



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NUMBER OF 175 OF 2013.**

*IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 90, 91, 98, 165, 258 & 261 OF THE  
CONSTITUTION.*

AND

*IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27, 28, 36, 38, 47 AND 50 OF  
THE CONSTITUTION OF KENYA 2010*

AND

*IN THE MATTER OF THE WOMEN MEMBERS NOMINATED TO THE SENATE AND  
GAZETTE NOTICE NO 3508 PUBLISHED IN THE KENYA GAZETTE DATED 20<sup>TH</sup> MARCH  
2013*

BETWEEN

LYDIA MATHIA.....PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC) .....RESPONDENT

NAISULA LESUUDA.....INTERESTED PARTY

**RULING**

**Introduction**

1. The Petitioner herein in an amended petition dated 2/5/2013 sought a declaration that the Respondent's list of Women Members Nominated to Senate for the National Alliance Party (TNA) contained in Gazette Notice 3508 published in the Kenya Gazette dated 20<sup>th</sup> March 2012 violated Article 90 and 98 of the Constitution, and that the Respondent herein had no power to re-organize the order of priority indicated in the National Alliance Party final list of Women Members nominated to Senate. Declarations were also sought that the said decision of the Respondent violated various constitutional rights of the Petitioner, and orders of certiorari were also sought to quash the decision. The Petitioner

further sought a mandatory injunction to compel the Respondent to gazette her election as Woman Member nominated to Senate by the National Alliance Party.

2. The Petitioner in addition separately filed **Election Petition 13 of 2013 - Lydia Mathia vs IEBC & Naisula Lesuuda** challenging the Interested Party's nomination claiming that the Respondent had no mandate to interfere with the party's list. Judgment was delivered by **Ougo, J** on 27/9/2013 in Election Petition 13 of 2013 and the learned Judge held that the Respondent had the mandate to designate the party's list in an endeavour to comply with the provisions of the election laws as provided for in the Constitution and the Elections Act, and further that the Interested Party was validly nominated as member of the Senate in compliance with Articles 88(4) (d), 90 and 98 (1) (b) of the Constitution.

3. The Petitioner subsequently appealed the decision of Ougo, J to the **Court of Appeal in Nairobi Civil Appeal No 287 of 2013 – Lydia Mathia vs Naisula Lesuuda & IEBC**. The Court of Appeal in dismissing the appeal found and held that in the circumstances of the appeal, the Respondent was justified in replacing the name of the Petitioner herein with that of the Interested Party for the sole purpose of satisfying the requirements of Article 98(2)(c) of the Constitution and the underlying values and principles of that provision.

### **The Applications**

4. The Respondent and Interested Party thereupon filed two applications seeking to strike out the petition filed herein. The Respondent's application is dated 25/8/2014 wherein the Respondent prays for orders that the petition be struck out with costs and the Petitioner be ordered to meet the costs of the application. The application is premised on grounds outlined in the application and supported by an affidavit sworn by the Respondent's Senior Legal Officer, Mr. Moses Kipkogei.

5. The said deponent averred that this court lacks substantive jurisdiction to entertain this petition. Secondly, that the constitutionality and legality of the process leading to the publication of Gazette Notice 3508 of 20/3/2013 and the contents therein have conclusively been determined by the Court of Appeal in **Nairobi CA No. 287 of 2013- Lydia Mathia v Naisula Lesuuda & Independent Electoral and Boundaries Commission**. Therefore, that the pendency of this Petition constitutes unmitigated abuse of the court's process.

6. The Interested Party's application is by way of a Notice of Motion dated 29/10/2013 and the Interested Party prays for orders that the Petition be struck out and dismissed with costs; that this Court issue any further orders that may favour the cause of justice; and that costs be provided for. The application is supported by an affidavit sworn by the Interested Party on 29/10/2013. The deponent states that the Petitioner's prayers in this Petition and in Election Petition 13 of 2013 are similar as they raise the same questions of law.

7. The deponent referred the Court to the judgment delivered by Lady Justice Ougo on 27/9/2013 in Election Petition 13 of 2013 and it was her position that the matters in issue herein have been heard and determined by another Court of competent jurisdiction, hence the bar of *res judicata* applies. Further, that the actions of the Petitioner in maintaining two parallel petitions on the same subject-matter and consuming judicial time should be discouraged by an award of costs in her favour.

