



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAIROBI

ELECTION PETITION NO. 12 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ELECTIONS ACT NO. 11 OF 2011

AND

**IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2013**

AND

THE ELECTIONS (GENERAL) REGULATIONS

AND

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

BETWEEN

NARC KENYA.....1ST PETITIONER

MUHUBO OMAR.....2ND PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

FATUMA MOHAMMED.....2ND RESPONDENT

JUDGEMENT

The constitution of Kenya 2010 ushered in a new electoral system in Kenya. Article 90(1) of the Constitution required that political parties nominate persons to serve as nominated members of the national assembly, senate and the county assemblies . This petition is in respect of a special seat in the County assembly of Garissa where the 1st petitioner was entitled to nominate one person in the gender top up category.

The petitioners filed the petition dated 13th August, 2013 seeking the following orders ;

- a. A declaration that the 1st respondent exceeded its powers by failing to have due regard to the 1st petitioners original party list as submitted on 30 th day of April, 2013 and consequently irregularly and illegally omitting the 2nd petitioner’s name whose name was forwarded to the 1st respondent.
- b. A declaration that the petitioner’s rights as envisaged under Article 177 of the constitution have been grossly infringed and violated by the 1st respondent and to remove her name from the submitted list for Garissa County.
- c. A declaration that the purported removal of the 2nd petitioner’s name from the list of Garissa County assembly was unlawful, null and void ab intio.
- d. An order revoking the decision and/or nomination of the 2nd respondent in the Garissa County assembly and further an order revoking and /or directing the 1st respondent to degazette the 2nd respondent.
- e. A declaration and an order that the 2nd petitioner is the 1st petitioner’s duly nominated representative for Garissa County assembly special seat as submitted by the 1st petitioner to the 1st respondent on 30th day of April,2013 and that her nomination be finalised.
- f. A declaration and order that the cost and interest thereon be borne by the respondent.

The 1st respondent filed a response to petition dated 6th September, 2013. The same was accompanied by an affidavit sworn on the same date by Noor Awadh. The 1st respondent prays that it be determined that the 2nd respondent was duly elected and the election was valid and the petition be dismissed with costs to the 1st respondent.

The 2nd respondent filed a response to petition dated 11th October, 2013 praying that the court determine that she was duly nominated as the member of the County assembly of Garissa under the gender top-up category.

Burden of proof in election petitions

It is now settled that 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**, where 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 :-

a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable doubt

“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.”

The petitioner in any election petition 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 in the election petition 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.

It is on this background that I have carefully considered the pleadings, the evidence presented and the submissions made by counsels for the parties.

Issues for determination

At the pre-trial conference on 13th November, 2013, the parties agreed by consent to have the following issues as the issues for determination in this petition. The issues are as follows:

1. Whether the petition is Res judicata
2. Whether the 2nd respondent was eligible for nomination by the 1st petitioner as a member of the County assembly of Garissa
3. Whether the 2nd petitioner was eligible for nomination as a member of the county assembly of Garissa
4. Whether the 2nd respondent was duly and lawfully nominated by the 1st petitioner as a member of the county assembly of Garissa
5. Whether the 1st and 2nd petitioner complied with the provisions of the Elections Act , 2011, the Elections(general) regulations and the Elections(Parliamentary and County Elections) Petition Rules, 2013
6. Who will bear costs of the petition.

1. Whether the petition is Res Judicata

On this issue, the petitioners submitted that the substantial issues raised before the High court were not heard and finally determined and as such the petition was properly before this court.

The 1st respondent did not make any submissions on this point.

It was submitted on behalf of the 2nd respondent that a complaint over this nomination had been raised before the Independent Electoral and Boundaries Dispute Resolution Committee which heard the same and dismissed it. The 2nd petitioner subsequently filed a High Court Judicial review application which was dismissed. It was submitted that the petitioners were raising the same issues which had been raised before the dispute resolution committee and the High Court and that it would be an unpleasant scenario to have the decision of the committee, the High Court and another one by this court over the same matter.

