



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 182 OF 2013

BETWEEN

HON. NJOROGE BAIYA 1ST PETITIONER
HON KIGO NJENGA 2ND PETITIONER
HON KIMANI ICHUNGWA 3RD PETITIONER
HON JUDE NJOMO 4TH PETITIONER
HON ALICE NG'ANG'A 5TH PETITIONER
HON JOSEPH NYUMU NGUGI 6TH PETITIONER
HON PAUL KOINANGE 7TH PETITIONER
HON GEORGE MUCHAI..... 8TH PETITIONER
HON MBURU KAHANGARA 9TH PETITIONER
HON MUNYUA WAITITU 10TH PETITIONER
LEAH WAMAITHA NDUATI 11TH PETITIONER
RUTH WAMAITHA HENRY 12TH PETITIONER
SAMUEL MUKIRI MWANGI 13TH PETITIONER
MARY WAHOGO 14TH PETITIONER
JOHN MUBEA MAHIGA 15TH PETITIONER

AND

THE NATIONAL ALLIANCE 1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC) 2ND RESPONDENT

JUDGMENT

1. This petition has been brought to challenge the constitutionality of party list submitted by The National Alliance Party (TNA) for the Kiambu County Assembly. It has been brought by the 1st to 10th petitioners who are Members of Parliament elected on a TNA ticket representing Kiambu County Constituencies. The 11th to 15th petitioners are persons who applied to the party to be considered for nomination but were never informed of the status of their applications and were given misleading information by the party.
2. The facts leading to the petitions are set out in petition dated 25th March 2013. The petitioners complain that the party list presented by TNA for Kiambu County nominees was prepared without involving or at least informing members of the party as it was prepared in a clandestine manner and submitted to the IEBC.
3. The petitioners contend that aspiring leaders were not involved in preparation of the party list and that it was irregularly and illegally prepared by the current Governor of Kiambu County without the participation of other party members. The petitioners aver that the party nomination rules were not followed and persons like the 11th to 15th petitioners who complied with the party rules were not put on the party list and no communication was relayed to them as to why they were excluded.
4. The petitioners aver that the party list submitted to the IEBC comprises well known and outspoken supporters of the Governor of Kiambu County. The list, they further aver, is unrepresentative as it excludes people from certain regions of the County and that it includes people who did not qualify for nomination because they are not party members or did not comply with party rules or for other legal or factual reasons.
5. The petitioners contend that the manner in which the party list was prepared violates the petitioner's constitutional rights including the right to effective representation and the right to offer themselves for nomination to public office guaranteed by **Article 38** of the Constitution. The petitioners also submit that TNA party list violates the **Political Parties Act, 2011** and the **Elections Act, 2011**. Further that it violates the values and principles of governance articulated in **Article 1** and **10** and undermines the principles of devolved governance in **Article 14** and **175**.
6. The petitioners seek the following reliefs from the court;
 - a. *A declaration that the party list submitted by the 1st respondent (TNA) is unconstitutional and therefore of no legal effect.*
 - b. *A declaration that the 1st respondent (TNA) has flagrantly violated the constitutional rights of the petitioners herein.*
 - c. *An order restraining the 2nd respondent (IEBC) from gazetting the list of nominees based on the party list submitted by the 1st respondent to the 2nd respondent.*

