



**REPUBLIC OF KENYA**

**IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI**

**ELECTION PETITION NO. 13 OF 2013**

**IN THE MATTER OF THE CONSTITUTION OF KENYA,**

**THE ELECTIONS ACT (2011) AND THE ELECTIONS (PARLIAMENTARY AND  
COUNTYELECTIONS) PETITION RULES, 2013**

**AND**

**IN THE MATTER OF NOMINATION TO THE COUNTY ASSEMBLY OF GARISSA**

**DUBAT ALI AMEY.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....1ST RESPONDENT**

**ISAAC HASSAN.....2ND RESPONDENT**

**GEDI ADOW ABDI.....3RD RESPONDENT**

**ORANGE DEMOCRATIC PARTY.....INTERESTED PARTY**

**JUDGEMENT**

**Background**

Following the general elections held on 4th March, 2013 conducted under the Constitution of Kenya 2010 in which various political parties fielded candidates for various elective seats in the national assembly, senate and the county assemblies in all the 47 counties, political parties were in line with Article 177 of the Constitution required to nominate additional members in respect of marginalised groups and gender top up to the county assemblies based on the number of seats won by candidates of the political party at the general elections. This petition is one which concerns a special seat in the County assembly of Garissa.

The petitioner filed a petition dated 14th August, 2013 in which he sought orders that

- a. It be determined that the said GEDI ADOW ABDI was not lawfully nominated and that the said nomination was irregular, unlawful and void and the same be nullified
- b. The honourable court do declare that the petitioner herein DUBAT ALI AMEY as the duly nominated member of Orange Democratic Movement to the County assembly of Garissa County under the special seat in place of GEDI ADOW ABDI
- c. Costs of the petition and interest
- d. Any other relief that this Honourable court may deem fit and just to grant.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by Noor Awadh on 18<sup>th</sup> September, 2013 while the 3<sup>rd</sup> respondent filed a response to petition dated 20<sup>th</sup> September, 2013 in which he prayed that the court determine that GEDI ADOW ABDI was duly nominated as the member of the County assembly of Garissa to represent people with disabilities and the nomination was valid.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents raised a preliminary objection which the court directed form part of the issues for determination to ensure expeditious disposal of the petition given the strict timelines set out in the Elections Act No. 24 of 2011.

A preliminary objection raised by counsel for the petitioner with regard to representation of the 3<sup>rd</sup> respondent and the interested party by the same law firm citing conflict of interest was resolved when Mr Kibungei for the 3<sup>rd</sup> respondent opted to cease acting for the interested party.

### **Issues for determination**

During the Pre-Trial Conference held on 27<sup>th</sup> November, 2013, the parties to this Petition agreed on the following issues for determination

- a. Whether the petition complies with the provisions of the Elections Act, 2011 and the regulations thereunder.
- b. Whether the matter is Res Judicata
- c. Whether the 3<sup>rd</sup> respondent was eligible for nomination as a member of the county Assembly
- d. Whether the nomination and gazettelement of the 3<sup>rd</sup> respondent as a member of the Garissa county assembly was in accordance with the law.
- e. Who should bear costs of the petition.

Before proceeding to consider each of the issues enumerated above, I considered the burden and standard of proof in cases such as these.

### **Burden of proof in election petitions**

The burden of proving the allegations made in the Petition lies with the Petitioner.

This was decided in the case of **Onalo –vs- Ondeki (2008) 3 KLR (EP) 500**, cited in the case of **Benard Shinali -vs- Boni Khalwale 2011 EKLR**, Rawal J stated that the burden of proving any allegation made in a petition lies with the petitioner and has to be to the satisfaction of the court on a higher degree than merely on a balance of probabilities.

In **Raila Odinga –Vs- IEBC & 3 Others, Election Petition No.5 of 2013** the Supreme Court of Kenya held that :-

***“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges for a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to be done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”***

It is therefore clear that in an election petition such as the present one, the Petitioner must present cogent evidence before the court in support of any allegation made with regard to any purported breaches of law by the Respondents.

