



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR CASE NO 201 OF 2013

REPUBLIC

.....APPLICANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION .. 1ST RESPONDENT

HUSSEIN GUYO JASO 2ND RESPONDENT

AND

THE NATIONAL ALLIANCEINTERESTED PARTY

Ex-Parte

IMANI FUMAO REDO

JUDGMENT

1. The applicant, Imani Fumao Redo, who states that he is from the minority Munyoyanya Clan in the Tana Delta, seeks orders to quash the decision of the 1st respondent with respect to the nomination of Hussein Guyo Jaso, the 2nd respondent, as a member of the County Assembly for Tana River, and to compel the 1st respondent to publish his name as the National Party Alliance (TNA) nominee for Tana River County. In his submissions before us, Counsel for the applicant, Mr. Mogaka, contended that the applicant had lodged a complaint with the IEBC, being complaint number IEBC/PL/186/2013, but that he was not given a hearing by the respondent.
2. However, in his affidavit in support of the application sworn on 12th June, 2013, the applicant avers at paragraph 9 that ***“I prosecuted my case on 3rd June 2013 at KICC before the 1st Respondent’s Tribunal”***. He also alleges that the 1st respondent exceeded its powers by including the 2nd respondent in the list of proposed nominees for Tana River County.
3. The applicant states that while he hails from Tana River County, his name was indicated in the publication of the IEBC in the Saturday Standard of 20th April 2013 in the list of nominees for Taita Taveta County; and upon inquiry he was informed that all that would be required would be a switch from Taita Taveta to Tana River County.

4. Mr. Mohamed Dado Hatu, the 2nd Interested Party, who was admitted to the proceedings on 3rd July 2013, also challenges the nomination of the 2nd respondent, Hussein Guyo Jaso, as the nominee for TNA for Tana River County. His case as presented by Mr. Mwenesi in reliance on his affidavit sworn on 3rd July 2013 is that he is a person with disabilities (PWD) and a member of TNA. He avers that he is the person who deserved to be nominated to the special interests slot reserved for persons with disabilities for Tana River County. He asserts that the 2nd respondent is not a member of TNA or resident in Tana River but was from Marsabit and would not qualify for nomination as a PWD to Tana River County; while the applicant is also not a PWD. He asks that the court should direct IEBC to cancel the nomination of Hussein Guyo Jaso as the nominee for Tana River County Assembly PWD nominee for TNA and include his name for gazettelement as the nominee. He submits that the court can grant such orders on the authority of the case of **Farmers Bus Services Ltd –vs- The Transport Licencing Tribunal (1959) EA 779**.
5. The 1st Interested Party, represented by Ms Milimo in this matter, filed grounds of opposition dated 4th July 2013, the gist of which is that this court lacks jurisdiction to hear the application dated 24th June 2013 by Imani Fumao Redo as it is an intra-party matter.
6. The 1st respondent submitted that the Interested Party had been on the list submitted by TNA and that the applicant had been accorded a hearing. In the affidavit sworn by Mr. Moses Kipkogei on 4th July 2013, the 1st respondent avers that it conducted a hearing and rendered its decision in respect of complaint No IEBC/DRC/PL/186/2013 where it found that the applicant was on the list for Taita Taveta County, not Tana River, and therefore dismissed his complaint.
7. The 1st respondent avers that there is no evidence that the applicant was nominated by TNA as he is not on the list of nominees submitted by TNA on 26th February 2013. It also asserts that the applicant raises new issues that were not before it in the complaint.
8. The respondent and the 1st interested party did not make any response or submissions with regard to the averments and submissions by the 2nd Interested Party.

Determination

9. The gist of the applicant's complaint is that he was not accorded a hearing by the IEBC in his complaint. However, from his own averments at paragraph 9 of his affidavit dated 24th June 2013, he did prosecute his complaint on 3rd June 2013. Consequently, there is no basis for impugning the decision of the 1st respondent as due process was observed with regard to his complaint. The other complaints raised in his statement filed in this matter pertain to matters that are new and were not placed before the 1st respondent, and we therefore decline to consider them.
10. With regard to the 2nd Interested Party, his complaint before the IEBC No IEBC/DRC/PL/142/2013 was heard and dismissed. The issues that he raised before the IEBC was whether Hussein Guyo Jaso is a member of any political party, whether he is a registered voter in Tana River County, and whether he was on the list of nominees submitted by the party to the 1st respondent. The two reasons given in the decision of 7th June 2013 for dismissal of his complaint by the 1st respondent is that the issue of party membership could not be sufficiently verified, and that the party did not come out strongly on the matter. The 2nd Interested Party has annexed to his affidavit a list on which he appears second, although in the category column against his name, the word 'women' is indicated.
11. In our view, the 1st respondent was under a duty to allocate the nominations for Tana River County on the basis of the list submitted to it by the 1st Interested Party. From the list annexed to the affidavit of the 2nd Interested Party, it is evident that he had been on the list for nomination,

and if a male was to be nominated, he ought to have been considered. It appears therefore that the 1st respondent failed to consider matters that were before it in nominating the 2nd respondent.

12. Regrettably, the 2nd respondent, who is directly affected by these proceedings, did not participate in these proceedings, and there is no evidence that he was ever served with the application. Consequently, it would be against the tenets of natural justice to make a decision that adversely affects his interests without affording him a hearing. It appears, however, from the evidence before us that the Interested Party's contentions merit a re-consideration by the 1st respondent. Consequently, we direct that the 1st respondent hears the parties to this matter afresh and makes a determination of the issues raised.

13. The respondent shall render its decision upon reconsideration of this matter within 14 days of today and thereafter gazette the nominee.

14. Each party shall bear its own costs.

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

MUMBI NGUGI

JUDGE

D. S. MAJANJA

JUDGE

WELDON KORIR

JUDGE