



**Ismail v Independent Electoral & Boundaries Commission (IEBC) & 2 others;
Clerk, County Assembly of Kajiado (Interested Party) (Election Petition
Appeal E002 of 2023) [2023] KEHC 21453 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
ELECTION PETITION APPEAL E002 OF 2023**

**FROO OLEL, J
JULY 31, 2023**

BETWEEN

MOHAMMED BASHIR ISMAIL APPELLANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

UNITED DEMOCRATIC ALLIANCE (UDA) 2ND RESPONDENT

ADEN HUSSEIN ALI 3RD RESPONDENT

AND

THE CLERK, COUNTY ASSEMBLY OF KAJIADO INTERESTED PARTY

*(Being an appeal from the whole of the judgement and decree of the
election court of Kajiado Hon. V. 1 Kachuodho (SRM) dated and
delivered on 9th February 2023 in the election petition no E002/2022)*

JUDGMENT

1. By a petition dated 20th September 2022 and filed in court on the same date, the appellant herein moved court and stated that the 2nd Respondent through its elections board invited deserving and qualified members of the party to apply, in order to be considered for nomination slots into the party list of all persons who would be nominated by the party in the county Assembly of Kajiado (Marginalized seats) and as the case may be on the basis of proportional representation in accordance with Article 90 and 177 of *the Constitution* of Kenya 2010 and Section 35 of the *Elections Act* no.24 of 2011.



2. The appellant expressed his interest and tendered his application which was considered alongside others and the 2nd Respondent did forward his name to the 1st Respondent in the party list category of special seats (marginalized). He was the parties' first preference in that category while the 3rd Respondent was appearing as number 10 in the gender top up category.
3. In a surprising turn of events on 9th September 2022, when the 1st Respondent did publish gazette notice No 10712 vol.CXXIV no.186 where the nominated members of Kajiado county assembly were published, the petitioner's name was deliberately excluded from the nomination list to represent the marginalized communities and instead it was unlawfully and illegally replaced, with the name of the 3rd Respondent. It was the petitioner's contention that this process was irregular and failed to conform to *the constitution* of Kenya, Election Act and the Election Regulations specifically on the basis that the 3rd Respondent did not live or stay in Kajiado and therefore did not qualify to represent the interest of the marginalized residence of Kajiado.
4. Further it was the petitioner's contention that by arbitrarily altering the approved list, the 1st Respondent exceeded its mandate and acted illegally by failing to notify him of the intended changes, thereby condemning him unheard. The petitioner/appellant therefore sought for several declarations in his petition namely that;
 - a. A declaration be issued that the election of special elected members to county assembly under Article 177(1)(b)(c) as read with Article 90 of *the Constitution* must conform to constitutional principles of the ethnic minorities and marginalized groups pursuant to Article 56 and 100 of *the Constitution*.
 - b. An order nullifying the nomination and subsequent gazette of the 3rd Respondent vide gazette notice no.10712 Vol.CXXIV no. 186 as nominated member of the county assembly of Kajiado in the UDA party list
 - c. It be declared that the petitioner is the 2nd Respondent duly nominated member of Kajiado county Assembly representing the marginalized communities and that he be gazetted forthwith.
 - d. An order directed to the independent electoral and boundaries commission to nominate and gazette the petitioner as UDA nominated member of county assembly representing the ethnic minority in Kajiado Assembly.
 - e. The honourable court do issue such other orders and give such other directions as it may deem fit to meet the ends of justice.
 - f. Costs of incidental to this suit be awarded to the petitioner.
5. In response to the petition filed the 1st respondent did file a replying affidavit dated 28th October 2022 sworn by one Chrispine Owiye, the director of legal services, where he stated that on 3rd June 2022, the 1st Respondent published guidelines on preparation of party lists in the Kenya gazette and two newspapers of national circulation. Thereafter on 25th June 2022, being 45 days to the general elections, the 1st respondent received a party lists from 79 political parties, the 2nd respondent list included. It was their duty to undertake a review of the said party lists to check compliance with relevant laws being section 34 of the *Elections Act* no.24 of 2011 as read together with Regulation 55 of the Elections (general) Regulations 2012 and Regulation 21 of 26 of Elections party primaries and party (lists) Regulations 2017.



6. On 15th July 2022 the 1st Respondent wrote to the 2nd Respondent highlighting areas of concern /non-compliance and required the 2nd respondent to amend its list within 7 days. On 24th July 2022, the 2nd Respondent submitted an amended list, where the petitioner was number three (3) on the said list, thereafter they published the amended list in the daily newspapers of 27th July 2022 in compliance with Regulation 54(8) of the Elections (general) regulations 2012.
7. Alongside the said publications, the 1st respondent together with political parties' dispute tribunal (PPDT) issued a joint public notice notifying the public that any aggrieved persons seeking to lodge a complaint as regards the final party list should lodge their complaints between 28th July 2022 to 6th August 2022. On 1st August 2022, the 2nd Respondent wrote to them and requested to be allowed to upload the amended party list reflecting decision arrived through internal dispute resolutions. They allowed them to do so on the 6th August 2022, even with the changes, the 2nd Respondent party list did not alter the order of priority, it maintained the petitioner's priority/placement as had been published earlier in the daily newspaper of 27th July 2022.
8. In compliance with provision of Section 36(4) of the Election Act No.24 of 2011, the 1st Respondent proceeded to allocate party list seats within 30 days from the date the elections were declared. The 1st Respondent averred that they complied with the law in picking the first two nominees in order of priority which slots the 2nd Respondent party was entitled to and the complied with provisions of Section 36(8) of the Elections Act no. 24 of 2011. The petitioner had the opportunity and forum to contest the publication but failed and/or ignored to utilize the forum provided and had only himself to blame.
9. The 2nd Respondent also filed a replying affidavit dated 16th October 2022 sworn by one Antony Mwaura, the chairperson of the 2nd Respondent national election board. He stated that the party in compliance with the 1st Respondent directives as well as Article 177 of the Constitution of Kenya and Section 34 (4) of the Election Act, submitted its general top up party list and marginalized list to the 1st respondent on 4th July 2022, which list was rejected for non-compliance. On 24th August 2022 in strict adherence to the guidelines put forth by the 1st respondent, a new party list was electronically uploaded stating the names and particulars of the nominees In the candidate registration management system (CRMS) and as a result its list of nominees to the 47 count assembly was gazetted by the 1st Respondent on 9th September 2022 vide a special issue of Kenya Gazette No.10712 Vol.CXXIX No. 186.
10. The 2nd Respondent party was only allotted two slots for nomination at Kajiado County Assembly in the marginalized group category and gender top up list and all the applicants on the said list were given equal opportunity as provided for in law and were fairly selected in a democratic manner and after public participation. This process fully complied with provision of sections 34, 35 and 36 of the Elections Act and therefore the petition as filed was frivolous and should be struck out.
11. The 3rd Respondent did file his Replying Affidavit dated 28th October 2022 and further Replying Affidavit dated 11th November 2022. He stated that he was a member of the 2nd Respondent party (UDA) and he too made an application to be nominated by the party for position of MCA in the marginalized category – ethnicity pursuant to provisions of the constitution of Kenya, Election Act and Elections (General) Regulations (2012) and the UDA party constitution. He resides and had done business within Kajiado West and Ngong for several years (since early 1990) and thus was qualified to be nominated.
12. In the list published in the Standard Newspaper on 27th July 2022, the petitioner was listed under special category (group of minorities and youth number three (3) while the 3rd Respondent was listed under special interest group ethnicity number one (1). Since the list was published the Respondent



