



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KIAGE & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 196 OF 2013

BETWEEN

FATUMA ADAN KALA.....APPELLANT

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION1ST RESPONDENT

UNITED REPUBLICAN PARTY.....2ND RESPONDENT

AMINA ABDULLAHI TIFOW.....3RD RESPONDENT

(An appeal from the Judgment & Decree of the High Court of Kenya at Nairobi (Mumbi Ngugi, D.S. Majanja & Weldon Korir, JJ.) dated 12th July, 2013

in

H.C. JR. NO. 235 OF 2013)

JUDGMENT OF THE COURT

1. In a Judgment delivered on 12th July 2013, the High Court (Mumbi Ngugi, D.S. Majanja and W.K. Korir, JJ.) dismissed the appellant's application challenging the 2nd respondent's party list for Mandera County Assembly and seeking to restrain the respondents from naming, gazetting and or swearing in the names of nominees for Mandera County Assembly. Aggrieved, the appellant has appealed the decision of the High Court to this Court.

History

2. The appellant's case before the High Court was that United Republican Party (URP), the 2nd respondent, nominated her as a member of the Mandera County Assembly and that her name was published in the newspapers but that the 1st respondent, the Independent Electoral and Boundaries Commission (IEBC) replaced her name with that of the Amina Abdullahi Tifow, the 3rd respondent without any justifiable reason.
3. IEBC's Dispute Resolution Committee first heard the appellant's complaint. At that point, the appellant complained that the 3rd respondent was not on the party list of nominees submitted by URP to IEBC. IEBC's Dispute Resolution Committee determined that there was no evidence to support the complaint that the 3rd respondent was not a member of the URP party and accordingly dismissed the complaint. The appellant then moved the High Court, by way of judicial review proceedings, to review the decision of IEBC's Dispute Resolution Committee.
4. In its judgment, the High Court held that its jurisdiction could not extend to reviewing the merits of the decisions of the Committee and declined to interfere. The court also held that the non-joinder of the 3rd respondent, whose nomination was being challenged in the proceedings before it, was fatal. That is the decision that is the subject of this appeal.
5. The grounds set out in the appellant's memorandum of appeal on which the appellant has challenged the decision of the High Court (and that of IEBC's Dispute Resolution Committee) is that the court and the Committee erred by:
 - a. Basing their decision on a non-existent party list.
 - b. Finding that the name of the 3rd respondent was in the party list.
 - c. Failing to analyze the evidence.

Submissions by counsel

6. At the hearing of the appeal before us the parties were represented by learned counsel. **Mr. Nabwayo** appeared for the appellant, **Mr. Odhiambo** appeared for the 1st respondent while **Mr. H. K. Sigeti** appeared for the 3rd respondent. There was no appearance for the 2nd respondent.
7. For the appellant, Mr. Nabwayo submitted that the appellant applied and was considered for nomination for gender top up by URP and the party list bearing her name at serial number 33 was forwarded by URP to IEBC; that the 3rd respondent's name appeared in the same list under serial number 14 and that based on that list the gender of the 3rd respondent is indicated as male; that the gender top up list was a preserve for women and the 3rd respondent did not therefore qualify for nomination under Article 90 of Constitution and regulations 50, 55(5) of 2012 regulations under the Elections Act; that the nomination of the 3rd respondent did not follow procedure and that IEBC did not have the mandate to substitute the name of the appellant with that of the 3rd respondent; that if the party list forwarded by URP to IEBC was not compliant, IEBC should have sent back the list to URP for rectification; that IEBC has no mandate to substitute names; that the appellant was not heard and the Committee and the High Court disregarded issue of natural justice as the appellant was not heard and the people of Mandera County have therefore been left without a representative.
8. Opposing the appeal, Mr. Odhiambo for the 1st respondent, while agreeing that it is the responsibility of the political party to submit a party list, submitted that the complaint by the appellant before the IEBC's Dispute Resolution Committee was whether the 3rd respondent's name was on the party list submitted by URP and not the gender of the 3rd respondent; that the decision of IEBC's Dispute Resolution Committee was premised on the absence of evidence that the 3rd respondent was not a member of URP; that the High Court correctly declined to interfere with the decision of IEBC's Dispute Resolution Committee as the court should not, in judicial review proceedings, be concerned with the merits of the decision of the Committee but with the process leading up to that decision; that once the 3rd respondent was gazetted as the duly elected representative for Mandera County Assembly under Article 90 of the Constitution, the process of

removal can only be undertaken by challenging that election through an election petition in an election court; that the decisions of IEBC's Dispute Resolution Committee and of the High Court are sound and this Court should not interfere with the same. With that Mr. Odhiambo urged us to dismiss the appeal with costs to 1st respondent.