As regards the standard of proof, the Petitioner is required to prove the allegations of electoral malpractices to the standard that is higher than that of a balance of probabilities that is applicable in civil cases but lower than that applicable in criminal cases i.e. that of proof beyond any reasonable doubt.

It is from this background that I have considered the issues for determination in this matter.

#### **A. Whether the petition complies with the provisions of the Elections Act, 2011 and the regulations thereunder**

I note that when parties agreed on the issues for determination, the issue of whether the 1<sup>st</sup> and 2<sup>nd</sup> respondent had filed an answer to petition in line with rule 14 of the Elections Rules or that the 3<sup>rd</sup> respondent’s answer to petition was not supported by an affidavit as required under Rule 15(2) of the Election Rules was not among the issues set out for determination and on which parties were required to be file submissions or call witnesses. The same has only been raised in the petitioners’ submissions with regard to the 1<sup>st</sup> issue for determination which was whether the petition complied with the provisions of the Elections Act, 2011 and is therefore in my considered view an afterthought. Having not been one of the issues set for determination the respondents did not file any submissions addressing the response by the 1<sup>st</sup> and 2<sup>nd</sup> respondents or the lack of an accompanying affidavit to the 3<sup>rd</sup> respondent’s response to petition. As all parties have a right to be heard, I will disregard this new angle introduced by the petitioner and proceed with the issue that had been framed by the consent of parties at the pre-trial conference.

On the issue of whether the petition complied with the provisions of the Elections Act and the regulations thereunder, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the allegations of illegality, forgery and collusion contained in the petition had not been particularised. He submitted that the petitioner had failed to furnish the mandatory particulars as required by law. To buttress his submissions on this issue, counsel relied on the case of **Amina Hassan Ahmed –vs-IEBC & Others.**

The 3<sup>rd</sup> respondent submitted that the petition was fatally defective as it failed to give particulars as required by Section 76 of the Elections Act and Rule 10 of the Election rules.

Counsel submitted that the petition was wanting in particulars as it generally made references to other parties not parties to the petition.

The petitioner submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not particularised the alleged defects or the missing particulars. The petitioner submitted that the defects if any were not material enough to fatally affect the whole petition.

In considering this issue I have considered the provision of Article 159(2)(d) of the Constitution, 2010 which provides that

***justice shall be administered without undue regard to procedural technicalities***

and further the Supreme Court’s decision in **Supreme Court No.5 of 2013 Raila Odinga & 5 others -**

**vs- IEBC & 3 others** when considering the meaning of Article 159(2)(d) of the constitution where the court stated that

***the article simply means that a court of law should not pay undue regard to procedural requirements at the expense of substantive justice. It was never meant to oust the obligations of litigants to comply with procedural imperatives as they seek justice from courts of law.***

I have also considered the provisions of Rule 10(3)(b) of the Election rules provides that

***an election petition shall be supported by an affidavit by the Petitioner containing the grounds on which relief is sought and setting out the facts relied on by the Petitioner;***

Bearing the above in mind, I have also considered that the High court in Garissa when faced with an application in **Petition No. 4 of 2013 Amina Hassan Ahmed -vs- Fathia Mahbub & 2 others** for amendment of a petition which had not complied with the provisions of Rule 10, stated that

***the provisions of Rule 10 and others aforesaid, are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of the intended petitions, they are nevertheless, at the same time, are substantive and go to the root and substance of issues and matters prescribed upon.***

I also considered the finding in the Ugandan High Court decision in **Election Petition 0008 of 2006 Ongole James Michael –vs – Electoral Commission & Ebukalin Sam** where the court held that the allegation of fraud had to be specifically pleaded and proved.

In the case before the Garissa High Court the petitioner had failed to indicate in the petition the specific information required under Rule 10(1) and (4) and not Rule 10(3) (b) as in the present case.