- had not raised any issue with the 2nd Respondent's internal disputes mechanism until the final list was published in the final gazette notice of 9th September 2022. He had therefore waived his right to lodge the present complaint and could not do so by surpassing the internal dispute mechanism of the 2nd Respondent and the political parties' tribunal.
13. The 3rd Respondent reiterated that he was legally and properly nominated to represent the interest of marginalized group in terms of ethnicity since he hails from a marginalized (garre clan) of Somali ethnic group living in Kajiado County. He was qualified and met the criteria prescribed under Article 173(1) of *the Constitution* of Kenya 2010, which did not place any legal requirement that one must be a voter within a specific county to be elected/nominated in that county. In his further Replying Affidavit the 3rd Respondent reiterated most of what he had stated in his earlier filed replying affidavit and further averred that the petitioner was pushing a false narrative, which is intended to use to achieve ulterior motive to the effect that the whole list submitted by the 2nd Respondent for nomination did not meet the legal threshold in all positions and that made him unsuccessful, therefore all nominated member of the 2nd Respondent party must sink with him.
 14. The petition as filed was frivolous as it was filed after closure of the legal window for dispute resolution. The list submitted to the 1st Respondent and particularly the one for county assembly of Kajiado remained the same and no alterations were made as alleged by the petitioner, with respect to the Kajiado county assemble nominee's. The 3rd Respondent prayed that the said petition be dismissed with costs.
 15. The Interested Party did file their Replying Affidavit dated 24.10.2022 sworn by the county Assembly clerk one Leboo Saisa. He stated that as per law and procedure, his role only extends to swearing in of the elected and nominated member of the county assembly and not to determine disputes in relation to nomination by political parties and their members. The 3rd Respondent was gazetted as member of the Kajiado County Assembly under marginalised group as per gazette notice No.186 of 9th September 2022. His office was never served with any court order stopping his swearing in and he was thus duly sworn in as a nominated member of the county assembly.
 16. In response to the various replying affidavits filed, the petitioner too did swear a further affidavit dated 7th November 2022 where he took issue with matters raised in the replying affidavit of the 1st Respondent. Their duty both constitutionally and statutorily is to conduct and supervise elections of special seats members of the county assembly and nothing more. The 1st Respondent failed in their duty when;
 - a. They deliberately failed to disclose to court why it rejected the 2nd respondent initial party list.
 - b. On 2nd August 2022 just 7 days to the date of general elections the 2nd Respondent wrote to the 1st Respondent requesting for further amendments to the party list to reflect what was referred to as the outcome of its internal party dispute resolutions. The 1st Respondent unlawfully allowed them to amend its party list despite there being no evidence of resolutions arrived at nor were the proceedings of the internal dispute resolutions mechanism availed to the petitioner or court.
 - c. The 1st Respondent resubmitted its further amended party list to the 1st respondent on 6th August 2022 just 2 days to the general elections to be held on 9th August 2022 and coincidentally the date 6th August 2022 was the last day for lodging, hearing and determination of the complaints against the party list presented to them by the political parties.
 17. The petitioner further stated that as a result the final party list was never subjected to public participation as the same was not made public nor was it published in the local dailies, no minutes of



- the internal party dispute mechanism was tabled to justify the changes in the party list and all this was in clear breach and violation of the various strict election law and constitution of Kenya 2010, and a such should not be allowed to stand.
18. The certificate of compliance issued by the 1st Respondent under provision of Section 34 (6A) of the [Elections Act](#) no.24 of 2011 nominating the 3rd respondent was for all intents and purposes a nullity for its seal of approved had material breach of the statutory and regulatory framework governing the elections.
 19. When the matter came up for pre-trial directions before the Election court (trial court) the parties agreed to proceed by ways of written submissions. All pleadings filed and the submissions tendered were considered by the trial magistrate Hon. V. Kachuodho (SRM) and vide her judgment dated 9th February 2023 did find that;
 - a. This petition which is primarily a dispute between members of a political party regarding the nomination of its members to the county assembly was not presented and/or resolved by the IEBC or PPDT.
 - b. The petitioner knew or ought to have known the facts but chose through action or omission not to present the same to IEBC or PPDT, redress of the same was still available to the petitioner.
 20. The trial magistrate having found that this petition was grounded on a pre-election dispute, found that the court lacked jurisdiction and thereby downed her pen. She consequently dismissed the petition dated 16th September 2022 and ordered each party to bear their costs.
 21. The appellant herein being dissatisfied with the said judgment filed his Memorandum of Appeal dated 3rd March 2023. Therein the appellant raised nine (9) grounds of appeal namely that;
 - a. The learned Senior Resident Magistrate erred in law when she abdicated her judicial responsibility by declining the jurisdiction to hear and determine the election petition lodged before her and striking out the petition.
 - b. The learned senior resident magistrate erred in law when she misapprehended and misapplied the guiding principles of law enunciated in the Locus Classicus case of Sammy Ndung'u Waity versus IEBC and 3 others (2019 eKLR thus arriving at erroneous findings and conclusions.
 - c. In finding and holding that the names of all the 2nd respondent's nominees to county assembly of Kajiado was made available to the appellant and everyone, the learned senior resident magistrate misapprehended the evidence on record by failing to evaluate it carefully, capture and decipher the salient issues in dispute before her thus arriving at an erroneous finding and conclusion.
 - d. The learned senior resident magistrate demonstratively acted with bias and selectively when she failed to consider and take into account the uncontroverted evidence on record that the 2nd Respondent resubmitted it further amended party list to the 1st Respondent on the 6th day of August 2022, just only two days to the general elections that was held on the 9th august 20202 thereby arriving at an unfair and unjust decision.
 - e. In finding and holding that the appellant failed to exercise diligence in holding and pre-election complaint, the learned senior resident magistrate erred in law and reached an erroneous finding and conclusions when she failed to consider and take into account the uncontroverted evidence on record that it was on the 6th day of August 2022 that the 1st Respondent had set to be the



last day for lodging, hearing and determination of the complaints if any against the party list presented to them by the 2nd Respondent.

