



REPUBLIC OF KENYA



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**Vincent v Langat & 5 others; Omollo & 15 others (Interested Parties) (Election
Petition Appeal E001 of 2023) [2023] KEHC 18005 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
ELECTION PETITION APPEAL E001 OF 2023**

JK SERGON, J

MAY 24, 2023

BETWEEN

KOSKEI KIPNG'ETICH VINCENT APPELLANT

AND

BEATRICE CHEPKOECH LANGAT 1ST RESPONDENT

EVANS KURGAT 2ND RESPONDENT

BENJAMIN KIPKORIR KOECH 3RD RESPONDENT

UNITED DEMOCRATIC ALLIANCE PARTY (UDA) 4TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC 5TH RESPONDENT**

THE CLERK OF THE COUNTY ASSEMBLY OF KERICHO . 6TH RESPONDENT

AND

OPILE NOELLA OMOLLO INTERESTED PARTY

ISSACK MATKEIR INTERESTED PARTY

MERCY NJERI GIKONYO INTERESTED PARTY

KEINO CHEPNG'ETICH DORAH INTERESTED PARTY

CHEPKIRUI EDINA TONUI INTERESTED PARTY

BETT GLADYS CHESANG INTERESTED PARTY

BEATRICE CHEPKEMOI INTERESTED PARTY

CHEPNGENO CHEPNGENO JESCA INTERESTED PARTY

LANGAT IRENE CHEBET INTERESTED PARTY

KORIR FANCY CHEPKORIR INTERESTED PARTY



LANGAT CHEKOECH WINNY INTERESTED PARTY
SIRMA LILY CHEPKEMOI INTERESTED PARTY
CHELANGAT MONICA INTERESTED PARTY
CHEPNGENO GABRIELA INTERESTED PARTY
CHEPWOGEN EVALYNE INTERESTED PARTY
CHEPKURUI BAVINA CHEPKURUI INTERESTED PARTY

(Being an appeal against the Judgement and Order of HON. F.M. NYKUNDI (SRM) in Kericho C.M.C Election Petition No. E002 of 2022 delivered on 10th February, 2023)

JUDGMENT

1. The appeal herein is against the ruling of the trial court (Hon FM Nyakundi) in Kericho CMC Election Petition No E002 of 2022 wherein the trial court held that the Appellant's name be deleted from the 4th Respondent's Party List and be replaced by the name of the 3rd Respondent.
2. The appellant being aggrieved preferred this appeal and put forward the following grounds:
 - i. That the learned trial magistrate erred in determining the subject Petition and issuing Orders adversely affecting the rights of the Appellant without according the Appellant a hearing in contravention of the Appellant's right to access to justice and a right to fair hearing protected by Article 48 and 50 of the Constitution.
 - ii. That the learned trial Magistrate in contravention of Article 165(d) of the Constitution erred in law in assuming jurisdiction of a Constitutional Petition disguised as an Election Petition.
 - iii. That the learned trial Magistrate in contravention of Article 165(d) of the Constitution erred in law in hearing questions in respect of the interpretation of the Constitution including the determination of the question as to whether the Gazette Notice no 10712 vii CXXIV-NO-86 of September 9, 2022 is consistent with or contravention with the Constitution.
 - iv. That the learned trial Magistrate in contravention of Article 165 (d) of the Constitution erred in law in hearing questions in respect of the interpretation of the Constitution including the determination of the question as to whether the Gender Top Up Category List was in violation of the Constitution.
 - v. That the learned trial Magistrate in contravention of Article 165 (d) of the Constitution erred in hearing questions in respect of the interpretation of the Constitution including the determination of the question as to whether an order be issued directing the 4th and the 5th Respondents to strictly comply with the provisions of Article 177 (1) of the Constitution.
 - vi. That the learned trial Magistrate erred in law in adjudicating upon certain specific matters outside Pleadings and making Orders upon them which matters parties to Election Petition had not raised.
 - vii. That the learned trial Magistrate erred in law in making determination on issues not pleaded and unilaterally framed its own without notice and according parties hearing on the same.



- viii. That the learned trial Magistrate erred in law in considering extraneous factors and matters neither pleaded nor submitted upon by any party in contravention of Articles 47, 48 and 50 of the Constitution.
 - ix. That the learned trial Magistrate erred in law in not considering the parties' list of issues and submissions.
 - x. That the learned trial Magistrate erred in law in ordering the replacement of the Appellant's name in the 4th Respondent's Party list.
 - xi. That the learned trial Magistrate erred in law in holding that Persons with Disability are nominated or otherwise appointed in priority over Youths and or other marginalized groups.
 - xii. That the learned trial Magistrate erred in not finding that Persons with Disabilities are in the same cluster of special seats as youths and other marginalized groups and which general cluster takes priority over other classes of persons and further that nominating or otherwise appointing anyone in the said cluster of seats fulfils the requirements of all the relevant Electoral Laws as regards marginalized groups.
 - xiii. That the learned trial Magistrate erred in law in requiring a higher standard of proof of the 5th Respondent's assertions that there were complaints over the 4th Respondent' first party List other than on a balance of probabilities and further for failing to find that the assertions alongside the assertion of the 4th Respondent that the said list was rejected by the 5th Respondent for being non-compliant was not controverted by the 1st and the 3rd Respondents.
3. The Appellant prayed that the Appeal be allowed and the Judgement and Order of the Trial Subordinate court be set aside with costs and that the costs of Appeal be borne by the 1st, 2nd and 3rd Respondents.
 4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. From the record it is clear that the 6th Respondent did not participate in the appeal.
 5. The Appellant in his submission outlined six issues for determination as follows:
 - i. Whether the trial Court determined the subject Petition and issuing Orders adversely affecting the rights of the Appellant without according the Appellant a hearing in contravention of the Appellant's right to access to justice and a right to a fair hearing protected by Articles 48 and 50 of the Constitution.
 - ii. Whether the Trial Court had jurisdiction to determine a Constitutional Petition or make a determination as to whether the actions of the 4th, 5th and 6th Respondents complained of by the 1st, 2nd and 3rd Respondents in their Petition violate Article 177 (1) (c) of the Constitution of Kenya 2010.
 - iii. Whether the Trial Court adjudicated upon certain specific matters outside Pleadings and made Orders upon them which matters parties to the Election Petition had not raised.
 - iv. Whether the Trial Court required a higher standard of proof of the 5th Respondent's assertions that there were complaints over the 4th Respondent's first party List other than on a balance of probabilities and further for failing to find that assertion alongside the assertion of the 4th Respondent that the said list was rejected by the 5th Respondent for being non-compliant was not controverted by the 1st and the 3rd Respondents.



- v. Whether Persons with Disability are nominated or otherwise appointed in priority over youths and other marginalized groups.
 - vi. Whether the 1st, 2nd and 3rd Respondent's are entitled to the orders for Mandatory Injunction sought.
6. On the first issue the Appellant submitted that he was never afforded any opportunity to be heard in his defence before the Trial Court reached its impugned decision that ousted him from his position as the 4th Respondent's Nominated Marginalized Member of the County Assembly of Kericho and that he was never formally informed of the decision made by the said trial court since he only got wind of it in the media.
7. He cited Article 25 (d) of the Constitution that provides that the right to a fair trial shall not be limited. He relied on the case of Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St Joseph Mukasa Catholic Church Kabawa West) [2018] eKLR, where it was held that:
- ' What the Constitution requires in my view is the notification of the intention to take an action against a person likely to be adversely affected thereby and the reasons for the intended action. The said reasons, it is my view must depend on the peculiar circumstances of each case and it is those peculiar circumstances which ought to be considered which consideration must under Article 47 of the Constitution entail an opportunity to the applicant to be heard on the circumstances alleged to constitute satisfactory reasons for the taking of the adverse action.
8. To further emphasize on the issue, the Appellant relied on the case of Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR, where the Court observed as follows:
- ' As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demand that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See O'Donoghue v South Eastern Health Board [2005] 4 IR 217). Hilary Delany in his book, Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272, notes that, 'Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.'
9. It was his submission that in many jurisdictions around the world it has long been established that notice is a matter of procedural fairness and an important component of natural justice hence information provided in relation to any judicial proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be and that in the instant case, service of all the subject Petition and all supporting documents upon the Appellant would have sufficed to satisfy this condition.
10. He submitted that the trial court record shows that service of the said Petition was not effected upon the Appellant copies of Notices of Appointment of Advocates annexed in his Supporting Affidavit dated February 13, 2023 were filed on behalf of the 4th, 5th and 6th Respondents hence confirming that



the Appellant never participated in the proceedings before the trial court by himself or through an advocate and that Affidavits of Service of the three court processes annexed in the aforementioned Supporting Affidavit clearly indicate those who were served and there is no mention of the Appellant and some other interested parties in the instant appeal.