Further unlike the provisions of Rule 8 which provide for the specific form in which the petition should be, rule 10(3)(b) merely states that the affidavit in support of the petition should contain the grounds on which the relief is sought. I note that the petition filed in this case is supported by the petitioner's affidavit sworn on 14th August, 2013. It in my view sets out the grounds and the facts to be relied on by the petitioner at paragraphs 3,4,5,6,8,9,20 and 21. Contrary to the submissions for counsel for the 1st, 2nd and 3rd respondents, I find that the petition has complied with Rule 10 (3) of the Election rules.

The 3rd respondent in his submissions also stated that he was never served with the petition and only got to know about it when he was served with a mention notice. The petitioner on the other hand submitted that the 3rd respondent was served on 27<sup>th</sup> August, 2013 in the presence of the leader of the majority in the County Assembly of Garissa.

Rule 13(1) of the Elections Rules provides that

***an election petition shall be served by the Petitioner on the Respondent by direct service; or publication in a newspaper of national circulation.***

I noted from the affidavit of service sworn by Ismael Mwaura on 10<sup>th</sup> September, 2013, the petition was served on the 3<sup>rd</sup> respondent on 27<sup>th</sup> August, 2013 as he was leaving the Garissa County assembly building. I noted that at no point during the proceedings did the 3<sup>rd</sup> respondent challenge the authenticity of the contents of affidavit of service sworn by the process server or request to have the deponent cross examined on his averments. He who alleges must prove and the onus was on the 3rd respondent who was

disputing service to show that he indeed was not served with the petition. As this was not done, the contents of the affidavit of service sworn on 10<sup>th</sup> September, 2013 stand. On the basis of the unchallenged averments in the said affidavit, I find that the 3<sup>rd</sup> respondent was properly served with the petition in accordance with the provision of Rule 13(1) (a) of the Election rules.

#### **B. Whether the matter is Res Judicata**

On this issue, the petitioner took the position that this matter was not Res Judicata. In support of this position, counsel for the petitioner submitted that Section 75(1) of the Elections Act did not contemplate any other means of removing a member of a county assembly from office other than through an election petition. As the 3<sup>rd</sup> respondent was a gazetted member of the County assembly of Garissa, the only avenue available is through an election petition. He relied on **J.R No. 110 of 2013 Chrispus Fwamba & another-vs- Transition Authority , IEBC and Alex Magero, speaker , Nairobi County assembly and NARC Kenya & 3 others –vs IEBC & 3 others (2013) eKLR.** Counsel for the petitioner while relying on the case of **Mumo Matemu –vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** submitted that the decision in J.R No. 202 of 2013 did not deal with the merits of the nomination of the 3<sup>rd</sup> respondent but with the process of such nomination.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent in his submissions stated that the petitioner had been dissatisfied with the final list drawn by the 1<sup>st</sup> respondent.

He filed complaint No. 483 before the 1<sup>st</sup> respondent's Dispute Resolution Committee which complaint was dismissed after consideration. He subsequently filed complaint ref no. DRC/PL/264/2013 in the Dispute Resolution Committee which was also dismissed. He then challenged the decision of the committee in the High court in JR No. 202 of 2013 which was dismissed for want of evidence. It was submitted on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents that this petition raised the same issues as those determined by the Dispute Resolution Committee and the High court. It was submitted that no new material was placed before this court that was not conclusively considered by the three judge bench. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents relied **on Nairobi High Court petition No. 139 of 2013 Stanley Kilimo Kore-vs Edward Katama Ngeywa & 2 others** and **High Court Petition No. 365 of 2013 Rose Wairimu Kamau –vs- IEBC & 3 Others**

The 3<sup>rd</sup> respondent submissions on this issue were similar those of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

I have carefully considered the pleadings, the submissions of the parties and the relevant provisions of the law. The Civil Procedure Act provides at Section 7 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.***

The essence of the doctrine of res judicata is that a party should not be vexed twice over the same cause and to bring an end to litigation. In the case of **Karia and Another Vs the Attorney General and Others (2005) 1EA 83.**, it was held that for res judicata to apply, the issue in the subject suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, are litigating under the same title.

From the foregoing, it is clear that the doctrine of Res judicata precludes the filing of subsequent suits on the same cause of action between the same parties after a final judgment on the merits has been made.