- f. In finding and holding that there was nothing that barred the appellant from challenging the competency and/or validity of the 3rd Respondent before the gazette notice no.10712 was published, the learned senior resident magistrate erred in law by failing to appreciate, comprehend and consider the appellants evidence on record.
 - g. In making reference to a political party (Orange Democratic Party) which was not a party to the proceedings in the impugned election petition as having forwarded the party list to the 1st Respondent, the learned senior resident magistrate demonstratively acted on wrong evidence thus arriving at an erroneous finding and conclusion.
 - h. The learned senior resident magistrate failed to appreciate and take into account the entire evidence placed before her thereby arriving at contradicting conclusions.
 - i. The learned trial magistrate failed to appreciate the full tenor and import of Article 90, 177 (1)(b)(c) and 2 of *the Constitution* of Kenya 2010 and section 7 of the county Government Act and Sections 34 – 36 of the Election Act, Regulations 54 – 55 of the Elections (general) regulations of 2012 as well as the (party primaries and party lists) Regulations 2017 thereby arriving at an absurd conclusion which was detrimental and prejudiced to the appellant.
22. The appellant therefore prayed that this appeal be allowed and further that;
- a. The judgment of the learned senior resident magistrate Hon. V Kachuodho dated and delivered on the 9th February 2023 be set aside.
 - b. A declaration that there was non-compliance with the election laws and regulations in the process of the nomination of the 3rd Respondent to the county assembly of Kajiado and such non-compliance substantially effect the validity of the nomination and subsequent election of the 3rd Respondent to the County Assembly of Kajiado.
 - c. The nomination of the 3rd Respondent as member of the county assembly of Kajiado under the category of marginalized be nullified.
 - d. The gazette ment of the 3rd Respondent as the nominated member of the county assembly of Kajiado under the category of marginalized be nullified.
 - e. The appellant be declared as the duly nominated member of the county assembly of Kajiado under the category of marginalized and that the 1st Respondent be ordered to gazette him as such.
 - f. In the alternative to prayer € above the 2nd Respondent be ordered to carry out fresh nomination within a period that the court may direct and forward the list to the 1st Respondent for gazette ment.
 - g. The Respondent be ordered to pay costs of this appeal.
 - h. The court may grant any other order that it may deem fit and fair to grant for the ends of justice to be met.
23. This appeal too was canvassed by way of written submissions and the parties were given an opportunity to highlight the same in court.



Appellants Submissions

24. The appellant filed his submissions on 26th July 2023 and stated that the basis of the petition before the trial court was the non-compliance with the relevant provisions of *the constitution* of Kenya 2010, the Electoral laws and regulations by the 1st and 2nd Respondents In the process of nomination of the 3rd Respondent to the county assembly of Kajiado. The process undertaken substantially effected the validity of the nomination process and subsequent election and gazettelement of the 3rd Respondent to the membership of the county assembly of Kajiado.
25. This appeal was brought pursuant to provisions of Sections 75 (a) and 75 (4) of the Election Act and Rule 34 of the Elections (Parliamentary and County Petitions Rules 2017). This court had ruled on the 3rd Respondent's preliminary objection dated 12th April 2023, and made a determination that this appeal hinged on matters of law and therefore the appellant was properly before court.
26. It was further submitted that the evaluation expected/anticipated in this instant appeal is the evaluation of the conclusion of a trial court on the basis of the evidence on record. The court had to maintain fidelity of the trial court records to find whether or not the conclusions of the trial court were reasonably drawn from the evidence presented. The appellant placed reliance on the Commentary by Professor Dickson in his book Administrative Justice and the supremacy of the law writings of 1927 and the citation of Gitarau Peter Munya versus Dickson Mwendwa Githinji and 2 others (2014) eKLR.
27. The gist of the appellant's grievances before the election court was the validity, eligibility and transparency of the nomination process and subsequent election of the 3rd Respondent to the membership of the county assembly of Kajiado. The trial magistrate posed the question of jurisdiction to hear the petition as the first issue for determination and proceeded to denounce jurisdiction by binding herself to the decision of Sammy Ndung'u Waity versus Independent Electoral and Boundaries Commission and 3 others SC Petition no.33 of 2018
28. The trial court held that the dispute before her arose from nomination of candidates which was clearly a pre-election dispute and fell squarely within the preview of IEBC as provided for under Article 88(4) (c) of *the constitution* of Kenya , Section 74 of the *Elections Act*, the internal political parties dispute resolution mechanism (IPPDRM) as provided for under Section 40(1) of the *political parties Act* and thus concluded that the court had no powers to usurp the power bestowed on the said office's.
29. After publication of the final party list on 27th July 2022 by the 1st Respondent in two of the leading local daily newspapers, the appellant herein went home knowing that his prospects of being elected as a member of the county assembly of Kajiado where high and pregnant .Unknown to him the 2nd Respondent in collusion with the 1st Respondent retreated and made further amendments to the published final party list in the wee hours to the election date (at the eleventh hour) without any public participation and scrutiny and the manipulation caused interference with the petitioners first preference in the party list
30. It was abundantly clear that the list altered by the 1st and 2nd Respondent breached and violated the strict compliance with electoral laws and *the constitution* of Kenya provisions relating to the same. The appellant was not aware of these manipulation going on as the amended list was sent to the 1st Respondent electronically on 6th August 2022, the very day of the deadline to lodge complaints. This constituted a "tragedy" that goes into the root of the election of the 3rd Respondent to the membership of the county assembly of Kajiado.
31. The appellant submitted that the jurisdiction to hear and determine a pre-election dispute was settled conclusively by the supreme court in the land mark case of Mohammed Abdi Mohammed versus



- Ahmed Abdullahi Mohammed and 3 others, Ali Mukhtar (interested party)(2019) eKLR where the court held that “in determining the validity of an election under Article 105 of *the Constitution*, or Section 75(1) of the *elections Act*, and election court may look into a pre-election dispute if it determines that such a dispute goes into 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.” That on authority of *the constitution*, in the event of the occurrence of certain “tragedies” to which the court attention could be drawn then the high court under Article 165 of *the constitution* could deal with the issues raised as *the constitution* was to be interpreted in a holistic and purposive way.
32. It we submitted that the judicial implication of the above pronouncement by the apex court was that the election court retained some “jurisdictional residuum” from which it may draw to hear and determine a pre-election disputes and question’s in certain exceptional circumstances as pronounced by the supreme court. The trial magistrate thus erred to hold that she had no jurisdiction and abdicated her judicial duty to determine the petition by misapplying and misapprehending the guiding principles of law as enunciated in the locus classicus case of Sammy Ndungu Waity versus IEBC and 3 others 2019) eKLR and therefore arrived at an erroneous finding and conclusion.
 33. The appellant further submitted that the trial magistrate erred in holding that the names of all the 2nd Respondents nominees to the county assembly of Kajiado was made available to the appellant and the public for scrutiny. No material evidence was placed before court to justify her findings as the appellant was not advised and/or made aware of the amended party list received by the 1st respondent on 6th August 2022. The appellant lost an opportunity to be heard as the list was submitted on the final day allowed to file complaints (if any) and was an affront to his right to be heard as envisaged under Article 50(1) of *the constitution* of Kenya 2010.
 34. Further the appellant submitted that the trial magistrate erred in holding and finding that nothing barred the appellant from challenging the competency and/or validity of the 3rd Respondent nomination before the gazette notice No.10712 was published. That finding was made in error as he was not aware of the changes made on 6th August 2022. The 1st and 2nd Respondent had a statutory duty to inform the appellant and the public of the changes made, which was not done. The candidate registration management system was also not opened up for public scrutiny given the sensitivity/management of the looming elections.
 35. The 2nd Respondent was not issued with the certificate of compliance nor did they submit minutes of the their internal party disputes mechanism to justify the amendment, the appellant reiterated that all these constituted ‘tragedies’ that went deep to the root of the nomination process and hence the court was rightly clothed with jurisdiction to determine this dispute, an invitation the trial court wrongly declined to take up.
 36. The appellant also faulted the trial magistrate judgement for failing to appreciate and take into account the entire evidence placed before her and thereby arrived at a contradicting finding. The appellants complaint were anchored in Article 38,81,86 and 88(4), 91,97(1), 98 (1) (b)(c) and Article 17 (1)(b) of *the constitution*. The appellant contended that he discharged that legal and evidential mandate in proving that the principles laid down in *the constitution* and electoral laws were not adhered to and the trial magistrate wrongly failed to appreciate the same. Reliance was placed on Micah Kigen and 2 others versus Attorney General and 2 others Nairobi Petition no.268 of 2012 eKLR, Kabetsi versus Anifa Kawooy and another Election Petition no.25 of 2005 and Commission for implementation of *the Constitution* versus Attorney General and 2 others civil appeal no 351 of 2012.
 37. The 3rd Respondent nomination looked at from the lens of Article 90, 171 (1)(b) (c) (2) of *the Constitution* of Kenya 2010 and Section 7 of the county government Act, failed as the nomination