9. Mr. Sigei for the 3rd respondent, while opposing the appeal submitted that in light of the appellants' concession that URP submitted a party list to IEBC in which the names of the appellant and the 3rd respondent appeared under serial numbers 14 and 33 respectively, the complaint by the appellant in its memorandum of appeal that IEBC's Dispute Resolution Committee and the High Court based their decision on a non-existent party list has no basis; that the 3rd respondent was properly nominated and the decision of the Committee dismissing the appellant's complaint was well founded as no evidence was presented to show that the 3rd respondent was not a member of URP; that the complaint before the Committee as borne out by the appellant's Complaint Form submitted to the Committee was that her name was replaced by that of the 3rd respondent who is not a member of URP and whose name was not on the party list submitted by URP; that on the evidence the Committee could not have arrived at a different decision; that despite the order of the High Court that the 3rd respondent should be served with process, the 3rd respondent was not joined in the proceedings before the High Court, and the High Court therefore rightly dismissed the appellant's application on the further ground of non-joinder of the 3rd respondent to the proceedings before the High Court as the 3rd respondent was neither a party in the proceedings before the Committee nor the High Court. Finally Mr. Sigei submitted that the complaint that the people of Mandera have been denied representation in the County Assembly is incorrect as the 3rd respondent is already a member of that assembly and ably representing the County. With that, Mr. Sigei urged us to dismiss the appeal with costs to 3rd respondent.

Our Decision

10. We have considered the appeal and submissions by learned counsel. We do not consider that there is any merit in this appeal. The complaints by the appellant have undergone metamorphosis over a relatively short period. When the appellant submitted her complaint to IEBC in May 2013 regarding allocation of nominees to the Mandera County Assembly, the appellant's grievance was the "*omission of my name and replacement by that of Tifow Amina Abdullahi, who is not a member of U.R.P and who was not part of the list of nominees submitted by U.R.P to the IEBC*". It was on that basis that the appellant urged the Committee to determine that the 3rd respondent was not duly nominated and to nullify the 3rd respondent's nomination.
11. In its determination on that complaint, the Committee expressed itself thus:

“The issue (is) whether the complainant was replaced by Tiffow Amina Abdullahi who is not a member of URP and was not on the party list of nominees submitted by URP to the IEBC. No evidence has been adduced to show that Tiffow Amina Abdullahi is not a member of URP. Complaint not supported by evidence and should be dismissed as the nomination followed the provisions of the law on party nomination.”

12. The material presented before us in the record of appeal by the appellant includes the URP's party list submitted to IEBC. Based on that list, the names of the 3rd respondent and the appellant appear under numbers 14 and 33 of the list. It is significant that the name of the 3rd respondent is ahead of that of the appellant as the party list is required to be set out in priority. The complaint that the name of 3rd respondent was not on the party list is therefore quickly dispelled as having no foundation.
13. When counsel for the appellant rose to address us, and appreciating that the complaint that the 3rd respondent's name was not on URP's party list, could not on the face of the material in the record, be sustained, the complaint evolved to the grievance that the gender of the 3rd respondent in the party list was indicated as male and therefore the 3rd respondent did not qualify for nomination.

14. We agree with counsel for the respondents that, that was not the matter before the Committee or the High Court and being a matter of fact cannot be taken before us for the first time on appeal. In any event, when pressed further by this Court during the hearing of this appeal, counsel for the appellant appeared to concede from the bar that the 3rd respondent is in fact of the female gender, and the indication to her gender in the list as male was erroneous.
15. In light of the material before us clearly demonstrating that the 3rd respondent was indeed on URP's party list, the complaints by the appellant in its memorandum of appeal that the Committee and the High Court erred in basing their decision on a non-existent party list or that the 3rd respondent's name was not on that list, or that the High Court failed to analyze the evidence have no basis. The subsequent complaint before us regarding the gender of the 3rd respondent, being a matter of fact that was never taken up either before the Committee or the High Court is not a matter we can entertain at the appellate stage.
16. The appellant has not in any way demonstrated that the High Court erred in its decision. For those reasons, the appeal is dismissed. The appellant will meet the costs of the appeal for the 1st and 3rd respondents.

DATED and DELIVERED at Nairobi this 31st day of January, 2014.

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR