



**Matuli & another & 2 others v Independent Electoral and Boundaries Commission & 2 others  
(Election Petition Appeal E001 of 2022) [2023] KEHC 3580 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3580 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
ELECTION PETITION APPEAL E001 OF 2022**

**RN NYAKUNDI, J**

**APRIL 26, 2023**

**IN THE MATTER OF ARTICLE 81,86,87 AND  
88 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ELECTION ACT NO 24 OF  
2011 THE ELECTIONS (GENERAL) REGULATIONS 2012**

**AND**

**THE ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES 2017**

**AND**

**IN THE MATTER OF THE ELECTION OFFENCES ACT 2016**

**AND**

**IN THE MATTER OF THE NOMINATION OF MEMBER OF COUNTY  
ASSEMBLY NANDI COUNTY GAZETTED ON 9TH SEPTEMBER 2022**

**BETWEEN**

**LYDIA MATULI & ANOTHER ..... 1<sup>ST</sup> APPELLANT**

**AMANI NATIONAL CONGRESS & ANOTHER ..... 2<sup>ND</sup> APPELLANT**

**AND**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**ESTHER JEMELI MISOI ..... 2<sup>ND</sup> RESPONDENT**

**VIOLET ENYIMBA CLEMENT ..... 3<sup>RD</sup> RESPONDENT**



## **County voter registration required eligibility for a position as Member of the County Assembly**

*The instant appeal arose from a challenge on the nomination and election of the 1st appellant as a nominated member in the County Assembly of Nandi County on the ground that the 1st appellant was a registered voter of Kakamega County. The court held that from the historical prism, Kenyans wanted a system where they elected leaders at the local government level on their own from amongst themselves and that that supported the proposition that one had to be a registered voter in a particular county for them to be eligible to be nominated as a member of the county assembly of that county. The court further held that excluding the people in the process of recruitment of members to the special seats did not serve the interests of democracy. The court further held that the list of members to be nominated contemplated in law was the list that originated from and signed by the authorized party officials and not the branch leadership.*

Reported by Kakai Toili

**Electoral Law** - nomination of members to a county assembly - requirements - requirement that the person to be nominated must be a registered voter in the county of nomination - requirement to submit a list of the proposed names to be nominated to the Independent Electoral and Boundaries Commission (IEBC) - whether a list of members to be nominated to a county assembly from a party's branch leadership was the list contemplated in law to be submitted to the IEBC - whether a person must be a registered voter in a county to be eligible for election/nomination to the county assembly of that county - whether citizens ought to be included in the process of recruitment of the representatives in the special seats - of Kenya, 2010, articles 1, 90, 174, 177 and 193; , sections 25, 34 and 35; Elections (General) Regulations , Part X.

**Electoral Law** - appeals - appeals from interlocutory applications in election petitions - what was the procedure to be followed by a party seeking to appeal against a decision made with respect to an interlocutory application in an election petition.

**Civil Practice and Procedure** - submissions - nature of submissions - what was the nature of submissions in a suit.

### **Brief facts**

On September 9, 2022, the Independent Electoral and Boundaries Commission, the 1<sup>st</sup> respondent (IEBC) gazetted a list of nominated members to county assemblies. The 1<sup>st</sup> appellant was among the nominated members in the County Assembly of Nandi County under the category of special seats (gender top up), being nominated by the 2<sup>nd</sup> appellant. Aggrieved by the 1<sup>st</sup> appellant's nomination, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, through a petition challenged the nomination and election of the 1<sup>st</sup> respondent as a nominated member in the County Assembly of Nandi County in the category of special seats (gender top-up). They laid claim on the IEBC's gazettement of the 1<sup>st</sup> appellant which they alleged to be unconstitutional for appointing a registered voter of Kakamega County as a Member in the County Assembly of Nandi County.

The trial court allowed the petition and declared the nomination of the 1<sup>st</sup> appellant as null and void. Consequently, the 1<sup>st</sup> appellant's gazettement was nullified. The IEBC was ordered to re-allocate the gender top up seat to the next female Nandi County registered voter in the list in accordance with section 37 of the . Aggrieved by the trial court's judgment, the appellants lodged the instant appeal.

### **Issues**

- i. Whether a person must be a registered voter in a county to be eligible for election/nomination to the county assembly of that county.
- ii. Whether citizens ought to be included in the process of recruitment of the representatives in the special seats.
- iii. Whether a list of members to be nominated to a county assembly from a party's branch leadership was the list contemplated in law to be submitted to the Independent Electoral and Boundaries Commission.



- iv. What was the procedure to be followed by a party seeking to appeal against a decision made with respect to an interlocutory application in an election petition?
- v. What was the nature of submissions in a suit?

**Held**

1. A court's jurisdiction could only flow from either the or legislation or both. Consequently, a court of law could only exercise jurisdiction as conferred by the or other written law. It could not arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The jurisdiction of the court in the instant appeal flowed from the .
2. The court's jurisdiction was constrained to only points of law. The determination of whether a question amounted to a matter of law, was not a straightforward one. It called for the court to keenly evaluate the matter before it and determine whether the points raised called for a fresh examination of evidence or the legal conclusions made by the trial court upon such an examination of the evidence before it.
3. The 1<sup>st</sup> appellant's right to a fair hearing under article 50 of the was not violated. Both the petitioners and the 1<sup>st</sup> appellant filed their pleadings before the trial court. The trial court considered the pleadings and conducted oral hearings of the petition on November 4 and 6, 2022 where all parties including the petitioner submitted evidence. It was only then that the court directed that the parties file submissions. Absence of submissions properly so on record where a case had already been heard orally and evidence presented did not prejudice a party.
4. Submissions by themselves were neither law nor evidence. They were only intended to sum up a case for a party. They did not constitute a new avenue to adduce evidence in a case but were rather meant as a guide to the trial court when evaluating the evidence before it. They did not form an integral part of the hearing and therefore they could not be said to be part and parcel of the trial.
5. Whether the pleadings in the petition were delivered to the rightful person on behalf of the 2<sup>nd</sup> appellant at their national offices in Nairobi did not present a matter of law. Even if the court were to extend latitude to the appellants to consider the question of whether a political party should be served exclusively at their registered national offices, the appellants were still in a fix. That was because the 2<sup>nd</sup> appellant already introduced that issue before the trial court in the form of an interlocutory application dated November 2, 2022 which the court determined and dismissed on November 4, 2022. The effect of that was that the 2<sup>nd</sup> applicant would be attempting to appeal against the trial court's decision on the application dated November 2, 2022 improperly through the instant proceedings.
6. The question of appeals on interlocutory applications in election petitions was well settled. A party seeking to appeal an interlocutory application was obliged to file a separate notice of appeal upon conclusion of the case in the trial court. It was only then that the appeal on the interlocutory application would be properly lodged and the court would consider it. No notice of appeal on the interlocutory application was presented before the court. Consequently, in as much as the court sympathized with the predicament of the 2<sup>nd</sup> appellant, it could do no more on that issue.
7. Nomination of members to the county assembly was governed by the and the . Article 177(c) of the set out the structure of the membership of the county assembly. The party lists under article 90 of the were governed by the ; the relevant sections being sections 34(4A), 34(6) and 35.
8. The only matter of law in the case would be the question whether a person must be a registered voter in a county to be eligible for election/nomination to the county assembly of that county.
9. The test for nullification of any election including election through nomination was set out under section 83 of the . It was incumbent upon the respondents to demonstrate how the nomination of the 1<sup>st</sup> appellant breached the provisions of the , the and other electoral law.
10. According to articles 90, 177 and 193 of the , sections 25, 34, of the and Part X of the Elections (General) Regulations, allocation of party lists was a matter left to political parties. Nevertheless, IEBC was responsible for the conduct and supervision of elections in those seats.



