



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

**PETITION NO 329 OF 2013**

**IMELDA NAFULA WANJALA .....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The petitioner's case as set out in her petition dated 24<sup>th</sup> June 2013 is that she was on the TNA party list for nomination to Nairobi County. She was the 6<sup>th</sup> female on the list. When the IEBC published the list of nominees on 18<sup>th</sup> May 2013, her name was at number 12, the 6<sup>th</sup> female.
2. She contends that following the disputes that arose from the publication of the lists, an amended list was published on 21<sup>st</sup> May 2013. Her name was missing from this list, replaced by one Agnes Njoki Waithaka.
3. The petitioner contends that the said Agnes Njoki Waithaka was not in the first/original list submitted by TNA to the 1<sup>st</sup> respondent, nor was she qualified to be nominated as she had stood for elections and lost in the TNA party nominations for Kayole Ward.
4. The petitioner states that she lodged complaint No. IEBC/DRC/PL/195/2013 but her complaint was dismissed without any or due consideration. She asserts that the decision of the 1<sup>st</sup> respondent on her complaint is riddled with illegalities and irregularities.
5. The 1<sup>st</sup> respondent's reply to the petitioner's contentions is set out in the affidavit of Moses Kipkogei. It states that it relied on the nomination lists submitted by the parties and that during the dispute resolution process, it dealt with each matter presented before it impartially and that it dismissed the petitioner's claim for lack of evidence.
6. The Interested Parties support the respondent's position on the matter and assert that they were in the TNA list all along. In her affidavit sworn on 3<sup>rd</sup> July 2013, **Agnes Njoki Waithaka**, the 6<sup>th</sup> Interested Party whose nomination the petitioner singles out as having been done to her detriment, states that she was in the list re-submitted by the 2<sup>nd</sup> respondent; that her name, along with those of others, had been omitted from the original list; that she was qualified for the gender top up list and was also validly short-listed in the original party list.
7. The 6<sup>th</sup> Interested Party contends that in the 1<sup>st</sup> respondent's decision of 4<sup>th</sup> May 2013, one

Milicent Nyaboke Omanga was removed and she replaced her; that the 1<sup>st</sup> respondent ‘cleaned up’ the nomination list, removed four people and replaced them with four others, including herself.

8. With regard to the issue of her eligibility, she asserts that this was not an issue before the IEBC and cannot therefore be raised now.

### **Determination**

9. Under the provisions of Article 177 of the Constitution and section 34 of the Elections Act, the respondent was required to nominate persons, on the basis of priority, from the list submitted to it prior to the elections, and it could only call and consider other lists under section 37(2) of the Constitution once the original list was exhausted. A failure on its part to act in accordance with these provisions would be irregular and in breach of the law.
10. From the original list published on 20<sup>th</sup> April 2013 and annexed to the petitioner’s affidavit as annexure INW1, the petitioner was no. 6 on the TNA party list of nominees for Nairobi County. The 6<sup>th</sup> Interested Party, Agnes Njoki Waithaka, was not on this list. The law and the essence of the decision in Petition No 147 of 2013 National Gender & Equality Commission –vs– IEBC, was that the allocation of seats in the County assemblies would be on the basis of the party list submitted prior to the elections unless there was reason to call for a further list in accordance with Section 37(2) of the Elections Act.
11. The 6<sup>th</sup> Interested Party argues that she was on the re-submitted list. However, it is not clear from the documents before us what that re-submitted list was, and the basis on which it was applied. The onus on the 1<sup>st</sup> respondent was to exhaust the original list, and then, deemed it necessary, formally call for another list from the political party in question.
12. The petitioner’s complaint no. IEBC/NDRC/OPL/195/2013, in which she sought removal of Agnes Njoki Waithaka as the TNA gender top up nominee, was dismissed on the basis that there was no evidence presented that the nomination of Agnes Njoki Waithaka was void.
13. It appears to us that the respondent failed in this instance to properly apply the law as it was required to in nominating the 6<sup>th</sup> Interested Party as a gender top up nominee in Nairobi County instead of the petitioner. As she was not on the original party list submitted before the elections, and there is no evidence that the respondent was unable to fill the slots for TNA from the original list, there appears to be no basis for the nomination of the 6<sup>th</sup> Interested Party in place of the petitioner.
14. For the above reasons, this matter is remitted to the respondent to reconsider and carry out the gender top up nominations in accordance with the provisions of Article 177 of the Constitution and section 34 of the Elections Act.
15. The respondent shall render its decision upon reconsideration of this matter within 14 days of today and thereafter gazette the nominee.
16. Each party shall bear its own costs of the petition.

**Dated, Delivered and Signed at Nairobi this 12<sup>th</sup> day of July 2013**

**MUMBI NGUGI**

**D. S. MAJANJA**

**WELDON KORIR**

**JUDGE**

**JUDGE**

**JUDGE**