was marred with fundamental irregularities and illegalities such that the 1st Respondent could not have declared him as duly nominated to represent the special interest group in the county assembly of Kajiado. The 3rd Respondent was proven to be a registered voter at Mandera County Mandera South constituency at Elwak D.E.B primary school polling station, station 01 whereas the appellant is registered as a voter in Kajiado County, Kajiado Central constituency, Lidmat ward. It had been held that only those who were registered to vote in wards within a county could qualify for nomination by a party to the county assembly. Reliance was placed on Victoria Cheruto Limo and another versus Independent Electoral and Boundaries Commission IEBC and another 2018 eKLR.

38. The appellant also submitted that the Respondents failed to tender into evidence a declaration of compliance with the nomination rules before the elections court thereby leading to the credence that they had deliberately breached electoral law which rendered the nomination and election of the 3rd Respondent to be invalid for being in breach of Section 35A of the [Elections Act](#) and Regulations 54 and 55 of the Election (general) Regulations rules. In short, the manner in which the party list was prepared and dealt with by the 1st and 2nd Respondent was not transparent at all.
39. In conclusion the appellant urged this court to find that based on the material evidence placed before court, there was non-compliance with the electoral laws and regulation in the process of the nomination of the 3rd Respondent to the county assembly of Kajiado and such non-compliance substantially effected the validity of the nomination and subsequent election of the 3rd Respondent to the county assembly of Kajiado. The said nomination should thus be revoked by the 1st respondent and/or a declaration issued quashing/revoking the 3rd Respondent membership to the county assembly of Kajiado.

1st Respondent Submissions

40. The 1st Respondent filed their submissions in opposition to this appeal on 4th July 2023 and crystallized three issues for determination before the honourable court. The issues raised were;
- a. Whether the 1st respondent executed its mandate as decreed by the law being [the constitution](#) of Kenya, [Elections Act](#) and the regulations therefrom;
 - b. Whether the court in Kajiado CMCC Election petition no.E003 of 2002 was correct in holding that it lacked the pre-requisite jurisdiction to hear and determine the matter.
 - c. Costs of the appeal.

Whether the 1st Respondent executed its mandate as decreed by law being [the constitution](#), [Elections Act](#) and the Regulations thereon

41. The 1st Respondent relied on their comprehensive Replying Affidavit filed in response to the petition and dated 28th October 2022. They had received various party list from 79 political parties including a nomination list from the 2nd Respondent. They reviewed the said list to check for compliance as demanded of it by Section 34 of the [Elections Act](#) No.24 of 2011 as read together with Regulation 55 of the Election (general) Regulations 2012 and Regulations 21 and 26 of the Elections party primaries and party (lists) Regulations 2017. The same was done forty-five (45) days before elections. The 2nd Respondent list was non-compliant and they were advised to review the same. On 24th July 2022 the amended party list was re-submitted and the same was published in the local daily newspaper on 27th July 2022.



42. The petitioner was third on the said list, published pursuant to Regulation 54(8) of the Election, (general) Regulations 2012 and Petition 147 of 2013 National Gender and Equality Commission versus Independent Electoral and Boundaries commission and another (2013). The 1st Respondent contended that its role was a supervisory one with individual parties tasked with coming up with the individual nomination lists. Article 88(4)(e) of *the constitution* only mandated the IEBC to intervene and settle disputes relating to or arising from nomination. *The constitution* at the same time denied the IEBC, the competence to adjudicate election disputes and disputes subsequent to the declaration of elections. Reliance was placed on Moses Mwirigi and 14 others versus Independent Electoral and Boundaries Commission and 5 others (2016) eKLR.
43. Article 90 (2) of *the Constitution* also stated that the 1st Respondent shall be responsible for the conduct and supervision of elections for the said seats(nominated) where prior to the said election, they ought to have confirmed that the party list issued by the various parties had;
- a. Only appropriate number of qualified candidates.
 - b. Alternates between male and female candidates.
 - c. Reflects the regional diversity, and
 - d. Reflects ethnic diversity of the people of Kenya.
44. Accordingly, the 1st Respondent after confirming that this criterion had been met, was obligated to gazette the same without altering the priority list therein. The 1st Respondent did not tamper with the said list and it was not demonstrated that specifically the list affecting Kajiado County was altered. Reliance was placed on; Ben Njoroge and another versus IEBC and 2 others (2013) eKLR.
45. The 1st respondent further submitted that the appellant was 3rd on the list published in the Kenya Gazette Vol. CXXIV no.186 gazette number 10712 dated 9th September 2022 and therefore missed out on being nominated as the 2nd Respondent party, only got two slots, which were given to the first two nominees on the submitted list. The 1st Respondent therefore denied the petitioner's allegations that they colluded with the 2nd Respondent to publish a nomination list that excluded the petitioner's names and no evidence was led to prove the same.

Whether the court in Kajiado CMCC Election Petition no.E002 of 2022 was correct in holding that it lacked the pre-requisite jurisdiction to hear and determine the matter.

46. The question of jurisdiction had been succinctly canvassed by various decision and the law was clear that jurisdiction flows either from *the constitution* or legislation or both. Jurisdiction was everything and without it the court had no power to make one more step. Reliance was placed on Owners of the motor vessel 'Lillian S' versus Caltex Oil (Kenya) Ltd (1989) KLR and Samuel Kamau Macharia and another versus Kenya Commercial Bank Limited and 2 others and in the matter of the interim independent electoral commission (appellant) Constitutional Application no.2 of 2011.
47. The 1st Respondent submitted that from a reading of the record of appeal and the proceeding before the Election court, the trial magistrate rightly concluded that the court was not clothed with jurisdiction to hear and determine and pre-election dispute in the first instance, as this power had been expressly donated to the 1st Respondent pursuant to provision of Article 88(4) of *the Constitution* of Kenya as read with Section 74 of the *Elections Act* no. 24 of 2011. The appellant was challenging the nomination of the 3rd Respondent as a member of the county assembly and it was a well-established fact the process of nomination is within the preserve of a political party. From the foregoing it was clear that the



appellant's challenge was a pre-election dispute which should have been handled as provided in law, before the appellant could move court.