11. He submitted further that the 1st, 2nd and 3rd Respondents were constitutionally obligated to give the Appellant prior and adequate notice of the nature and the reasons for the action taken and an opportunity to be heard and to make representation in that regard and that it was also imperative that the trial court confirms the same before proceeding with the subject case which it terribly failed to.
12. In submitting that violating the right to be heard renders the decisions ultimately arrived at as null and void, he relied on the case of *Ridge v Baldwin (1962) 2 ALL ER 66 at P 81* where Lord Reid expressed himself as follows:

' Time and again in the cases I have cited it has been stated that a decision given without the principle of natural justice is void'

13. He further relied on [Republic V Vice Chancellor Jomo Kenyatta University Of Agriculture and Technology \[2008\] eKLR](#) where the court cited with approval Lord Wright's decision in *General Medical Council v Spackman (1943) 2 ALL ER* where he stated that:

' If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared no decision.'

14. It was the Appellant's submissions that his right to be heard before an adverse decision was taken was violated by the trial court and the 1st, 2nd, and 3rd Respondents and that it may be that the trial court would have come to the same decision had they heard the Appellant, but having violated their right to be heard, it matters not that the trial court could have ultimately arrived at the same decision. That had the Appellant been afforded an opportunity to be heard, he would have raised all the issues herein with the trial court and the said issues would have been ironed out at such a forum to the satisfaction of all the parties and the instant appeal would have been unnecessary.
15. He further placed reliance in the case of [INM v AJMN \[2022\] eKLR](#) where the court in allowing the Appeal cited the decisions below and stated at para 8 and 9 as follows:

' The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General [1986-1989] EA 456*). There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.(See *Sangram Singh v Election Tribunal, Kotah, AIR 1955 SC 664, at 711 – Supreme Court of India*)

In *Ridge v Baldwin (1964) AC (1963) 2 ALL ER 66* the court, while discussing the right to fair hearing observed as follows;

'The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the



decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process.'

16. He concluded by submitting that his right to access to justice and a right to a fair hearing protected by Article 48 and 50 of the Constitution were violated as averred in Ground 1 of the Memorandum of Appeal and that the Appellant was not only not afforded a chance to be heard but was also not informed of the decision after it had been made and asked the court to allow the appeal.
17. On the second issue the Appellant submitted that as contended at Grounds 2,3,4 and 5 of the Memorandum of Appeal, the Appellant is aggrieved by the trial Magistrate's assumption of jurisdiction which was not conferred upon the court by law and that the said trial court acted outside the limits of its jurisdiction. That the said court misconstrued the nature and scope of the said jurisdiction granted to it by law or its duties in connection therewith and in the process, it acted in absence of jurisdiction and the ensuing proceedings and decisions subject of the instant appeal are thus a nullity.
18. The Appellant further submitted that the trial court in contravention of Article 165 (3) (d) of the Constitution, erred in law in hearing questions in respect of the interpretation of the Constitution including determination of the question as to whether the Gazette Notice no 10712 vol CXXIV-NO-86 of September 9, 2022 is consistent with or in contravention with the Constitution. That the trial court also erred in law in hearing questions in respect of the interpretation of the Constitution including the determination of the question as to whether the Gender Top Up Category List was in violation of the Constitution.
19. It was the Appellants further submissions that the trial court erred in law in respect of the interpretation of the Constitution including the determination of the question as to whether an order be issued directing the 4th and 5th Respondents to strictly comply with the provisions of Article 177 (1) (c) of the Constitution therefore wrongly assuming the jurisdiction of a Constitutional Petition guised as an Election Petition and that the drafting of the Petition betrays the said Pleadings as a Constitutional Petition.
20. In citing Article 165 (3) (d) (i) and (ii) of the Constitution on the High Court having jurisdiction to hear any question in respect of the interpretation of the Constitution, the appellant submitted that the orders as sought by the 1st, 2nd and 3rd Respondents in their Petition dated September 16, 2022, the issues for determination as framed by the trial court in the impugned judgement and the issues as framed by the 1st, 2nd and 3rd Respondents in their written submissions indicates that the said petition is the one under Article 165 (3) (d) (i) and (ii).
21. The appellant further submitted that a quick perusal of the said Petition reveals that it does not contain any allegation that any of the 1st, 2nd and 3rd Respondent's fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, which fact would have granted the Trial Court jurisdiction under Section 8 of the Magistrates Courts Act as read together with Article 165 (3) (b) of the Constitution to hear the Petition as a Constitutional Petition and that strictly the instant petition is one under Article 165 (3) (d) (i) and (ii) of the Constitution as it raises fundamental constitutional questions which is a preserve of the High Court.
22. The Appellant relied on the case on CNM v WMG [2018] eKLR where the court in weighing in on what qualify as 'constitutional question' stated as follows:

' Constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.



'When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.'

Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.'

23. He contended that modelling the Petition subject of the instant Appeal as an Election Petition does not cure it more so when it does not specifically seek nullification of the election of the Petitioner or anyone else and that the 1st, 2nd and 3rd Respondents cannot through draftsmanship and legal craftsmanship, in their pleadings, confer jurisdiction of a Constitutional Petition guised as Election Petition upon the trial court. That to allow a Constitutional dispute to be transmuted into an Election Petition for vindication of violations that raise questions regarding interpretation of the Constitution is a contravention of Article 165 (3) (i) and (ii).
24. He submitted that the 1st, 2nd and 3rd Respondents could not through their Pleadings confer jurisdiction to the trial court where none existed because jurisdiction is conferred by law and not through pleadings and legal conmanship. That it is the substance of the claim and the reliefs sought that determine the jurisdiction competence of a court and that looking at the instant Petition, it is clear that the claim is premised on Constitutional questions which the trial court was incompetent to interrogate and make a determination on.
25. It was his submissions that it is settled in law that parties are bound by their pleadings and that evidence which tends to be at variance with the Pleadings is for rejection, that the trial court was not invited to make a finding on whether or not the election of the Appellant should be nullified neither has it been invited to determine whether or not the Appellant be de-gazetted as a Member of the County of Kericho. That the trial court was only asked to make a determination as to whether the actions of the 4th, 5th and 6th Respondents complained of by the 1st, 2nd and 3rd Respondents in their Petition violated Article 177 (1) (c) of the Constitution of Kenya 2010 and that ordering that the Appellant's name be deleted as so prescribed was a departure from pleadings. That any evidence or submissions, however strong that tends to be at variance with the Pleadings must be discarded.
26. He relied on the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR where the court in citing with approval the decision of the Supreme Court of Nigeria in ADETOUN OLADEJI (NIG) LTD Vs NIGERIA BREWERIES PLC SC 91/2002 where the Judges of Supreme Court expressed himself on the importance and place of pleadings as follows:

' It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'



'In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.'

27. It was submitted on behalf of the Appellant that the Petition and the evidence tendered by the 1st, 2nd and 3rd Respondents does not contain any prayer for and support any finding of the nullification of elections or de-Gazettement of the Appellant who had already been gazetted as a Member of the County Assembly of Kericho and neither was any suitable amendment sought to otherwise make it an Election Petition hence the trial court was wrong in delving in the same.

28. To further buttress on the essence of pleadings, the Appellant relied on the case of [*Railla Amolo Odinga & Another v IEBC & 2 others \[2017\] eKLR*](#) where the court held that:

' In absence of Pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled proposition that no party should be permitted to travel beyond its leadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleading,'

29. The Appellant further contended that it cannot be that the drafters of the [*Constitution*](#), the Magistrates Act and the [*Elections Act*](#) intended that the jurisdiction of the High Court conferred to it under Article 165 (3) (d) (i) and (ii) of the [*Constitution*](#) be limited, curtailed or otherwise ousted by the latter mentioned pieces of legislation and that if that was the intention, nothing would have been easier than so saying.