Bearing the above in mind, I have considered whether the parties in this election petition are the same as those in J. R no. 202 of 2013. I noted that a copy of the pleadings in J.R 202 of 2013 was not availed. However the court has gone through the judgement of the High court and noted that the parties are indicated as

**REPUBLIC.....APPLICANT**

**VERSUS**

**I E B C .....1<sup>ST</sup> RESP**

**GEDOW ADOW ABDI.....2<sup>ND</sup> RESP**

**ORANGE DEMOCRATIC PARTY.....3<sup>RD</sup> RESP**

**Exparte DUBAT ALI AMEY**

While the parties in the present petition when filed were indicated as

**DUBAT ALI AMEY.....PETITIONER**

**VERSUS**

**I E B C.....1<sup>ST</sup> RESP**

**ISAACK HASSAN.....2<sup>ND</sup> RESP**

**GEDOW ADOW ABDI.....3<sup>RD</sup> RESP**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESP**

**ORANGE DEMOCRATIC PARTY.....INTERESTED PARTY**

The petition against the Attorney General was subsequently withdrawn leaving the 1<sup>st</sup> to 3<sup>rd</sup> respondents together with the interested party. Unlike in the judicial review application in the High Court, Mr. Isaack Hassan is a respondent in this petition with the petitioner having made specific allegations against him( see paragraphs 24,25 and 26 of the affidavit in support of the petition) With the inclusion of the 2<sup>nd</sup> respondent in this petition and given the allegations made against him, I am of the view that the parties in this petition are not the same as in the High Court matter and as such the doctrine of res judicata does not in my view arise. For the foregoing reasons, I find that the matter is not Res judicata.

In determining this issue, I have also considered the provisions of Article 50(1) of the Constitution 2010 which provides that

***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

And the provisions of Article 87(1) of the Constitution 2010 which provides that

***Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.***

The Elections Act No. 24 of 2011 enacted by parliament pursuant to the provisions of Article 87(1) of the Constitution 2010, which deals with settlement of electoral disputes provides at Section 75(1) (A) that

***A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.***

The 3rd respondent is currently a member of the County assembly of Garissa having been duly gazetted. The petitioner has filed this petition seeking orders that he be declared the duly nominated member of ODM to the County assembly of Garissa in place of the 3rd respondent. In essence the petitioner seeks to have the membership of the 3rd respondent to the County assembly of Garissa annulled.

Given the above provisions of law, I am of the considered view that as the 3rd respondent was a member of the County assembly of Garissa, he could only vacate office through one of the ways prescribed at Article 194(1) of the constitution which include through an election petition such as this one. This court having been duly gazetted by the Chief Justice to handle election petitions, is in my view therefore the proper forum for the petitioner to settle his dispute against the 3rd respondent. It is my view that to hold otherwise would be to limit the petitioner's right under Article 50(1) of the Constitution, 2010.

### **C. Whether the 3rd respondent was eligible for nomination as a member of the county Assembly**

On this issue, counsel for the petitioner submitted that the 3rd respondent was not eligible for nomination as a member of the county assembly of Garissa having been a public officer duly employed by the National Hospital Insurance Fund, a state corporation upto 19th April, 2013. He submitted that the 3rd respondent's nomination offended the provisions of the Constitution and the Elections Act No. 24 of 2011. The petitioner's submission was that the nomination of the 3rd respondent offends the provisions of Section 25 and 43(5) of the Elections Act. He submitted that the said provisions were to apply uniformly to public officers seeking both elective and nominated seats. Counsel further submitted that Article 177(1)(c)(2) of the Constitution 2010, provided that it was political parties who had the mandate to nominate candidates to the county assembly and that for a person to be nominated, one had to be a member of the political party which in the case of the 3rd defendant who was a public officer would offend the provisions of Section 25 of the Election Act No. 24 of 2011.

The 1st and 2nd respondents submitted that candidates for special seats were not required to resign 6 months prior to the elections as the candidate for a nominated seat cannot by virtue of his public office influence the nomination and further because as opposed to an election where an election date is set in advance, the nomination date is not and as such it is difficult to determine when a prospective nominee is required to resign.