### **The Petitioner's Response**

8. The Petitioner filed Grounds of Opposition dated 17/10/2014 wherein she averred first, that the jurisdiction of an Election Court derived from the Election Act is different from that of this Court which is derived from the Constitution. Secondly, that the prayers sought in this petition and the Election Petition are different since the petition herein touches on the Petitioner's fundamental human rights. Additionally, that the Constitutional Court is duty bound to hear matters of enforcement of fundamental rights and interpretation of the Constitution.

9. Further, that a petition for enforcement of fundamental human rights cannot be disposed of by any

manner other than hearing and determination of the issues therein. The Petitioner urged the court to dismiss with costs the Respondent's application dated 25/8/2014 and the Interested Party's application dated 29/10/2013 on the basis that no grounds had been cited in support of the applications to form a substrate on which the orders sought can be granted.

### **The Submissions**

10. Both applications were canvassed by way of written submissions. **Murugu, Rigoro & Co. Advocates** for the Respondent filed submissions dated 25/8/2014. Counsel commenced by submitting on jurisdiction stating that jurisdiction is everything, without which the court ought to down its tools. It was submitted that this court lacked jurisdiction since the gist of the Petition was to challenge the result of an election as declared by the Respondent; hence the proper medium would be an election petition instituted in an Election Court. Furthermore, that an election court is a court so designated and published in the Gazette by the Chief Justice to exercise the special jurisdiction on matters relating to the challenge of election results.

11. Counsel referred the court to the ruling delivered in this petition by **Majanja, J**; while dismissing an interlocutory application the learned Judge noted that *despite the issues raised by the Petitioners being matters of fundamental rights and freedoms, this did not remove the matter from the ambit of Article 105*. In further support of the submission on jurisdiction of the High Court in relation to election disputes, counsel cited the following authorities: **Nairobi Election Petition No. 1 of 2013 - Ferdinand Waititu v Independent Electoral and Boundaries Commission & Others**; **Nairobi Election Petition No. 147 of 2013 - National Gender and Equality Commission v Independent Electoral and Boundaries Commission & Others**; and **Supreme Court Petition No. 10 of 2013 - Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others**.

12. On the constitutionality and legality of the impugned decision of the Respondent (IEBC), counsel submitted that the same had been settled by the Court of Appeal in its judgment and having conclusively determined the issue, this Court lacks the jurisdiction to depart from, review or in any way reconsider that decision. Counsel submitted further that this Court was bound by the decision of the Court of Appeal and that its pendency was a waste of judicial resources and thus an abuse of the court process. Counsel urged the court to find first, that it has no jurisdiction to hear and determine the Petition, and secondly, that the issues in the petition have been determined by the Court of Appeal, which decision is binding on this Court.

13. **Muma & Kanjama, Advocates** for the Interested Party filed submission dated 6/8/2014. On the issue whether the suit is *res judicata*, Counsel submitted the issues set out in the Petition and the Election Petition are substantially the same and in relation to the same parties, which issues were adjudicated upon by the High Court and subsequently on appeal at the Court of Appeal.

14. It was further submitted that though Constitutional Petitions are governed by the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** reference would be made to section 7 of Civil Procedure Act which provides for the doctrine of *res judicata*. In support of the reliance on the rules of procedure, counsel cited the case of **Booth Irrigation v Mombasa Water Products Ltd (Booth Irrigation No. 1) Nairobi HC Misc. Appl. No. 1052 of 2004** wherein the court held:

**“Although Constitutional Applications should be heard on merit, I find that there is nothing that would prevent a challenger of the alleged contravention moving this court to demonstrate that the application does violate fundamental principles of law including public policy for example the matter raised was res judicata. Res Judicata is in turn based on the principle grounded on public policy that litigation at some point must come to an end. Res Judicata is a fundamental principle of our law.”**

15. On whether this suit was an election petition disguised as a constitutional petition, counsel submitted that the gist of both Petitions is that there was an illegality in the nomination of the Interested Party as

Senator, and therefore the Petitioner be declared the rightly chosen candidate. Further, that the contents of the affidavits in support of the said petitions aver the same facts surrounding the same event.