30. To emphasize on the above sentiments, he relied on the case of [*Evans Ladtema Muswahili v Vibiga County Public Service Board & 2 others; Marley Ezekiel Ayiego \(Interested Party\) \[2021\] eKLR*](#) where it was held that:

' The other argument by the respondents is that the jurisdiction of the High Court over the constitutional petition is taken away or limited by a number of statutes. I have a short response to this argument. The [*Constitution*](#) is the supreme law in Kenya, by dint of Article 2(1) of the [*Constitution*](#). All other laws, including legislation, are inferior or subordinate to it, for they draw their legitimacy from it, and most of them are made by entities created by the [*Constitution*](#) itself. The supremacy of the [*Constitution*](#) is underlined by Article 2(4), which states that any law which is inconsistent with the [*Constitution*](#) is void to the extent of the inconsistency. I say so because Article 165(3) of the [*Constitution*](#) vests jurisdiction in the High Court, to entertain constitutional petitions, which raise questions about violations of the [*Constitution*](#) and which call for interpretation of the [*Constitution*](#). Any statute designed to limit jurisdiction of the High Court as vested by Article 165(3), to entertain constitutional petitions, around such matters, would run afoul of Article 2 of the [*Constitution*](#), and would be unconstitutional.'

31. It was the Appellant's further submissions that the Petition is poorly drafted and poorly articulated hence giving it life as an Election Petition will be a waste of judicial time since it does not qualify as such and that our Electoral Laws are ill equipped to address the Constitutional questions enumerated in the Petition. That the Court might address other concerns relating to an electoral process but they do not



have the specific jurisdiction that the Constitution has granted the High court to address constitutional questions and redress constitutional violations as envisaged under Article 165 (3) (d) (i) and (ii) of the Constitution. As such the Trial Court did not have jurisdiction to grant the reliefs sought in the 1st, 2nd and 3rd Respondents Petition at pages 36 and 37 of the record of Appeal and urged the court to so determine.

32. On the third issue, the Appellant reiterated his submissions on the first issue in submitting on Grounds 6, 7 and 8 of the Memorandum of Appeal and added that issues for determination as framed by the trial court in its impugned judgement, as framed by the 1st, 2nd and 3rd Respondents, as framed by the 4th Respondent and as framed by the 5th Respondent in pages 777-778, 415, 541 and 667, and 649-650 of the Record of Appeal respectively shows clearly that parties never raised the second issue as framed by court to wit, whether the Gazette Notice no. 10712 vol CXXIV – NO – 86 dated September 9, 2022 violates the Constitution and the Election Act, especially in terms of nomination of the 1st Interested Party (the Appellant herein) Vis a Vis the 3rd Petitioner (the 3rd Respondent herein). That issue was never brought to their attention of the court to hear their input on the same.
33. It was the Appellant's submissions that the trial court in ordering that 'the 1st and 2nd Respondents (who are the 4th and 5th Respondents herein) to delete the name of the 1st Interested Party (Koskei Kipngetch Vincent), (who is the Appellant herein) and replace him with the 3rd Petitioner one Benjamin Kipkorir Koech, (who is the 3rd Respondent herein) within 7 (seven) days from February 10, 2023' in the impugned judgement admitted that the Pleadings and submissions by the Petitioner did not directly touch on the appointment and nomination and eventual appointment of the 1st Interested party one Koskei Kipngetch Vincent Vis A Vis The 3rd Petitioner One Benjamin Kipkorir Koech.
34. He relied on the Court of Appeal decision in Galaxy Paints Co ltd vs Falcon Guards Ltd court of Appeal Case No. 219 of 1998, where it stated that:-

' Issues for determination in a suit generally flow from Pleadings and unless the Pleadings are amended in accordance with the Civil Procedure Rules, the Trial Court by didn't of the aforesaid rules may only pronounce judgement on the issues arising from pleadings or such issues as parties have framed for the court's determination.'

35. The appellant further placed reliance on the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others (2014) e KLR which also relied on the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd vs Nyasulu (1998) MWSC 3 in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled 'The Present Importance of Pleadings.' The same was published in Current Legal Problems (1960), at page 174 where it was stated that: -

' As the parties are adversaries, it left to each one of them to formulate his case in his own way, subject to the basic rules of Pleadings. for the sake of certainty and finality, each party is bound by his own Pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the Pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the Pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculations. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved: for a decision



given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be denial of justice.

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their Pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for item called “Any Other Business” in the sense that points other than those specific may be raised without notice.’

36. The Appellant urged the Court to find that the issue framed and determined by the trial court on its own as enumerated above is a nullity and of no legal consequence since it is not the function of the court to descend into the arena of litigation as a contestant but to be a referee on the same. That the trial court went out of bounds and character when it made pronouncements on issues not raised by parties. An Order or a decision on a claim or defence not pleaded amounts to a determination made without a hearing and leads to denial of justice. The least the trial Magistrate could have done would have been to ask the parties to address him on the said issues that he unilaterally framed.

37. To further emphasize on this issue the appellant relied on the case of *Accounting Officer Kenya Ports Authority (Ex Parte) v Public Procurement Administrative Review Board & 3 others (Interested parties) [2019] eKLR* where Ogola J held that:

‘ From the foregoing, the jurisprudence is that a court cannot raise an issue suo moto and determine it suo moto without giving an affected party a chance to be heard on the issue. It is irrelevant whether the Tribunal would have arrived at the same decision even if it had afforded the parties an opportunity of being heard before making its decision. It must always be remembered that where a party has a right to be heard that right cannot be taken away by the mere fact that the Tribunal considers that the said party’s contribution is unlikely to affect the decision.’

38. The Appellant thus urged the court to make a determination that the learned trial Magistrate erred in law in making a determination on issues not pleaded and unilaterally framing its own without notice and according parties a hearing on the same in contravention of Articles 47, 48 and 50 of the *Constitution*.

39. On the fourth issue and in submitting on ground 13 of the Memorandum of Appeal, the appellant contended that the balance of probability standard means that a court is satisfied that an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not.

40. It was his submission that the 5th Respondent’s assertions that there were complaints over the 4th Respondent’s first Party List alongside the assertion of the 4th Respondent that the said list was rejected by the 5th Respondent for being non-compliant was not controverted by the 1st, 2nd and or 3rd Respondents hence on a balance of probabilities this seems to have been the case and the trial court ought to have so determined.

41. He relied on the case of *William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526* where Kimaru J (as he was then) stated that:

‘ In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.’



42. On the fifth issue and on grounds 11 and 12 of the Memorandum of Appeal, the appellant submitted that the context of the word 'marginalized group' as is used in Article 177(1) (c) of the Constitution and Section 7 (1) (a) as read with Section 7 (2) (b) County Governments Act infers that youths and persons with disabilities are categorized under one pot and that it is upon the subject political party to insert its 'hand' in the pot and draw whoever it shall lay its hand on which person will represent everyone else in that category. Hence if a youth is nominated, he will represent the interests of all other persons disadvantaged by discrimination on one or more of the grounds in Article 27 (4) of the Constitution and vice versa. It does not mean that persons with disabilities are to be prioritized over youth as proclaimed by the trial Court and that in so proclaiming, the trial court erred.
43. It was the Appellant's further submissions that the list prescribed by the Constitution as to who are classified in the marginalized group, is just that, a list and it is by no means an order of priority as wrongly insinuated by the trial magistrate. That the mischief the provision was meant to cure by so being provided was that it will be impossible for every party to have a representation of each of the listed moreso since the class is broad and relative in definition. With freedom of association being a guarantee under the Constitution, it will be difficult to force political parties to have representation of all the listed persons, hence the clustering. He continued to argue that if the framers of the Constitution and the other legislations intended that persons with disabilities be prioritized over all others named in the Marginalized Group, nothing would have been easier than so providing.
44. The Appellant thus urged the court to make a finding that Persons with Disabilities are in the same cluster of special seats as youths and others in the Marginalized Group and which general cluster takes priority over other classes of persons and further that nominating or otherwise appointing anyone in the said cluster of seats fulfils the requirements of all the relevant Electoral Laws as regards marginalized groups.
45. On the 6th issue the appellant referring to the 5th Respondent's Replying Affidavit dated October 11, 2022 submitted the 5th Respondent stated that upon reviewing party lists, it established that none of the 79 country - wide lists from different political parties that had been submitted complied with the relevant electoral laws and the position was communicated to the said political parties as well as the general public vide communique of July 15, 2022 whereby the 5th Respondent directed the parties to amend their lists in compliance with the said relevant laws.
46. He submitted that upon review, the 5th Respondent added that the said parties resubmitted their lists which were then approved hence the Kenya Gazette No 10712 VOL CXXIV – No 186. The 5th Respondent also clarified that the list provided in newspapers of national circulation were not final lists and was meant to give the public an opportunity to scrutinize the same and that this evidence was not controverted.
47. He relied on the decision in In Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR where the court rendered itself thus:
- ' The court will not grant a mandatory injunction if the damage feared by the Plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer.'
48. The Appellant thus submitted that if the Orders sought are granted the 5th Respondent will have to reverse its decisions in all the 79 country - wide lists from different political parties' subject of its communique of July 15, 2022. The inconvenience that the same would do to the entire electoral



process at this juncture would be enormous with financial consequences and that the balance of convenience tilts in favour of denying the said Orders and urged the court to so find.

