Kenya Human Rights Commission & 4 others v Independent Electoral & Boundaries Commission & 3 others; National Council for Persons with Disability & another (Interested Parties) (Petition E454 of 2022) [2024] KEHC 16497 (KLR) (Constitutional and Human Rights) (31 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E454 OF 2022

LN MUGAMBI, J

DECEMBER 31, 2024

BETWEEN

KENYA HUMAN RIGHTS COMMISSION ..... 1ST PETITIONER

CRAWN TRUST ..... 2ND PETITIONER

UNITED DISABLED PERSONS OF KENYA ..... 3RD PETITIONER

ACTION NETWORK FOR THE DISABLED ..... 4TH PETITIONER

CONSORTIUM OF DISABLED PEOPLE ORGANIZATIONS IN KENYA ..... 5TH PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

COUNTY ASSEMBLIES FORUM ..... 3RD RESPONDENT

REGISTRAR OF POLITICAL PARTIES ..... 4TH RESPONDENT

AND

NATIONAL COUNCIL FOR PERSONS WITH DISABILITY .... INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 23rd September 2022 was amended on 5th October 2022. The Petition is supported by the 1st and 3rd Petitioners' affidavits.

2. This suit arises from the list published by the 1st Respondent in the Gazette Notice dated 9th September 2022 which the Petitioner contended does not conform to the Constitutional dictates in respect of Persons living with Disabilities (PWDs), women and the youth. The Petitioners thus challenge Section 36 (8) of the *Elections Act* on grounds that it is unconstitutional.

3. The Petitioners seek the following relief against the Respondents:

    i. A Declaration that the 1st Respondent was duty bound to ensure that the final nomination list published on 9th September 2022 (No. 10712) complied with Articles 177 (1) (b) & (c) as read with Sections 7 (1) & 7A of the *County Governments Act* and 34 (5) and 36 of the *Elections Act*.

    ii. A Declaration that the 22 Counties listed in paragraph 37 (i) of this Petition are not DULY & FULLY per Section 7 (1) of the *County Governments Act* as they do not have persons with disabilities.

    iii. A Declaration that Section 36 (8) of the *Elections Act* is unconstitutional.

    iv. A Declaration that the final lists on the gazette notice of 9th September 2022 (NO. 10712) violated Articles 1,2, 10, 20,21, 28, 47, 54, 55, 91 and 177 of *the Constitution*.

    v. An Order of Certiorari bringing to the high Court Gazette Notice No. 10712 of 9th September 2022 for quashing.

    vi. A Mandatory Order compelling the 1st Respondent to conduct the process of nomination of Members of County Assemblies afresh in compliance with the dictates of *the Constitution* and the *Elections Act*.

    vii. The costs of this Petition be borne by the Respondents.

1st Respondent Notice of Preliminary Objection

4. The 1st Respondent in response to the amended Petition filed a Notice of Preliminary Objection dated 13th October 2022 on the grounds that:

    i. The Petition is defective, incompetent, misconceived and lacks merit thus should be dismissed in limine.

    ii. The Petition is an abuse of the Court process.

    iii. This Court has no jurisdiction to entertain the matter as filed.

    iv. The Petition and orders as sought offend the provisions of Article 50 of *the Constitution* as against the gazetted and duly elected members of the county assemblies, the 47 County Assemblies themselves as well as all the political parties involved in the contested party lists and impugned gazette notice.

v. The Petition and orders as sought offends the provisions of Section 35A (3) of the *Elections Act* No. 24 of 2011.

vi. The Petition offends the provisions of Regulation 9 and 13 of the Rules of Procedure on Settlement of Disputes (Legal Notice No. 139).

vii. The Petition as well as orders sought offends the provisions of Section 381, 40 and 41 of the *Political Parties Act* No. 11 of 2011.

viii. The Petition and orders as sought offends the provisions of Section 75(1A) of the *Elections Act* No. 24 of 2011.

ix. The Petition and orders as sought offends the provisions of Article 87 (1) and (2) of *the Constitution*.

Petitioners' Case

5. The 1st Respondent in compliance with Section 36(4) of the *Elections Act*, in Gazette Notice No.10712 gazetted the nominees to the county assemblies on 9th September 2022.

6. According to the Petitioners', the list published by the 1st Respondent did not in comply with the Constitutional obligations, legislation and the international law. This is because, in most of the counties, people with disability were not included contrary to Section 36 (1) (f) of the Election Act.

7. It was contended once the nominations lists are issued by political parties, the 1st Respondent has a duty to ensure that the County Assemblies are duly and fully constituted by ensuring that representation of the marginalized groups constitute part of the membership. As such, the Petitioners argue that the 1st Respondent's failure to ensure compliance is in violation of Article 177 (1) (c) of *the Constitution* as read with Section 7 (1) of the *County Governments Act*.

8. Particularly, the Petitioners depone that the lists are unlawful for a number of reasons. First, it is alleged that in Nyamira, Bungoma, Kilifi, Taita Taveta, Wajir, Marsabit, Isiolo, Meru, Tharaka Nithi, Machakos, Makueni, Turkana, West Pokot, Tran Nzoia, Baringo, Laikipia, Narok & Kericho counties did not include PWDs. Furthermore, that these lists did not have youth representatives. Conversely, some of those nominated as youth were above the age of 35. Additionally, that some of those nominated were not residents or registered voters of the counties they are representing.

