

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 300 OF 2013

DAVID MAJOR MALALAPETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 2ND RESPONDENT

JUDGMENT

1. The petitioner's complaint in this matter is that the list submitted by the Orange Democratic Movement (ODM) to the 1st respondent is not the genuine list agreed upon by the Kakamega Branch of ODM. The applicant contends that the list submitted by the party had errors and included persons unknown to the ODM Kakamega Branch. He contends that the list breaches Article 90 as it does not reflect the regional and proportionate balance within Kakamega County as smaller counties with lesser populations get more representation on the County Assembly, and is aggrieved by the decision of the 1st respondent made on 7th June 2013 in which it dismissed his complaint without giving reasons.
2. The position taken by the respondent is that it complied with the law in allocating the gender top up and marginalized seats for the Kakamega County Assembly. It contends that under Article 177 (c) and (d), the preparation and submission of party lists is the preserve of the party and within its exclusive jurisdiction; that the 2nd respondent submitted its list on 30th January 2013, which list was rejected for non-compliance with section 36(2) of the Elections Act; that a second, compliant list was submitted on 2nd March 2013, and it was on the basis of this list that the gender top up and marginalized category nominations was done. It submits that its decision of 7th June 2013 was therefore correct, and asks the court to dismiss this petition with costs.

Determination

3. The court notes that the 1st respondent, in determining the applicant's complaint in IEBC/NDRC/155/2013 in its decision of 7th June 2013, allowed it to the extent of replacing one Josephine Nakesa Samba's name with that of Asia Hassan Mohamed who was above her in the list and had been indicated as male.
4. The gist of the petitioner's complaint before us and before the 1st respondent is that the 1st respondent acted on the list submitted by the party, rather than on the wishes and on the list submitted by the County Branch of the party. The position taken by the 1st respondent in this matter is, in our view, correct. Neither the IEBC nor this court can enter into internal party disputes within ODM, which are subject to Section 40 of the Political Parties Act. If indeed the list submitted by the Kakamega Branch of ODM was altered by the party headquarters, that is a dispute involving the party and its branches. It cannot be the subject of resolution either by the 1st respondent or the court.
5. In the circumstances, this petition is dismissed with no order as to costs.

Dated, Delivered and Signed at Nairobi this 12th day of July 2013

MUMBI NGUGI

D. S. MAJANJA

WELDON KORIR

JUDGE

JUDGE

JUDGE