49. The Appellant prayed that the Appeal be allowed and the Judgement and Order of the Trial Subordinate Court be set aside with costs and that the costs of this Appeal be borne by the 1st, 2nd and 3rd Respondents.
50. The 1st, 2nd and 3rd Respondents submitted that the trial magistrate erred in one aspect of the judgment that is in singling out the appellant for removal from the Kericho County Assembly, instead of nullifying the whole list of nominees in the category of the marginalized as he found the gazettelement to be in violation of the Constitution owing to the fact that persons with disability were not included. The Respondents submitted that the court ought to have ordered that the compliant list be published in the Kenya Gazette, picking the first four nominees as representatives of the marginalized.
51. They cited rule 34 (10) of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* conferring the power on the appellate court to remedy mishaps by the election court, including having the same powers and perform the same duties as are conferred and imposed by the court exercising original jurisdiction. Therefore, the Respondents urged the court to consider the merits of the petition afresh and offer a remedy to the persons living with disabilities.
52. On the issue as to whether, the appellant herein was served, the 1st, 2nd and 3rd Respondents contended that it was trite law that judgments in election petitions are judgments in rem as opposed to judgments in personam and therefore while conceding that the appellant was not served, they reiterated that it was inconsequential whether or not he was heard as the party list of the marginalized as gazetted in the Kenya Gazette No 10712, Vol CXXIV No 186 of September 9, 2022 was null and void for violating the provisions of the Constitution and the Elections Act.
53. They submitted that on the ground as to whether the trial court had jurisdiction to determine a constitutional petition or to make a determination that the actions of the 4th and 5th Respondent were tantamount to a violation of article 177 (1) (c) of the Constitution, the Respondents argued appellant had misapprehended the Constitution, the Elections Act and its rules. The Respondents submitted that the trial magistrate acted within the law in interpreting the provisions of the Constitution in an election matter, that whilst in the process of determining an election matter, the court had the jurisdiction and competence to interpret the provisions of the Constitution, the Elections Act and its regulations. They further argued that the special jurisdiction of the election court as granted by the law is distinct and distant from the ordinary original and appellate jurisdiction whilst citing the superior court cases to wit *Orange Democratic Movement v Yusuf Ali Mohamed & 5 Ors [2018] eKLR* & *Peter Ngoge v Franis Ole Kaparo & 5 Ors, Supreme Court Petition No 2 of 2012 [2013] eKLR* and further argued that there was no other way to determine whether or not there was compliance with the provisions of the Constitution without interpreting the provisions of the Constitution. They reiterated that the learned trial magistrate had the jurisdiction to determine the election petition and the issues raised therein.
54. The 1st, 2nd and 3rd Respondents reiterated that the Constitution and the Elections Act require that the County Assembly includes representation of persons living with disability which is the letter and the spirit of article 177 (1) © of the Constitution and upon examination of the gazetted list, the conclusion is the County Assembly of Kericho has no representation of persons living with disability, it was therefore within the purview and jurisdiction of the election court to declare that it was not duly constituted as required by the Constitution.
55. They contended the Appellant's assertions that the order directing the removal of the name of the Appellant and replacing it with that of the 3rd Respondent herein was a determination outside the



- issues raised by parties to the court for determination. The Respondents further contended that that it was a selective reading of the judgment of the trial court.
56. They submitted that there were 3 lists submitted by the 4th Respondent to the 5th Respondent, the first list was rejected amongst others by the 5th Respondent as being non-compliant with the Constitution and the law. The second list which was published in the dailies on the July 27, 2022 and a third list which under suspicious circumstances was gazetted. The Respondents contended that the third list which was uploaded to the IEBC website and subsequently gazetted was done through the back door and the court in its finding took cognizance of this, they further contended that there was no evidence tendered to support that disputes arose or evidence of the dispute resolution process.
57. They contended the fact that there was no internal dispute which was subsequently subjected to the party's internal dispute resolution mechanism, Political Parties Disputes Tribunal (PPDT) or the IEBC resolution committee necessitating the altered list thereby shortchanging the persons with disability. The Respondents also pointed out that the 5th Respondent in paragraph 12 of the Replying affidavit to the Petition, the 5th Respondent had conceded that the list of nominees published on July 27, 2022 was compliant with the law. The Respondents argued that the trial magistrate made a determination after keenly studying the alteration of names, and made a finding that the party list submitted and published in the dailies on July 27, 2022 was the lawful list and that the reordering of nominees in the Kenya Gazette No 10712 vol CXXIV No 186 dated September 9, 2022 violated the Constitution and the Elections Act, especially in terms of nominating the 1st interested party (the appellant herein) one Koskey Kipngetich Vincent instead of nominating the 3rd petitioner one Benjamin Kipkorir Koech on priority basis in accordance with the first list submitted by the 1st Respondent and not the amended list pursuant to the letter dated August 1, 2022.
58. They further maintained that the court was justified in ordering the removal of the 1st interested party (the appellant) as his name could not be justified by the 4th and 5th Respondents. They reiterated that the appeal was counterproductive and that upon the court's declaration of the invalidity of the Kenya Gazette No 10712 it means that all the nominees in the marginalized category stood invalidated hence their nominations were null and void, including the appellant, it was therefore immaterial that he was subsequently singled out.
59. The 1st, 2nd and 3rd Respondents faulted the 4th Respondent for failing to demonstrate whether any disputes arose within the party and how they were resolved neither was there any account rendered as to whether the 1st and 3rd Respondents were heard in those disputes before the adverse decision affecting a whole segment of the society, namely, persons living with disability who were subsequently, left out of representation in the County Assembly of Kericho.
60. They argued that persons with disability are nominated or otherwise appointed in priority over the youth and/or other marginalized groups while citing sections of the Elections Act which ought to give executory regime to article 177 (1) © of the Constitution, they cited section 36 (1) (f) and section 36 (3) of the Elections Act and reiterated that these constitutional and legislative provisions as rendered vitiated the 11 and 12 grounds contained in the memorandum of appeal and therefore the Respondents urged the court to dismiss the said grounds of appeal.
61. The 1st, 2nd and 3rd Respondents submitted that all they were seeking was the representation of persons with disability in the Kericho County Assembly and that the trial magistrate correctly found that the Constitution and the Elections Act and rules were not complied with by the 4th and 5th Respondents, hence the party list gazetted violated the Constitution and further that the proper party list was the one published in the dailies on July 27, 2022 and there being no proof of any disputes and resolutions made resulting in alterations, the said party list ought to have been gazetted.



62. They therefore urged the court to exercise the powers it was clothed with under rule 34 (10) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and grant a mandatory injunction directed at the 5th Respondent to gazette the list of nominees as per the party list published on the 27th of July, 2022 as per the dictates of the Constitution and the law.
63. The 1st, 2nd and 3rd Respondents submitted that the instant appeal was without merit and ought to be dismissed without costs.
64. The 4th Respondent on the other hand on whether the trial court had jurisdiction submitted that the Petition before the Magistrate’s Court ideally challenged the final party nomination list submitted by the 4th Respondent on which basis the Appellant and the 1st to 16th Interested Parties were elected to office. In essence, that constituted a dispute between a member of the party and the party itself as to the validity and merit of the said list as was submitted and that the Petitioners’ (being the 1st to 3rd Respondents herein) grievances before the Magistrate’s Court was a pre-election dispute which the Court sitting as an election court was not clothed with the requisite jurisdiction to hear and determine the dispute in the first instance.
65. The 4th Respondent cited Article 88(4)(e) of the Constitution of Kenya, 2010, as read with Section 74(1) of the Election Act, 2011 as well as Section 4 of the Independent, Electoral and Boundaries Commission Act in submitting that Independent, Electoral and Boundaries Commission is mandated to arbitrate on any matter relating to the nomination or any dispute arising from nomination of candidates to elective office(s) of nomination or dispute arising from nomination and thereafter make a decision.
66. It was the 4th Respondent’s further submission that upon the 5th Respondent publishing the names of nominees in the Standard Newspaper on July 27, 2022, it proceeded to issue notices to any aggrieved party to challenge the party list through the IEBC dispute resolution committee. A right which the Petitioners now the 1st to the 3rd Respondents waived.
67. It relied on the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party) [2019] eKLR where the supreme court stated as follows:
- (68) So as to ensure that Article 88 (4) (e) of the Constitution is not rendered inoperable, while at the same time preserving the efficacy and functionality of an election Court under Article 105 of the Constitution, the Court developed the following principles:
- (i) All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
 - (ii) Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the election Court;
 - (iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution;



the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;

- (iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court;
- (v) The action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition;
- (vi) in determining the validity of an election under Article 105 of the Constitution, or Section 75 (1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.'