48. The appellant knew that the 3rd Respondent name was amongst the nominees published in the Standard newspaper dated 27th July 2022, which gave all aggrieved parties a chance to challenge the published list through IEBC dispute resolution committee. The appellant never presented any evidence that he pursued the above mechanism nor was there any record of any complaint made by the appellant to the 1st Respondent. Further being a party driven process, any challenge should have been addressed through the political parties' dispute tribunal.
49. The appellant was to blame for his own misfortune as he failed to exhaust all laid down mechanism that were provide under the statute and the court could not usurp the power of the said offices. Reliance was placed on the citation of Speaker of the National Assembly versus Kamona (Civil Application 9 2 of 1992 (1992) KECA 42 (KLR), Sammy Ndungu Waity versus Independent Electoral and Boundaries commission and 3 others 2019 eKLR, Isaiah Gichu Ndirangu and 2 others versus Independent Electoral and Boundaries commission and 4 others, Kennedy Moki versus Rachael Kaki Nyamai, IEBC and another Kitui Election Petition no.2 of 2017 and Margaret Wanjiru Ileri and 2 others versus Monica Gathoni and 4 others Nyahururu Election Appeal no. 13 of 2018 eKLR, amongst others.
50. The appellant had misdirected himself by rushing to court without knocking on the 1st port of call, which ought to have been the IEBC dispute resolution committee or the political parties' dispute tribunal. The decision of the Honourable magistrate in Kajiado CMCC Election petition No.E002 of 2022 was thus proper and should not be disturbed.
51. On costs, the 1st Respondent submitted that Section 84 of the [Elections Act](#) was clear than an election court shall award costs of and incidental to a petition and such costs shall follow the cause. The 1st respondent prayed that they be awarded costs of this appeal.

2nd Respondent Submissions

52. The 2nd Respondent filed their submissions on 6th July 2023 and gave a factual background of the dispute. The 2nd Respondent supported the trial courts finding that the court did not have jurisdiction to hear and determined what primarily was a pre-election dispute. The dispute constituted a dispute between a member of the party and the party itself as to the validity and merit of the nomination list as was submitted to the 1st respondent. Pursuant to provision of Article 88(4)(e) of [the Constitution](#) of Kenya 2010 as read with Section 74(i) of the [Elections Act](#) 2012, IEBC was mandated to deal with disputes arising from nomination and the appellant waived that right when he failed to challenge the list published in the standard newspaper on 27th July 2022.
53. The 2nd Respondent relied on the supreme court case of Mohammed Abdi Mohammed versus Ahmed Abdullahi Mohammed and 3 others, Ahmed Ali Muktar (interested party) (2019)eKLR where the court developed the following principles to preserve the efficacy and functionality of an election court under Article 105 of [the Constitution](#). The principles developed were that;
 - a. All pre-election disputes, including this relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case maybe in the first instance;
 - b. Where a pre-election dispute has been conclusively resolved by 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.



- c. 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;
 - d. 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 elections court.
 - e. 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 petitions.
 - f. In determining the validity of an election under Article 105 of *the Constitution* or Section 74(1) of the Election Act, an election court may look into a pre-election dispute if it is a determined that such a 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 court.
54. The appellant was aware of the party list published on 27th July 2022 but opted not to raise any dispute for resolution before the party's electoral dispute resolution committee, the IEBC dispute resolution committee or the political parties dispute tribunal, the appellant thus waived his rights and could not be heard to complain. Reliance was placed in Fredrick Odhiambo Oyugi versus Orange Democratic Movement and 2 others Nairobi civil Appeal no. 199 of 2017.
55. The 2nd Respondent further submitted that the appellant was indolent. The party invited applicants to apply for party list nomination on 19th May 2022 and both the appellant and 3rd Respondent applied to be considered for nomination in Kajiado County. The party undertook the process of ranking their preferred candidates and ranked them in the order of priority for purposes of nomination. The two categories were gender top up and marginalized group category.
56. The 1st party list was rejected as it was deemed non-compliant and the 2nd Respondent redirected to re-submit another list which they did and it was published on 27th July 2022. The appellant was content with the same and thus cannot be heard to cry foul when he was not nominated. He was not vigilant and equity aids only the vigilant and not indolent. Reliance as placed on Geoffrey Muthira and another versus Samuel Muguna Henry & 1756 others (2015)eKLR.
57. The final point raised in the submission by the 2nd respondent was that the process of preparing party list was an internal party affair made in compliance provision of regulation 54 and 55 of the Election (general) Regulations 2012. It was not demonstrated that the said list was in non-compliant with the law and neither was it established that the process was irregular. The 2nd Respondent thus prayed that this appeal be dismissed with costs.

3rd Respondent Submissions

58. The 3rd Respondent also filed their submission on 6th July 2023 and submitted that the subordinate court in its decision only dealt with one issue, that of jurisdiction and proposed three issues for determination in this appeal namely that;
- a). Whether this court has jurisdiction to determine issues that were never addressed by the subordinate court.



- b). whether subordinate court correctly held that it did not have jurisdiction to determine pre-election disputes including those relating to the nomination of candidates.
- c) who will bear costs of this appeal.

Whether this court has jurisdiction to determine issues that were never addressed by the subordinate court.

59. The election court only dealt with one issue that it lack of jurisdiction and on that basis dismissed the petition. The trial court did not deal with other grounds raised in the election petition. Notwithstanding this decision by the election court, the appeal court is urged to assume jurisdiction and determine issues that were left unresolved by the election court. The 3rd Respondent submitted that in absence of a determination by the election court on an issue, no appeal can properly fall before the court. The 3rd respondent relied on the Supreme Court decision by Basil Critcos versus Independent Electoral and Boundaries Commission and 2 others (2015) eKLR. Where the court posed the question “in the absence of a judgment by the court of appeal, in which the constitutional issues has been canvassed what would this court be sitting an appeal over?”.
60. The 3rd Respondent urged that similar circumstances prevail herein and this court could not pronounce itself on issues that were not determined by the trial court. The central issue for determination was the 2nd respondent party list for Kajiado County Assembly as published on 27th July 2023. In the said list the 3rd Respondent was listed as number 1 in the marginalized seat category, while the appellant was satisfied with the listing, until the 3rd Respondent was gazetted on 9th September 2022 as a nominated member of the Kajiado county Assembly, only to raise a protest which legally he should have raised earlier.

Whether the dispute before court was a pre-election dispute (being that of nomination of candidates) and this court lacked requisite jurisdiction to hear and determine the same

61. The 3rd Respondent adopt similar submission as the 1st and 2nd Respondent and stated that the law was settled; that with regard to pre-elections disputes the same had to be resolved by the parties internal dispute tribunal mechanism, then by IEBC dispute mechanism or the political parties dispute tribunal (PPDT). The appellant failed to follow this proper channel and thus was correctly shut out by court. Reliance was placed on Republic versus The National Alliance Party of Kenya and another, expert Dr. Billy Alias Nyonge, Diana Kathi Kilonzo and another versus IEBC and others, Jared Odoyo Okello versus IEBC and 3 others Kisumu Electoral Petition no. 1 of 2013 (2013) eKLR, Francis Gitau Parsimel and 2 others versus National Alliance Party and 4 others (2012) eKLR amongst others.
62. The 3rd Respondent further submitted that the 1st Respondent published a notice and gave any aggrieved party an opportunity to challenge the party list vide the three available dispute resolution mechanism availed but the petitioner waived his rights. The appellant was aware of the listing order and did not complain. The appellant knew or ought to have known the facts forming the basis of a pre-election disputes and the same could not be used as grounds in a petition to the election court. Reliance was placed on Karanja Kabugu versus Joseph Kiuna Kairambegu Nganga and 2 others (2013) eKLR and Sammy Ndung’u Waity versus Independent Electoral and Boundaries Commission and 3 others (2019) eKLR.
63. The 3rd Respondent urged this court to uphold the principle of stare decisis in determining that it had no jurisdiction to hear and determine this appeal. The 3rd Respondent also prayed for costs



Interested Party submissions.