- d. *The 1st respondent (TNA) be ordered to prepare a fresh party list that is compliant, participatory and representative and submit a fresh party list for the special seats in the County Assembly for Kiambu county.*
 - e. *The 1st respondent to consult with the 1st – 10th petitioners as the representative of the people and as party members in coming with a fresh party list.*
 - f. *The petitioners be awarded costs of this petition.*
 - g. *Any other or further relief that this Honourable Court considers appropriate and just to grant.*
7. Before we proceed to consider the petitioners' case we note that a differently constituted bench in the case of ***National Gender and Equality Commission v Independent Electoral and Boundaries Commission and the Attorney General Nairobi Petition No. 147 of 2013*** [2013]eKLR had the opportunity to consider the issues surrounding the constitution of party lists prepared under **Article 90** of the Constitution. In light of that case when this matter was filed and came up *ex parte* before Justice Mumbi Ngugi on 2nd April 2013, she stated that, ***“this matter raises the same issues as are the subject of Petition No. 147 of 2013 in which the court granted orders restraining the gazetting of nominations of County Assembly Representatives based on the party lists submitted by political parties. These orders apply to all political parties’ lists and shall therefore apply to the TNA list.”***
8. On 19th April 2013, Justice Mumbi Ngugi ordered that, ***“in light of the judgment of the court in Petition No. 147 of 2013 let the petitioners abide by the directions of the court in that matter. Should there still be outstanding issues in relation to this petition thereafter appropriate directions with regard to the hearing will be given.”***
9. The ***National Gender and Equality Commission Case*** dealt with issues arising from the party lists submitted by the parties to the IEBC in accordance with **section 35** of the ***Elections Act, 2011***. In its judgment of 15th March 2013, the court made the following orders;
- i. *The IEBC shall within 5 days from the date hereof publish in accordance with regulation 54 of the Election (General) Regulations, 2012 the party lists submitted for the parties that have qualified in accordance with Article 90(3) for membership of the County assemblies under Article 177 of the Constitution in at least two newspapers of national circulation.*
 - ii. *The IEBC shall immediately put in place mechanisms to resolve any disputes concerning the lists in accordance with Article 88(4)(e) of the Constitution as read with section 74 of the Elections Act, 2011 upon publication of the party lists.*
 - iii. *The IEBC shall finalise settlement of all disputes submitted to it in respect of the party lists within 7 days from the date of publication of the party lists stated in (i) above.*
 - iv. *The final list of nominees shall be gazetted 7 days after the determination of any disputes.*
 - v. *We direct the IEBC to develop a program, in conjunction with constitutional and statutory commissions and political parties, to develop policies and measures geared towards increasing the participation of women, youth, persons with disabilities, marginalised groups and other vulnerable persons to effectively participate in political processes.*
 - vi. *Each party shall bear its own costs.*
10. In compliance with the orders, the IEBC published the party lists and parties and the public were given the opportunity to ventilate their grievances before the IEBC Dispute Resolution Committee (“the Committee”) constituted under **Article 88(4)(e)**.
11. According to the replying affidavit of Moses Kipkoge, the Senior Legal Officer of the IEBC, sworn on 4th July 2013, the Committee made several determination filed challenging the Kiambu County TNA party list. The Committee heard a total of 28 complaints relating to the Kiambu County TNA party list. The 11th and 15th petitioners filed complaints as follows;
1. Leah Wamaitha Nduati (11th Petitioner) filed **Complaint No. 181 of 2013** on the basis that she is a party member of TNA and she paid the nomination fee but his name was omitted. She

