint No. 141 of 2013*** in which she claimed that the name of the nominee Mary Aroot Okedi was published in the wrong manner in the Busia County gender top-up list for the United Democratic Form (UDF) party. She stated that it was published as Mary Beatrice Okeda also the nominee’s ID Number was different from hers. She prayed that the nominee be referred to her by her actual name and the mistake be corrected.

53. The Committee duly considered the evidence and noted that there are two different parties not a mere typographical error as claimed. Mary Beatrice Okedi swore a deposition in this matter and confirmed that the petitioner is an imposter and she is the proper person nominated by UDF.

54. In our view, the matter of the identity of a party is a factual issue which the Committee considered and came to a conclusion based on the evidence before it. Its decision to dismiss the complaint

cannot be faulted and in the circumstances, the petitioner's case is dismissed.

Peter Nyakona Nyakona

55.The petitioner applied to the Progressive Party of Kenya (PPK) to be nominated for the special interest seat as a person with disabilities. He claims that one Richard Mokaya Bosire misrepresented facts about himself that he was a person with disability and he was nominated instead. As the hearing of **Complaint No. 83/2013**, he claimed that his name was omitted from the PPK list submitted to the IEBC.

56.The Committee concluded that, ***“The complaint is dismissed as these are mere allegations and nothing has been placed before the Committee to prove that the persons who have been placed on the list are not persons with disabilities.”***

57.We have reviewed the depositions and we do not find any error in the Committee's appreciation of the evidence before it. The petitioner's case is dismissed.

Disposition

58.Having considered each of the petitioners' case we dismiss the petition with no order as to costs.

DATED and DELIVERED at NAIROBI this 12th July 2013

MUMBI NGUGI

D.S. MAJANJA

W.K KORIR

JUDGE

JUDGE

JUDGE