9. Likewise, it is stated in some counties, nominated men were passed off as women. Moreover, that some of the final lists are not in the order that they were before the elections when they were submitted by the political parties contrary to Section 34(5) of the *Elections Act*. In like manner, in some counties, persons not in the nomination list were gazetted.

10. Considering this, the Petitioners aver that the Court must intervene to stop the continued violation of the law in this regard. That the violation occurred despite the various meetings that the Petitioners had held with the political parties in a bid to emphasize the need for people with disabilities inclusion in the general elections.

11. To be precise, meetings were held on 24th February 2022, 5th May 2022 and 19th May 2022. In addition, the Petitioners through the Kenya Inclusive Political Parties (KIPP) programme did pressers in the run up to the elections to notify the general public and concerned persons of the need to ensure compliance with the law in the election.

12. In view of this, the Petitioners are certain that the 1st Respondent, alongside the 3rd and 4th Respondents have acquiesced to the violation of Article 177 and other related Articles of *the Constitution*. Consequently, the Petitioners are apprehensive that unless this Court intervenes, the 3rd Respondent will continue violating *the Constitution* and the law with regards to inclusion PWDs, women and the youth.

1st Respondent's Case

13. In reply to the amended Petition, the 1st Respondent filed its grounds of opposition dated 27th January 2023 on the premise that:

    i. The Petitioners have not applied and or appreciated the holistic approach to constitutional interpretation in relation to unconstitutionality of Section 36(8) of The *Elections Act*.

    ii. The composition of a County Assembly in line with Article 177(1) (c) of *the Constitution* in relation to marginalized groups which is demographic is a broad spectrum.

    iii. The Petition, in terms of how the Petitioners would want the impugned Section 36(8) of The *Elections Act* to be rendered unconstitutional is in itself discriminatory

    iv. The Petition does not in any way demonstrate how the impugned Section 36(8) is unconstitutional.

    v. The Petition does not appreciate the history, import and context or Article 90 of *the Constitution* in respect of the role of political parties and the 1st Respondent.

2nd Respondent's Case

14. In like manner, the 2nd Respondent also filed its grounds of opposition dated 17th October 2022 on the premise that:

    i. The Petitioners have not demonstrated before the Court how the 2nd Respondent violated their Constitutional rights.

    ii. The present application fails to meet the threshold of a constitutional petition both in form as stipulated in Rule 10 of the Mutunga Rules and in substance as held in the locus classicus Anarita Karimi Njeri Vs R (1976-1980) KLR 1272 which requires that a Petitioner ought to identify and specify how constitutional provisions have been violated.

    iii. The Petition violates the principle of constitutional avoidance as set out by the Supreme Court of Kenya in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014]eKLR, and therefore should be dismissed forthwith. This is an election petition as was held by the Court of Appeal in Rose Wairimu Kamau & 3 others v *Independent Electoral and Boundaries Commission NBI CA Civil Appeal No. 169 of 2013* where it observed the following in respect of nominated members of the County Assembly:

iv. "In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 971 (c) and 177 (2) respectively have been gazetted ... they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be

by way of election petitions under Articles 105 of *the Constitution* or Part VIII of the *Elections Act* as the case may be".

v. The present dispute is an election dispute which ought to be handled by a duly gazette election court in line with Section 75(1A) of the *Elections Act*, 2011, and can only be presented before the High Court on Appeal under Section 75(4) of the *Elections Act*, 2011.

vi. The procedure for nomination to a county assembly is a legal process which starts at the Political Party. Lists are then presented to the Registrar of Political Parties and finally to the IEBC. All this are bodies with statutory and constitutional mandate to conduct the process. The 2nd Respondent has absolutely no role in the process leading up to the gazettement as the IEBC which has the final say, enjoys constitutional independence.

vii. The Petitioners ought to have challenged the lists as soon as they were published by IEBC. The dispute would have been presented before the Political Parties Disputes Tribunal as the issue is with the Political parties which submitted the lists. Therefore, the Petition is brought in violation of the doctrine of exhaustion as was explained in the case of Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR.

viii. The present Petition, if allowed will result in removal of various members of county assemblies from office without offering them an opportunity to be heard, which is a violation of the provisions of Article 50 on fair hearing as well as the rules of natural justice.

ix. Judicial intervention should be limited to acts that are manifestly in breach of the law or where the Court is satisfied that the decision maker reached a wrong decision influenced by other considerations other than the law, evidence and the duty to serve the interest of justice. The Petitioners have neither pleaded nor adduced evidence of the same.

x. The claims of unconstitutionality of Section 36(8) of the *Elections Act* are based on a clear misunderstanding of the centrality of political parties in elections in Kenya. Political parties are centrally placed in Kenya as a democracy, is underscored by Articles 91 and 92 of *the Constitution* as well as the *Political Parties Act*, 2011.

xi. The Petition seeks to challenge lists presented by political parties yet the said political parties are not Respondents herein. The Petitioner cannot require the 1st Respondent to usurp the decisions of the political parties, which remain unchallenged by the members of the said political parties, in relation to the party lists.

xii. Contrary to the position taken by the Petitioners, the only way more persons living with disability can be included in various assemblies, is if the political parties have their names higher on the lists submitted, and the IEBC cannot by-pass a name duly nominated, without a just cause.

xiii. The Petition is defective both in form and in substance and is therefore unmerited and brought in bad faith.

xiv. It is in the public interest and in the interest of justice that the current Petition be dismissed with costs as the same is an abuse of court process.