64. The interested parties did not file any written submissions, but, their counsel orally submitted before court that the fully align themselves with the submission's made by the 1st to 3rd respondent's. Further the role of the assembly was to receive the names of the nominated candidate's and organise for their swearing in. They had no legal role to play in the pre-election nomination process and could therefore not be faulted for carrying out its duty. Further there was no court order stopping the said swearing in of the 3rd respondent, thus he was duly sworn in. They too prayed that this appeal be dismissed with costs.

Analysis and Determination

65. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased) by L.Rs* (2001) 3 SCC 179.
66. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Joseph* AIR 1969 Keral 316
67. Having considered the entire pleadings as filed, the proceedings as contained in the record of appeal, the judgment of the trial court and written/ oral submissions put forth by the parties herein, this court is minded to note, that it has only jurisdiction to entertain this appeal on issues of law only and not on issues of fact and thus will broadly formulate the issues for determination as follows ;
- a. Whether this court has jurisdiction to make a determination on issues which were not addressed in the determination of the election court.
 - b. Whether the election court had/ or did not have jurisdiction to determine a prelection dispute especially one relating to the nomination of candidates by political parties to the county Assembly.
 - c. Who should bear costs of this suit.

A. Whether this court has jurisdiction to make a determination on issues which were not addressed in the determination of the trial court.

68. The High court of Kenya is established under Article 165(1) of *the Constitution* of Kenya and has original or appellat jurisdiction to hear matters conferred on it by legislation pursuant to Article 165(3)(e). Further under Article 164(b) the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.



69. The appellant herein has exercised his right of appeal as conferred under provisions of section 75 (1), (A) as read with section 75(4) of the *Elections Act* 2011 and rule 34 of the Elections (Parliamentary and county petitions rules 2017). The said provisions of law provide that;

Section 75(1a) and 4 of the Election Act no 24 of 2011 provides that

SUBPARA (1a)

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

Further section 74(4) of the Election Act provides that

“An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be;

- a. Filed within 30 days of the decision of the magistrate’s court; and
 - b. Be heard and determined within six months form the date of filing the appeal.
70. The appellant did file their submissions and sough that this court to reconsider the entire record of Appeal and make a finding that ;
- a. The judgment of the learned senior resident magistrate Hon. V Kachuodho dated and delivered on the 9th February 2023 be set aside.
 - b. A declaration that there was non-compliance with the election laws and regulations in the process of the nomination of the 3rd Respondent to the county assembly of Kajiado and such non-compliance substantially effect the validity of the nomination and subsequent election of the 3rd Respondent to the County Assembly of Kajiado.
 - c. The nomination of the 3rd Respondent as member of the county assembly of Kajiado under the category of marginalized be nullified.
 - d. The gazettelement of the 3rd Respondent as the nominated member of the county assembly of Kajiado under the category of marginalized be nullified.
 - e. The appellant be declared as the duly nominated member of the county assembly of Kajiado under the category of marginalized and that the 1st Respondent be ordered to gazette him as such.
 - f. In the alternative to prayer € above the 2nd Respondent be ordered to carry out fresh nomination within a period that the court may direct and forward the list to the 1st Respondent for gazettelement.
 - g. The Respondent be ordered to pay costs of this appeal.
 - h. The court may grant any other order that it may deem fit and fair to grant for the ends of justice to be met.
71. The third respondent submitted that primarily in this appeal, it was not open for the appellant to canvass and seek for this court to consider the entire grounds of appeal as filed for the reason that the learned trial magistrate only made a determination on a single issue, that being of jurisdiction to hear and determine the said petition. The trial court did not deal with the other grounds as filed in the said



election petition and therefore this court could not assume jurisdiction and determine issues which were left unresolved by the trial court. Reliance was placed on *Basil Criticos Vs Independent Electoral and Boundaries Commission & 2 others* (2015) eKLR, where the supreme court posed the following question?

“In the absence of a judgment by the court of appeal, in which constitutional issues have been canvassed, what would this court be sitting on appeal over?”

72. In *Nyutu Agrovet Limited Vs Airtel Networks Kenya Limited ; Chartered Institute of Arbitrators – Kenya Branch (Interested Party)* (2019) eKLR, the supreme court did consider the question if the court of Appeal had jurisdiction to hear a determination arising from the high court regarding Arbitration matters in light of Section 35 of the *Arbitration Act* and noted that ;

[80] The Court of Appeal, it is now clear, never determined the substantive complaint by Nyutu as to whether the learned Judge properly applied his mind to the grounds for setting aside an award under Section 35 of the Act. We have clarified the circumscribed jurisdiction of the Court of Appeal in that regard. Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to that Court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo J, the “journey was a false start”.

73. In *Mohammed Abdi Mahamud Vs Ahmed Abdullahi Mohammed & 3 others; Ahmed Ali Muktar (Interested party)* 2019 eKLR. It was held that;

(At 204) In exercising its appellate jurisdiction, the issues of contestations must involve questions that were subject of determination by the court whose decision is being impugned. The supreme court of India in the case of *Bolin chetia Vs Jogadish Bhuyan & others Appeal civil case No 7376 of 2003* (11th March 2005) thus correctly captured the meaning of the term “appeal” in the following words;

“ In its natural and ordinary meaning, an appeal is a remedy by which a cause determined by an inferior forum is subjected before a superior forum for the purpose of testing the correctness of the decision given by the inferior forum.”

(At 205) I agree and it follows that, if there is no determination by the court of Appeal on the issue which is now before us, how then will the correctness of the “decision” by the superior court be tested with regard to the exercise of our jurisdiction under Article 163(4)(a) of *the constitution* , how would a litigant fault the court of Appeal on the basis of a particular interpretation or application of *the constitution*”

74. The clear import of the three decisions of the Supreme Court (which this court is bound to follow on the basis of stare decisis), is that on appeal, the appellate court, will apply its mind and make a determination on the issues upon which the trial court applied its mind and made a definite conclusion. Where there were issues before the trial court, upon which no decision was made, the appellate court, would not assume jurisdiction over the undetermined issues and the right cause of action upon



conclusion of the appeal, if the appellant is successful was to send the file back for retrial before another judicial office with competent jurisdiction to re handle the same.

75. I do find merit in the 3rd respondent's arguments put forth that the trial magistrate only made a determination on the point touching on jurisdiction of the court to handle a pre-election dispute and that is the sole issue falling for determined in this appeal.

Whether the trial court had/ or did not have jurisdiction to determine a pre-election dispute especially one relating to the nomination of candidates by political parties to the county Assembly.

76. The parties herein did agree to have the election petition before the Honourable magistrate determined by way written submissions, which the court considered and made a determination. The trial court in its considered wisdom did chose to deal with the primary issue of jurisdiction for obvious legal reasons and in her considered judgement, she upheld the respondent's arguments that this dispute was;

- a. The petition is primarily a dispute between members of a political party regarding the nomination of its members to the county assembly.
- b. The disputed nomination was not presented and/or resolved by IEBC or PPDT.
- c. The petitioner knew or ought to have known the facts but chose through action or omission not to present the same to IEBC or PPDT, redress of the same still being available to the petitioner.
- d. Having found the petition was grounded on pre-election dispute; the court has no jurisdiction, downed her tools and consequently dismissed the petition dated 16th September 2022.