11. The allegation that the 1<sup>st</sup> appellant did not apply for nomination to the position with the 2<sup>nd</sup> appellant hence leading to unfair competition and discrimination contrary to article 27 of the was controverted with the 1<sup>st</sup> appellant's evidence and found not to be true.
12. Following the evidence at the trial court, the list in which the 2<sup>nd</sup> respondent alleged to have been number one was a list of May 18, 2022 originating from the 2<sup>nd</sup> appellant's Nandi County Branch. The list contained names of persons proposed by the county branch leadership for nomination to the County Assembly. That was not the list contemplated in law. That list was a mere proposal by the county leadership. The list contemplated in law was the list that originated from and signed by the authorized party officials and not the branch leadership. From evidence presented, that list duly signed by the authorized party officials and presented to the IEBC had the 1<sup>st</sup> appellant's name at number one and the 2<sup>nd</sup> respondent's name at number two. It was that list that was later gazzetted by the IEBC and from which the 1<sup>st</sup> appellant was declared as nominated to the County Assembly of Nandi County.
13. The requirements prescribed for the position of member of county assembly in the Rules and Procedures of the 2<sup>nd</sup> respondent, under rule 36.1(n) were that a member must be a voter from the electoral area in which the candidate sought to vie. It followed that the requirements to be an elected member of county assembly applied *mutatis mutandis* to the applicants to be a nominee for the same position.
14. The form for the application to be nominated as a party list candidate for the position of member of county assembly at page 290 of the record of appeal expressly stated that the nominees to the county assembly must be registered voters and residents of the county they wished to represent. Even though the authenticity of the list was questioned by a letter dated September 2, 2022 from the secretary general of the 2<sup>nd</sup> appellant, the trial court found no evidence that IEBC interfered with the list. Moreover, from a reading of the record, nothing indicated that the list was interfered with.
15. There was nothing to suggest the nomination process of the 1<sup>st</sup> appellant by the 2<sup>nd</sup> appellant was flawed in any way. Moreover, there was nothing to suggest that IEBC interfered with the list presented to it by the 2<sup>nd</sup> appellant.
16. Nothing in articles 90, 177 and 193 of the , section 25 of the , rule 42 of the 2<sup>nd</sup> appellant's Election and Nomination Rules; Procedures as well as the marking scheme used by the election board of the 2<sup>nd</sup> respondent provided that a person must be a registered voter in the county whose county assembly they sought to be elected in. The left the process of nomination of persons to specialized seats to the political parties which were to be supervised by IEBC.
17. Courts needed to resolve constitution-making contradictions; clarify draftsmanship-gaps; and settle constitutional disputes that may have arisen from constitution-making compromises that often attended the -making process. In doing so, the court was to adopt a purposive approach which promoted the dreams and aspirations of the Kenyan people. The import of article 259 of the was that courts should interpret the in a purposive manner which defended, encouraged, assisted and helped the flourishing of the purposes, values and principles of the. It was to do so in a manner that furthered or encouraged the progress or existence of those purposes, values and principles.
18. The provisions in question concerned the election of a person into the county assembly, an entity created by the devolved structure of governance. The provisions must thus be interpreted in the context of and in a manner that promoted the values and principles of devolved government. It was incumbent upon the court to identify the purposes, the core values and the principles of devolved governance and give effect to them.
19. The provision in question on eligibility to be elected to the county assembly was article 193(1)(a) of the which simply required a person to be a registered voter. The systematic and the teleological methods of analysis of the constitutional text enjoined the court to adopt a holistic approach to interpretation, with a view to protecting and promoting the purpose, effect, intent and principles of the.



20. A holistic interpretation of the constitutional provisions on devolution begun from article 1 of the on sovereignty of the people. While article 1(1) declared the people as the sovereign, the people under article 1(3)(a) delegated that sovereign power to Parliament at the national level and to the legislative assemblies in the county governments. Therefore, that meant that the powers exercised by members of the county assemblies emanated directly from the people. In fact, as only voters registered in wards in a particular county could vote-in, representatives at the county level, such people of that particular county constituted the political sovereign for the county. The powers of their elected officials to govern county affairs emanated from them and it follows that the people entrusted with such powers would be from among them.
21. Article 174 of the enunciated the objects of devolved governance. The objects of devolution provided a justification as to why Kenya opted for a devolved system of governance by specifying the problem areas experienced in the past which devolution aimed to address.
22. A historical method of interpretation would call for a contextual analysis of the provisions of the on devolution. From the historical prism, the people of Kenya wanted a system where they elected leaders at the local government level on their own from amongst themselves. That supported the proposition that one had to be a registered voter in a particular county for them to be eligible into a position as member of the county assembly of that county.
23. A purposive interpretation of article 193(1) of the on the eligibility for election as a member of the county assembly would favour a position that would require a candidate to be a registered voter in that county.
24. Article 90 of the provided for the allocation of party lists. It provided that elections for the members of special seats both in the National Assembly and in the county assembly shall be on the basis of proportional representation by use of party lists. Article 90(2) consequently mandated the IEBC to be responsible for the conduct and supervision for the special seats.
25. The enshrinement of the special seats in the was laudable as it was a progressive step which promoted representation of special interest groups and affirmative action. It ensured that all categories of people in the society got a chance in governance thus promoting equality. A look into the historical development of the provision of special seats revealed that special seats were designed to promote the inclusion and representation of special interest groups such as women and people with disabilities who had often been left out in decision making.
26. The drafters were cognizant of the fact that in designing an all-inclusive system, other factors such as discrimination among the minorities themselves would arise. That informed the adoption of the mixed proportional representation approach. Unfortunately, much about the recruitment of the members to represent the people in the special seats was left to political parties. It was political parties which were given the powers to nominate and rank the members to stand elected in the special seats' category.
27. Immediately after their nomination by a political party and subsequent election, the representatives in the special seats category became representatives of the interests of the people and not those of the political party. Excluding the people in the process of recruitment of such members did not serve the interests of democracy. The philosophical foundations behind the concept of special and reserve seats did not favour a position that would allow the exclusion of the people's participation.
28. The concepts of popular sovereignty and participation of the people were key tenets of any democracy such as Kenya. Popular sovereignty was the idea that the people were the ultimate authority and the source of the authority of Government. It was the ideal that the people were sovereign in democracy, which was to say that the ultimate power rested with them. Citizens were the source of all Government power. Democracy was thus based on the idea that governments were only legitimate (they only had the right to rule) if they were based on the consent of the people. That intractably linked with the concept of citizen participation in a democracy.



29. Citizen participation was a component of democracy which referred to the process whereby people acted in political ways to connect themselves to government and thus become self-governing. People could participate through established structures of the adopted forms of democracy; as well as through civil associations. In democracies, the election of leaders must be free and fair. In that way citizens became part of decision-making and governance.
30. Lack of people's participation in free associations bore the risk that since it was difficult for an individual to pressurize the Government into meeting people's needs, the failure of individual efforts led to individual despair and frustration, which may in turn lead to withdrawal from the campaign for democracy.
31. Participation could occur in different forms and degrees, in all spheres of life and at all levels in the political system. In the political sphere people in a democratic system had opportunities to participate through different mechanisms, from the local to the national level. The most common form of political participation in a democracy was voting in elections. Apart from voting for other candidates people could also become candidates themselves and run for public office.
32. Forms of political participation beyond elections included referenda and consultations by leaders (for example through community meetings). Participation, however, could also occur in alternative forms of proactive initiative by the citizens who could, for example, engage their leaders in discussions and dialogues. Some of the alternative forms could be institutionalized to a certain extent; for instance, people could join political parties or form certain interest and lobby groups.
33. The of Kenya, 2010 put a lot of emphasis on the issue of the participation of the people. Although the adopted the concept of representative democracy, it indicated that such democracy could co-exist with direct participation of the people. The emphasis in article 1 that all sovereign authority emanated from the people sat in well with the concept that democracy was government by the people. The article was a foundation of the concept of self-rule which was at the core of democratic rule.
34. It was concerning that the nomination and election of special seats category members was silent on the critical element on the participation of the people. It was saddening that there were no mechanisms in place to ensure that the special seats members were vetted by the people to ensure that they were truly capable or that they had the capacity or the desire to represent the people well. The same had been left to political parties leading to processes that were marred with lack of transparency and accountability. It was not surprising that persons with no interests of the people at heart may end up getting nominated and elected in the special seats' categories.
35. In countries such Uganda, they too had reserved special seats. However, the special seats were not automatic and after nomination by a political party in the special seat, one had to seek mandate from the people. That ensured that the people had a voice on who became their leaders. It was important that the parties understood the reason why some of the nominee positions existed. The gender top up positions existed for the purpose of giving life to the requirements of articles 27(8) and 81 of the .
36. The court could only call upon the relevant stakeholders including IEBC to spearhead policy changes that would ensure the participation of the people in accordance with the spirit of the. The most striking innovation in the was that norms of democratic procedure, transparency, and accountability that were applied daily political decision making were also demanded on nomination deliberations by the main actors prescribed in the law.
37. Possibly, it was time citizens also participated directly in the conduct of the political affairs to choose their representatives in consonant with the principles laid down in the and electoral laws. Mechanism of participation by the people what, when, how and why were aspects which could be inbuilt in the relevant status.
38. IEBC as the constitutionally mandated body should not shy away from establishing legal mechanisms to ensure that the special seats nomination process was democratic with ideals of popular sovereignty and participation of the people. Moreover, IEBC should put in place mechanisms to ensure that