68. It was submitted by the 4th Respondent that the 1st to the 3rd Respondents, being the Petitioners in the magistrates Court were aware of the party list and chose not to raise any dispute for resolution before the IEBC dispute resolution committee or the Political Parties Dispute Tribunal hence the trial Magistrate erred and usurped his mandate in directing the 4th and 5th Respondents herein to delete the name of the 1st Interested Party (Koskey Kipngetch Vincent) and replace him with that of the 3rd Petitioner being (Benjamin Kipkorir Koech).

69. Citing Article 90(1) and Section 2 of the Elections Act which defines 'Party List' as a list of nominees prepared by a political party and submitted to the Commission, the 4th Respondent submitted that the responsibility of preparing the Party list, submitting it to the 5th Respondent and the power over who gets the special/ reserved seats resides with the 4th Respondent and not any other person and or authority thus the learned Magistrate erred in nullifying the nomination of the Appellant and directing that his name be replaced with that of the 3rd Respondent herein as the court assumed a role that is only mandated and reserved for the 4th Respondent.

70. The 4th respondent relied on the case of of Lydia Mathia vs Naisula Lesuuda & Another [2013] eKLR where the Court of Appeal held that:

'The definition of 'Party lists' under Section 2 of the Elections Act suggested ownership of the list by the political Party that has prepared it. The practice, indeed the law is that the power over who gets the reserved seats resides with the parties themselves and no other authority'

71. To further emphasize on the issue, the 4th Respondent also relied on the case of Moses Mwigigi & 14 Others vs Independent Electoral and Boundaries & 5 Others (2016) eKLR where the Supreme Court held that:

- ' (95) The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national



Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55.

'A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the 'elections' for these special seats. In the event of non-compliance by political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh list or by amending the list already submitted.'

72. The 4th Respondent cited Section 34(5) of the *Elections Act*, 2011 which provides that party lists shall be submitted in order of priority in submitting that the 4th Respondent undertook its responsibility of choosing their preferred candidates and ranked them in order of priority for purposes of nominating the said party members in the Marginalized Category in the County Assembly of Kericho. That the said list was then forwarded to the 5th Respondent and after considering the list and finding that it was compliant with the law, the list was published by the 5th Respondent in the special issue of the Kenya Gazette No 10712 Vol CXXIV- No 186.
73. It was the 4th Respondent's submissions that the list being in order of priority, if at all the learned Magistrate found that the Appellant's nomination was null and void, then it would only be lawful that the next nominee in the list be nominated in place of the Appellant and not the 3rd Respondent herein hence the learned Magistrate erred in law in nullifying the nomination of the Appellant and replacing him with the 3rd Respondent herein.
74. It was the 4th Respondent's submissions that the 4th Respondent's party list for Members of Kericho County Assembly under the Marginalized Group category contained 2 names of persons with disabilities, one youth, one person who is a minority group and 2 persons who are marginalized in terms of their ethnicity hence the said party list fully complied with the provisions of Article 177 1 (c) as well as Section 36 (f) of the *Elections Act* as all the sub categories required under the Marginalized Group were accommodated.
75. The 4th Respondent further submitted that an application for consideration for nomination is not a guarantee for nomination as the slots allocated to the party by the 5th Respondent are limited in number.
76. The 4th Respondent relied on the case of *Millicent Cherotich v Omari Esba Wanjiku & 2 others [2018] eKLR* where the court stated that the marginalised groups referred to under 177(1) (c) of the *Constitution* are defined under two heads:

'Marginalised community' means—(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or d) pastoral persons and communities, whether they are—(i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole; 'marginalised group' means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4)'



77. In citing Article 27(4) of the Constitution of Kenya, 2010 which provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth, the 4th Respondent submitted that the youth and persons with disability fall under the same category and therefore the learned Magistrate's misdirected himself by finding that the persons with disabilities take priority over the youth.
78. It was submitted that the 4th Respondent did not deliberately discriminate against persons with disability in Kericho County Assembly as the list included persons with disability and were it not for the four slots allocated to the 4th Respondent, the said persons with disability would have been gazetted as duly elected members of the County Assembly thus the learned Magistrate erred in finding that the 4th Respondent's party list violated the provisions of Article 177 (1) (c) of the Constitution of Kenya, 2010.
79. The 4th Respondent thus urged the Court to find that the 4th Respondent's party list fully complied with the law and the persons gazetted on September 9, 2022 by the 1st Respondent vide special issue of the Kenya Gazette No 10712 Vol CXXIV-No 186 be deemed to have been validly nominated and duly elected as members of the Kericho County Assembly and that the costs of the Appeal should be awarded to the 4th Respondent.
80. The 5th Respondent submitted that they partly supported the instant appeal, particularly to the extent that the trial court faulted the Independent Electoral and Boundaries Commission (IEBC), the 5th Respondent herein, for violating the relevant laws. The 5th Respondent therefore urged the court through its submissions to make a finding that IEBC, fully discharged its mandate in an accordance with the Constitution of Kenya, 2010 (Constitution) and the Elections Act, No 24 of 2011 (Elections Act), while conducting the party list elections of the Kericho County Assembly.
81. The 5th Respondent further submitted that it played no role whatsoever in preparation of the United Democratic Alliance (UDA) party list that was submitted to it. The UDA revised its party list twice. First, pursuant to IEBC's direction that no political party had submitted a list that was compliant with the relevant electoral laws. Second, pursuant to internal political party processes which included the settlement of internal disputes. IEBC relied on the final list presented to it by the UDA party to conduct party list nominations. This list was compliant with the law. The 5th Respondent also submitted before the lower court that it did not alter or tinker with the party list submitted to it by the UDA party. It merely picked from that list in the priority in which they were listed.
82. The 5th Respondent therefore contended that the trial magistrate erred in law in two ways. First, by rendering himself in a constitutional petition, yet he was gazetted to hear and determine an election petition. What was before him was not an election petition. Secondly, even if he had jurisdiction, the learned magistrate erred in law by making a determination that persons with disability are ranked in priority to the other special groups under the marginalized category, and on that basis, went on to nullify the election of the Appellant and substituted him with the 3rd Respondent herein.
83. The 5th Respondent submitted that it actively participated in the proceedings before the lower court and confirmed that neither the Appellant nor his Advocate appeared in any of the sessions before the lower court. They further submitted that they could neither confirm nor deny whether the Appellant was properly served with the Petition in the manner prescribed by Article 87 (3) of the Constitution, section 77 (2) of the Election Act and Rule 10 (1) of the Elections (Parliamentary and County Elections) Petition Rules. They further stated that the court was at liberty to confirm the issue of service by examining the record before the lower court and upon establishing that service was not properly



- effected, the court should allow the appeal and overturn the finding of the lower court for want of proper service. They reiterated that the rules of natural justice demand that no party can be condemned unheard and cited the court in the case of *Patrick Ngeta kimanzi v Marcus Mutua Muluvi & 2 Others, Election Petition (Machakos) No 8 of 2013*.
84. The 5th Respondent submitted that the petition before the lower court was not an election petition, rather, it was a constitutional petition challenging the decision of a political party which was upheld by the IEBC. They submitted that this assertion was backed by the manner in which the petition was framed as well as the reliefs sought thereof. They maintained that there was no single prayer seeking for the nullification of the nomination/election of any of the interested parties and there was no specificity of the precise person against whom the Petitioners sought a relief. They cited the case of *Kenya Commercial Bank Ltd v Sheikh Osman Mohammed*, CA No 179 of 2010 whereby the Court expressed itself thus: 'It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.'
85. The 5th Respondent submitted that their argument is augmented by the fact that the learned magistrate had to frame an issue which none of the parties before him argued, and ultimately a prayer/relief which was not sought by the Petitioners. At page 777 of the Record of Appeal where the Court frames the issues for determination. Issue number 2 is framed as: 'Whether the Gazette Notice No 10712 vol CXXIV No 86 dated 9th September 2022 violates the *Constitution* and the *Elections Act*, especially in terms of the first interested party vis-à-vis the 3rd Petitioner.' Therefore, 5th Respondent contended that the petition was not properly pleaded as an election petition and consequently, the learned magistrate had to trouble himself with framing the petitioner's case to give it the character of an election petition.
86. The 5th Respondent therefore faulted the learned magistrate for arrogating himself the jurisdiction to hear a constitutional petition, whilst he did not have such powers. His jurisdiction was strictly that of an election court. The 5th Respondent maintained that all the learned magistrate was required to do, was to determine whether the parties whose election was challenged, was done in conformity with the *Constitution* and the *Elections Act*. However, the petition placed before him did not raise such questions, the learned magistrate therefore used judicial craft to arrogate to himself jurisdiction which he did not have in the first place. They cited the locus classicus on jurisdiction, in support of their case, the well-known Supreme Court Case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR* whereby the court stated as follows: 'A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.' The 5th Respondent reiterated that the petition filed before the lower court did not meet the threshold of an election petition, instead, what was before the trial court was a constitutional petition whose jurisdiction is reserved for the high court, hence, the trial magistrate entertained a matter which he did not have jurisdiction.
87. The 5th Respondent while referring to page 20-21 of the lower court's judgment (784 – 785 of the Record of Appeal), whereby the trial court noted that: 'I also take note that in priority basis article 177 (1) (c) of the *Constitution* as read with section 36 (1) (f) (2) (3) of the *Elections Act* requires on