3rd Respondent's Case

15. The 3rd Respondent filed its Replying Affidavit by its Chairperson, Hon. Ndegwa Wahome sworn on 19th October 2022.

16. Reiterating the Petitioners proclamations, he asserts that the lists that were issued by the 1st Respondent indicating the elected members of county assemblies, indeed did not comply with the laws. Hence the lists were in clear violation of Article 177(1) (c) of *the Constitution*.

17. It is asserted that County Assemblies can only be fully constituted when marginalized groups are nominated to the County which was not the case in this matter.

18. Accordingly, it is contended that determination of this Petition by this Court will ensure that the political parties strictly adhere to the provisions of Article 177 of *the Constitution* in nominating the marginalized groups to the County Assembly.

4th Respondent's case

19. The 4th Respondent in reply filed grounds of opposition dated 12th October 2022 on the basis that:

    i. The Petition has not appreciated the history, import, and the context of Article 90 of *the Constitution* with respect to the role of political parties and the electoral commission.

    ii. The composition of a county assembly in terms of Article 177(1) (c) is marginalized groups which demographic is a broad spectrum.

    iii. The Petition opens a door to unfair treatment of party list, elected members.

    iv. The Petitioner has not demonstrated with specificity and clarity on how the impugned Sections are unconstitutional as set out in Anarita Karimi Njeru v Republic [1979] eKLR.

    v. The Petition creates room for the possibility of collision among the provisions of *the Constitution* contrary to what was observed in Institute of Social Accountability & Another vs. National Assembly & 4 Others [2015]eKLR:

> "Lastly and fundamentally, it is the principle that the provisions of *the Constitution* must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside *the Constitution*, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of *the Constitution*."

    vi. The Petition does not appreciate the underlying principles on application of state power.

Interested Parties Case

20. The Interested Parties responses and submissions in this matter are not in the Court file or the Court Online Platform (CTS).

Parties' Submissions

Petitioners' Submissions

21. In the submissions dated 17th April 2023, Kosgei, Muriuki and Koome for the Petitioners' sought to discuss: whether the law requires the participation of persons with disabilities in County assemblies and whether their exclusion results in an unconstitutional assembly; whether the law grants IEBC responsibility to implement inclusion of Persons with Disabilities in County assemblies; whether nominations done as per Section 36(8) of the *Elections Act* complied with the legal requirements and principles of international law and whether Section 36(8) of the *Elections Act* 2011 inhibits the power of IEBC to conduct election by nomination in compliance with the law.

22. It was submitted in the first issue that PWDs have a constitutionally guaranteed right under Article 177 of *the Constitution* to participate and be represented in county assemblies. Accordingly, a lawful constitution of a County Assembly must include women, youth and PWDs. This condition is said to be further buttressed by Section 7A of the *County Governments Act*. For this reason, it was stated that the county assemblies in light of this suit are not fully and duly constituted.

23. Counsel added that the State under Article 54 of *the Constitution* has an obligation to ensure the progressive implementation of the principle that at least 5% of members of the public in elective and appointive bodies are PWDs. Per se, the State's failure to ensure this, directly violates these persons right to human dignity and their freedom to participate in the political process in line with Article 91(1) (e) of *the Constitution*.

24. On the second issue, Counsel submitted that the 1st Respondent has the mandate of overseeing the nomination process of candidates of various elective positions including nominations to county assemblies. Bearing this in mind, it was asserted that the 1st Respondent is obligated under Article 82 of *the Constitution* to ensure compliance with the law on nominations and the process therein. In addition, it was pointed out that the 1st Respondent has the power to reject lists that do not comply with the law as provided under Regulation 55 of the Elections (General) Regulations.

25. Counsel on this premise, submitted that the Court ought to weigh Section 36 (8) of the *Elections Act* against all the relevant clauses of *the Constitution*, *Elections Act*, the Elections (General) Regulations and the County Government Act. Reliance was placed in Commissioner for the Implementation of *the Constitution* v Attorney General & 2 others [2013] eKLR where it was held that:

> " It is abundantly clear to us that far from attaining the true object of protecting the rights of the marginalized as envisioned by *the constitution*, the inclusion of Presidential and Deputy Presidential candidates in Article 34(9) of the *Elections Act* does violence to all reason and logic by arbitrary and irrational superimposition of well-heeled individuals on a list of the disadvantaged and marginalized to the detriment of the protected classes or interests.
>
> Having arrived at that conclusion we are satisfied that the learned judge misdirected himself in his interpretation and treatment of the question of "special interests" as captured in the five grounds of appeal filed and argued before us. The upshot is that this appeal succeeds and we declare Section 34(9) of the *Elections Act* to be invalid and void."

26. Like dependence was placed in Lichete v Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party) [2022] KEHC 13244 (KLR).

27. Tying these arguments to the third issue, Counsel asserted that the nominations that led to the impugned gazettement did not comply with the law. In particular, Section 36 (4) of the Election Act which provides that within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.