- political parties ensured the people participated through means such as public consultations and dialogue to vet those who sought to represent them in special seats. Once such was in place, IEBC should ensure oversight and monitoring of the process.
39. The deepening and enhancement of the mechanism for the people to express their will in consonant with article 10 of the may incorporate clear guidelines in the regulation or statute for good governance. Those forms and levels may not be limited to the suggestions therein but the express provisions of the , electoral statute and regulations. It was that impact of citizen participation that persuaded the court to reckon that though democracy was one of the most used phrase in Kenya's governance sometimes Kenyans forget that it touched the very fundamentals of the life of human beings in society. That was the reason Kenyans should embark to advance the standards which contributed in the democratization of politics.
40. Democracy as an ideal to be pursued by every citizenry must reflect the diversity and cultural particularities for Kenya. There was need to stay at the constancy where the deals of democracy were essentially to preserve and promote the dignity and fundamental rights of the individual to achieve social justice, foster the economic and social development of Kenyan communities, geared towards strengthening the cohesion of the multiethnic society namely the Republic of Kenya. That indeed would enhance national tranquility. The strong political participation of the youth, women, people with disabilities, vulnerable or marginalized for one reason or another was critical for democratic governance.
41. Human dignity, equity, social justice, inclusiveness, equality, and human rights permeated in pursuit of Kenya's ideal democracy. The appeal inspired the court on a further legal reform around the questionable nomination keeping in view the historical litigation of this matter. Maybe it would help to add to the voice for Kenya as a people to invest in citizens capacity to participate in politics and civic life and create favourable conditions for democratic governors to thrive. Some of the salient features which emerged from the litigation revolved around the following guidelines:
1. Nomination of persons in special seats should be in accordance with clearly delineated constitutional principles including the values and principles of governance under article 10 of the , the political rights under article 38 and the general principles of the electoral system under article 81 of the .
  2. Persons nominated to special seats must satisfy a clearly set out criteria devised in accordance with the . Such criteria should require only those who actively participate in local affairs and were registered voters in a particular area to be eligible for nomination to represent such an area in the specialized seats.
  3. In accordance with the constitutional principles of governance, the public must participate in the process of nomination of members in the special seats. Political parties should present evidence of participation by the public in the nomination process in accordance with the established principles.
  4. The roles, scope and constituency of the members nominated in the specialized seats must be clearly defined.
  5. Notions of the people had become more inclusive and the mechanism through which the people exacted the influence would be an innovative approach to that process of nomination.
  6. Community participation in the nomination process in the reserved special interest seats was a conscious form of the as stipulated in article 10 of the supreme law of the land.
42. Unless misdirection or application of wrong principles on the part of the trial court was proved, an appellate court would not interfere with the trial court's decision on costs. The trial court properly applied itself on the principles guiding the awarding of costs. Consequently, the trial court decision on costs stood.

*Appeal dismissed.*



## **Orders**

- i. *In essence the order on gazettment of the appellant as a member of Nandi County Assembly under the gender top up was affirmed as null and void.*
- ii. *The declaration made by the trial court in clause 3 of the judgment took effect forthwith but not later than thirty (30) days from the date of the court's decision on the appeal.*
- iii. *Costs as decreed by the trial court*

## **Citations**

### **Kenya**

1. *Buyera, Mutali Sam v Independent Electoral and Boundaries Commission of Kenya, Chebii Lazarus, Returning Officer & Manjari Elikana Kagunda* Election Petition 2 of 2017; [2017] KEMC 28 (KLR) [2017]eKLR - (Applied)
2. *Buyu, Rozaah Akinyi v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 40 of 2013; [2014] KECA 809 (KLR)[2014] eKLR - (Applied)
3. *Chemutai, Lorna & 4 others v Independent Elections & Boundaries Commission & 2 others* Election Petition 1 of 2018; [2018] KEHC 6538 (KLR)[2018] eKLR - (Explained)
4. *Cidi, Kumbatha Naomi v County Returning Officer, Kilifi & 3 others* Election Petition 13 of 2013; [2013] KEHC 3446 (KLR) - (Applied)
5. *In the Matter of the Speaker of the Senate & Senate of the Republic of Kenya* Advisory Opinions Application 2 of 2013; [2013] KESC 7 (KLR)[2013] eKLR - (Explained)
6. *John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu* Election Appeal 5 of 2018; [2018] KECA 700 (KLR) - (Explained)
7. *Joseph Mwangi Njoroge v Republic* Criminal Appeal 314 of 2012; [2017] KEHC 9714 (KLR) - (Followed)
8. *Kimanzi, Patrick Ngeta v Muluvi, Marcus Mutual, Alice Kimani (Returning Officer) & Independent Electoral and Boundaries Commission* Civil Appeal 191 of 2013; [2014] KECA 795 (KLR) [2014]eKLR - (Applied)
9. *Limo, Victoria Cheruto & another v Independent Electoral and Boundaries Commission (IEBC) & another* Election Appeal 5 & 7 of 2018; [2018] KEHC 4571 (KLR) - (Explained)
10. *Loitiptip, Anuar v Independent Electoral & Boundaries Commission & 2 others* Petition 18 & 20 of 2018 (Consolidated), [2019] eKLR - (Explained)
11. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Applied)
12. *Munya v Independent Electoral and Boundaries Commission & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
13. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2017] KESC 31 (KLR) - (Explained)
14. *Patroba, Eric Soita v Sudukwa, Grace & another* Election Petition 1 of 2017; [2017] KEMC 21 (KLR) - (Applied)
15. *Saad, Saad Yusuf v Independent Electoral and Boundaries Commission (IEBC) & 2 others* Environment & Land Case 8 of 2011; [2017] KEELC 285 (KLR) - (Applied)

### **United Kingdom**

*Bracegirdle v Oxley (2)* [1947] 1 All ER 126 - (Explained)

### **Statutes**

#### **Kenya**

1. Constitution of Kenya articles 1(1)(3)(a),10,27(8),38,50,81,90,97(1)(c),98(1)(b)(c)(d),177(1)(b)(c)(2),193,259 - (Interpreted)



2. Elections Act (cap 7) sections 25, 34(4A)(6), 35, 37, 75(1A)(4), 83, 85A- (Interpreted)

#### **Advocates**

None mentioned

## **JUDGMENT**

### **Background**

1. Before the court is an election petition appeal against the trial court's judgment in Election Petition No E003 of 2022 from the Chief Magistrates' Court at Kapsabet.
2. On September 9, 2022, the Independent Electoral and Boundaries Commission, the 1<sup>st</sup> respondent Gazetted a list of Nominated Members to County Assemblies. Lydia Matuli, the 1<sup>st</sup> appellant was among the Nominated members in the County Assembly of Nandi County under the Category of Special Seats (Gender Top Up), being nominated by the Amani National Congress the 2<sup>nd</sup> appellant.
3. Aggrieved by the 1<sup>st</sup> appellant's nomination, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, through a petition on September 20, 2022, approached the trial court, challenging the nomination and election of the 1<sup>st</sup> respondent as a Nominated member in the County Assembly of Nandi County in the category of Special Seats (Gender Top-Up). They laid claim on the 1<sup>st</sup> respondent's Gazettement of the 1<sup>st</sup> appellant through Gazette Notice No 10712 of September 9, 2022 which they claimed to be unconstitutional for appointing a registered voter of Kakamega County as a Member in the County Assembly of Nandi County.
4. Through the judgement dated and delivered on November 2, 2022, Hon DA Ocharo PM allowed the petitioners petition. The trial court declared the nomination of the 1<sup>st</sup> appellant as a member of Nandi County Assembly under the Category of Special Seats (Gender Top Up) as null and void. Consequently, the 1<sup>st</sup> appellant's Gazettement was nullified. The 1<sup>st</sup> respondent was ordered to re-allocate the gender top up seat to the next female Nandi County Registered voter in the list in accordance with section 37 of the [Elections Act](#). The court also capped the costs of the petition at Kshs 500,000 to be borne by all the Respondents.
5. Aggrieved by the trial court's judgement, the appellants *vide* a memorandum of appeal dated December 6, 2022 lodged this appeal raising 12 grounds of appeal as will be subsequently discussed.

### **Proceedings before the Trial Court**

#### **The petition**

6. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their petition before the trial court on September 20, 2022. The two petitioners described themselves as the members of the 1<sup>st</sup> appellant, with the 2<sup>nd</sup> respondent specifically describing herself as a life member of the 2<sup>nd</sup> appellant of membership number xxxx. The 1<sup>st</sup> appellant was described in the petition as a female adult of Nandi County as well as a resident of Kakamega County, Likuyani Constituency, Nzoia Ward, Mumonyozo Polling Station. The 2<sup>nd</sup> appellant is a registered political party that proposed the 1<sup>st</sup> appellant for nomination as a Member of County Assembly in Nandi County via its party list submitted to the 1<sup>st</sup> respondent.
7. The petitioners grievances before the trial court were that the 1<sup>st</sup> appellant's nomination did not pass the constitutional test under article 177(2) of the [Constitution of Kenya 2010](#). According to the petitioners, the 2<sup>nd</sup> respondent was a permanent resident of Kakamega County without a permanent



abode in Nandi County or any constituency whose interests she could serve. They averred that she was not a registered voter in any constituency in Nandi County.

8. The petitioner's also submitted that the 2<sup>nd</sup> respondent had submitted her application for consideration before the 2<sup>nd</sup> appellant and her name was presented by the 2<sup>nd</sup> appellant as the first name on the list. she averred that in the list published by the 1<sup>st</sup> respondent, her name had been changed to number 3. She raised issues with the fact that the 1<sup>st</sup> appellant's name was brought as number 1 on the list despite the fact that according to the petitioners, the 1<sup>st</sup> appellant neither applied for the position to the 2<sup>nd</sup> appellant nor did they pay the mandatory application fees. The petitioners further averred that this failure by the 1<sup>st</sup> appellant to apply and to pay and consequently allowing their name to be included in the party list nominees for Nandi County, amounted to election offences.

The petitioners prayed for: -

- a. A declaration that the Gazettement of the 1<sup>st</sup> appellant be declared unconstitutional null and void for purporting to appoint a resident of Kakemega County, Likuyani Constituency, Nzoia Ward, Mumonyonzo Polling Station as a Nominated Member of County Assembly Nandi County.
- b. A declaration that the Gazettement of the 1<sup>st</sup> appellant as a nominated Member of County Assembly Nandi County breached the provisions of article 177(2) of the [Constitution of Kenya, 2010](#).
- c. A declaration that the Gazettement based on the 2<sup>nd</sup> Appellant's party list on priority basis, the 2<sup>nd</sup> respondent be declared as a Nominated Member of County Assembly Nandi County and the 1<sup>st</sup> respondent be ordered to consequently Gazette as such.
- d. Costs to the petitioners.