I have carefully considered the submissions made on this point in light of 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.

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.

In the present case, the 2nd petitioner raised a complaint over the nomination of the 2nd respondent with the dispute resolution committee of the 1st respondent. The committee heard the complaint and dismissed the same in its decision of 7th June, 2013. The petitioner not being satisfied with the outcome filed Judicial Review No. 203 of 2013 challenging the nomination of the 2nd respondent as the gender top up nominee for Garissa County for NARC Kenya party . In its judgement, the court stated that

This matter raises serious issues against the 2nd respondent and any determination of the matter would adversely affect her interests. However the 2nd respondent did not participate in these proceedings as she was never served. In the affidavit of service sworn by Daniel Kanyiri Watu, an appointed court process server on 28th June 2013, he states at Paragraph 10 thereof that he was unable to trace and serve the 2nd respondent. It is a cardinal principle of natural justice that no party shall be condemned unheard. To make a decision in this matter in the absence of the 2nd respondent may well result in her being condemned without having had a chance to present her side of the matter. In the circumstances, the application must fail. It is hereby dismissed but with no orders as to costs.

It is clear from the judgment that the High court did not consider the issues raised by the applicant who is the 2nd petitioner in this petition on their merits given the absence of the 2nd respondent who had not been served.

After the dismissal of the judicial review application for lack of service on the 2nd respondent, the 2nd petitioner filed judicial review No. 252 of 2013 seeking the following orders:-

- i. An order of certiorari quashing the decision of the 1st respondent dated 7th June, 2013 which purported to nominate the 2nd respondent as the nominee of the 1st applicant to the county assembly of Garissa under the gender top up category
- ii. The Honourable court be pleased to grant a prohibitory order restraining the 2nd respondent from taking or having the oath of office administered upon her by anyone whatsoever pursuant to gazette Notice NO.9794 Vol.CXV-No.105 date 17.7.2013
- iii. That a mandamus order to issue directed at the 1st respondent or the 4th respondent requiring them to degazette and or expunge the 2nd respondent from gazette Notice NO.9794 Vol.CXV-No.105 date 17.7.2013 as nominee for the 1st applicant to the Garissa County assembly
- iv. That a mandamus order do issue directed at the 3rd and 4th respondents to arrest and arraign the 2nd respondent in a court of law and charge or cause the 2nd respondent to be charged
- v. That a mandamus order do issue directed at the 1st respondent to gazette the name of Muhubo Omar Ahmed of ID No.10360874 as the nominee of Narc Kenya to the County

- vi. That the costs of this application be provided for
- vii. Any other relief this Honourable court may deem fit and just to grant

The court in its ruling striking out this application with no orders as to costs stated that

The applicants have not been denied the opportunity to address their grievance. What they are required to do is to use the avenue open for them to challenge the validity of the election of a member of the county assembly by lodging an election petition in accordance with the applicable rules.

From the ruling, it is clear that the issues raised in the application were not determined as the court held that the proper avenue available for the petitioners to ventilate their claim was by filing of an election petition.

Having analysed the decisions in the judicial review applications in the High Court, I am persuaded that the petitioners have not been heard on the issues they have raised and a decision made on the same by a competent court. As such the doctrine of Res judicata does not apply in the circumstances of this case.

2. Whether the 2nd respondent was eligible for nomination by the 1st petitioner as a member of the County assembly of Garissa

On this issue, the petitioners submitted that the 2nd respondent was not a member of the party and that she was still a civil servant as at 2nd June, 2013 evidenced by annexure AMN 9 a duty roster for administration police officers stationed at Garissa District.

Counsel for the 2nd respondent submitted that the 2nd respondent met the legal and constitutional threshold of nominations as provided under Article 97(1) (c) of the Constitution as she had resigned as an employee of the Government of Kenya. It was further submitted that this being a nominative and not elective position, the provisions of Section 43(5) of the Elections Act No. 24 of 2011 does not apply to the 2nd respondent.