This court has carefully considered the evidence tendered in respect of this issue. Section 25(2)(a) of the Elections Act 2011 provides thus:-

***A person is disqualified from being elected a member of a county assembly if the person is a State officer or other public officer, other than a member of the county assembly;***

Article 260 of the constitution defines

**“public officer”to mean any State officer; or any person, other than a State Officer, who holds a public office while “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;**

The Public Officers Ethics Act at Section 2 defines a public officer as **any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following -**

**(d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law”**

It is not in dispute that the 3<sup>rd</sup> respondent had been an employee of NHIF up to 19<sup>th</sup> April, 2013 when he tendered his resignation. He confirmed this in his response to the petition. National Hospital Insurance Fund is a State Parastatal that was established in 1966 as a department under the Ministry of Health and is governed by the NHIF Act No. 9 of 1998. The 3<sup>rd</sup> respondent was therefore a public officer in line Section 2 of the Public Officers Ethics Act.

Having said so, the question that arises is whether the 3<sup>rd</sup> respondent was required to resign 6 months prior to his nomination in line with the provisions of Section 43(5) of the Elections Act, 2011

I have considered that Section 43(5) of the Elections Act provides that

**a public officer who intends to contest an election should resign from public office at least six months before the date of election.**

Having been a public officer, the above provision of the law applied to the 3<sup>rd</sup> respondent if he wanted to contest an election. The issue for determination by the court was whether any public officer seeking nomination to any of the special seats provided for at Article 177 (1) (b) and (c) had to comply with the provisions of Section 43(5) of the Elections Act.

In considering this issue, I noted that the provisions of Section 43(5) of the Elections Act did not make any mention of those public officers seeking nominations for the special seats but expressly provides that those intending to contest an election should resign from the public office at least 6 months from the date of the election. In seeking to decipher whether the legislature intended the provisions of Section 43(5) of the Elections Act to apply to public officers seeking nomination to the special seats, I noted that an important and useful principle in construction especially of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. A case in point is the **Republic vs. EL Mann Mwenda Co. Int. 1969 EARLR 357** where it was held that:-

**“Where the language of an Act is clear and explicit we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak of the intention of the legislature”.**

I have also considered the finding in **Petition No. 23 of 2013 Lady Justice Nancy Baraza-vs- the Judicial Service Commission (2012) e KLR** where the court held that

**“ If parliament, in its wisdom intended the process for removal of the Deputy Chief Justice to be the same as that of removing the Chief Justice nothing would have prevented it from saying so.”**

In the present case where Section 43(5) of the Elections Act clearly makes reference to public officers

seeking to contest an election, it is my considered view that if the legislature had the intention of having the provisions of Section 43(5) apply to those seeking nomination for the special seats under Article 177 (1) (b) (c), nothing would have been easier than for them to expressly say so. As it stands, I am of the view that the legislature's intention was for the provision to apply to those seeking to contest elective posts in any general election.

A question that arose from the submissions of the petitioner was whether having been a public officer, the 3rd respondent was eligible to be a member of a political party and therefore qualify for nomination for the special seats in the County assembly.

Section 16 of Public Officers Ethics Act provides that.

***A public officer shall not, in or in connection with the performance of his duties as such act as an agent for, or so as to further the interest of, a political party; or indicate support for or opposition to any political party or candidate in an election. A public officer shall not engage in political activity that may compromise or be seen to compromise the political neutrality of his office.***

Section 12. (1) of the Political Parties Act provides that

***A public officer shall not—***

***(a) be eligible to be a founding member of a political party;***

***(b) be eligible to hold office in a political party;***

***(c) engage in political activity that may compromise or be seen to compromise the political neutrality of that person's office; or***

***(d) publicly indicate support for or opposition to any political party or candidate in an election.***

It is clear that the above provision of law does not preclude a public officer from being a member of a political party but only barred him/her from being the founding member or holding office in a political party. The section further bars the public officer from engaging in political activity that may compromise or be seen to compromise the neutrality of that person's office or to publicly indicate support or opposition to any political party or candidate in an election. No evidence was led to indicate that the 3rd respondent was a founding member of ODM or that he held any office in the said party. Further no evidence was led to indicate that he at any time engaged in political activity that compromised the neutrality of his office or that he publicly indicated his support for ODM as a party or any of its candidates in the concluded general elections.