28. It is stressed that the 1st Respondent was obligated before publishing the list to ensure that the same complies with the law in view of the marginalized groups, however failed to do so. Reliance was placed in Rose Moturi Mwene v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR where it was held that:

> " This court in *Lydia Mathai v Naisula Lesuuda & another [2013] eKLR, Election Petition 13 of 2013* found that IEBC had the mandate to step in and ensure compliance with *the Constitution* and election laws."

29. Turning to the substantive contention in the fourth issue, Counsel submitted that in order to ensure that the final lists comply with the requirements of *the Constitution*, the 1st Respondent must have the authority to give priority to the marginalized groups as appreciated under Section 36(3) of the *Elections Act*. It was however contended that Section 36(8) of *the Constitution* is unconstitutional as seeks to tie the 1st Respondent's hands to uphold this requirement and its constitutional mandate. It is their case therefore that the 1st Respondent's mandate should not be limited by Statutes.

30. Reliance was placed in Kenya Human Rights Commission v Attorney General & another [2018] eKLR where a comparable observation was made. The Court held that:

> " 96. It is plain to me, that the architecture, design and engineering of the impugned Act was aimed at making courts less effective given that the power to punish for contempt is the single most important tool courts have to ensure that they remain relevant, effective and administer justice to all without fear or favour. Limiting this power can only lead to loss of confidence in the courts and society's rapid degeneration into chaos.
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> 97. In this regard, Mahomed CJ, said;
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> > "..Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect *the Constitution* if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem with which the Judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity."

31. Counsel as well submitted that this Court in making its determination ought to be guided by the principles of constitutional interpretation. Reliance was placed in State vs Acheson 1991 (2) SA 805 (NM) where it was held that:

> " The spirit of *the constitution* must, therefore preside and permeate the process of judicial interpretation and judicial discretion.' The disposition of Constitutional questions must be formidable in terms of some Constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be ad hoc. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case."

32. Equal dependence was placed in Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR.

33. In conclusion, Counsel submitted that costs which are at the discretion of the Court usually follow the event. Having made out the Petitioners' case, Counsel urged the Court to award them costs of this suit. To buttress this point reliance was placed in Orix Oil (Kenya) Limited V Paul Kabeu & 2 Other [2014] eKLR where it was held that:

> " ...the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do."

34. Similar dependence was placed in Republic vs Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Co-operative Society (2014) eKLR and Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR.

1st Respondent's Submissions

35. The 1st Respondent through Murugu, Rigoro and Company Advocates filed submissions dated 17th November 2023.

36. Counsel examining Article 90 of *the Constitution* submitted that the 1st Respondent's mandate in allocation of party seats is based on the use of party lists as set out in this provision. This position is further echoed under Section 34 and 36 of the *Elections Act* and Regulations 54, 55 and 56 of the Elections (General) Regulations, 2012.

37. It is submitted that in this matter, the 1st Respondent upon receiving the party lists applied the formula that, the number of seats won by a political party divided by the total number of seats multiplied by available seat then allocated to the political parties qualifying for the special seats the proportionate seats to the seats won in the general election. Thereafter in line with its mandate published the list in the gazette notice. Counsel as such argued that the election conducted in relation to this Petition was lawful and constitutionally sound.

38. With regard to the Constitutionality of Section 36(8) of the Election Act, Counsel submitted that the purpose or mischief that this Section wanted to cure was limitation of the 1st Respondent's interference with the party lists in line with Article 177(1)(b) and (c) of *the Constitution*.

39. Further it was contended that while Regulation 26 of the Elections (Party Primaries and Party Lists) Regulations, 2017 provides that the 1st Respondent can reject a party list that is not legally compliant, the Petitioners did not adduce any of the party lists that the 1st Respondent ought to have rejected on account of this Regulation.

40. Counsel contended that the Petitioners in seeking to have Section 36(8) of the *Elections Act* declared unconstitutional want the 1st Respondent's mandate to be expanded. Off essence to note is that this declaration is sought in relation to party lists that have not even been produced before the Court for interrogation. Additionally, without the parties themselves participating in the suit herein.

41. Conversely, Counsel submitted that the order sought by the Petitioners is in itself unconstitutional. This is because the marginalized group under Article 177(1) (c) of *the Constitution* is only a fraction of the wider spectrum of this group. On the whole, advancing the argument that PWDs should be granted priority over the rest of the members of the marginalized group is discriminatory and in violation of Article 27(4) of *the Constitution*. Nonetheless it was argued that such an interpretation would be offensive to a holistic interpretation of *the Constitution*.

42. Reliance was placed In the Matter of Kenya National Commission on Human Rights [2014] eKLR as follows:

> "But what is meant by a 'holistic interpretation of *the Constitution*'? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

43. Further dependence was placed in Law Society of Kenya v Attorney General & Another [2021]eKLR.

44. In conclusion, Counsel asserted that the roles assigned to political parties ought to be left as such otherwise seeking to declare the impugned Section unconstitutional is a call to have the 1st Respondent surpass its mandate which in itself would be unconstitutional.

2nd Respondent's submissions

45. State Counsel, Jackline Kiramana on the 2nd Respondent's behalf filed submissions dated 15th November 2023 where she sought to discuss the role of the 1st Respondent in view of party lists.