Section 34(8) of the Elections Act provides that

A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

It therefore follows that membership to Narc Kenya party was an important pre requisite for nomination of the 2nd respondent to the County assembly of Garissa and that if she was not a member of the said party at the date of nomination, she cannot be said to have been nominated by the party. As stated earlier, the burden of proof rests on the petitioners. It was for the petitioners to show to the required standard that the 2nd respondent was not a member of the party and therefore not eligible for nomination by the party. It was not enough in my view for the petitioners to simply state that the 2nd respondent was not one of its members especially once the 2nd respondent asserted that she was a member of the 1st petitioner being member No. NK11NG357664. It would have been more prudent for the party to perhaps display a list or register of all its members or indicate whether the membership number that the 2nd respondent indicated was hers belonged to another person. This would not have been difficult for the 1st petitioner to avail before the court as the Political Parties Act No. 11 of 2011 provides at Section 17(1)(a) that

A political party shall maintain at its head office and at each

of its county office in the prescribed form, an accurate and authentic record of a register of its members in a form prescribed in the Second Schedule.

The 1st petitioner being a political party was expected to have in its possession the accurate and authentic register of its members. The register which according to the Second schedule of the Political Parties Act is expected to contain membership of the party including identification details, region, ethnicity, gender and county would have been cogent and conclusive evidence of the fact that the 2nd respondent was not a member of the 1st petitioner.

The 1st petitioner did not display the said record to prove that the 2nd respondent was not one of its members and therefore not eligible for nomination to the County assembly. I have considered the finding of the High Court in Musikari Kombo case cited by counsel for the petitioner and while agreeing with it, note that in this case, the petitioners had not in my view laid prima facie evidence that the 2nd respondent was not a member of the 1st petitioner requiring the evidential burden to shift to the 2nd respondent on the issue of party membership. As it stands, I find that the petitioners were unable to prove to the required standard that 2nd respondent was not a member of the 1st petitioner.

It had been submitted by the petitioners that the 2nd respondent was not eligible for nomination as she was still a civil servant. The petitioners have annexed a duty roster in which the name Fatuma Mohammed appears as manning the CC office and main gate during the week beginning 2nd June, 2013 and ending 8th June, 2013. The 2nd respondent submitted that the name Fatuma Mohammed was a common name in their community and the one indicated in the duty roster was not her as she had resigned from the police force on 4th February, 2013. In her response to the petition, the 2nd respondent stated that there were 2 former colleagues with the same name still serving in the police force stationed in Garissa.

As he who alleges must prove, it was for the petitioners to prove to the required standard that the 2nd respondent was not eligible for nomination as a member of the county assembly as she was employed by the government as a police officer.

I have considered the evidence presented and note that the duty roster (AMN-9) does not contain ID or force numbers of the officers listed in the absence of which it would be difficult to tell whether the Fatuma Mohammed indicated as allocated the duties of manning the gate was the 2nd respondent herein given that the 2nd respondent has indicated that there were 2 other officers with the same name. With respect, I am of the considered view that it was not as suggested by counsel for the petitioners the duty of the 2nd respondent to show that she was not a police officer. It was the duty of the petitioners to show to the required standard that the Fatuma Mohammed indicated in the duty roster was the same person as the 2nd respondent in this case. The petitioners would have easily sought clarification from the Inspector General of Police whether the 2nd respondent was a member of the police force as at the date of her nomination or gazettement. Such clarification would have identified the 2nd respondent by use of either her identity card number or force number both of which are specific to her. In this way, the petitioners would have demonstrated to the required standard that the 2nd respondent was still a serving police officer as at the time she was nominated on 24th April, 2013. In the absence of such cogent evidence, this court is unable to find that the 2nd respondent was a police officer as at the date of her gazettement as a member of the County assembly of Garissa and therefore precluded from membership to the county assembly by virtue of Section 25 (2) (a) of the Elections Act.

But even if the 2nd respondent was a police officer at the time of her nomination, the counsel for the 2nd respondent submitted that the provisions of Section 43(5) of the Elections Act did not apply to her as this was a nominative and not an elective position.