16. Further reliance was placed on the ruling delivered by Majanja, J who dismissed the Chamber Summons application dated 25/3/2013 filed alongside the Petition holding that the proper medium for the issues raised would be vide an Election Petition which led to the filing of the Election Petition No 13 of 2013. This move, counsel submits, is a clear indication that the issues herein are the same as those in the Election Petition. Counsel submitted that on the foregoing, the suit was an abuse of the court process, which ought to be dismissed with costs in the realm of KShs 2 Million owing to the misuse of judicial time.

17. ***Kinoti & Kibe Company Advocates*** for the Petitioner filed submissions dated 15/10/2014 wherein counsel submitted that this court is clothed with jurisdiction under Articles 165(3), read together with Article 23 of the Constitution, to hear and determine applications for redress and denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. Consequently, it was in order for the Petitioner to seek redress for the violation of her fundamental rights in the High Court.

18. On the issue of striking out the petition, it was submitted for the Petitioner that it is a principal of justice enshrined in the Constitution that disputes should go to trial and be decided fairly. Counsel cited various authorities that restated the principle enunciated in the case of **D.T. Dobie & Company Kenya limited v Muchina (1982) KLR 1** that striking out of pleadings is a draconian measure that ought to be employed sparingly. On the issue of procedure as one of the grounds for striking out the pleadings, counsel relied on the Court of Appeal decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR** that:

**Deviations from and lapses in form and procedure which do not go to the jurisdiction of the court, or to the root of the dispute, or which do not at all occasion prejudice or miscarriage of justice to the opposite party, ought not be elevated to the level of criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances, the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”**

### **Our Determination**

19. We have considered the pleadings and submissions made by the parties to this petition. The issue for determination is whether the instant petition should be struck out for being *res judicata* and an abuse of the court process. Striking out of pleadings is provided for under Order 2, Rule 15 (1) of the Civil Procedure Rule, which states as follows -

**“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that —**

**a. it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court,**

**and may order the suit to be stayed or dismissed or judgment to be entered**

accordingly, as the case may be. “

20. It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1

21. It is contended by the Respondent and Interested Party that the present petition is *res judicata* and hence an abuse of the court of process. The substantive law on the doctrine of *res judicata* is section 7 of the Civil Procedure Act which provides that:

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

Therefore, for a suit or issue to be *res judicata*, the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit between the same parties and the issue must have been heard and finally decided by a competent court.

22. The requirements for *res judicata* to arise as stated in the said section are that -There must have been a previous suit between the same parties.

- a. The issue before the court must have been finally determined in that previous suit.
- b. The issue must have been determined by a court having competent jurisdiction.

Section 7 has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality. A suit is in this regard defined under the Civil Procedure Act to mean all civil proceedings commenced in any manner prescribed, and will therefore include the petitions and appeal that have been filed by the Petitioner herein.

23. It is not disputed that the parties in the instant petition and those in the separate election petition and appeal filed by the petitioner are the same. The Petitioner herein was also the petitioner in Election Petition 13 of 2013 – Lydia Mathia vs IEBC & Naisula Lesuuda , as well as the appellant in the appeal - Nairobi Civil Appeal No. 287 of 2013 – Lydia Mathia vs Naisula Lesuuda & IEBC. The Respondent and Interested Party herein were the 2<sup>nd</sup> and 1<sup>st</sup> Respondent respectively in both the election petition and appeal.

24. As regards the issues in this petition and in the election petition and appeal therefrom, it is not in dispute that all the three suits dealt with the decision of the Respondent herein to gazette and elect the Interested Party as Senator from the list of the National Alliance Party of the Women members nominated to Senate. The Petitioner in the present petition has challenged the constitutionality of the said election and has relied on various constitutional provisions, specifically, Article 27, 28, 36, 38, 47, 50, 90, 91 and 98 of the Constitution. A perusal of the judgement in the election petition and appeal reveals that the main finding in this respect was that the Interested Party was validly elected and nominated as a member of Senate in compliance with Articles 90 and 98 of the Constitution.