mandatory terms that on priority basis, the marginalized groups, takes first priority followed by people living with disabilities and finally the youth in that priority order basis. At no time therefore the youth was to take priority above people living with disability which is the case in this petition.' It was on the aforementioned basis that the learned magistrate proceeded to nullify the election of the Appellant and substitute him with the 3rd Respondent herein. Therefore, the 5th Respondent while citing article 177 (1) © of the Constitution faulted the trial court firstly, for listing the 'marginalized category' alongside 'persons with disability' and 'youth' as other categories, secondly, in declaring that the category of 'persons with disability' is to be prioritised over the 'youth'.

88. The 5th Respondent contended that the trial court took a narrow approach of the meaning and import of the construction of Article 177 (1) (c) of the Constitution while citing the decision of the Court of Appeal in Commissioner of the Implementation of the Constitution v The Attorney General & Others - Civil Appeal No 351 of 2012 where the Court while interpreting the provisions of Article 97 (1) (c) which mirrors the provisions of Article 177 (1) (c) stated as follows: 'That the interpretation of Article 97 (1) (c) of the Constitution invites the application of the ejusdem rule, the youth and persons with disability fall in the category of the marginalized and disadvantaged and the vulnerable. Those who are sufficiently empowered to muscle their way generally speaking into inner sanctions of political and state power.'
89. The 5th Respondent further contended the trial court in adopting a narrow approach in interpreting article 171 (1) ©, the court purported to interfere with a political party's discretion to prepare its party list and resolve internal disputes in line with its own guidelines. The Court thus fell into error by making a declaration that persons with disability have priority over the other categories of marginalized groups contemplated by Article 177 (1) (c) of the Constitution.
90. The 5th Respondent contended that by falling into the above errors, the learned magistrate disregarded the ultimate party list prepared by the 4th Respondent and submitted to the 5th Respondent in accordance with the law. By doing so, the court interfered with the 4th Respondent's unfettered discretion to prepare a party list. The trial court also purported to interfere with the 5th Respondent's mandate of selecting party list nominees from lists submitted by the political parties and sticking to the priority given by the party.
91. The 5th Respondent further reiterated that the appeal herein is highly meritorious and urged that the honorable court finds merit in the same and reverses the findings of the trial court.
92. I have re-evaluate the arguments put forward in the case before the trial court plus the judgment therein. I have also considered the grounds of appeal, the submissions by the parties and upon doing so I find that the following issues are ripe for determination by this court;
 - i. Whether the trial Court determined the subject Petition and issuing Orders adversely affecting the rights of the Appellant without according the Appellant a hearing in contravention of the Appellant's right to access to justice and a right to a fair hearing protected by Articles 48 and 50 of the Constitution.
 - ii. Whether the Trial Court had jurisdiction to determine a Constitutional Petition or make a determination as to whether the actions of the 4th, 5th and 6th Respondents complained of by the 1st, 2nd and 3rd Respondents in their Petition violated Article 177 (1) (c) of the Constitution of Kenya 2010
 - iii. Whether the learned trial Magistrate erred in law in adjudicating upon certain specific matters outside Pleadings and making Orders upon them which matters parties to Election Petition had not raised.



- iv. Whether Persons with Disability are nominated or otherwise appointed in priority over youths and other marginalized groups.
 - v. Remedies
93. On the first issue the Appellant submitted firstly, he was never served with a copy of the petition and secondly, that he was never afforded any opportunity to be heard before the Trial Court reached its impugned decision that ousted him from his position as the 4th Respondent's nominated marginalized member of the County Assembly of Kericho and further that he was never formally informed of the decision made by the said trial court since he only got wind of it in the media. The Appellant asserted that had he been afforded an opportunity to be heard, he would have raised all the issues herein with the trial court and the said issues would have been ironed out at such a forum to the satisfaction of all the parties and the instant appeal would have been unnecessary.
94. In his submissions, he reiterated that in many jurisdictions around the world it has long been established that notice is a matter of procedural fairness and an important component of natural justice hence information provided in relation to any judicial proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be and that in the instant case, service of all the subject Petition and all supporting documents upon the Appellant would have sufficed to satisfy this condition.
95. The Appellant contended that the failure to effect service of the petition and the fact that he was not afforded the opportunity to be heard offended the principles of natural justice, he cited article 25 (d) of the [Constitution](#) in support of his case, the said article provides that the right to a fair trial shall not be limited.
96. The 1st, 2nd and 3rd Respondents while conceding that the appellant was not served, contended that judgments in election matters are judgments in rem as opposed to judgments in personam. They further argued that it was inconsequential whether or not the appellant was heard by the trial court as the party list gazetted in the Kenya Gazette No 10712, Vol CXXIV No 186 of 9th September, 2022 was found to be null and void for violating the provisions of [Constitution](#) and the [Elections Act](#).
97. The 5th Respondent on its part submitted that it actively participated in the proceedings before the lower court and confirmed that neither the Appellant nor his Advocate appeared in any of the sessions before the lower court and however they could neither confirm nor deny whether the Appellant was properly served with the Petition in the manner prescribed by article 87 (3) of the [Constitution](#), section 77 (2) of the Election Act and Rule 10 (1) of the Elections (Parliamentary and County Elections) Petition Rules.
98. I have taken the liberty of examining the record of appeal and I find that the appellant was not served as proven by the affidavits of service by appellants annexed and marked as 'KKV - 3 (d)', 'KKV - 3 (e)', 'KKV - 3 (f)', 'KKV - 3 (g)', 'KKV - 3 (h)', 'KKV - 3 (i)', and 'KKV - 3 (j)', the petitioners effected service on the 4th, 5th and 6th Respondents herein and some of the interested parties excluding the appellant. I have perused the record of appeal provided and the court proceedings therein and confirm that the appellant did not participate in the proceedings before the trial court. With respect, I am persuaded by the 1st, 2nd and 3rd Respondents' submission that Judgment in Election Petitions are Judgment in as opposed to Judgments in personal. I hence inconsequential whether or not he was heard as the party list of the marginalized as gazetted in the Kenya Gazette Notice No 10712 VOL CXXIV NO 186 violated article 177 (1) © of the [Constitution](#). Nothing turns on the first issue.