### **The Response**

9. In response to the petition, the 1<sup>st</sup> appellant swore an affidavit on October 5, 2022. She averred that she is a member of the 2<sup>nd</sup> appellant with membership no xxxx. She also averred that she applied to the 2<sup>nd</sup> appellant for nomination as a member of the County Assembly, Nandi County on May 17, 2022 and paid the prescribed fees. She further avers that her number was put by the 2<sup>nd</sup> appellant as the first name on the list.
10. The 1<sup>st</sup> respondent, the Independent Electoral and Boundary Commission, sought to leave to file its response to the petition out of time which was granted by the trial court. They thus put in their response and an Affidavit sworn by Chrispine Owiye, IEBC's director in charge of legal services. According to the 1<sup>st</sup> respondent, the 1<sup>st</sup> appellant had been lawfully gazetted as a nominated member of the County Assembly of Nandi County.
11. On November 1, 2022, the 1<sup>st</sup> Appellant sought leave to file a further list of witnesses and sworn statements and further to be allowed to call their additional witnesses to testify during the hearing but this application was dismissed by the trial court on November 4, 2022.
12. The 2<sup>nd</sup> appellant who was the 3<sup>rd</sup> respondent in the petition before the trial court did not enter appearance. On November 2, 2022, the 2<sup>nd</sup> appellant sought leave to file its response and accompanying documents out of time. This application was also dismissed by the court on November 4, 2022.



## **The Trial Court's findings**

13. The court framed the issues for determination as: -
  - a. Whether the 1<sup>st</sup> petitioner was first on the priority list submitted by the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent and whether she was wrongly removed and replaced by the 2<sup>nd</sup> respondent.
  - b. Whether the 2<sup>nd</sup> respondent was qualified to be nominated as a member of the Nandi County assembly.
  - c. What reliefs would the court grant?
14. The trial court heard evidence from all the parties on 4<sup>th</sup> and November 8, 2022 and thereafter directed that parties file submissions thereafter. the petitioners filed their submissions on November 16, 2022 while the 1<sup>st</sup> respondent filed their submissions on November 18, 2022. There however appears to be some confusion as to whether the 1<sup>st</sup> and 2<sup>nd</sup> appellants filed their submissions in time before the trial court. The trial court observes that the 1<sup>st</sup> appellant's advocates M/S Humprey & Co Advocates wrote a letter dated November 16, 2022 asking for extension of time to file their submissions on the basis that the petitioner did not file its submissions within the period prescribe by the court.
15. On the first issue of whether the 1<sup>st</sup> petitioner was top on the party list presented to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> appellant, the trial court found that she was not.
16. On the 2<sup>nd</sup> issue as to whether the 1<sup>st</sup> appellant was qualified for nomination as a member of the Nandi County Assembly, the trial court found that she was not for not being a registered voter in Nandi County.

## **The Appeal**

17. The appellants lodged this appeal via a memorandum of appeal dated December 6, 2022 where they raise 12 substantive grounds of appeal that: -
  1. The learned magistrate erred in law in summarily dismissing the 2<sup>nd</sup> appellant's application dated November 2, 2022.
  2. The learned magistrate erred in law in summarily dismissing the 1<sup>st</sup> appellant's application date November 1, 2022.
  3. The learned magistrate erred in law in holding that the 2<sup>nd</sup> appellant was duly served with the petition but failed to enter appearance within the requisite timeline.
  4. The learned Magistrate erred in law by failing to consider the issue of service of the election petition and particularly that the petitioner served a conflicted party purporting to acting on behalf of the 2<sup>nd</sup> appellant.
  5. The learned magistrate erred in law by holding that the 2<sup>nd</sup> respondent did not file and serve their submissions within the stipulated time stipulated by the court.
  6. The honourable court erred in interpreting the requirement in the 2<sup>nd</sup> appellant's form for nomination process to mean the 1<sup>st</sup> appellant ought to have been a registered voter of Nandi County.
  7. The learned magistrate erred in law in failing to consider the oral testimony of witnesses as presented during the hearing.



8. The learned magistrate erred in law in failing to consider the 1<sup>st</sup> appellant's evidence and documents that were duly filled and served upon all the parties.
  9. The honourable court erred in law by nullifying the nomination of the 1<sup>st</sup> appellant as the member of the county assembly of Nandi County.
  10. The honourable court erred in law by nullifying the gazette of the 1<sup>st</sup> appellant as the Nominated Member of Nandi County Assembly under the category of special seats (Gender Top up List) *vide* gazette Notice No 10712 dated September 9, 2022.
  11. The honourable court erred in law by ordering the 1<sup>st</sup> respondent to reallocate the Gender top seat to the next female Nandi County registered vote in the list.
  12. The learned magistrate erred in awarding the 2<sup>nd</sup> respondent Kenya Shillings 500,000.00 being costs of the Suit.
18. The appellants pray that the appeal be allowed and the entire judgment of the trial court be set aside. They also pray that this court confirms the nomination of the 1<sup>st</sup> appellant as constitutional and set aside the certificate of validity of elections issued by the trial court.
  19. When this matter came before me on December 19, 2022 for inter parties hearing, I directed that the appeal be disposed off by way of written submissions.

#### **Written submissions on the appeal**

20. The appellants filed their submissions received by the court on January 11, 2023. They submit on five issues which they aver as issues that this court is to determine. That is: -
  - i. Whether the 2<sup>nd</sup> appellant was duly served with the petition.
  - ii. Whether the learned magistrate erred in finding that the 1<sup>st</sup> appellant never filed and served their written submissions during the trial proceedings.
  - iii. Whether article 177(2) as read together with article 90 of the *Constitution* should be interpreted to require an applicant seeking nomination to the county assembly to be a resident and a registered voter of the same county they wish to represent.
  - iv. What relief and orders can the court grant?
  - v. Who should bear the costs of the lower court petition and this appeal.
21. On the first issue of service, the appellants admit through their submissions that indeed, the question of service is a question of fact. They submit that the 2<sup>nd</sup> appellant was never served with the petition in good time and could not enter appearance in good time. They submit that as a separate and distinct person under the law, with registered offices at Amani National House in Nairobi, the 2<sup>nd</sup> appellant ought to have been served at the registered offices in Nairobi but according to them, there was nothing on record to prove that such service was done. They submit that instead of the National offices at Nairobi, service was effected upon a conflicted party, one Pius Lumwachi Mmbalia at their registered offices in Nandi County. Mr Pius Lumwachi Mmbalia is said to have sent the petition to the 1<sup>st</sup> appellants registered office to Nairobi by bus. The appellants rely on the decisions of *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi and 2 others (2014)eKLR* as well as Saad *Yusuf Saad vs Independent Electoral and Boundaries Commission & 2 others (2017)eKLR* to submit on point of direct and personal service. They also cite the case of *Rozaah Akinyi Buyu v IEBC and others(2014) eKLR* where the court of appeal held that failure to serve the petition upon the respondents went into the root of the petition



and the petition could not stand when there was failure to serve the same. They also cited the cases of *Eric Soita Patroba v Sudukwa Grace and another(2017)eKLR*, *Mutali Sam Buyera v IEBC and 2 others (2017)eKLR* and the case of *Kumbatha Naomi Cidi v County Returning Officer ,Kilifi and others, Malindi EP No 13 of 2013*. The petitioners ask the court to allow the appeal on the basis that the 2<sup>nd</sup> appellant was not served. They also ask this court to find that the trial court erred in law in summarily dismissing the appellants' applications dated 1<sup>st</sup> and November 2, 2022.

22. On the second issue of filing of submissions by the 1<sup>st</sup> appellant, the appellants submit that the first appellant filed and served their submissions on November 21, 2022. They submit that they first filed online in the court's system and subsequently, printed and served hard copies. They further submit that at the mention on November 22, 2022, the trial court confirmed that all parties had filed their submissions before setting down the judgment date for December 2, 2022. The appellants are thus aggrieved the 1<sup>st</sup> appellant's submissions were not considered by the court in arriving at its decision. The appellant's thus submit that they were condemned unheard.
23. On the third issue of whether a nominee for an MCA position should be a registered voter in the county they are nominated, the appellants submit that article 177(2) of the *Constitution* does not require a nominee to be a resident of the county they are nominated in to qualify for a position. They further submit that there is no provision in law requiring the nominee to be a registered voter in the county nominated.
24. On the reliefs and orders that the court can grant, the appellants reiterate their prayers in the memorandum of appeal.
25. The 1<sup>st</sup> respondent on its part filed submissions dated January 27, 2023. They reiterate their submissions filed in the trial court. On the non-appearance of the 2<sup>nd</sup> appellant, they reiterate that the 2<sup>nd</sup> appellant was properly enjoined but failed to appear in time and the application to file documents out of time dismissed. The 1<sup>st</sup> respondents major contention however is on the question of costs at the trial court. They submit that although costs are at the discretion of the court, the court ought to be guided by certain principles. They submit that costs should be borne by a party that unjustifiably brings another party before the court, or gives another party cause to have recourse to court to obtain his/her rights.