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 2nd respondent if she 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, 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 before the date of the election.

In the case of **Republic vs. EL Mann Mwenda Co. Int. 1969 EARLR 357** 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.

For the foregoing reasons, I find that the 2nd respondent was eligible for nomination as a member of the county assembly of Garissa.

3. Whether the 2nd petitioner was eligible for nomination as a member of the county assembly of Garissa

On this issue, it was submitted on behalf of the petitioners that the 2nd petitioner was fit to be nominated in accordance with the provisions of Section 31(1) and Section 34(8) of the Elections Act.

The 1st respondent did not make any submissions with regard to this issue. It was submitted on behalf of the 2nd respondent that the 2nd petitioner had contested an elective post in the general elections and that nominative positions were reserved for people who were not candidates in the general election.

I have carefully considered the submissions made by learned counsel, the pleadings and the relevant provisions of the law.

Section 25 of the Elections Act, 2011 regarding qualifications for nomination as member of county assembly provides that

Unless disqualified under subsection (2), a person qualifies for nomination as a member of a county assembly if the person—

(a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed the Constitution and this Act; and

(c) is either—

(i) nominated by a political party; or

(ii) an independent candidate supported by at least fivehundred registered voters in the ward concerned.

(2) A person is disqualified from being elected a member of a county assembly if the person—

(a) is a State officer or other public officer, other than a member of the county assembly;

(b) has, at any time within the five years immediately before the date of election, held office as a member of the Commission;

(c) has not been a citizen of Kenya for at least the ten years immediately preceding the date of election;

(d) is of unsound mind;

(e) is an undischarged bankrupt;

(f) is serving a sentence of imprisonment of at least six months; or

(g) has been found, in accordance with any law, to have misused or abused a State office or public office or to have contravened Chapter Six of the Constitution.

Section 31 of the Elections Act, 2011 provides that

A person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections; and subject to subsection (4), the party certifies the nomination to the Commission.

There was no suggestion that the 2nd petitioner fell into any of the categories listed at Section 25(2) of the Elections Act. The only issue raised was that she had contested elections in Waberi Ward in the County of Garissa. The question for determination is whether having been a candidate in the elections, the 2nd petitioner was ineligible for nomination as a member of the County assembly of Garissa.

Section 25(2) of the Elections Act does not list contesting for an elective post in the general elections as one of the grounds for disqualification for nomination as a member of a county assembly.

As indicated earlier, I am of the view that if the legislature intended this to be the case, they would have expressly said so. I find that the fact that the 2nd petitioner had contested the elections in Waberi ward under the Narc Kenya Party ticket did not in any way preclude her from being eligible for nomination in the County assembly of Garissa.

4. Whether the 2nd respondent was duly and lawfully nominated by the 1st petitioner as a

member of the county assembly of Garissa

The petitioners did not make any submissions under this head. However they called a witness who is the secretary general of NARC Kenya Party. In his evidence, Ambassador Mwanyingela Ngali disowned the letter dated 24th April, 2013 nominating the 2nd respondent as a member of the County assembly of Garissa under the gender top up category. He stated that the same was not from their party and was a forgery. He told the court that he compared the said letter with the one dated 30th April, 2013 which he confirmed emanated from the party and noted that the latter had the reference NK/IEBC/PL/4 which was the reference used for party lists while the forged letter had the reference LK/GE/AA/3 which reference indicated that it was from the file used to appoint party agents. He told the court that they were dealing with a party list and not a name. He further stated that the genuine letter came after the one dated 24th April, 2013 and should have cancelled the earlier one. It was his evidence that if the 2 letters were from the same source, the one dated 30th April, 2013 would have made reference to that dated 24th April, 2013. It was also his evidence that the letter dated 30th April, 2013 made reference to the National Executive Committee which was the decision making organ of the party while the one dated 24th April, 2013 did not.