- complained that the party list lacked regional balance. The Committee dismissed her complaint the list was in accordance with the law and there was no requirement for regional balance under **Article 90(2)(c)** of the Constitution.
2. Ruth Wanjiku Henry (12th Petitioner) filed **Complaint No. 370 of 2013** where she complained that she had applied to be nominated on the party list but her name did not appear on the party list. The Committee dismissed the complaint on the basis that her position on the party list was not in priority to the names listed on the published list.
12. None of the decisions which challenged the IEBC Committee decision are before us for review and hence we shall not express our view on the matter. We reiterate the position stated in **National Gender Commission Case (Supra)** where the court stated, “[78] Another important reason for publication of the party lists is to enable parties invoke the dispute resolution process provided for under the Constitution. Under Article 88(4)(e) of the Constitution, as read with section 74 of the Elections Act, 2011, the IEBC has the mandate to settle electoral disputes including disputes relating to or arising out of nominations. As a result of failure to publicise the party lists, the public was effectively denied the opportunity to demand accountability on the part of the IEBC. In our view, this litigation would have been avoided had the IEBC complied with this provision and made the list available to the public for scrutiny as contemplated by the General Regulations. It is also through this process that IEBC would have demanded accountability from the political parties and ensured that the party lists comply with the Constitution and the law.” [Emphasis ours]
13. This position is consistent with the established principle that where the Constitution or statute provides a procedure to be followed, then that procedure ought to be followed. In **International Centre for Policy and Conflict & 5 others v The Hon. Attorney General & 4 others, Nairobi Petition 552 of 2012, [2013]eKLR**, the aptly captured this principle thus, “[109] An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution. [110] Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.” (See also **Francis Gitau Parsimei & Others v National Alliance Party and Others, Nairobi Petition No. 356 of 2012 (Unreported)**, **Philemon Donny Opar v Orange Democratic Movement Party & 2 Others, Nairobi Petition No. 49 of 2013 (Unreported)**, **Roseline Achieng Mulaha Randa v IEBC and 2 others Mombasa Petition No. 8 of 2013 (Unreported)**).
14. In our view, the grievances by the 11th to 15th petitioners who claim membership of the party lists were subject to the jurisdiction of the Committee as directed in **National Gender and Equality Commission Case**. In the circumstances, we decline to deal with the 11th to 15th petitioners’ grievances.
15. Mr Mwangi, learned counsel for the petitioners, sought to persuade us that in fact, the Committee did not deal with the issues raised by the petitioners. Counsel reiterated that the TNA party list did not consider the ethnic balance within the county, cultural and regional diversity and as such it was in breach of the constitution.
15. Both learned counsel for the IEBC and TNA, Ms Odhiambo and Ms Milimu respectively agreed that the matters in issue were party internal matters and as such were outside the immediate jurisdiction of the IEBC. Ms Odhiambo submitted that **Article 90(2)(c)** indicates that with regard to representation at county level, reference to ethnic and regional balance in Kenya is excluded.
16. We have set out the petitioners’ grievances in regard to TNA party list at paragraphs 3, 4 and 5 of

this judgment. It is clear that the petitioners' grievances relate to how the list submitted to IEBC was prepared. The court dealt with this issue in the **National Gender and Equality Case (Supra)** at paragraph 44 and 45 where it was stated that, "[44] In our view, the word "elections" in Article 90 must be read in light of the context in which it appears in the Constitution and other provisions governing elections. We therefore agree with the position taken by the respondents and KI that the word "elections" in Article 90 does not refer to internal party elections for positions on the party lists. As the opening title suggests, Article 90 deals with the allocation of party seats. It is the allocation of those party seats that results in an election of the party members based on the lists submitted by the political parties to the IEBC. [45] We therefore find and hold that Article 90(2) does not deal with elections leading to the constitution of party lists nor concern itself with the manner in which parties come up with the names on the lists. How the election of persons on the list is carried out is a matter entirely within the mandate of the respective political parties. It is for this reason that regulation 55 (1) of the General Regulations provides that, "The party list contemplated under regulation 54 [the lists under Article 90(1) of the Constitution] shall be prepared in accordance with the rules of the political party." Furthermore, paragraph 19 of the Second Schedule to the Political Parties Act (Act No. 11 of 2011) requires every party to have, "nomination rules and regulations with respect to elections of the party and rules governing the preparation of party lists."

17. We have come to the conclusion that the matters raised by the petitioners are essentially party issues which ought to have been resolved by the party internally or through the Political Parties Tribunal established under the **Political Parties Act, 2011**.

18. Before conclude this judgment, we would like to mention that although **Article 90(2)(c)** excludes County Assemblies consideration of regional balance by reference to Kenya as a whole but in preparation of party lists inclusiveness, diversity and non discrimination are principles and national values that ought to be taken into account at all levels including the party level by reason of **Articles 1 and 10** of the Constitution. The political parties are also bound by the **Electoral Code of Conduct** at the **Second Schedule** to the **Elections Act, 2011** whose paragraph 5 binds them amongst other things to "(a) adhere to the values and principles of the Constitution." Whether the party list complies with this requirement is a matter for the party and the IEBC Committee in dealing with specific complaints before it and in considering the issue the party and the Committee will have regard to the entire evidence. In view of the fact that the issues raised by the petitioners were not tested before the Committee on this basis, we decline to intervene in reconstitution of the list. Furthermore, the proceeding on the path suggested by the petitioners at this stage would be contrary to the provisions of **section 35** of the **Elections Act, 2011** which settles the membership of the party lists prior to the election date.

19. The net effect of our findings is that the petitioners' case be and is hereby dismissed 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