46. In this regard, she submitted that by virtue of Section 36(7) of the Election Act, the 1st Respondent is bound by the lists submitted by political parties as long as are compliant with Article 177 of *the Constitution*. He cited the Supreme Court in Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] KESC 2 (KLR) to buttress his submissions.

47. A comparable position was also held in National Gender and Equality Commission (NGEC) v Independent Electoral & Boundaries Commission (IEBC) & 3 others [2018] eKLR which was also cited in support.

48. On this premise, Counsel submitted thus that the Petitioners claim lacks merit and so the Petition ought to be dismissed.

3rd Respondent's Submissions

49. This Party's submissions are not in the Court file or Court Online Platform (CTS).

4th Respondent's Submissions

50. The 4th Respondent through its Counsel, Wafula Wakoko filed submissions dated 21st June 2023. Counsel sought to discuss the composition of a county assembly in terms of Article 177(1) (c) of *the Constitution* and the role of the IEBC and political parties under *the Constitution* on party list election.

51. Counsel submitted that the composition of a county assembly is stipulated under Article 177 (1) (c) of *the Constitution* as including members of marginalized groups, including persons with disabilities and the youth. Counsel pointed out that *the Constitution* under Articles 100 and 260 define marginalized persons in various ways other than those listed under Article 177 (1)(c). Accordingly Counsel took the view that this means that a county assembly must comprise of members of the marginalized groups not only PWDs and the youth.

52. Reliance was placed in Aden Noor Ali v Independent Electoral & Boundaries Commission & 2 others [2017]eKLR where it was held that:

> "To my understanding, neither *the Constitution*, nor the *Elections Act* and the relevant Regulations provide for the prioritizing of the names in the party list. To prioritize the nominees in my view would not be the right thing to do. This would mean that the categories appearing on the first positions would almost always be picked to fill special seats. I think I am not wrong in stating that by placing some categories of special interests before others in *the Constitution* and other relevant statutes was not intended to prioritize these categories over the others. This to me was just a chance listing of the categories. I take the view that to prioritize some categories over others would amount to discrimination. There is likelihood that some categories of special interest placed lower in rank would never make it to the top elective positions due to the place they occupy in the list. I want to believe that this is not the intention of the drafters of *the Constitution* and the electoral laws."

53. On the second issue, Counsel submitted that the mandate of creating party lists is solely vested in political parties by virtue of Article 90 of *the Constitution*. Consequently, it was argued that the 1st Respondent's role is to ensure that the party lists are compliant with the standards set out under Section 34 (6A) of the *Elections Act* as read with the Elections (Party Primaries and Party List) Regulations. Owing to this, it was argued that the 1st Respondent has no mandate in skipping the priority of candidates as listed by the party.

54. Counsel pointed out that in this matter, the 1st Respondent under Article 177(1) (c) of *the Constitution* does not have the same leeway granted to it under Article 98(1)(d) of *the Constitution*. For that reason, it was stressed that the 1st Respondent could only act within the confines of the law and hence, Section 36(8) of the *Elections Act* cannot be faulted.

55. To buttress this point reliance was placed in National Gender and Equality Commission (NGEC) v Independent Electoral & Boundaries Commission (IEBC) & 3 others [2018]eKLR where it was held that:

> "Upon analyzing the earlier cited provisions of *the Constitution*, the Election laws and the Regulations, and applying the law and the authorities cited herein above to the above facts, I conclude that the role of IEBC is to allocate seats on the basis of lists submitted by

the Political Parties. This position that been appreciated in several Court decisions in this Country among them Linet Kemunto Nyakeriga & Another vs Ben Njoroge & 2 Others, National Gender and Equality Commission vs IEBC & Another, and Moses Mwicigi & 14 Others vs Independent Electoral and Bondaries & 5 Others. There is nothing to show that IEBC failed in its mandate. In fact, most of the allegations are directed against the Political Parties which are not parties in this Petition, yet as earlier stated, the Political Parties were necessary parties in these proceedings"

56. Counsel as well submitted that this Court should be guided by the rules of constitutional and statutory interpretation in this matter. Reliance was placed in Re the Matter of Kenya National Commission on Human Rights [2014] eKLR where it was held that:

> " But what is meant by a 'holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."

57. Equal dependence was placed in Law Society of Kenya v Attorney General & another (2021) eKLR and Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 others, [2015] eKLR.

58. Before embarking on analysis and determination, I will refer to this Court's Ruling dated 16th December 2022 delivered by Justice M. Thande as follows:

> "
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> " 22. The people of Kenya when enacting *the Constitution* recognized that disputes relating to elections will inevitably arise. Provision was thus made under article 87(1) that Parliament shall enact legislation to establish mechanisms for the timely settlement of electoral disputes. The *Elections Act*, 2011 is the legislation that was enacted to give effect to the said article. In determining the jurisdiction of this court in matters relating to elections, or indeed any other matter, the court must beyond the provisions of *the Constitution* have regard to the provisions of relevant statutes.
>
> Under article 88(4)(e) and section 74 of the *Elections Act*, IEBC is vested with the mandate to resolve electoral disputes. However, that mandate does not extend to election petitions and disputes subsequent to the declaration of election results. Article 88(4)(e) provides as follows:
>
> "(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
>
> (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;"

Section 74 of the *Elections Act* is couched in similar terms as follows:

> "Pursuant to article 88(4)(e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results."