99. Concerning the second issue, as to whether the learned trial magistrate had jurisdiction to adjudicate the dispute, I have considered the submissions by the parties on this issue. I take cognizance of the fact that the learned magistrate adjudicated the dispute at hand as an election court and while sitting as an election court, he was at liberty to interpret the provisions of the Constitution. The trial magistrate was also acted within his jurisdiction and mandate in directing the 4th and 5th Respondents herein to delete the name of the 1st Interested Party (Koskey Kipngetich Vincent) (the Appellant herein) and replace him with that of the 3rd Petitioner being (Benjamin Kipkorir Koech),(the 3rd Respondent herein). In the case of *Lydia Mathia v Naisula Lesuuda & another*, [2013] eKLR the Court of Appeal observed that; 'The definition of 'party lists' under section 2 of the Elections Act suggested ownership of the list by the political party that has prepared it. The practice, indeed the law is that the power over who gets the reserved seats resides with the parties themselves and no other authority.' Similarly, the Court of Appeal in the case of *Lydia Nyaguthi Githendu v Independent Electoral and Boundaries Commission & 17 others*, [2015] eKLR the Court held; 'We must express the view that the constitutional scheme vests, to some extent an unregulated power to the political parties to regulate and formulate the list of candidates, and a secondary power to the Commission to supervise, with the Court retaining the ultimate and final authority to address and determine instances of violation or infringement of fundamental rights'.
100. The 4th Respondents in its submissions owned the list of nominated members in the gazette notice while citing section 34 (5) of the Elections Act which provides that party lists shall be submitted in order of priority, 4th Respondent maintained that it undertook its responsibility of choosing their preferred candidates and ranked them in order of priority for purposes of nominating the said party members in the marginalized category in the County Assembly of Kericho and that the said list was then forwarded to the 5th Respondent and after considering the list and finding that it was compliant with the law, the list was published by the 5th Respondent in the special issue of the Kenya Gazette No. 10712 Vol CXXIV- No 186. I therefore find that the grounds 2,3,4,5 challenging the jurisdiction of the court in its interpretation of the provisions of the Constitution in adjudicating the petition in the memorandum of appeal hereby fail.
101. As regarding the third issue, the appellants submitted that the issues for determination as framed by the trial court in its impugned judgement, as framed by the 1st, 2nd and 3rd Respondents, as framed by the 4th Respondent and as framed by the 5th Respondent in pages 777-778, 415, 541 and 667, and 649-650 of the Record of Appeal respectively shows clearly that parties never raised the second issue as framed by court to wit, whether the Gazette Notice no. 10712 vol CXXIV – NO – 86 dated 09.09.2022 violate the Constitution and the Election Act, especially in terms of nomination of the 1st Interested Party (the Appellant herein) Vis a Vis the 3rd Petitioner (the 3rd Respondent herein). That the issue was never brought to the attention of the court to hear their input on the same. That the trial magistrate in the impugned judgement admitted that the Pleadings and submissions by the Petitioner did not directly touch on the appointment and nomination and eventual appointment of the 1st Interested party one Koskey Kipngetich Vincent Vis A Vis the 3rd Petitioner One Benjamin Kipkorir Koech.
102. The 1st, 2nd and the 3rd Respondents on the other hand submitted that this was as a result of selective reading of the judgement of the learned trial magistrate which resulted in a twisted and distorted impression and that the court was justified in ordering the removal of the Appellant's name from the list as the 4th and the 5th Respondents could not explain the appearance of his name in the party list.
103. The 1st, 2nd and the 3rd Respondents added that the declaration of the invalidity of the impugned Kenya Gazette number 10712 means that all the nominees in that category of the marginalized group stand invalidated and hence their nomination is null and void the Appellant included and that it is immaterial



that he was singled out and that if the court finds out that the learned trial magistrate was entitled to find that there was non-compliance with the provisions of the *Constitution* and the *Elections Act*, then the whole list of the nominees in the marginalized category remains null and void.

104. In submitting on this issue, the 5th Respondent stated that there was no single prayer seeking for the nullification of the nomination/election of any of the interested parties and there was no specificity of the precise person against whom the Petitioners sought a relief. That the learned magistrate had to frame an issue which none of the parties before him argued, and ultimately a prayer/relief which was not sought by the Petitioners indicating that the petition was not properly pleaded as an election petition and consequently, the learned magistrate had to trouble himself with framing the petitioner's case to give it the character of an election petition.
105. Upon my study of the record of appeal, I find that the issues for determination as framed by the parties in their pleadings and submissions were as follows:
106. vide a Petition dated September 16, 2022 (pages 17 to 37 of the Record of Appeal) the 1st, 2nd and 3rd Respondents at pages 36 and 37 thereof sought the following Orders:-
- (i) a Declaration do issue that the List of Nominees to the County Government of Kericho contained in Schedule (Marginalized List) one of the Kenya Gazette No 10712 VOL CXXIV – No 186 dated September 9, 2022 violates the Article 177 (1) (c) of *Constitution* of Kenya 2010 and Section 36(1) (f) and (3) of the *Elections Act*.
 - (ii) A Declaration do issue that the Kericho County Assembly as currently constituted is unconstitutionally constituted for failure to include Persons living with disabilities.
 - (ii) A Declaration do issue that the List of Nominees to the County Government of Kericho contained in Schedule (Marginalized List) one of the Kenya Gazette No 10712 VOL CXXIV – No 186 dated September 9, 2022 is unconstitutional, invalid and void for contravening the provisions of Article 177 (1) (c) of the *Constitution* of Kenya 2010 and Section 36(1) (f) and (3) of the *Elections Act*.
 - (iv) an Order of mandatory injunction directing the 4th and 5th Respondents herein to gazette the names of the 1st 2nd and 3rd Respondents herein as the nominees to the County Assembly of Kericho representing the Persons living with disabilities as require by the provisions of the *Constitution* of Kenya and the *Elections Act*, and
 - (iv) in the alternative an Order of mandatory injunction directing the 4th and 5th Respondents herein to strictly comply with the provisions of Article 177 (1) (c) of the *Constitution* of Kenya 2010 and Section 36(1) (f) and (3) of the *Elections Act* by publishing in the Kenya Gazette and nominating such number of nominees representing Persons living with disabilities as required by the law.
107. The 1st, 2nd and 3rd Respondents in their Submissions at page 415 of the Record of Appeal framed issues for determination as:-
- i. Is this court bereft of jurisdiction to hear and determine the Petition?
 - ii. Whether the Gazette Notice no 10712 vol CXXIV – NO – 86 dated September 9, 2022 violates the *Constitution* and the Election Act.
 - iii. Whether the Kericho County Assembly is currently unconstitutionally constituted for being without representatives of persons living with disability.



- iv. Is the list of nominees to the County Assembly of Kericho contained in the Kenya Gazette Notice no. 10712 vol CXXIV – NO – 86 dated September 9, 2022 unconstitutional, null and void?
 - v. Whether or not an Order an Order of mandatory injunction directing the 1st and 2nd Respondents to gazette the names of the Petitioners (who are 1st 2nd and 3rd Respondents herein) as the nominees to the County Assembly of Kericho representing the Persons living with disabilities.
 - vi. Should an Order issue directing the 1st and 2nd Respondents to strictly comply with the provisions of Article 177 (1) (c) of the Constitution of Kenya 2010 and Section 36(1) (f) and (3) of the Elections Act?
 - vii. Who is to bear costs of the Petition?
108. The 4th Respondent on the other hand framed issues for determination in their submissions at pages 541 and 667 of the Record of Appeal as follows: -
- i. What is the role and mandate of the 1st respondent with regard to the nomination of individuals to special seats in Kericho County?
 - ii. Whether the 1st respondent performed its duty and responsibility as provided by the law with regards to nomination of persons to special seats in the County assembly of Kericho.
 - iii. Whether the 1st to 17th interested Parties were validly nominated to the Kericho County Assembly.
 - iv. Whether the Petitioner has proved any of the allegations made against the 1st Respondent.
 - v. Who bears costs of the Petition?
 - vi. Whether this Honourable Court lacks jurisdiction to hear and determine this Instant Petition.
109. Finally, the 5th Respondent also framed issues for determination in their submissions at page 649 and 650 of the Record of Appeal as follows: -
- i. Whether this court is clothed with the jurisdiction to hear the Petition?
 - ii. Whether the Gazette Notice no 10712 vol CXXIV – NO – 86 dated 09.09.2022 violates the Constitution and the Election Act.
 - iii. Whether the Gender Top up Category list was prepared in violation of the Constitution and the Elections Act.
110. In the impugned Judgement, at page 777 and 778 of the Record of Appeal, the Trial Court framed issues for determination as:
- i. Whether this court is clothed with jurisdiction to hear and determine this Petition.
 - ii. Whether the Gazette Notice no 10712 vol CXXIV – NO – 86 dated 09.09.2022 violates the Constitution and the Election Act, especially in terms of nomination of the 1st Interested Party Vis a Vis the 3rd Petitioner.
 - iii. Whether the Gender Top up Category list was in violation of the Constitution.
 - iv. Should any order be issued directing the 1st and 2nd Respondents to strictly comply with the provisions of Article 177 (1) (c) of the Constitution and section 36 (1) (f) of the Elections Act,



