



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JR CASE NO 202 OF 2013

REPUBLIC APPLICANT

VERSUS

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION1ST
RESPONDENT**

GEDI ADOW ABDI 2ND RESPONDENT

ORANGE DEMOCRATIC PARTY3RD RESPONDENT

Ex-Parte.....DUBAT ALI AMEY

JUDGMENT

1. The applicant charges the 1st respondent with illegality unreasonableness, bias and acting in excess of jurisdiction in its decision made on 7th June, 2013 upholding the nomination of Gedi Adow Abdi, the 2nd respondent as the nominee for the marginalised/gender top up seat for Orange Democratic Party (ODM), Garissa County. He alleges that he was in the ODM party lists for the gender top up/ marginalized seats submitted to the IEBC by the 3rd respondent on 23rd January and 2nd March 2013. He claims, however that the 1st respondent, in collusion with the 2nd respondent, uttered a false document, a list back-dated to 23rd January 2013 nominating the 2nd respondent to the same seat as the applicant.
2. The applicant claims further that by a letter dated 8th May 2013, the 3rd respondent recommended his nomination in place of the 2nd respondent who was not on the party list either for the gender top up or for the marginalized seat. The applicant also alleges that the 2nd respondent was an employee of the National Hospital Insurance Fund as at 19th April 2013. The applicant also alleges bias by the chair of the 1st respondent based on clan rivalries in Garissa.

3. On its part, the 1st respondent contends that it received two lists from the 3rd respondent, one dated 23rd January 2013 and the other dated 2nd March 2013. It avers that the applicant, who is 66 years of age, was in the first list which contained 30 names, while the 2nd respondent was in the second list containing 8 names.

4. The 1st respondent contends that on 8th May 2013, it received a letter from the 3rd respondent alleging that the 2nd respondent was neither in its marginalised or gender top up lists; that it inspected the lists and noted that the 2nd respondent was on the 2nd list submitted by ODM; that in view of the contradictions and in the absence of directions from the party, it merged both lists and both the applicant and the 2nd respondent were on the merged list; that after applying the formula in the Constitution, section 36 of the Elections Act and regulation 56(2) of the Elections (General) Regulations 2012, the 2nd respondent, who is 40 years old and a person with disability was found to be the most qualified; that the applicant did not prove that he had a superior claim to the 2nd respondent, and the contention that the 2nd respondent was a public officer was only raised later. The 1st respondent states that the 3rd respondent did not appear before it at the hearing of the applicant's complaint before it.

Determination

5. The complaint before the 1st respondent in IEBC/DRC/PL/264/2013 was whether the party list submitted by ODM was followed and whether the decision of the Committee in the complaint filed earlier was binding. In its decision on 7th June 2013 dismissing the applicant's complaint, the 1st respondent stated that the complainant was not a person with disability.

6. From the material before us, it is apparent that two lists, dated 23rd January 2013 were received by the 1st respondent. No evidence was adduced before us to support the alleged collusion between the 1st and 2nd respondent, and the 3rd respondent did not appear to shed light on the matter.

7. On the basis of the material before us, we are unable to find any illegality or unreasonableness on the part of the respondent in arriving at the decision to nominate the 2nd respondent, who appears to have been on the party list, is 40 years old and is a person with disability, and this merited nominated to the special interests seats.

8. The application is therefore dismissed with no order as to costs.

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

MUMBI NGUGI

D. MAJANJA

W. KORIR

JUDGE

JUDGE

JUDGE