77. The appellant submitted that the jurisdiction to hear and determine a pre-election dispute was settled conclusively by the supreme court in the land mark case of Mohamed Abdi Mahamud versus Ahmed Abdullahi Mohammed and 3 others, Ali Mukhtar (interested party)(2019) eKLR where the court held that "in determining the validity of an election under Article 105 of *the Constitution*, or Section 75(1) of the *elections Act*, and election court may look into a pre-election dispute if it determines that such a dispute goes into 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." That on authority of *the constitution*, in the event of the occurrence of certain "tragedies" to which the court's attention could be drawn, then the high court/election court under Article 165 of *the constitution* could deal with the issues raised as *the constitution* was to be interpreted in a holistic and purposive way.

78. It we submitted that the judicial implication of the above pronouncement by the apex court was that the election court retained some "jurisdictional residuum" from which it may draw powers to hear and determine a pre-election disputes in certain exceptional circumstances as pronounced by the supreme court. The trial magistrate thus erred to hold that she had no jurisdiction and abdicated her judicial duty to determine the petition by misapplying and misapprehending the guiding principles of law as enunciated in the locus classicus in the case of Sammy Ndungu Waity versus IEBC and 3 others 2019) eKLR and therefore arrived at an erroneous finding and conclusion.

79. The appellants complaint in summary were that the validity, eligibility and transparency of the nomination process and subsequent nomination of the 3rd respondent to the membership of the county assemble of Kajiado was irreparable flawed for the following reasons;

- a. After publication of the final list on 27th July 2022 in the local media, unknown to the appellant, the 1st to 3rd respondent conspired and on 6th August 2023 altered/amended the final list of nominees to the county Assembly. This was on the eve of the election and on the last day



allowed by law for the appellant to lodge his complaint with the IEBC dispute's committee and/or the PPDT thereby denying him his constitution right to challenge the same under Article 50(1) of *the constitution* of Kenya 2010.

- b. The said process to alter the list was done in contravention of the law as the 1st respondent did not issue the 2nd respondent with the mandatory certificate of compliance nor did the 2nd respondent attach the minutes of the internal party disputes mechanism used to justify the amendments and that went to the deep root of the nomination process.
 - c. The trial magistrate was also faulted for failing to appreciate and take into account the entire evidence placed before her, especially the fact that the appellants complaints were anchored in Article 38,81,86 and 88(4), 91, 97(1) and 98(1),(b),(c) of *the constitution* of Kenya and Section 7 of the county Government Act. The appellant stated that he discharged the legal and evidential burden by proving that the nomination process did not adhere to these principles.
 - d. The 3rd respondent's nomination breached the clear provisions of law and should have been declared invalid for being in breach of section 35A of the *Elections Act* and Regulation 54 and 55 of the Elections (General) Regulations rules.
 - e. The 3rd respondent was a registered voter at Mandera county south constituency at Elwak D.E.B primary school polling station, station 01 and therefore did not qualify to be nominated by the 2nd respondent party within the county Assembly of Kajiado.
80. In response, the 1st to 3rd Respondents were clear that the process to nominate the 3rd respondent was done transparently and in an open manner, culminating in the nomination list being published in the daily newspaper of 27th July 2022. The appellant had a window to challenge this list through, the party internal dispute mechanism, IEBC resolution committee and/or through the PPDT, between the said publication and the last day on 6th August 2022 but in his wisdom failed to do so and thus could not be heard to complain about the subsequent nomination of the 3rd respondent to the county Assembly.
81. That it was true that the 2nd respondent on 1st August 2022 did request for alteration of the party list after resolving complaints raised to reflect the decision arrived through internal party dispute resolution. On 6th August 2022 they were allowed to do so by the 1st respondent, but notably the changes effected did not alter the order of priority and placement with respect to the persons nominated for Kajiado county assembly. In compliance with section 36(4) of the *elections Act*, the 2nd respondent party was allocated two (2) seats in order of priority and the 3rd respondent nomination went through and he was duly Gazetted by the 1st respondent on 9th September 2022 vide a special gazette notice No 10712 Vol. CXXXIX NO 186.
82. The dispute was undoubtedly a pre-election dispute between a party member and the party and concerning the nomination process of individuals to the county assembly. The appellant thus misdirected himself by rushing to court without knocking on the first port of call which should have been the IEBC dispute's tribunal and the PPDT which were the right forum to deal with the dispute raised pursuant to provisions of Article 88(4)(e) of *the constitution* of Kenya and Section 74(1) of the *Elections Act* 2012. The petition was misconceived and thus was rightly dismissed.

General election principles

83. Article 10 of *the Constitution* of Kenya provides the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*; enacts, applies or interprets any law; or makes or implements public policy decisions.



84. The core of the constitutional structure of elections in Kenya is Article 38 on the right to vote. It is for this reason that Article 81 and 86 specifically amplifies the principles under Article 10 as the general principles of electoral system in Kenya. Article 81 (1)(e) of *the Constitution* of Kenya provides that the electoral system shall comply with the following principles— (e) free and fair elections, which are— ... (iv) transparent; and (v) administered in an impartial, neutral, efficient, accurate and accountable manner.
85. From the above constitutional principles, the Court is enjoined to determine whether the nomination of the 3rd respondent to the county assembly of Kajiado, was conducted in compliance with the law and whether it was simple, accurate, verifiable, secure, accountable and transparent. The Supreme Court in respect to these principles in Presidential Petition No.1 of 2017 the following to say;
- (237) It is important to note that the terms “simple, accurate, verifiable, secure, accountable and transparent” engrafted into these provisions, are the self same constitutional principles in Articles 10, 38, 81 and 86. We must in that context now proceed, to determine whether, the 1st respondent, conducted the presidential election in accordance with the principles laid down in *the Constitution* and the law.
86. Though this appeal concerns a nomination process, just like an election, nomination of candidates also involves a process and is not an event. For an election/nomination to meet the Constitutional Principles set under Article 81 of *the Constitution* of an election that is free and fair; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner at every stage from applying to the party to be considered for nomination to gazettement of the nominees to the county assembly must be constitutional compliant. This position was appreciated Emukule J in *Karanja Kabage vs. Joseph Kiuna Kariambegu Nganga & 2 others* [2013] eKLR where the Learned Judge expressed himself as hereunder:
- “ Articles 88(4)(e) and Sections 74(1) and 110(1) of the *Elections Act*, and paragraphs 6 and 15 of the Code of Conduct are all provisions which regulate the conduct of public elections. In construing such elective statutes, no single provision would be read or construed in such a way as to render meaningless or absurd any other statutory provision. As these provisions flow one to the other, they shall be considered in *pari materia* and as they relate to the same subject matter they must be read together and applied harmoniously and consistently. This court’s jurisdiction under Article 105(1)(a) of *the Constitution* is to determine the validity of the election of a Member of Parliament, National Assembly or Senate not nomination to contest or vie for an election post. However an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process upto the declaration of results.
87. In *Republic vs Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & another* (supra) stated that Justice Odunga (As he was then) stated that;
- “What the above discourse means is that general elections are a process as opposed to a one-off event. All the processes leading to the elections are subject of scrutiny and may well be grounds for nullification of elections. Therefore, to avoid such an eventuality, the



preparations leading to the elections must meet the minimum standards articulated in both *the Constitution* and the law.