In the present case, the petitioners challenge gazette notice of September 9, 2022 by the IEBC, of the nominated members of 22 county assemblies. It is now well settled that gazettement of nominated members of county assemblies, as in the present case, is an election. In the case of Rahma Issak Ibrahim vs Independent Electoral & Boundary Commission & 2others [2017] eKLR Mwita, J reiterated the legal position on the effect of gazettement of nominated members of a county assembly and stated:

"41. The legal position emerging from the above analysis is that once a member has been gazetted as duly nominated, that becomes an election result and anyone unhappy with that result can only challenge it as an election dispute in an election court."

The Court of Appeal while considering this very issue in the case of Rose Wairimu Kamau and 3 others v IEBC, *CA No 169 of 2013* rendered itself as follows:

> "[I]n reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under articles 971(C) and 177(2) respectively have been gazetted....they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under article 105 of *the Constitution* or part VIII of the *Elections Act* as the case may be."

Similarly, in the case of Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another [2015] eKLR, the Court of Appeal considered the question of the jurisdiction of the High Court in a dispute concerning gazettement of nominated of members of county assemblies. The court stated that the High Court lacked jurisdiction and stated as follows:

> "We are cognizant of the principle that upon gazettment of members of the County Assembly, they are deemed to be elected members of the County Assembly. Applying the foregoing dicta and principles of law to the instant case, section 75 (1A) of the *Elections Act* expressly indicates that the jurisdiction to consider, hear and determine the question as to the validity of election of a member of County Assembly is vested with the Resident Magistrate's Court designated by the Chief Justice. The proper and original forum to determine the question of whether the 2nd respondent was validly nominated and gazetted as representative of the marginalized communities in Isiolo County Assembly is the Resident Magistrate's Court. The learned Judge did not err in interpreting and applying section 75 (1A) of the *Elections Act*. We state that the High Court has no original jurisdiction to determine questions of membership to County Assemblies."

The Supreme Court also had occasion to consider this very same issue in the case of Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR, and had this to say:

"(117) It is clear to us that *the Constitution* provides for two modes of 'election'. The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition'.

(118) On such a foundation of principle, we hold it to be the case that whereas the Court of Appeal exercised jurisdiction as an appellate electoral court, it had not been moved as such, in accordance with section 85 A of the *Elections Act*, and relevant provisions of *the Constitution*. The respondents had moved the appellate court on the basis that they were aggrieved by the High Court's decision in judicial review proceedings, in which that court had declined jurisdiction. This in our view, would have been a proper case for the appellate court to refer the matter back to the High Court, with appropriate directions.

(119) To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under article 165 (3) of *the Constitution*, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution."

The Supreme Court affirmed the legal position of election by way of nomination, through the party list. The court further affirmed the principle that that any challenge of such an election may only be by way of an election petition.

Based on the foregoing, it quite evident that upon gazettement of members of a county assembly who are nominated pursuant to article 177 of *the Constitution*, such members are deemed to be duly elected. Any person aggrieved by such gazettement as the petitioners herein are, may only find recourse in an election court designated under section 75(1A) which provides as follows:

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

A reading of the above provision makes it clear that the question as to the validity of the election of a member of county assembly may only be raised in the election court. Thus, a person wishing to challenge the gazettement of a member of a county assembly, as the Petitioners have herein, may only do so in an election court. Such election court is a Resident Magistrate's Court duly designated as such, by the Hon Chief Justice. A petition filed in any other court or forum to challenge such election, is incompetent for want of jurisdiction.

My view is that the issue of violation of *the Constitution* and statute by IEBC in gazetting the nominees for the various county assemblies ought to be raised in the election court as a ground for nullification of the election. Duly guided by the Supreme Court in the case

of Moses Mwicigi & 14 others, I find that allowing the petitioners herein to move this court by way of a constitutional petition in the present circumstances, is to set up a parallel electoral dispute-resolution regime, thereby defeating the sui generis character of electoral dispute-resolution mechanism provided in law. It is in the election court that the validity or otherwise of the nominations in question is to be determined. Accordingly, this court must not allow an electoral dispute to be transmuted into a constitutional petition as sought by the petitioners herein.

The law has provided a clear procedure for redress and such procedure must be followed to the letter. In the case of such case is Speaker of the National Assembly v James Njenga Karume [1992] eKLR the Court of Appeal addressed its mind to this very issue and stated:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

The court is of the view that prayers A, B D E and F sought in the amended petition, if granted, will have the effect of nullifying the election of members of the 22 county assemblies. As indicated herein, the jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. This is one such instance. Jurisdiction to adjudicate entertain a dispute in respect of the election of a member of a county assembly has been conferred upon the Resident Magistrate's Court, as designated by the Chief Justice under section 75(1A) of the *Elections Act*.

The court is aware that the petitioners also seek a declaration that section 36(8) of the *Elections Act* is unconstitutional. This court has jurisdiction under article 165(3)(d)(i) to determine the question whether any law is inconsistent with or in contravention of this Constitution.