In cross examination by counsel for the 1st respondent, the witness stated that it was the executive director of the party who had the responsibility of drafting the letters while he signs them. He confirmed that the party would sometimes use scanned signatures in its correspondences. He stated that he would not have signed the letter dated 24th April, 2013 as it was not authorised. He told the court that there was a pending forgery case at Milimani court in which the 2nd respondent was the accused person. In cross examination by counsel for the 2nd respondent, the witness stated that the party had submitted the names of all its nominees prior to the elections.

Counsel for the 1st respondent in his submissions stated that the 2nd respondent had made her application which had been accepted by the 1st petitioner who then submitted the same to the 1st respondent. Counsel submitted that in his evidence before the court, the petitioners' witness had acknowledged use of electronic signatures in some of the party's correspondences and that someone else had the responsibility of drafting letters while he read the same. In the submissions on behalf of the 1st respondent, it was stated that the nomination of the 2nd respondent was valid as the petitioners did not provide any evidence that the nomination letter was indeed fraudulent. It was also submitted that the generation of party lists was the sole duty of the political parties as provided for under Section 34(6) of the Elections Act as read with rule 55(1) of the Elections (General) regulations, 2012 and that the 2nd respondent's name appeared as the nominee for gender top up list on the basis that it had been submitted first by the 1st petitioners.

It was submitted on behalf of the 2nd respondent that she had no mandate to nominate herself and should not be punished for structural failures. It was also submitted that the 1st respondent was acting under the mandate given to it under Section 13(2) of the Election Act the 2nd respondent had been validly nominated by the 1st petitioner as a member of the County assembly of Garissa.

I have carefully considered the pleadings, the evidence led and the submissions of learned counsels on this point. It is not in dispute that the letter nominating the 2nd respondent as a member of the County assembly of Garissa is dated 24th April, 2013 and is the one which the 1st respondent relied on to gazette her as a member of the County assembly of Garissa. It is this letter that the petitioners have disowned and called a forgery. It therefore follows that this issue turns on whether the letter dated 24th April, 2013 was a forgery in which case it should not have been relied on by the 1st respondent.

The secretary general in his evidence before me stated that the letter dated 24th April, 2013 was

a forgery as it was not from the party. However, I note that no evidence was led to the required standard indicating that the said letter did not originate from the party. I say so because the witness conceded that the party used electronic signatures on some of its correspondences. The witness has stated that the drafting of documents would be done by the Executive Director but that he would have to go through all letters that were done. However, it was not clear whether it was the witness who had exclusive custody of the electronic signatures of the Chairperson and secretary of the party. As such it is difficult to tell whether any other person within the party would have authored the letter dated 24th April, 2013 and appended the electronic signatures.

Section 31(1) of the Elections Act provides that

A person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections; and subject to subsection (4), the party certifies the nomination to the Commission.

And that Section 31(3) of the said Act provides that

Every political party shall notify the Commission of the name of the person authorised by the party to certify to the Commission that a person has or persons have been selected by the party under subsection (1) and the person or persons so named shall deposit his or their specimen signature with the Commission in such manner as the Commission may subsection (4) shall, in writing, certify that a candidate has been nominated by the party. (Emphasis mine)

From the above provision, it is clear that NARC Kenya party being a registered political party was required to deposit with the 1st respondent the names and specimen signatures of the persons who would certify that a candidate had been nominated by the party. I note that the letter dated 24th April, 2013 and which is said to be a forgery contains the electronic signatures of both the Chairperson and Secretary yet the one the witness acknowledged emanated from the party is only signed by the secretary general. It would have been helpful if the 1st petitioner had led evidence to show who the authorised signatories of the party as required under Section 31(3) of the Elections Act were. This evidence would have shown whether the letter dated 24th April, 2013 was signed by the authorised signatories or signatory of the party or not.