### **Determination**

26. The 12 grounds of appeals raised in the present appeal can be summed up into three major issues for determination. That is: -
  - a. Whether the 2<sup>nd</sup> appellant was properly served.
  - b. Whether a person must be a registered voter in a county to be eligible for election/nomination to the county assembly of that county.
  - c. The issue of costs in the petition.
27. Before delving into the substance of the above issues, it is important that to delineate the limits of this court's jurisdiction in the present appeal. I will also address the question of filing of submissions in the petition by the 1<sup>st</sup> appellant before focusing on the above issues for determination.

### **Jurisdiction of the Court**

28. As the Supreme Court observed in *Samuel Kamau Macharia and anor v Kenya Commercial Bank & 2 others SC Civil Application No 2 of 2011* a court's jurisdiction can only flow from either the *Constitution*



or legislation or both. Consequently, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

29. The jurisdiction of this court in the present appeal flows the Elections Act which in the part relevant provides: -

Section 75(1A)

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

Further, section 75(4) provides: -

' An appeal under section (1A) shall lie to the High Court on matters of law only.'

30. Therefore, it follows that this court's jurisdiction is constrained to only points of law. This position has been affirmed by this court in a number of instances such as in Lorna Chemutai & 4 others v Independent Electoral and Boundaries Commission & 18 others [2018] eKLR where Mumbi Ngugi (as she then was) that any appeal against the decision of the election court must, as required under section 75 (1A) be confined to matters of law.

31. It is indeed true that the determination of whether a question amounts to a matter of law, is not a straightforward one. It calls for the court to keenly evaluate the matter before it and determine whether the points raised call for a fresh examination of evidence or the legal conclusions made by the trial court upon such an examination of the evidence before it.

32. In distinguishing between a matter of fact and a matter of law, Denning J in the English case of Bracegirdle v Oxley (2) [1947] 1 All ER 126 at p 130 observes;

' The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts.'

33. Similarly, on what amounts to a matter of law, the Court of Appeal in the case of John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR, observes that 'matters of law' means:

[T]he interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the trial court.'

34. The Supreme Court of Kenya has also occasion to consider a similar provision limiting an appellate court's jurisdiction to matters of law. This is the case of Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others SC Petition 2B of 2014 where an issue arose with respect to section 85A of the



*Elections Act 2011* which limits the Court of Appeal's jurisdiction in Election Appeals to only matter of law. The Supreme Court observes as follows: -

(82) Flowing from these guiding principles, it follows that a petition which requires the appellate court to re-examine the probative value of the evidence tendered at the trial court, or invites the court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral-dispute adjudication, on the other hand.

35. It therefore follows in determining the present appeal, this court is constrained only to matters of law.

### **The issue of the 1<sup>st</sup> Appellant's submissions in the Petition**

36. The 1<sup>st</sup> appellant raises issue that the trial court did not take into consideration its submissions before arriving at the decision. They claim to have filed and served their submissions online on November 21, 2022. They also claim to have later served the physical copies of the submissions. When the matter came up for a mention on November 22, 2022, it is submitted that the court confirmed that all the parties had filed their submissions. However, in the court's judgement, the trial court notes that the 1<sup>st</sup> appellant did not file its submissions as directed. the court had directed that parties file submissions by. The court notes that the 1<sup>st</sup> appellant wrote a letter dated November 16, 2022 to the court asking for more time to file their submissions for reason that the petitioners had not served their submissions in the prescribed time.

37. The appellants now claim that the 1<sup>st</sup> appellant's right to a fair hearing under article 50 of the *Constitution* was violated. I do not agree with the appellants. Both the petitioners and the 1<sup>st</sup> appellant herein who were the respondents in trial court filed their pleadings before the trial court. The trial court considered the pleadings and conducted oral hearings of the petition on the 4<sup>th</sup> and November 6, 2022 where all parties including the petitioner submitted the evidence. It is only then that the court directed that the parties file submissions by. Did the 1<sup>st</sup> appellant file submissions within the prescribed time? In any event, does absence of submissions properly so on record where a case has already been heard orally and evidence presented prejudice a party? I do not think so. I agree with the court's finding in *Joseph Mwangi Njoroge v Republic* [2017] eKLR that submissions by themselves are neither law nor evidence. They only are intended to sum up a case for a party. They do not constitute a new avenue to adduce evidence in a case but are rather meant as a guide to the trial court when evaluating the evidence before it. They do not form an integral part of the hearing and therefore they cannot be said, as the appellant contends, to be part and parcel of the trial.

### **Whether the 2<sup>nd</sup> appellant was properly served**

38. The appellants admit in their submissions that the question of service is a question of fact. It is not contented that the petition was served at the 2<sup>nd</sup> appellant's county offices in Nandi County. What the appellants content is whether the person served one Mr Pius Lumwachi Mmbalia was the rightful person to be served on behalf of the 2<sup>nd</sup> appellant. They also content that the petition ought to have been served at the 2<sup>nd</sup> appellant's registered offices at Amani House in Nairobi. It is also said that Mr Pius Lumwachi after receiving the petition sent it to the 2<sup>nd</sup> appellant's Nairobi office *via* bus.

39. In essence the appellants are inviting this court to establish whether the pleadings in the petition were delivered to the rightful person on behalf of the 2<sup>nd</sup> appellant at their National offices in Nairobi. Does this predicament present a matter of law? I do not think so.



40. Even if this court were to extent latitude to the appellants to consider the question of whether a political party should be served exclusively at their registered national offices, the appellants are still in a fix. This is because the 2<sup>nd</sup> appellant already introduced this issue before the trial court in the form of an interlocutory application dated November 2, 2022 which the court determined and dismissed on November 4, 2022. The effect of this is that the 2<sup>nd</sup> applicant will be attempting to appeal against the trial court's decision on the application dated November 2, 2022 improperly through these proceedings. I say so bearing in mind the fact the question of appeals on interlocutory applications in election petitions has now been well settled. A party seeking to appeal an interlocutory application is obliged to file a separate notice of appeal upon conclusion of the case in the trial court. It is only then that the Appeal on the interlocutory application will be properly lodged and this court will consider it.
41. The Supreme Court in the case of *Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 others* [2019]eKLR observes on this point as follows: -
- (84) The appellate court in determining the questions arising from rulings on interlocutory applications must do so only if the appellant has filed a notice of appeal on the interlocutory ruling simultaneous to filing of the notice of appeal to the main appeal. Consequently, we hold that the Court of Appeal erred in law by determining questions pertaining to rulings on interlocutory applications on scrutiny without proper notices of appeal, thereby exceeding its jurisdiction and jeopardizing the appellants' right to fair trial.
- (73) We therefore direct that, for the purposes of election petitions only, where one is aggrieved by a decision in an interlocutory application in election petitions, such a party must file a notice of appeal against the interlocutory decision consecutively with the notice of appeal against the final judgement. Indeed, it is this notice that shall grant an appellate court jurisdiction to determine issues before it.
42. No notice of appeal on the interlocutory application was presented before the court. Consequently, in as much as the court sympathizes with the predicament of the 2<sup>nd</sup> appellant, it can do no more on this issue.

**Whether a person must be a registered voter in a county to be eligible for election/nomination to the county assembly of that county**

43. Nomination of members to the County Assembly is governed by the *Constitution* and the *Elections Act*. Article 177(c) of the *Constitution of Kenya* sets out the structure of the membership of the County Assembly as follows;
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.
43. The party lists under article 90 are governed by the [Elections act](#); the relevant sections being sections 34(4A), 34(6) and 35 ;
- (4A) In the case of a person nominated pursuant to article 177(1)(c) of the [Constitution](#), the party list shall include a certification in the manner prescribed by the Commission.
- (6) The party lists submitted to the Commission under this section shall be in accordance with the [Constitution](#) or nomination rules of the political party concerned.

Section 35 provides as follows;

A political party shall submit its party list to the Commission at least forty-five days before the date of the general election

44. The only matter of law in this case would be the question whether a person must be a registered voter in a county to be eligible for election/nomination to the county assembly of that county. This court is thus called upon to determine whether the 1<sup>st</sup> respondent was validly nominated as a Member of County Assembly in the Nandi County Assembly.
45. The 1<sup>st</sup> appellant was elected by nomination to the Nandi County Assembly and her election consequently Gazetted by the IEBC. The Trial court faulted IEBC's decision to Gazette the 1<sup>st</sup> appellant's nomination as a Member in the County Assembly of Nandi and nullified the 1<sup>st</sup> appellant's Gazettement. In other words, the trial court nullified the 1<sup>st</sup> appellant's election to the Nandi County Assembly. The first question that confronts this court is as to whether the test for nullification of the 1<sup>st</sup> appellant's election to the Nandi County Assembly was met.
46. The test for nullification of any election including election through nomination is set out under section 83 of the Election Act which provides that: —No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the [Constitution](#) and in that written law or that the non-compliance did not affect the result of the election. The Supreme Court while interpreting this section in [Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another](#)[2017]eKLR, holds that before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the [Constitution](#), the [Elections Act](#) and other electoral law.
47. Therefore, in the present case, it was incumbent upon the petitioners, now respondents to demonstrate how the nomination of the 1<sup>st</sup> appellant breached the provisions of the [Constitution](#), the [Elections Act](#) and other electoral law. The relevant provisions on the nomination of members of the County Assembly are follows.