Having considered the foregoing, the inevitable conclusion that this court must draw is that it lacks jurisdiction to entertain the petition herein save for prayer C. It is trite law that without jurisdiction this court has no power to make one more step. See the case of Owners of the Motor Vessel "Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi, JA held as follows:

> "[J]urisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In the end and in view of the foregoing, the final orders hereby issue:

i. The preliminary objection dated October 13, 2022 partially succeeds.

ii. The court declines jurisdiction in respect of prayers A, B, D, E and F of the amended petition.

iii. The court has jurisdiction to deal with prayer C of the amended petition.

iv. Costs in the cause."

Analysis and Determination

59. In view of the above ruling which dealt with several issues, this judgment is only confined to the constitutionality of Section 36 (8) of the *Elections Act* only. Consequently, there is only a singular outstanding issue for determination in this matter, that is:

    Whether or not Section 36 (8) of the *Elections Act* is constitutional.

60. The Petitioner's challenge the constitutionality of Section 36 (8) when considered against Article 177 (1) (c) of *the Constitution* which relates to the 1st Respondent's mandate in the nominations of County Assemblies.

61. A proper scrutiny of impugned statutory provision vis-a-vis the relevant provisions of *the Constitution* it allegedly violates will be necessary alongside the relevant principles in interpretation of *the Constitution* and Statutes.

62. This brings into sharp focus the provisions of Article 259 of *the Constitution*. The obligation on this Court is to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of rights in a manner that contributes to good governance. In exercising its judicial authority, this Court is also obliged under Article 159 (2) (e) of *the Constitution* to protect and promote the purposes and principles of *the Constitution*.

63. Constitutional interpretation is a beaten path which has seen the application and growth of jurisprudence through principles to aid in Constitutional interpretation. In the case of Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] eKLR, the Court stated:

> "I accept the proposition that the appellant has put forward, that *the Constitution* must be interpreted in a liberal, purposive and progressive manner, in order to give effect to the principles and values contained therein. This is found at Article 259 (1) of *the Constitution* which is framed as follows:
>
> > Article 259. (1) This Constitution shall be interpreted in a manner that—
> >
> > i. promotes its purposes, values and principles;
> >
> > ii. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
> >
> > iii. permits the development of the law; and
> >
> > iv. contributes to good governance.
>
> These principles have been reiterated time and again by our courts. In Njoya & 6 others -vs- Attorney General & 3 others No 2 [2008] 2 KLR (EP), this Court held that:
>
> > *The Constitution* is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it."

64. Correspondingly, the Supreme Court in the Matter of the Interim Independent Electoral [2011] KESC 1 (KLR) guided as follows:

> "(86)" .....The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.
>
> (87) In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights...
>
> (89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting *the Constitution*, is a task distinct from interpreting the ordinary law. The very style of *the Constitution* compels a broad and flexible approach to interpretation."

65. Equally, in Communications Commission of Kenya (supra) the Supreme Court stated as follows:

> "(137) This, in our perception, is an interpretive conundrum, that is best resolved by the application of principle. This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that *the Constitution* should be interpreted in a holistic manner, within its context, and in its spirit. In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012;[2014] eKLR, this Court [paragraph 26] had thus remarked:
>
> > "...But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result"

(138) In Speaker of the Senate & Another v. Attorney-General & 4 Others, Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR, [paragraph 156], this Court further explicated the relevant principle:

> "The Supreme Court of Kenya, in the exercise of the powers vested in it by *the Constitution*, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret *the Constitution*. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on *the Constitution*; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of *the Constitution* has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras."

66. There is also a general presumption that every Act of Parliament is deemed constitutional. This principle was captured by the Court of Appeal of Tanzania in Ndyanabo vs. Attorney General [2001] EA 495 being a restatement of the law in the English case of Pearlberg vs. Varty [1972] 1 WLR 534 that:

> "Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

67. Discussing the presumption of constitutionality of a statute, the Supreme Court of India in Hamdard Dawakhana vs. Union of India Air (1960) AIR 554, 1960 SCR (2)671 stated as follows:

> "In examining the Constitutionality of a statute, it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

68. There is also the purpose and effect of the impugned provision which was also applied by the Constitutional Court of Uganda in Olum and another vs Attorney General [2002] 2 EA, where it was noted that:

> " To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by *the constitution*, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by *the constitution*, the impugned statute or section thereof shall be declared unconstitutional..."

69. Furthermore, the Court is required to interrogate the intention articulated and intended in the Statute. This was confirmed by the Court of Appeal in County Government of Nyeri & another vs Cecilia Wangechi Ndungu [2015] eKLR where it stated as follows:

> " The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context..."

70. Further, the burden of proving the unconstitutionality of a statute rests on the person who alleges that the Act is unconstitutional. In the persuasive authority of U.S. vs Butler 297 U.S. 1 (1936), the Court stated as follows:

> " When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of *the Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

71. Furthermore, in Council of County Governors v Attorney General & another [2017] eKLR the Court highlighted another important principle in the interpretation of Statute by stating as follows:

> " A law which violates *the constitution* is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of *the Constitution*. When the constitutionality of a law is challenged on grounds that it infringes *the constitution*, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant considerations is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach
>
> Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom *the Constitution* vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with *the Constitution*.

72. To be able to consider the issue at hand exhaustively, it is necessary to set out the entire Section 36 of *Elections Act* before narrowing down to Section 36 (8) and Article 117 of *the Constitution*.

