



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 236 OF 2013**

**BETWEEN**

**ROSE WAIRIMU KAMAU.....1<sup>ST</sup> PETITIONER**  
**SALOME WAIRIMU KAGO.....2<sup>ND</sup> PETITIONER**  
**ELIZABETH MUTHONI WANJAU.....3<sup>RD</sup> PETITIONER**  
**MARY MUTHONI NJERU.....4<sup>TH</sup> PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....RESPONDENT**

**RULING**

1. This matter comes up for directions regarding two applications arising from the Appellate Court judgment flowing from a judgment delivered in this matter. The parties addressed me on the issue of jurisdiction and I think it is necessary to recapitulate the history of the matter before considering the issue.
2. The original petition was filed by the petitioners who were aggrieved by the decision taken by the Independent Electoral and Boundaries Commission (“IEBC”) Dispute Resolution Committee which dismissed their complaints regarding the constitution of The National Alliance (‘TNA’) party list for Nyeri County. The decision of the Committee was the subject of the petition filed herein and by a judgment dated 12<sup>th</sup> July 2013, the High Court (Mumbi Ngugi, Majanja and Korir JJ) dismissed the petition with no order as to costs.
3. The judgment provoked an appeal to wit, **Nairobi Civil Appeal No. 169 of 2013**. After hearing the appeal, the Court of Appeal (Maraga, Mwera and Mohamed JJA) held as follows;

*[20] For these reasons, we allow this appeal and hereby set aside the TNA nomination for the Nyeri County representatives. TNA shall within fifteen days of the date hereof submit to the IEBC a proper party list. The IEBC shall in turn gazette the nominees within seven days of receipt of the list. As the Appellants did not make TNA a party to this appeal, we order that each party shall bear its own*

costs of this appeal and even those of the proceedings before the High court and the IEBC.

[21] In reaching this conclusion, we are alive to the fact that once the nominees to Parliament and to the County assemblies under Articles 97(1)(c) and 177(2) respectively have been gazetted, as the High Court correctly observed in **The National Gender and Equality Commission v. The IEBC and Others, Petition No. 147 of 2013; [2013] eKLR**, they are deemed to be elected members of Parliament and County Assemblies and any challenge to their membership has to be by way of election petitions under Article 105 of the Constitution or Part VII of the Elections Act as the case may be. That, however, does not apply here as the complaint giving rise to this appeal was lodged with the IEBC and a constitutional petition filed in the High Court before the nominees were gazetted. We are therefore entitled to make the orders we have made. [Emphasis mine]

4. Pursuant to the Court of Appeal Judgment, the Independent Electoral and Boundaries Commission ('IEBC') published **Gazette Notice No. 15096** dated 25<sup>th</sup> November 2013 in which it gazetted fresh members to the Nyeri County Assembly.
5. The petitioners have now moved the Court to seek enforcement of the Court of Appeal decision. In the Notice of Motion dated 20<sup>th</sup> January 2014, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> petitioners seek the following orders;
  1. *The inclusion of the interested party in the list of the 2<sup>nd</sup> respondent's nominees to the Nyeri County Assembly contained in the Gazette Notice No. 15096 dated 25<sup>th</sup> November 2013 and published by the 1<sup>st</sup> respondent on 29<sup>th</sup> November 2013 be and is hereby declared inconsistent with the Court of Appeal judgment dated and delivered on 8<sup>th</sup> November 2013 and therefore null and void.*
  2. *The 1<sup>st</sup> respondent be and is hereby directed to amend Gazette Notice no. 15096 of 29<sup>th</sup> November 2013 to delete the name of the Interested Party and insert the name of the applicant in the list of the 2<sup>nd</sup> respondent's nominees to the Nyeri County Assembly.*
6. In the Notice of Motion filed on 31<sup>st</sup> January 2014, the 3<sup>rd</sup> petitioner seeks inter alia the following orders;
  - (4) *The Honourable Court be pleased to issue a conservatory order of stay suspending the operation of the contents of the Kenya Gazette No. 15096 published in the Kenya Gazette dated 29<sup>th</sup> November 2013 as it relates to Nyeri County Assembly pending the hearing and determination of this application.*
  - (5) *The Honourable Court be pleased to find that the TNA party erred and failed to comply with the directives of the Court of Appeal in the judgment dated 8<sup>th</sup> November 2013 by including persons who had not been nominated in the first lists.*
  - (6) *The Honourable Court be pleased to set aside the Kenya Gazette Notice No. 15096 published in Kenya Gazette dated 29<sup>th</sup> November 2013 containing the list of TNA nominated members of Nyeri County assembly.*
  - (7) *The Honourable Court be pleased to order the inclusion of the applicant's name in the amended list of nominees to the Nyeri County Assembly by the national Alliance Party.*
7. The petitioners' case is that they seek to implement the decision of the Court of Appeal arising from the judgment in this matter. The complaints centre on the fact that the petitioners' names

have been excluded from the lists presented by TNA and subsequently gazetted by the IEBC. Their contention is that TNA did not comply with the directive of the Court of Appeal as the Court did not order the reconstitution of the list nor did it give the IEBC or TNA the authority to include person outside the original lists.

8. In my view these applications cannot proceed as this court lacks jurisdiction in the manner the petitioners suggest. Firstly, the matter in this case was completed by a judgment which was overturned by the Court of Appeal. It is evident that the Appellate Court issued fresh directions regarding the constitution of the TNA Party list which culminated in certain actions by TNA and the IEBC resulting in gazettment of new members of the County Assembly. These actions constitute separate causes of action which cannot be litigated in this matter as the present matter is now exhausted.
9. Secondly, as the decision of the Court of Appeal culminated in the gazetting of members of the County Assembly, this avenue of the litigation herein is now foreclosed. As the Court of Appeal observed at paragraph 21 of its decision, once members of the County Assembly are gazetted, they are deemed to be elected and as such any challenge to their membership must be by way of an election petition under **Article 105** of the Constitution and **Part VII** of the *Elections Act*.
10. As the effect of entertaining the application will inevitably lead to questioning the membership of the County Assembly, it follows that the applications are incompetent as the Court lacks jurisdiction to deal with questions of membership of the County Assembly in any other manner other than through an election petition.
11. I am aware that striking out is a drastic remedy but in such a case the Constitution and the law does not permit the course adopted by the applicants and the Court must be able to so state clearly and at the earliest opportunity to avoid unnecessary increase in costs to the parties.
12. I have no choice but to strike out the petitioners' applications under consideration. There shall be no order as to costs

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> February 2014**

**D.S. MAJANJA**

**JUDGE**