The secretary general of NARC Kenya party in his evidence before the court stated that the letter dated 24th April, 2013 had not been sanctioned by NEC which was the decision making body of the party. However no minutes of the meeting of NEC nominating persons to fill the special seats was available to conclusively show that the 2nd respondent was not one of those nominated by the party. The letter dated 30th April, 2013 while making reference to the decision of the NEC does not indicate when the said meeting took place. It is my considered view that if evidence had been led indicating that the NEC meeting took place after the letter dated 24th April, 2013 had been written, this would have led credence to the petitioners' position that the same was a forgery.

Rule 55(1) of the with Elections(general) regulations provides that

The party list contemplated under regulation 54 shall be

prepared in accordance with the nomination rules of the political party.

The petitioners did not lead any evidence regarding the nomination rules of NARC Kenya party. If they had done so, the court would have had occasion to confirm whether the nomination of

the 2nd respondent was indeed in accordance with the said nomination rules of NARC Kenya party.

Generation of party lists was the sole responsibility of the political parties and it was up to the political parties to ensure that their processes complied with their nomination rules and were not open to abuse.

Having analysed the evidence presented, the submissions of parties and the pleadings in regard to this issue, I am of the view that the petitioners have not proved to the required standard that the letter dated 24th April, 2013 was a forgery. Without conclusive proof that the said letter was a forgery, I find that the 2nd respondent was validly and lawfully nominated to the County assembly of Garissa under the gender top up category.

5. Whether the 1st and 2nd petitioner complied with the provisions of the Elections Act, 2011, the Elections (general) regulations and the Elections (Parliamentary and County Elections) Petition Rules, 2013

Under this heading, the 2nd respondent's submissions was that she had not been served with the petition within the statutory period and as service of the petition went to the root of the petition, the petition should be struck out. It was the 2nd respondent's submission that the petitioners had sought an order of the court to serve the petition even when such an order was not required and that service of the petition was done outside the statutory period.

Section 77(2) of Elections Act, 2011 provides that

A petition may be served personally upon a respondent or by advertisement in a newspaper with national circulation.

A similar provision is found at Rule 13 of the Elections (Parliamentary and County Election) Petition rules .

In this case, the record of the court of 13th September, 2013 indicates that Mr. Okoth for the petitioners stated that the petition had been served and that there was an affidavit of service dated 29th August, 2013. As the 2nd respondent had not filed a response, counsel then asked for time to serve by substituted service. At no time did counsel seek a court order to serve by substituted service and none was issued by this court.

I note that the contents of the affidavit of service sworn on 29th August, 2013 by Jacob Odoyo Okore were not challenged by the 2nd respondent during this proceedings. At no time was a request made to have the said process server cross examined on the contents of his affidavit. As the same were not challenged, the same must stand. I note that even if the court were to find that the 2nd respondent was only served by way of substituted service in the newspaper, I note that from the provisions of law relating to service of election petitions, there is no time prescribed for serving a petition on the respondent after filing. The 2nd respondent cannot therefore be heard to say that she was served outside the statutory period .

I therefore find that the petitioners complied with the provisions of the Elections Act, 2011, the Elections (general) regulations and the Elections (Parliamentary and County Elections) Petition Rules, 2013.

6. Who will bear costs of the petition.

Costs follow the cause and no reason has been advanced why this should not be the case here save that no costs are awarded to the 1st respondent given that in this case it failed in its duty of

ensuring that party lists complied with the Constitution, Elections Act ,2011, and the regulations made thereunder and other relevant statutes as held by the High Court in **Petition No. 147 Of 2013 The National Gender and Equality Commission and IEBC and 6 others.**

The final orders are as follows:-

- a. The petition is hereby dismissed
- b. I hereby declare that Fatuma Mohammed Ali was validly nominated by Narc Kenya Party as member of the county assembly of Garissa under the gender top up category
- c. The petitioners shall bear the costs of the petition as against the 2nd respondent which are capped as 400,000.

Dated at Nairobi this 13th day of February, 2014

C.A OTIENO

Ag. PRINCIPAL MAGISTRATE.

In the presence of

_____ Court Clerk

_____ for petitioners

_____ for 1st respondent

_____ for 2nd respondent.