25. The Petitioner has argued that this petition is limited to the issue of the fundamental rights of the Petitioner. It is however notable that this particular issue was pleaded in the election petition and referred to and noted in the judgment by Ougo, J. The Petitioner had claimed in the election petition that the Respondent by its action had violated various constitutional rights, including her rights as enshrined in Articles 27, 28, 38, 47 and 50 of the Constitution. The judgment by Ougo, J was made after due consideration of these arguments. Lastly, it is also notable that the various remedies sought in the present

petition were also sought and expressly denied in the election petition.

26. The upshot of the foregoing is that we find that the present petition is *res judicata* as the issues herein had been pleaded, considered and decided upon in the judgment delivered by Ougo, J on 27<sup>th</sup> September 2013 in **Election Petition 13 of 2013 – Lydia Mathia vs IEBC & Naisula Lesuuda**, and in the judgment by the Court of Appeal in **Nairobi Civil Appeal No. 287 of 2013 – Lydia Mathia vs Naisula Lesuuda & IEBC** delivered on 16<sup>th</sup> April 2014. This petition is accordingly struck out for being an abuse of process of court.

### Costs

27. Following directions given by this Court on 15/5/2014, parties filed submissions on the issue of costs. Murugu, Riogo & Co. Advocates for the Respondent filed submissions dated 12/6/2014 wherein counsel submitted that the Petitioner adamantly insisted on prosecuting the instant petition despite filing Election Petition No 13 of 2013, ensuing the ruling by Majanja, J delivered on 27/3/2013 dismissing the application filed alongside this petition. As a result, counsel submitted, the Respondent filed its response to the petition.

28. It was further submitted by counsel that the petition failed to proceed on several occasions at the behest of the Petitioner. Further, that even after judgment was entered in Election Petition No 13 of 2013, which decision substantially dealt with the issues raised in the instant petition, the Petitioner insisted on prosecuting the petition when it was evident that the same ought to have been withdrawn. It was submitted that the Respondent, having procured the services of an independent Advocate who filed responses and dutifully attended court, it is entitled to costs.

29. Muma & Kanjama Advocates for the Interested Party filed submissions dated 16/6/2014 wherein counsel submitted on whether costs can be awarded in a Constitutional petition, and secondly whether an Interested Party can be awarded costs. On the first issue, counsel referred to **Rule 26(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2010** which provides that-

**“The award of costs is at the discretion of the Court.”**

30. Counsel submitted that in petitions such as this, whereas the Court has to secure access to justice, it holds the scale in determining whether it is just to award costs to a party that has been barged with litigation versus the party that seeks enforcement of rights allegedly infringed. It was submitted for the Interested Party that the petition herein was vexatious given that it had similar facts to Election Petition No. 13 of 2013. Further, that in declining requests to withdraw the petition, the Interested Party was subjected to expense and effort in dealing with the petition.

31. On whether the Interested Party can be awarded costs, counsel submitted that the Interested Party asked to be joined to the petition as its determination was directly pegged to the outcome of Election Petition No. 13 of 2013, as well as to get an opportunity to be heard. Counsel relied on the case of **Trusted Human Rights Alliance v Mumo Matemu & 5 Others (2014) eKLR** in defining the place of an interested party where it was held that:

***“An Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”***

32. It was submitted that the Interested Party had exhibited that she had a stake in the outcome of the petition including the direct bearing to the outcome of Election Petition No. 13 of 2013, thereby demonstrating her entitlement to costs.

33. Costs follow the event, and are also at the discretion of the court. The petition herein is the second one to be filed by the Petitioner, and the Respondent and Interested Party have had to defend their respective positions as a result of the averments made, and remedies sought in the said petition. We hold that the Respondent and Interested Party are as a result entitled to costs in light of the striking out of this Petition. We accordingly award the Respondent and Interested Party costs of the petition to be paid by the Petitioner.

34. There will be orders accordingly.

**Dated Signed and Delivered at Nairobi this 11<sup>th</sup> day of March 2015**

**A. MBOGHOLI MSAGHA**

**JUDGE**

**H. P. G. WAWERU**

**JUDGE**

**P. NYAMWEYA**

**JUDGE**