



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISIONS

PETITION NO 317 OF 2013

FURAHA JUMA SHEBA
PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
RESPONDENT

JUDGMENT

1. In her petition dated 19th June 2013, the petitioner alleges that she should have been the first to be considered for nomination to the Kwale County Assembly for the Orange Democratic Movement (ODM). She states that she and others were in the final list of prospective nominees for ODM in Kwale County, and that they only realized that they were short-changed when they saw the final ODM list. She alleges that the published list did not conform to the list agreed upon and was altered at the last minute.
2. The petitioner complained to the respondent vide complaint No IEBC/DRC/PL/58/2013 but her complaint was dismissed on 7th June 2013. She seeks declarations that the original list of nominees as confirmed in ODM's letter of 25th March 2013 and supported by all elected leaders in Kwale County by their letter dated 16th March 2013 is the proper list of nominees for ODM for the County.
3. The petitioner further submitted that she ought to be nominated to the Kwale County Assembly since the three nominees are not eligible or are not taking up the seats for various reasons. She contended that one **Fatuma Juma Nimakelele** has expressed a desire to resign due to the nature of her business in an affidavit sworn on 10th May 2013; that one **Fatuma Saidi Jirani** similarly expressed her desire to resign, in an affidavit sworn on 10th May 2013, as she is a civil servant working at Kwale County Council, while **Binti Omar Mwamuera** is not an ODM member but a Conservative Party member.

4. In its response, the respondent counters that what the petitioner wishes to achieve is a re-allocation of the County Assembly seats for Kwale County. It submits that it has no objection to the re-allocation, but it cannot confirm whether or not the evidence alleged by the petitioner was before it when its decision of 7th June 2013 was made.

Determination

5. The court notes from the decision of the IEBC dated 7th June 2013 that no reference is made to the affidavits allegedly sworn and placed before it on 10th May 2013. The IEBC observes only that the issue before it was whether or not the nominees are members of ODM, and it dismisses the complaint on the basis that no evidence was placed before it to show that the nominees are not members of ODM.
6. From the documents annexed to the affidavit of the petitioner sworn on 19th June 2013 in support of the application for conservatory orders, the petitioner has annexed the two affidavits by the two nominees who opted not to take up the Kwale County Assembly seats, namely Fatuma Juma Nimakelele and Fatuma Saidi Jirani, both sworn on 10th May 2013 and received by the respondent on the same day as indicated by the stamp of the IEBC's Directorate of Legal and Public Affairs.
7. It appears therefore that the IEBC failed to take into account evidence that was placed before it by the petitioner, and that it misdirected itself on the issue before it when it rendered its decision on the applicant's complaint on 7th June 2013.
8. The respondent indicated at the hearing of this matter before us that it had no objection to re-allocation of the Kwale County Assembly seats provided that the nominees alleged to have resigned are present. While this court will not enter into the party issues regarding the alteration of the ODM party list for Kwale, we are of the view that if indeed the two nominees referred to above resigned, then a reconsideration of the matter, and re allocation of the nominations, is merited in this case in light of section 37(1) of the Elections Act.
9. Our directions therefore are that the IEBC reconsiders the position with regard to the ODM Kwale County Assembly nominations in the presence of all the parties, including the two nominees who allegedly resigned, and re-allocates the seats as prayed by the petitioner if the IEBC finds that she was on the party list or a re-submitted list and was qualified for nomination.
10. The respondent shall render its decision upon reconsideration of this matter within 14 days of today and thereafter gazette the ODM nominee to the Kwale County Assembly.
11. Each party shall bear its own costs of this petition.

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

MUMBI NGUGI

D. S. MAJANJA

WELDON KORIR

JUDGE

JUDGE

JUDGE