Section 36. Allocation of special seats.

(1) A party list submitted by a political party under—

a. Article 97(1)(c) of *the Constitution* shall include twelve candidates;

(b) Article 98(1)(b) of *the Constitution* shall include sixteen candidates;

(c) Article 98(1)(c) of *the Constitution* shall include two candidates;

(d) Article 98(1)(d) of *the Constitution* shall include two candidates;

(e) Article 177(1)(b) of *the Constitution* shall include a list of the number of candidates reflecting the number of wards in the county;

(f) Article 177(1)(c) of *the Constitution* shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalized group.

(2) A party list submitted under subsection (1)(a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.

(3) The party list referred to under subsection (1)(f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.

(4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.

(5) The allocation of seats by the Commission under Article 97(1)(c) of *the Constitution* will be proportional to the number of seats won by the party under Article 97(1)(a) and (b) of *the Constitution*.

(6) The allocation of seats by the Commission under Article 98(1)(b), (c) and (d) of *the Constitution* shall be proportional to the number of seats won by the party under Article 98(1) (a) of *the Constitution*.

(7) For purposes of Article 177(1)(b) of *the Constitution*, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.

(8) For purposes of Article 177(1)(c) of *the Constitution*, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.

(9) The allocation of seats by the Commission under Article 177(1)(b) and (c) of *the Constitution* shall be proportional to the number of seats won by the party under Article 177(1)(a) of *the Constitution*.

73. Turning now to Article 177 of *the Constitution*, it provides for the membership of a County Assembly as follows:

Article 177. Membership of county assembly

(1) A county assembly consists of—

(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;

(b) the number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;

(c) the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and

(d) the Speaker, who is an ex officio member.

(2) The members contemplated in clause (1)(b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.

(3) The filling of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward.

(4) A county assembly is elected for a term of five years.

74. In my view, the Political Parties, just like the IEBC are not exempt from abiding by the Constitutional dictates. This duty continues and applies even in the drawing the Party lists for submission under Article 177 (c). Article 2 (1) of *the Constitution* declares that theConstitution binds all persons and all State organs at both levels of government while Article 3 (1) declares that every person has an obligation to respect, uphold and defend this Constitution. In case political parties fail to comply with the constitutional and statutory requirement in drawing the list, there is an elaborate dispute settlement process as very well-articulated in the ruling by Justice Thande.

75. From a Constitutional viewpoint, IEBC has a Constitutional obligation to decline a list that is submitted by a political party if it does not comply with the requirements of Article 117 (c) of *the Constitution* and direct the defiant party to submit a Constitutionally compliant list. However, I do not accept that IEBC has the latitude to substitute or tamper with the priority list of a political party. That would amount to usurping the constitutional mandate assigned to the political parties. IEBC's role is merely facilitatory and not an active player in the political in deciding who is shoved from the list and who is retained. That would be tantamount to directly taking part in the 'election' of candidates and can easily drag IEBC into political battlefield risking to ruin IEBC's neutrality in elections particularly if the 'skipped', 'removed or bypassed' candidates by IEBC and their political parties decide to unite against IEBC. As was observed in R vs Big M Drug Mart Ltd 1985 CR 295 as cited with approval in Geoffrey Andare v Attorney General & 2 others [2016] eKLR the Court should bear in mind the purpose and effect of implementation of a legislation when considering its constitutionality or otherwise. In this case, the Court guided thus:

> "Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

76. In the event that IEBC approves a non-conforming list, then that cannot be considered in this Court for it becomes an electoral dispute which can only be resolved by the elections Court.

77. It is thus my finding that applying the purpose and effect principle, Section 36 (8) is not unconstitutional for limiting IEBC's role to acting only on the list of candidates and going by the order given by the political party. The only Constitutional and legal duty on the part of IEBC is to satisfy itself that the list conforms with *the Constitution* and any relevant statutory requirements. The purpose and effect of Section 36 (8) is to preserve the neutrality of IEBC in electoral process by restricting direct participation of IEBC 'in elections' of candidates. There is no room that IEBC can maneuver or interfere with the party list by IEBC. IEBC role is limited to rejecting a non-compliant list and insisting on its rectification to meet Constitutional and legal threshold by a defaulting party but must not interfere with the list by making unilaterally making changes in a party's list lest it undermines its neutral role.

78. I am emboldened in reaching this finding by the Supreme Court decision of Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] KESC 2 (KLR) where the Supreme Court observed:

> "(95) The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55.
>
> (96) A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the "elections" for these special seats. In the event of non-compliance by political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh list or by amending the list already submitted "

79. As already noted, if IEBC there is concrete evidence that demonstrates that the party lists that were submitted and acted upon by IEBC were not constitutionally compliant in any county, the intervention is not through this Court but an elections Court. This was the holding of the Supreme Court which dealt with a similar issue in the case of Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others (supra), and held thus:

> "(117) It is clear to us that *the Constitution* provides for two modes of 'election'. The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition'... (119) To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under article 165 (3) of *the Constitution*, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution."

79. It is my finding that this Petition lacks merit and is hereby dismissed.

80. As this is a public interest litigation, each Party shall bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 31ST DAY OF DECEMBER, 2024.

.....

L N MUGAMBI

JUDGE