The 3rd respondent was therefore within his rights as a Kenyan to be a member of ODM and was therefore eligible for nomination by the party for the special seats at the County assembly of Garissa

**D. Whether the nomination and gazettelement of the 3rd respondent as a member of the Garissa county assembly was in accordance with the law.**

Article 90(1) of the Constitution, 2010 provides that

***Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.***

Article 90(2) (a) further provides that

***The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation***

On this issue, counsel for the petitioner submitted that the petitioner's name was submitted to the 1<sup>st</sup> respondent by the interested party as its nominee for the special seat to the County assembly of Garissa. He indicated that the petitioner's name appeared at no.5 of the marginalised list. It was also submitted on behalf of the petitioner that the secretary general of the interested party had on 8<sup>th</sup> May, 2013 in a letter to the 1<sup>st</sup> respondent indicated that the petitioner was its rightful nominee to represent persons with disabilities. They also sought to rely on the affidavit of Hon. Prof Anyang Nyongo sworn on 19<sup>th</sup> September, 2013 in which at paragraph 13, Hon. Nyongo stated that the petitioner was the interested party's true nominee to represent persons with disabilities in Garissa County.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents' submission on this issue was that the nomination of the 3<sup>rd</sup> respondent was done in accordance with the law. Counsel submitted that Article 90(2) of the constitution bestowed on the 1st respondent the duty of ensuring that party lists met the criteria set out in the Constitution and legislation.

He submitted that the interested party submitted two lists which were merged which action was within the mandate of the 1st respondent. He relied on the case of **Lydia Mathia –vs- Naisula Lesuuda & Anor.**

Counsel for the 3rd respondent submitted that both the petitioner and the 3rd respondent were both in the party list of the interested party but in different categories with the former being in the list of gender top up while the latter was in the list of marginalised groups. Consequently the petitioner could not lay claim to the party's nomination in the marginalised category. Counsel submitted the nomination of the 3<sup>rd</sup> respondent had been conducted in accordance with the law.

The petitioner's counsel has submitted that the deputy secretary general of ODM was called to testify having not sworn an affidavit in contravention of the rules. The record of the court of 27th November, 2013 indicates that counsel for the interested party sought an adjournment on the date for hearing as Hon. Prof Nyongo was absent and that when counsel for the 3rd respondent suggested that the interested party be allowed to call any other official, a position supported by counsel for the interested party who indicated that he had made such a proposition to his learned seniors, Counsel for the petitioner is on record as having stated that the deputy secretary general of ODM could be called to testify and that they would require the personal attendance of Hon. Prof. Nyongo if his deputy was unable to answer questions directed to him. Leave was granted pursuant to the provisions of Rule 15(5) of the Elections rules. The petitioner's submissions on this point are therefore erroneous.

Hon. Mwangi, the deputy secretary general of the interested party who testified on 2nd December, 2013 stated that the petitioner's name was in the interested party's list under gender top up while that of the 3rd respondent was in its list for marginalised groups.

I have considered the submissions of parties, the relevant provisions of the law and the evidence led. In this case, the secretary general Hon. Prof. Anyang Nyongo swore two affidavits dated 19th September, 2013 and 26th September, 2013 respectively. In the former, he stated that the petitioner was the interested party's bonafide nominee while in the latter he averred that the 3rd respondent was the interested party's nominee under the marginalised category. Given the contradictory averments by the Secretary general and as he was not able to attend court to clarify the contents of each affidavit, I found

the affidavits to be of little evidential value and opted to disregard both of them and proceed to determine this issue on the basis of other evidence presented.