[Constitution of Kenya, 2010](#)

Allocation of party list seats.

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



- (2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—
- (a) Each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;
  - (b) Except in the case of the seats provided for under article 98(1)(b), each party list comprises the appropriate number of qualified candidates an alternate between male and female candidates in the priority in which they are listed; and
  - (c) Except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.
- (3) The seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.

Membership of county assembly.

177. A county assembly consists of—

- (1)
  - (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;
  - (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.

Qualifications for election as member of county assembly.

193. Unless disqualified under clause (2), a person is eligible for election 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 by this Constitution or an Act of Parliament; and
- (c) Is either— (i) nominated by a political party; or (ii) an independent candidate supported by at least five hundred registered voters in the ward concerned.

The *Elections Act*, No 24 of 2011

Section 25 of the *Elections Act*, No 24 of 2011 reiterates the provisions of article 193 of the *Constitution* as cited above.

Section 34 of the *Elections Act* speaks in the following terms

Nomination of party lists members



34. Nomination of party lists members

- (1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under articles 97(1)(c) and 98(1)(b)(c) and (d) and article 177(1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with article 90 of the Constitution.
- (4) A political party which nominates a candidate for election under article 177(1)(a) shall submit to the Commission a party list in accordance with article 177(1)(b) and (c) of the Constitution.
- (4A) In the case of a person nominated pursuant to article 177(1)(c) of the Constitution, the party list shall include a certification in the manner prescribed by the Commission.
- (5) The party lists under subsection (2),(3) and (4) shall be submitted in order of priority.
- (6) The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned.
- (6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and —
  - (a) Issue the political party with a certificate of compliance; or
  - (b) Require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.
- (6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.
- (7) The party lists submitted to the Commission shall be valid for the term of Parliament.
- (8) 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.
- (9) The party list shall not contain a name of a candidate nominated for an election.
- (10) A party list submitted for purposes of subsection (2), (3), (4) and (5) shall not be amended during the term of Parliament or the



county assembly, as the case may be, for which the candidates are elected.

## The Elections (General) Regulations

### Part X – Nominations For Party Lists

#### 54. Submission of political party list for allocation of special seats

- (1) Each political party shall submit to the Commission a party list of all persons who would stand elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with article 90 of the Constitution and sections 34, 35, 36 and 37 of the Act.

#### 55. Party list to be prepared in accordance with party rules

- (1) The party list contemplated under regulation 54 shall be prepared in accordance with the nomination rules of the political party.
- (2) The Commission shall within fourteen days of receipt reject any party list that does not comply with the requirements of the Constitution, the Act or these Regulations.
- (3) The political party whose party list or nominee has been rejected by the Commission under sub-regulation (2) shall resubmit the party list or nominee within seven days from the date that the party list was rejected under sub regulation (2).
- (3A) Where a political party fails to amend the party list or resubmit the list as directed by the Commission, the Commission shall reject the party list.
- (4) A political party submitting a party list under regulation 54 shall submit a declaration to the effect that the political party has complied with its rules relating to the nomination of the names contained in the list.

48. From the above provisions, it is clear that allocation of party lists is a matter left to political parties. Nevertheless, IEBC is responsible for the conduct and supervision of elections in these seats.

49. In the petition, the petitioners alleged that the 1<sup>st</sup> appellant did not apply for nomination to the position with the 2<sup>nd</sup> appellant hence leading to unfair competition and discrimination contrary to article 27 of the Constitution. This was however controverted with the 1<sup>st</sup> appellant's evidence and found not to be true.

50. The petitioners also alleged that she had been placed as no 1 in the party list presented to IEBC but on publication of the List, she noted that the 1<sup>st</sup> appellant was the one whose name appeared as No 1. However, from the evidence at the trial court, it was clear that the list in which the 1<sup>st</sup> petitioner alleges to have been no 1 was a list of may 18, 2022 originating from the 2<sup>nd</sup> appellant's Nandi County Branch. The list contained names of persons proposed by the County Branch leadership for nomination to the County Assembly. The trial court correctly finds that this was not the list contemplated in law.



This list was a mere proposal by the County Leadership. The List contemplated in law is the list that originates from and is signed by the authorized party officials and not the branch leadership. From evidence presented, this list duly signed by the authorized party officials and presented to the IEBC had the 1<sup>st</sup> appellant's name at no 1 and the 2<sup>nd</sup> respondent's name at No 2. It is this list that was later Gazzetted by the IEBC and from which the 1<sup>st</sup> appellant was declared as nominated to the County Assembly of Nandi County.

51. The rules and procedures of the 2<sup>nd</sup> appellant, Amani Congress Party, are contained at page 301 of the record of appeal. Page 339 of the record of appeal contains the categories of nominees to the party lists with (f) referring to the position relevant to this suit. Rule 42 lists the qualifications for the ANC Party lists with rule 42(p) stating as follows;

A member seeking for nomination to party lists shall;

- (p) Fulfil the requirements prescribed for the position for which he/she is vying where prescribed in the party constitution.

52. The requirements prescribed for the position of Member of County Assembly in the rules and procedures of the 2<sup>nd</sup> respondent at page 332 of the record of appeal, under rule 36.1(n) it is required that a member must be a voter from the electoral area in which the candidate seeks to vie. It follows that the requirements to be an elected Member of County Assembly apply mutatis mutandis to the applicants to be a nominee for the same position.
53. Further, the form for the application to be nominated as a party list candidate for the position of Member of County Assembly at page 290 of the record of appeal expressly states that 'Note that the nominees to the county assembly must be registered voters and residents of the county they wish to represent.'
54. Even though the authenticity of this list is questioned by a letter dated September 2, 2022 from the Secretary General of the 2<sup>nd</sup> appellant, the trial court finds no evidence that IEBC interfered with the list. Moreover, from a reading of the Record, nothing indicates that the list was interfered with.
55. Having considered the proceedings before the trial court, the record and submissions by parties, there is no reason to interfere with the trial court's findings on this issue. There is nothing to suggest the nomination process of the 1<sup>st</sup> appellant by the 2<sup>nd</sup> appellant was flawed in any way. Moreover, there is nothing to suggest that IEBC interfered with the list presented to it by the 2<sup>nd</sup> appellant.
56. However, having arrived at the above finding, this court is confronted with another issue which is critical to the determination of this appeal. That is, whether by not being a registered voter in Nandi County, the 1<sup>st</sup> appellant could not be validly nominated as an MCA in Nandi County.
57. It is not in contention that the 1<sup>st</sup> appellant was a registered voter in Kakamega County, Likuyani Constituency, Nzoia Ward, Mumonyozo polling station. Consequently, the trial Court found that the 1<sup>st</sup> Appellant would not have qualified to be elected as an elected member of the county assembly of Nandi because her name was not in the register of voters in any of the wards in Nandi County. The upshot of this was that the 1<sup>st</sup> appellant did not qualify to be nominated as a member of the County Assembly of Nandi. Therefore, the trial court nullified the 1<sup>st</sup> appellant's nomination as a member of Nandi County Assembly under the category of Special seats (Gender top up).
58. The appellants faults the trial court for this finding. They aver that there is no legal provision requiring a person to be a registered voter in a county where they wish and/or intend to be elected. They place reliance on articles 90,177 and 193 of the Constitution, section 25 of the Elections Act, rule 42 of the



2<sup>nd</sup> appellants Election and Nomination Rules; Procedures as well as the Marking scheme used by the Election board of the 2<sup>nd</sup> respondent. According to them, nomination under article 177(2) of the Constitution is subject to the seats to be allocated to the party and is to be done in accordance with the doctrine of priority.

59. It is indeed true that nothing in the above provisions provides that a person must be a registered voter in the county whose county assembly they seek to be elected in. It is also true that the Constitution leaves the process of nomination of persons to specialized seats to the political parties which are to be supervised by IEBC. One thus asks, what is the proper interpretation of the above constitutional provisions on eligibility for election to a special seat? Does proper interpretation of the article favour a position that allows for any registered voter to be elected into a county assembly regardless of the county assembly where there are registered as voters? What is the place of the people in the process? How are the values of inclusivity, participation of the people and good governance inculcated?
60. This court is confronted with at least four critical questions on election of members in Special Seats as contemplated under the law. These are: -
1. What constitutional principles govern nomination of persons to specialized seats?
  2. Is there a clear criterion under the Constitution which a person must satisfy in order to be eligible for nomination to any of the special seats?
  3. What is the place of participation by people in the nomination process of persons to specialized seats?
  4. What is the constituency should the members nominated to specialized seats serve and what is the scope their functions?
61. The Supreme Court of Kenya in the Speaker of the Senate & another v Attorney-General & 4 Others, Sup Ct Advisory Opinion No 2 of 2013; [2013] eKLR urges courts, this court included, to resolve constitution-making contradictions; clarify draftsmanship-gaps; and settle constitutional disputes that may have arisen from constitution-making compromises that often attend the Constitution-making process. In doing so, this court is to adopt a purposive approach which promotes the dreams and aspirations of the Kenyan people. In fact, towards that end, the Supreme Court in Raila Odinga 2 Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another reiterates that framework applicable in interpreting the Constitution is as set under article 259 which provides thus;
- 259 (1) This Constitution shall be interpreted in a manner that—
- (a) Promotes its purposes, values and principles;
  - (b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - (c) Permits the development of the law; and
  - (d) Contributes to good governance.
- (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.
62. The import of article 259 is that courts should interpret the Constitution in a purposive manner which defends, encourages, assists and helps the flourishing of the purposes, values and principles of the



