



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JR. CASE NO 208 OF 2013**

**REPUBLIC .....APPLICANT**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .....1<sup>ST</sup> RESPONDENT**

**ORANGE DEMOCRATIC MOVEMENT PARTY OF KENYA ..... 2<sup>ND</sup>  
 RESPONDENT**

**AND**

**MONICA MUNGALA APIYO.....1<sup>ST</sup> INTERESTED PARTY**

**HAPPY GLORIA AKHAYALU.....2<sup>ND</sup> INTERESTED PARTY**

**ROSEBELLA NASIENYA.....3<sup>RD</sup> INTERESTED PARTY**

**PAMELA OMUKANGA.....4<sup>TH</sup> INTERESTED PARTY**

**RACHEL OMOLO.....5<sup>TH</sup> INTERESTED PARTY**

**Ex – Parte**

**FLORENCE MWIKALI MUTUA**

**JUDGMENT**

1. This application, like **Petition No 344 of 2013-Colletta Ayomba Ong’ong’a –vs- IEBC and Others**, arises out of the nominations for Busia County. The applicant, Florence Mwkiali Mutua, the women’s representative in Busia County, was the complainant in IEBC /NDRC/PL/275/2013 which resulted in the removal of Colleta Ayomba the petitioner in Petition No 344 of 2013, from the Busia County marginalized list.
2. Ms Mutua complains in this matter that she is dissatisfied with the decision of the 1<sup>st</sup> respondent on her complaint as its decision is not the decision of the party, the 2<sup>nd</sup> respondent. She submits that in the said decision, the 1<sup>st</sup> respondent relied partly on the information provided by the 2<sup>nd</sup> respondent, the Orange Democratic Movement, with regard to persons with disabilities, but it

- ignored the party list with regard to the gender top up.
3. In its decision on complaint no. IEBC/NPRC/PL/275/2013, the 1<sup>st</sup> respondent addressed itself to the issue of Colleta Ayomba whom it removed from the list on the basis that she was not a person with a disability. It replaced her with Charles John Otete.
  4. The basis of the complaint by the applicant is that the list submitted by the party to IEBC did not reflect the nominees agreed upon and forwarded to the party by Busia County leaders. This is evident from the affidavits sworn by Messrs Sospeter Odeke Ojaamong and Amos Shitswila Wako on 17<sup>th</sup> June 2013 and 14<sup>th</sup> June 2013 respectively, in support of the application.
  5. In her affidavit sworn on 14<sup>th</sup> June 2013, the applicant avers that the elected leaders met and agreed on a list of nominees for Busia County, and that the list was forwarded to the IEBC by letter dated 6<sup>th</sup> May 2013. She asserts that the list published by the 1<sup>st</sup> respondent did not reflect the ethnic and cultural diversity of the county, and that the party supported her contention in Complaint No. 275 that the position of the party on the nominees was as contained in the letter of 6<sup>th</sup> May 2013.
  6. The applicant complains that the 1<sup>st</sup> respondent descended into the political party arena by defaulting from the party position that it should nominate persons from the list agreed by the party.
  7. In the affidavit sworn by Moses Kipkogei on 4<sup>th</sup> July 2013, the 1<sup>st</sup> respondent takes two positions on the matter. It contends that the complaint before it in complaint no. IEBC/NDRC/PL/275 of 2013 was that the Busia County marginalized and gender top up list contained names of persons not agreed upon by the Busia County leadership; that the rightful nominees were replaced and they should be given their nominations; and that one Charles Mwatete was partially disabled. It submits that it therefore replaced Colleta Ayombo as there was sufficient evidence that she was not a person with a disability.
  8. The 1<sup>st</sup> respondent maintains, however that the other matters raised by the applicant in this matter were not before it in her complaint before it.
  9. The second point raised by the 1<sup>st</sup> respondent is that the obligation to submit names to the IEBC was vested in the party, not branches of the party, and any mandate to submit lists given to party branches can only be on the basis of the party's internal rules. It therefore asks that the application be dismissed.
  10. The interested Parties, through an affidavit sworn by Monica Mungala Apio, oppose the application. They contend that the orders sought cannot issue as it has not been indicated against which of the 8 ODM nominees the orders are directed; that only 5 of the 8 nominees are named as Interested Parties and are therefore participating in these proceedings, and that the applicant lacks locus in these proceedings.
  11. They contend that if the Busia County leadership submitted any list to the 1<sup>st</sup> respondent on 6<sup>th</sup> May 2013, such list was in breach of the Elections Act as such party lists were required to be submitted 45 days before the elections. They contend that the 2<sup>nd</sup> respondent had submitted a party list on 23<sup>rd</sup> January 2013 but was required to re-submit the list, which it did on 30<sup>th</sup> March 2013 containing the same names as the list of 23<sup>rd</sup> January 2013 save that it was re-organized to comply with the law. They also ask that the application be dismissed.

### **Determination**

12. In determining the matter before us, it is useful to refer to the IEBC decision with regard to Busia County made on 4<sup>th</sup> May 2013. In that decision which is found at page 48 of the IEBC decision, the 1<sup>st</sup> respondent ruled that Colleta Ayomba, the petitioner in Petition No 344 of 2013, should

- replace one Roseline Auma Oduori. No changes were made with regard to the gender top up for Busia County.
13. Following this decision, the applicant lodged her complaint IEBC/NDRC/PL/275 of 2013, whose content and decision we have referred to above.
  14. The complaint now before us is that the respondent descended into the political party arena by refusing to accept the list agreed by the Busia County leadership and forwarded to it in the letter dated 6<sup>th</sup> May 2013.
  15. In our view, the mandate of the 1<sup>st</sup> respondent was to nominate persons on the party's list submitted before the elections. In the event that such list was not in compliance with the law, then it could ask the party to submit a compliant list, which it did in this case, resulting in the list submitted on 30<sup>th</sup> March 2013 and which, according to the 1<sup>st</sup> respondent, it relied on.
  16. In our view, there is no legal obligation on the 1<sup>st</sup> respondent to accept lists submitted by the party long after the elections as in this case when the party demanded that the 1<sup>st</sup> respondent should nominate persons from a list submitted on 6<sup>th</sup> May 2013. The 1<sup>st</sup> respondent would have been in breach of the law and of its constitutional obligations were it to act on the basis of such a list.
  17. We note also that not all the parties likely to be affected by this matter with regard to the gender top up nominations for Busia County are parties to this matter. It would be in breach of the rules of natural justice were this court to allow the orders sought in this matter with regard to the gender top up list.
  18. For the above reasons, this application is dismissed.
  19. The court has allowed **High Court Petition No 344 of 2013-Colletta Ayomba Ong'ong'a –vs- IEBC and Others** to the extent of requiring the IEBC to accord a hearing to Ms Colleta Ayomba, the petitioner in that matter, who was removed, without being accorded a hearing, from the nomination for marginalized persons. This does not, however, translate to a re-opening of the matter with regard to the Busia County nominations. Such hearing shall be confined solely to the marginalized seat from which the said Colleta Ayomba was removed without giving her the opportunity to defend herself.
  20. Each party shall bear its own costs of this application.

**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**