The petitioner's position is that his name was presented to the 1<sup>st</sup> respondent for nomination to represent persons living with disabilities in the County assembly of Garissa.

The allegation by the petitioner that the list in which the name of the 3<sup>rd</sup> respondent appears at No.1 was a false document and did not originate from the interested party was not substantiated as no evidence was led in this respect. As stated earlier, the burden of proof in election petitions rests with the petitioner and in this case, it was for the petitioner to prove to the required standard that the said list was a forgery. To the contrary, the deputy secretary who testified before the court acknowledged the list bearing the 3<sup>rd</sup> respondent's name at No.1 in the marginalised category as having originated from the interested party. He stated that the petitioner's name had also been submitted to the 1<sup>st</sup> respondent under the gender top up list. Having had occasion to look at the list dated 23<sup>rd</sup> January, 2013 annexed to the petition and marked DAA-1 which the petitioner indicates is the authentic list sent by the interested party to the 1<sup>st</sup> respondent, it is clear that the petitioner's name appears in a list with the heading gender top up which has a total of 30 names. In his affidavit in support of the petition, the petitioner at paragraph 4 averred that

***The interested party captured my name in position 5 of the gender top up list dated 23<sup>rd</sup> January, 2014... (Emphasis mine)***

From the foregoing, it is clear that at no point was the petitioner's name in the marginalised party list of the interested party. The evidence presented even by the petitioner himself and which is in tandem with the oral evidence of the deputy secretary general of the interested party is that his name was presented to the 1<sup>st</sup> respondent under the gender top up category. The letter dated 8<sup>th</sup> May, 2013 by the interested party's secretary general also clearly indicates that the petitioner was the party's nominee in the gender top up list.

The evidence presented negates the assertions of the petitioner in his petition that his name appeared in the gender top up/ marginalised group list. Article 177(1) and (2) creates two types of special seats. One for gender top up and the other for marginalised groups and the slot available for nomination at the County Assembly of Garissa was in respect of marginalised groups and not gender top up as the deputy secretary general stated in his evidence before court that to the best of his knowledge there were no women elected members of the County assembly of Garissa and as such the positions in the gender top up category were all filled by women. The petitioner having not been listed in the marginalised category cannot therefore be heard to say that he should have been the one nominated by IEBC to fill the available slot for marginalised persons in the County assembly of Garissa. The deputy secretary general clarified that even though the petitioner was a person with disability, he had been nominated under the gender top up category.

The petitioner having been listed under the gender top up list could not have been expected to be nominated in the marginalised group slot which became available for ODM after the general election. The constitution gives political parties the right to nominate persons for the special category seats and it is only fair that the courts give effect to the desires of the respective political parties.

Having considered the evidence led with regard to whether the nomination of the 3<sup>rd</sup> respondent was in accordance with the law, I am satisfied that the 3<sup>rd</sup> respondent's nomination was conducted in accordance with the law as the 1<sup>st</sup> respondent acted in accordance with the wishes of the interested party.

For the foregoing reasons, I find that the petitioner has no merit and is hereby dismissed. I find that GEDI ADOW ABDI was duly and validly nominated as the member of the County assembly of Garissa to represent people with disabilities .

**E. Who should bear costs of the petition.**

Costs follow the cause and as such I award the respondents costs against the petitioner. The interested party is to bear its own costs given the contradictory affidavits sworn by its secretary general. Pursuant to **Rule 34 (1) (a) of the Election Petition Rules**, this Court caps the total costs payable to the Respondents at Kshs1,000,000 as follows:

. The 1<sup>st</sup> respondent awarded Kshs.400,000

The 2<sup>nd</sup> respondent awarded Kshs.200,000

The 3<sup>rd</sup> respondent awarded Kshs.400,000.

The security deposit shall remain in the court custody and may be used towards payment of the costs.

I wish to commend the counsels for the manner in which they conducted themselves during the hearing of this petition.

**Dated at Nairobi this 3<sup>rd</sup> February, 2014**

**C.A OTIENO**

**Ag.PRINCIPAL MAGISTRATE.**