- Constitution. It is to do so in a manner that furthers or encourages the progress or existence of those purposes, values and principles.
63. The provisions in question concern the election of a person into the County Assembly, an entity created by the devolved structure of governance. The provisions must thus be interpreted in the context of and in a manner that promotes the values and principles of devolved government. It is incumbent upon the court to identify the purposes, the core values and the principles of devolved governance and give effect to them.
  64. Such a purposive approach as Komers DP argues in ‘The Constitutional jurisprudence of the Federal Republic of Germany (1989) 50’ refers to grammatical systematic, teleological, and historical methods of analysis of the constitutional text as a main focus. He observes that the grammatical method, which is often the starting point, relies on a verbal analysis of words and phrases in a constitutional provision. The systematic method interprets particular provisions of the Constitution as part of a constitutional totality. The teleological method is a form of structural reasoning which looks for the purposes, goals, and aspirations behind the language of the Constitution. Finally, the historical method elucidates the text with reference to the original intent of the framers, or the values they constitutionalised.
  65. The provision in question in the present appeal on eligibility to be elected to the county assembly is article 193(1)a which simply requires a person to be a registered voter. This brings us to the systematic and the teleological methods which enjoins the court to adopt a holistic approach to interpretation, with a view to protecting and promoting the purpose, effect, intent and principles of the Constitution as held in the Speaker of the Senate & another v Attorney-General & 4 others, Sup Ct Advisory Opinion No 2 of 2013; [2013] eKLR
  66. A holistic interpretation of the constitutional provisions on devolution begins from article 1 of the Constitution which on Sovereignty of the people. While article 1(1) declares the people as the sovereign, the people under article 1(3)a delegate this sovereign power to parliament at the national level and to the legislative assemblies in the county governments. Therefore, this means that the powers exercised by members of the county assemblies emanate directly from the people. In fact, as only voters registered in wards in a particular county can vote-in, representatives at the county level, such people of that particular county constitute the political sovereign for the county. The powers of their elected officials to govern county affairs emanates from them and it follows that the people entrusted with such powers will be from among them.
  67. From the prism of the values and objects of devolution, Dr Mutakha Kangu in An Interpretation of the Constitutional Framework for Devolution in Kenya: A Comparative Approach, observes that where a devolution provision is in question, the objectives and purposes of devolution in general and the devolution provision in particular should be ascertained and given effect. Where there are two possible meanings and the interpreter has to make a choice, a purposive interpretation would settle for that meaning which, more than the other, furthers the objectives and purposes of the provision being interpreted.
  68. Article 174 of the Constitution enunciates the objects of devolved governance which include;
    - (a) To promote democratic and accountable exercise of power;
    - (b) To foster national unity by recognizing diversity;
    - (c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;



- (d) To recognize the right of communities to manage their own affairs and to further their development;
- (e) To protect and promote the interests and rights of minorities and marginalized communities;
- (f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) To ensure equitable sharing of national and local resources throughout Kenya;
- (h) To facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and
- (i) To enhance checks and balances and the separation of powers.

69. The above objects of devolution provide a justification as to why Kenya opted for a devolved system of governance by specifying the problem areas experienced in the past which devolution aims to address. The first and third objects are relevant to the questions on who should be eligible for election to the county assembly. The first object aims at the promotion of democratic and accountable exercise of power. While democracy has many facets, the most basic one is the people electing their representatives from among themselves. It cannot be a democracy where the elected representatives are foreign to their constituents. As such, to promote and give effect to democratic exercise of power, those elected in county assemblies must at the very least be registered voters in the county. The third object of devolution calls for giving powers of self-governance to the people and enhancing the participation of the people in the exercise of the powers of the State and in making decisions affecting them. While classically, this can be viewed as taking power from the centralized unit to the devolved structures, self-governance at the basic, entails the polity in a devolved unit exercising their own leadership and control. It cannot be self-governance where the elected officials in a county assembly are of all things not registered as voters in that particular region. Various counties have urgent developmental priorities, and with their elected leadership committed to local issues.

70. Finally, a historical method to interpretation will call for a contextual analysis of the provisions of the Constitution on devolution. As the Supreme Court observed in *Re Kenya National Human Rights Commission*, Supreme Court Advisory Opinion Reference No 1 of 2012.

' 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.'

71. The historical development of the provisions on devolved governance in Kenya can be discerned from inter alia, the Final Report of the Constitution of Kenya Review Commission of 2005 as well as the Final Report of the Committee of experts. From the reports, devolution in Kenya was animated by among others the lamentations of the Kenyan people on their exclusion and lack of control on government policies. The Kenyan people complained about central government officials at the local level, such as provincial administration that was not answerable to them but to central government in Nairobi and thus alienated them from decision-making. The people also rejected the notion of leaders at the local level being nominated or appointed by the central government. From this historical prism, it is discernable that the people of Kenya wanted a system where they elect leaders at the local government level on their own from amongst themselves. This supports the proposition that one has to be a registered voter in a particular county for them to be eligible into a position as member of the county assembly of that county.



72. The question before the court presented itself before Dulo J in *Victoria Cheruto & Hamid Ahmed vs IEBC NCIC*. The court finds as follows: -
40. It can be easily discerned from the above provisions of the *Constitution* that the operative words are the Ward, the County, the election, the voters in the Wards, and the seats received in the County. It is also important to note that under article 90(2)(c) of the *Constitution*, the party lists for County Assembly seats are not required to reflect the regional and ethnic diversity of the people of Kenya, unlike in the case of the National Assembly and Senate.
41. In Kenya also voters are registered to vote in only one polling station, which will of course be in one Ward and one County.
- Under regulation 38 of the Elections (Registration of Voters) Regulations 2012, Kenyan citizens residing outside Kenya are only allowed to vote in Presidential Elections or Referendum. Under regulation 39E, the same conditions apply to prisoners. As such, my constitutional interpretation is that only those who were registered to vote in Wards in Garissa County could qualify for nomination by the party to the County Assembly of Garissa. In my view therefore, Victoria Cheruto Limo being a registered voter of Uasin Gishu County was not qualified and not validly nominated to fill the gender top-up position in the Garissa County Assembly.
73. Comparatively, the system in South Africa where Kenya borrowed some of her elements of devolution is instructive. South Africa has three levels of government known as spheres. The National level, the Provincial Level and the Municipal Level. Separate elections therefore happen at the each of the three levels. The Municipal Level which is akin to the county level in Kenya conducts municipal elections. Municipal elections take place every five years and adopt a mixed or hybrid system, making use of both the ward system and the proportional representation (PR) system, is used for municipal elections. According to section 158(1) of the South African Constitution, one is only eligible to contest in a municipal council if they are registered as voters and thus eligible to vote in that municipality.
74. From the foregoing, it is apparent that a purpose interpretation of article 193(1) of the *Constitution* on the eligibility for election as a member of the County Assembly would favour a position that would require a candidate to be a registered voter in that county.
75. The next raveling question that this court is drawn to is on the role of the people in the selection of special seats members. as observed above, article 90 of the *Constitution* provides for the allocation of party lists. It provides that elections for the members of special seats both in the National Assembly and in the County, Assembly shall be on the basis of proportional representation by use of party lists. Article 90(2) consequently mandates the Independent Electoral and Boundaries Commission to be responsible for the conduct and supervision for the special seats. The special seats in Kenya include: under article 97(1)c, 12 members nominated to the National Assembly by Political Parties to represent the youth, persons with disability and workers; article 98(1)b 16 women nominated to the senate; 98(1)c one male and one female nominated to the senate to represent the youth; 98(1)d one man and one woman representing the youth nominated to the senate and article 177(1)b and c being those nominated to the County Assemblies.
76. The enshrinement of the above seats in the *Constitution* was laudable as it is a progressive step which promotes representation of special interest groups and affirmative action. It ensures that all categories of people in the society get a chance in governance thus promoting equality. A look into the historical development of the provision of special seats reveals that special seats were designed to promote the



inclusion and representation of special interest groups such as women and people with disabilities who had often been left out in decision making.