(113.) In this case, as I have shown hereinabove, election is a process and not an event. Every stage of the electoral process is important and failure to adhere thereto may, depending on the weight attached to it warrant the nullification of the election. That being the position, the failure by the Respondent to comply with Regulation 3 of the Regulations may well be raised as a ground in a subsequent petition. It will be upon the Court before which such an issue is raised to determine the weight to be attached to it.

88. Finally in *Kabatsi Vs Anifa Kawooya & Ano Elelction Petition No 25 of 2005* the court held that;

“An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law it affects the quality of the electoral process and subject to the gravity of the flow it is bound to affect the election’s results..... if any declaration is invalid by reason of non-compliance with the law it affects the quality and results of the electoral process.”

89. I have considered the above principles and the judgment of the trial court. There were two aspects to the appellants challenge. He challenged the 3rd respondent’s nomination on the basis of various grounds of fact and law. I do find that the trial magistrate did not err when she made a finding that the appellant had a window of opportunity from 27th July 2022 to 6th August 2022, which period the appellant should have been diligent enough and used the said period to file any objection to the 3rd respondent’s being placed as Number one in the nomination list of the 2nd respondent party and him being placed at Number three, on the said party nomination list. This was an issue of fact which did not change and had this appeal been based only on this fact it would have fallen flat on its face.

90. But be that as it may, the 1st and 2nd respondent’s did make changes on the said nomination list and undertook a process which the appellant submitted failed to comply with Article 50 (1), 81, 86,90, 177,171(1),(b) (c), (2) of *the constitution* of Kenya 2010, section 7 of the county Government Act, sections 34-36 of the *Elections Act*, Regulations 54-55 of the Elections (General) regulations of 2012, as well as the (Parties Primaries & party lists) Regulations 2017 and clearly articulated instances of non-compliance with the law which in his opinion vitiated the entire nomination process. Unfortunately, trial magistrate did not consider these issues as raised.

91. The supreme Court in the case of *Mohammed Abdi Mohamud versus Ahmed Abdullahi Mohamad and 4 others, Ahmed Ali Muktar (interested party) (2019) eKLR* had the following to say;

“(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;

- a. 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.
- b. 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.

- c. 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.
- d. 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.
- e. 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.
- f. 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 what dispute before the election.”

92. The apex court went on, at paragraph 80, to expressed itself as follows;

- [80] On the basis of the foregoing reasoning, we find and hold that both the election court and the court of appeal wrongly assumed jurisdiction, in determining what a pre-election dispute clearly, regarding the academic qualifications of the petitioner. However, as our principle number (v)(above) stipulates, a petitioner’s inaction does not prevent him from presenting the dispute for resolution before 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*.
- (81) This principle as read with principle (vi) means that at any time, the judicial process is never closed. It also preserves the authority of *the constitution*, in the event of the occurrence of certain “tragedies”, to which our attention was drawn. For example, what would happen if a person who is not a citizen of Kenya were to slip through IEBC vetting process and become elected M.P, Governor, or even, President? Or what happens if a person who is not qualified as provided for by *the constitution*, slips through the IEBC vetting process and gets elected? The answer lies in the two principles. In one instance, where the tragedy was not known, the Election court could assume jurisdiction. In other instance, where the tragedy was known, the high court takes over under Article 165 to preserve *the constitution* . This interpretation framework is



not only holistic and purposive, it is also forward looking. After all, whatever can slip through the IEBC vetting process, can also slip through the election court petition processes! At the end of the day, the constitutional pre-election dispute resolution mandate of the IEBC is respected, the efficacy of the Election court is preserved, and above all, the Authority of the constitution is intact! (emphasis added)

93. I do also hold that nomination process just like an election process is a process and not an event. It was incumbent upon the 1st and 2nd respondents to adhere to the strict provisions of the constitution and various Election laws, at every stage of the nomination process and failure to adhere thereto may, depending on the weight attached to it would warrant the nullification of the said nomination.
94. The lack of public participation and adherence with other relevant provisions of law as regards the nomination process as pointed out by the appellant opened a window of “jurisdictional residuum” through which the appellant could challenge the said process as these “other tragedies” warranted a review by the court, especially given the fact that the same were affected on 6th August 2022, the very last date when disputes could be lodged at IEBC disputes tribunal and PPDT. The appellant was essentially locked out without being heard and thus had no option but to approach court to be heard.
95. It is thus my finding that given the special circumstance and facts of this appeal, even though the dispute herein is clearly a pre-election dispute, which normally would be settled by IEBC disputes tribunal or PPDT, the court erred by failing considering the legal issues raised by the appellant.

Disposition

96. The normal fallback position with regard to this kind of appeals would have been that this matter is referred back to a new magistrate (gazetted to hear election petitions) to reconsider the petition afresh.
97. The parties hereto are however reminded of the legal position in law espoused Martha Wangari Karua Vs Independent Elections and Boundaries Commission & 3 others (2019_ eKLR, where the supreme court held that the time set in law for hearing and determination of election matters, does not stop running due to the existence of an appeal and once the six months period for hearing an election petition lapsed, time could not be extended. The court had this to say;

“The need to adhere to the constitutional timeframes was also emphasised in the cases of Hassan Ali Joho & Another Vs Suleiman Said Shahbal and another Sc petition No 10 of 2013;(2013) eKLR and Evens Odhiambo Kidero & 4 others Vs Ferdinard Ndungu Waititu & 4 others S.C petition No 20 of 2014; (2014) eKLR, in that regard, we still hold the position that the period provided for the settlement of electoral disputes cannot be extended by any court and we see no reason to depart from that position in this or any other case.”

“It is indeed unfortunate that in remitting the matter back to the high court after determination of the prior appeal, the court of appeal appeared to have disregarded the courts decision in Lemanken Aramat vs Harun Maitamei Lempaka & 2 others. Had the Appellant court applied the precedent in that case, it would not have made an open-ended order of remission as it did.”

98. The appellants case is thus time barred and cannot be referred back to the magistrate’s court for fresh hearing.



Who should bear the costs of these proceedings?

- 99. The court does sympathise with the petitioner who, without any fault of his own, has been locked out of the seat of justice. The parties have engaged in a full judicial process and spent considerable resources in prosecuting and defending this matter. While the general rule is that the successful party ought to be paid costs in these proceedings no party can claim success. See Paul Chen- Young Vs Ajax Investments Ltd & others Jamaica supreme court civil Appeal No 39 of 2006 Para 205 and 206.
- 100. Each party will thus bear their own costs in the proceeding herein and the previous proceedings before the election court.

Orders

- 101. Flowing from the above determination, I do make the following orders
 - a. This appeal is hereby dismissed
 - b. Each party to bear their own costs in the appeal.
 - c. Orders Accordingly

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JULY 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of July, 2023.

In the presence of;

-for Appellant
-for 1st Respondent
-for 2nd Respondent
-for 3rd Respondent
-for Interested Party
-Court Assistant