- v. Who bears costs of the suit?
111. It can clearly be deduced from the foregoing that parties never raised the second issue as framed by court to wit, whether the Gazette Notice no 10712 vol. CXXIV – NO – 86 dated September 9, 2022 violates the Constitution and the Election Act, especially in terms of nomination of the 1st Interested Party (the Appellant herein) Vis a Vis the 3rd Petitioner (the 3rd Respondent herein).
112. It is worth noting that in the said impugned judgement at page 790 of the Record of Appeal, the Trial Court admits that indeed the said issue was not pleaded in line 7 to 23 thereof by stating that: -
- ‘Though the Pleadings and submissions by the Petitioner did not directly touch on the appointment and nomination and eventual appointment of the 1st Interested party one Koskey Kipngetch Vincent Vis A Vis the 3rd Petitioner One Benjamin Kipkorir Koech, it is my finding that the 1st Interested Party was gazette and eventually elected and sworn in as member of the county Assembly of Kericho, it was illegal as the part list submitted by the 1st Respondent dated July 27, 2022 placed the 3rd and 1st Petitioner on priority basis above the 1st Interested Party and which in my own opinion ought to have been followed by the 2nd Respondent it is therefore my finding and it is hereby ordered that ‘the 1st and 2nd Respondents (who are the 4th and 5th Respondents herein) to delete the name of the 1st Interested Party (Koskey Kipngetch Vincent), (who is the Appellant herein) and replace him with the 3rd Petitioner one Benjamin Kipkorir Koech, (who is the 3rd Respondent herein) within 7 (seven) days from February 10, 2023.’
113. It is trite law that parties are bound by their pleadings. In cited by the appellant, it was held that:
- ‘ The court itself is as bound by the Pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the Pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculations. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved: for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be denial of justice.’
114. However, from the material placed before the trial court, it is clear that the learned trial magistrate was justified to frame the issue for determination since the parties appear to have left it for the determination of the court. The parties basically made submissions urging for the determination of the issue but they failed to frame it for the Court’s decision.
115. Concerning the fourth issue, the appellant submitted that the context of the word ‘marginalized group’ as is used in Article 177(1) (c) of the Constitution and Section 7 (1) (a) as read with Section 7 (2) (b) County Governments Act infers that youths and persons with disabilities are categorized under one pot and that it is upon the subject political party to insert its ‘hand’ in the pot and draw whoever it shall lay its hand on which person will represent everyone else in that category. Hence if a youth is nominated, he will represent the interests of all other persons disadvantaged by discrimination on one or more of the grounds in Article 27 (4) of the Constitution and vice versa. It does not mean that persons with disabilities are to be prioritized over youth as proclaimed by the trial Court and that in so proclaiming, the trial court erred.



116. It was the Appellant's further submissions that the list prescribed by the Constitution as to who are classified in the marginalized group, is just that, a list and it is by no means an order of priority as wrongly insinuated by the trial magistrate. That the mischief the provision was meant to cure by so being provided was that it will be impossible for every party to have a representation of each of the listed moreso since the class is broad and relative in definition. With freedom of association being a guarantee under the Constitution, it will be difficult to force political parties to have representation of all the listed persons, hence the clustering. He continued that if the framers of the Constitution and the other legislations intended that persons with disabilities be prioritized over all others named in the Marginalized Group, nothing would have been easier than so providing.
117. The 1st, 2nd and the 3rd Respondents in citing Article 177(1) (c) of the Constitution, Section 36(1) (f) and Section 36(3) of the Elections Act on the other hand submitted that the argument that youths and persons with disability are categorized under one pot was misguided since the said provisions clearly spelt out in mandatory terms that the persons with disability should be represented.
118. The 4th Respondent in citing Article 27(4) of the Constitution of Kenya, 2010 which provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth, submitted that the youth and persons with disability fall under the same category and therefore the learned Magistrate's misdirected himself by finding that the persons with disabilities take priority over the youth. The 4th Respondent also stated that it did not deliberately discriminate against persons with disability in Kericho County Assembly as the list included persons with disability and were it not for the four slots allocated to the 4th Respondent, the said persons with disability would have been gazetted as duly elected members of the County Assembly thus the learned Magistrate erred in finding that the 4th Respondent's party list violated the provisions of Article 177 (1) (c) of the Constitution of Kenya, 2010.
119. On their part, the 5th Respondent contended that the trial magistrate erred in law in two ways. First, by rendering himself in a constitutional petition, yet he was gazetted to hear and determine an election petition. What was before him was not an election petition. Secondly, even if he had jurisdiction, the learned magistrate erred in law by making a determination that persons with disability are ranked in priority to the other special groups under the marginalized category, and on that basis, went on to nullify the election of the Appellant and substituted him with the 3rd Respondent herein.
120. The 5th Respondent while citing article 177 (1) (c) of the Constitution faulted the trial court firstly, for listing the 'marginalized category' alongside 'persons with disability' and 'youth' as other categories, secondly, in declaring that the category of 'persons with disability' is to be prioritised over the 'youth'. That the court took a narrow approach of the meaning and import of the construction of Article 177 (1) (c) of the Constitution and in so doing the court purported to interfere with a political party's discretion to prepare its party list and resolve internal disputes in line with its own guidelines hence falling into error by making a declaration that persons with disability have priority over the other categories of marginalized groups contemplated by Article 177 (1) (c) of the Constitution.
121. Upon my study of the record, at page 784-785, the learned magistrate in the impugned Judgement stated that:

' I also take note that in priority basis, article 177 (1) (c) of the Constitution as read with section 36 (1) (f), (2) and (3) of the Elections Act requires on mandatory terms that on priority basis, the marginalized group takes first priority followed by people living with disability and finally the youth in that priority order basis and that at no time therefore



the youth was to take priority above people living with disability which is the case in this petition.'

122. Article 177 (1) (c) of the Constitution provides that:

' A county assembly consists of—

- a. .
- b. .
- c. The number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
- d. .'

123. Section 36 (1) (f), (2) and (3) (8) and (9) provides that:

1. A party list submitted by a political party under—
(f) Article 177 (1) (c) of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalized group.
- (2) A party list submitted under subsection (1) (a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.
- (3) The party list referred to under subsection (1) (f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.
- 8) For purposes of Article 177 (1) (c) of the Constitution, the Commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the party.
- (9) The allocation of seats by the Commission under Article 177(1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution.

124. Article 260 of the Constitution of Kenya defines 'Marginalized Group' to mean

' A group of people who, because of laws or practices before, on, or after the effective date, were/or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)'

125. Article 27(4) of the Constitution on the other hand provides that:

' The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.'



126. I cite the case of Commissioner of the Implementation of the Constitution -Versus- The Attorney General & Others - Civil Appeal No 351 OF 2012, where the Court while interpreting the provisions of Article 97 (1) (c) which mirrors the provisions of Article 177 (1) (c) stated as follows:

' That the interpretation of Article 97 (1) (c) of the Constitution invites the application of the ejusdem Rule, the Youth and persons with disability fall in the category of the marginalized and disadvantaged and the vulnerable. Those who are sufficiently empowered to muscle their way generally speaking into inner sanctions of political and state power'

127. Also, in *Micah Kigen and 2 Others v Attorney General and 2 Others Nairobi Petition No 268 and 398 of 2012 [2012] eKLR* where the court considered the definition of special interests in the context the provisions of Articles 97(1) (b) & (c), 98 (1)(b)(c) and (d), 177 (1) (c) and 90, and observed as follows:

' Taking all these into provisions into account means that 'special interests including' must have a broad and expanded meaning to cover interests identified by the political parties and not restricted to the categories of interest or groups identified by the Constitution. It would be inconsistent with the Constitution to limit the right of any special interests identified by political parties to be represented in the National Assembly.'

The nature and extent of what constitutes special interests is defined by the party nominating the candidates and, in this respect, I agree with counsel for the Attorney General, that a reading of the Article 97(1)(c) as proposed by the petitioners would be too restrictive. The provision refers to a broader term 'interests' rather than a more restrictive term 'groups.' The nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to time. As the Constitution must be read broadly, I think reading special interests ejusdem generis with the youth, persons with disabilities and workers as contended by Ms Kilonzo would be too restrictive to take into account any special interests that may emerge in future and which the political party may consider require representation.'

128. From the foregoing, I find that the persons living with Disability and the youth are in the same category and none of them ranks higher than the other. It is therefore upon the political party which is the owner of the party list to identify the special interest in that broad sense and to nominate a person or persons falling within that special interest group to represent every other person in the said special group.

129. In the end, the Appeal is found to be without merits. The same is dismissed.

130. On the issue as to costs, I order that each party to this appeal bear its own costs.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF MAY, 2023.

.....
J.K. SERGON

JUDGE

In the presence of:

C/Assistant – Rutoh

Kirui holding brief for Mutai J. K. for 1st, 2nd and 3rd Respondent

No Appearance Ochieng for the Appellant



No Appearance for the 4th and 5th Respondent