77. From the Final Report of the Committee of Experts, it is reported that the Bomas Draft did not have a proportional component but provided for the election of MPs from constituencies (the number is to be determined by law), the election of a woman from every district, and 14 representatives of marginalized groups elected through electoral colleges. On the other hand, the CKRC Draft, and the PNC proposed a mixed member proportional system. The PNC draft for instance provided for women elected from 'special constituencies'. An additional number of members were to be drawn from lists in proportion to the votes received by parties. These lists were to be used to secure the fair representation of women and minority groups.
78. The report moreover records that political parties were notorious for renegeing on promises to represent historically excluded and marginalised peoples and were generally unwilling to support them as candidates. Women, persons with disabilities, youth and other marginalised peoples were therefore unwilling to entrust the matter of their access to elective office purely in the hands of political parties. It was further reported that there was a feeling that if political parties were to be entitled to public funds, they must also be required to ensure the representation of all Kenyan peoples (as all citizens pay taxes) at all levels.
79. The drafters were also cognizant of the fact that in designing an all-inclusive system, other factors such as discrimination among the minorities themselves would still arise. This informed the adoption of the mixed proportional representation approach.
80. Unfortunately, much about the recruitment of the members to represent the people in the special seats is left to political parties. It is political parties which are given the powers to nominate and rank the members to stand elected in the special seats' category. Thus, the question begs, where is the public left in this process?
81. This court is forced to grapple with among others, the following questions. What is the role of the people in the nomination and election of special seat members? How do the people at the local level participate in the process? what is the import of article of the Constitution on public participation? What constituency do the nominated members serve? For instance, in do nominated MCAs serve the entire county? Can the process be more inclusive? How do we involve the people?
82. It must be noted that immediately after their nomination by a political party and subsequent election, the representatives in the special seats category become representatives of the interests of the people and not those of the political party. Does excluding the people in the process of recruitment of such members therefore serve the interests of democracy? Do the philosophical foundations behind the concept of special and reserve seats favour a position that will allow the exclusion of the people's participation? I do not think so.
83. The concepts of popular sovereignty and participation of the people are key tenets of any democracy such as Kenya. Popular sovereignty is the idea that the people are the ultimate authority and the source of the authority of government. It is the ideal that the people are sovereign in democracy, which is to say that the ultimate power rests with them. That Citizens are the source of all government power. Democracy is thus based on the idea that governments are only legitimate (they only have the right to rule) if they are based on the consent of the people. This intractably links with the concept of citizen participation in a democracy.
84. Citizen participation on the other hand is a component of democracy which refers to the process whereby people act in political ways to connect themselves to government and thus become self-



governing. People can participate through established structures of the adopted forms of democracy; as well as through civil associations. In democracies, the election of leaders must be free and fair. In this way citizens become part of decision-making and governance.

85. Lack of people's participation in free associations bears the risk that since it is difficult for an individual to pressurize the government into meeting people's needs, the failure of individual efforts leads to individual despair and frustration, which may in turn lead to withdrawal from the campaign for democracy.
86. Participation can occur in different forms and degrees, in all spheres of life and at all levels in the political system. In the political sphere people in a democratic system have opportunities to participate through different mechanisms, from the local to the national level. The most common form of political participation in a democracy is voting in elections. Apart from voting for other candidates' people can, of course, also become candidates themselves and run for public office. Forms of political participation beyond elections include referenda and consultations by leaders (for example through community meetings). Participation, however, can also occur in alternative forms of proactive initiative by the citizens who can, for example, engage their leaders in discussions and dialogues. Some of these alternative forms can be institutionalized to a certain extent; for instance, people can join political parties or form certain interest and lobby groups.
87. In the Kenyan context the new constitution puts a lot of emphasis on the issue of the participation of the people. Although the *Constitution* adopts the concept of representative democracy, it indicates that such democracy can co-exist with direct participation of the people. The emphasis in Article 1 that all sovereign authority emanates from the people sits in well with the concept that democracy is government by the people. The article is a foundation of the concept of self-rule which is at the core of democratic rule. Indeed, sub-article 1(2) clearly provides that the sovereign people can exercise their sovereign authority either directly or through democratically elected representatives. Article 4 which declares Kenya a republic describes it as 'a multi-party democratic state.'
88. It is therefore concerning that the nomination and election of special seats category members is silent on this critical element on the participation of the people. It is saddening that there are no mechanisms in place to ensure that the special seats members are vetted by the people to ensure that they are truly capable or that they have the capacity or the desire to represent the people well. The same has been left political parties leading to process that are marred with lack of transparency and accountability. At the end of it, it is not surprising that persons with no interests of the people at heart may end up getting nominated and elected in the special seats' categories.
89. In countries such as our neighbors Uganda, they too have reserved special seats. However, the special seats are not automatic and after nomination by a political party in the special seat, one still has to seek mandate from the people. This ensures that the people have a voice on who becomes their leaders.
90. It is important that the parties understand the reason why some of these nominee positions exist. The gender top up positions exist for the purpose of giving life to the requirements of articles 27(8) and 81 of the *Constitution* which provide;
- 27 (8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender.
- Article 81 states;
81. The electoral system shall comply with the following principles—



- (b) Not more than two-thirds of the members of elective public bodies shall be of the same gender;

91. This court can only therefore call upon the relevant stakeholders including Independent and Boundaries Commission to spearhead policy changes that will ensure the participation of the people in accordance with the spirit of the *Constitution*. The most striking innovation in the 2010 constitution is that norms of Democratic Procedure, Transparency, and accountability that are applied daily political decision making are now also demanded on nomination deliberations by the main actors prescribed in the law. A right to public participation in the nomination process creates a stronger ground on which to stand given the position that our politics is competitive sometimes an ethnic card plays out. Modest approach to democratization starting with the political parties is generally to focus on the fairness and justice of the electoral process. May be it is time citizens also participate directly in the conduct of the political affairs to choose their representatives in consonant with the principles laid down in our constitution and electoral laws. Mechanism of participation by the people what, when, how and why are aspects which can be inbuilt in the relevant status. IEBC as the constitutionally mandated body should not shy away from establishing legal mechanisms to ensure that the Special Seats nomination process is democratic with ideals of popular sovereignty and participation of the people. Moreover, IEBC should put in place mechanisms to ensure that Political Parties ensure the people participate through means such as public consultations and dialogue to vet those who seek to represent them in special seats. Once such is in place, IEBC should ensure oversight and monitoring of the process. In my considered view the deepening and enhancement of the mechanism for the people to express their will in consonant with article 10 of the *Constitution* may incorporate clear guidelines in the regulation or statute for good governance. Those forms and levels may not be limited to the suggestions herein under but the express provisions of the *Constitution*, electoral statute and regulations. It is that impact of citizen participation persuades me to reckon that though democracy is one of the most used phrase in our governance sometimes we forget that it touches the very fundamentals of the life of human beings in society. That is the reason we should embark to advance the standards which contribute in the democratization of our politics. Looking at the facts of this petition democracy as an ideal to be pursued by every citizenry must reflect the diversity and cultural particularities for our motherland Kenya. We need to stay at the constancy where the deals of democracy is essentially to preserve and promote the dignity and fundamental rights of the individual to achieve social justice, foster the economic and social development of our communities, geared towards strengthening the cohesion of the multiethnic society namely the Republic of Kenya. That indeed will enhance National tranquility. The strong political participation of our youths, women, people with disabilities, vulnerable or marginalize for one reason or another is critical for democratic governance. As I pen off, I am persuaded that human dignity, equity, social justice, inclusiveness, equality, and human rights permeate in pursuit of our ideal democracy. This appeal inspired me on a further legal reform around the questionable nomination keeping in view the historical litigation of this matter. May be it would help to add to the voice for we as a people to invest in citizens capacity to participate in politics and civic life and crate favourable conditions for democratic governors to thrive. Some of the salient features which emerged from this litigation revolves around the following guidelines:

1. Nomination of persons in special seats should be in accordance with clearly delineated constitutional principles including the values and principles of governance under article 10 of the *Constitution*, the political rights under article 38 and the general principles of the electoral system under article 81 of the *Constitution of Kenya, 2010*.
2. Persons nominated to special seats must satisfy a clearly set out criteria devised in accordance with the *Constitution*. Such criteria should require only those who actively participate in local



affairs and are registered voters in a particular area to be eligible for nomination to represent such an area in the specialized seats.

3. In accordance with the constitutional principles of governance, the public must participate in the process of nomination of members in the special seats. Political parties should present evidence of participation by the public in the nomination process in accordance with the established principles.
  4. The roles, scope and constituency of the members nominated in the specialized seats must be clearly defined.
  5. Notions of the people have become more inclusive and the mechanism through which the people exact the influence to me would be an innovative approach to that process of nomination.
  6. Community participation in the nomination process in this reserved special interest seats is a conscious form of the Constitution as stipulated in article 10 of the supreme law of the land.
92. The common thread running through the authorities cited, provisions of the Constitution and statute law invoked largely influences me to rule that I am satisfied the appeal as submitted lacks merit on points of facts and law. It is in line with the above spirit that it is a good idea to dismiss the petition in its entirety save for a word or so on costs.

#### **Costs in the Petition at the Trial Court**

93. The trial court capped costs of the petition at Kshs 500,000 to be borne by all the respondents. Unless misdirection or application of wrong principles on the part of the trial court is proved, an appellate court will not interfere with the trial court's decision on costs. In the present case, i find that the trial court properly applied itself on the principles guiding the awarding of costs. Consequently, i find that the trial court decision on costs stands.

#### **Conclusion**

94. The upshot is that this appeal is without merit and is therefore dismissed with costs as decreed by the trial magistrate. In essence the order on gazetment of the appellant Lydia Matulu as a member of Nandi County Assembly under the gender top up be affirmed as null and void. That the declaration made by the trial court in clause 3 of the judgement take effect forthwith but not later than thirty (30) days from today's decision on the appeal

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> DAY OF APRIL 2023**

In the presence of

Mr Mbaye Advocate

Mr Rotich Advocate

Appellant Lydia Matuli Present

Esther Jemeli Misoi Present

.....

**R. NYAKUNDI**

**JUDGE**

