



REPUBLIC OF KENYA



**Ongeri & another v Nyamweya & 7 others (Election Petition Appeal
E004 of 2023) [2023] KEHC 21836 (KLR) (31 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
ELECTION PETITION APPEAL E004 OF 2023
FG MUGAMBI, J
AUGUST 31, 2023**

BETWEEN

NANCY NYANCHOKA ONGERI 1ST APPELLANT

JOSEPHINE NYABONYI MARIONGA 2ND APPELLANT

AND

MANSON NYAMWEYA 1ST RESPONDENT

BENJAMIN ABUGA GISORE 2ND RESPONDENT

THE NATIONAL CONGRESS PARTY 3RD RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH
RESPONDENT**

LILIAN ANYANGO 5TH RESPONDENT

HALIMA HUSEIN KAHIIYA 6TH RESPONDENT

GRACE BOSIBORI ONGWAE 7TH RESPONDENT

ALFRED ASANDE ONGORO 8TH RESPONDENT

JUDGMENT

Introduction

1. Before the Court is a Memorandum of Appeal filed on 20th March 2023 against the decision of Hon C.A. Ocharo delivered on 7th March 2023 in Election Petition No. E007 of 2023.
2. The appeal challenges the findings of the Learned Magistrate on the 3rd respondent's party nominations. The grounds are that the 5th to 8th respondents are not members of the 3rd respondent



and that the 5th, 6th and 8th respondents were not properly nominated in their respective capacities as their suitability did not conform with the spirit of article 177 of the Constitution.

3. Further, the 1st appellant was dissatisfied with being placed in the marginalized category while the 2nd appellant was dissatisfied with the priority she was ranked in the gender top-up category. The nomination of the 8th respondent was also questioned because he was not a voter in Kisii but in Machakos County. He was also not a person living with disability even though he had been nominated in that category.
4. The appeal is premised on 12 grounds of appeal. Out of these grounds, the appellants framed the following issues for determination by the court:
 - i. Whether the nomination process of the 5th to 8th respondents was conducted as per the Constitution and the written law.
 - ii. Whether the appellants proved the 5th to 8th respondents are non-members of 3rd respondent.
 - iii. Whether the 8th respondent qualified to be a nominated member in the Kisii County Assembly.
 - iv. Whether the 4th respondent effected its oversight role in the nomination.
 - v. Who is to bear the costs of the petition?

Parties' submissions

5. The appeal was canvassed by way of written submissions upon which the parties were also heard. I will briefly highlight the submissions of the parties in response to each of the issues raised by the appellants.

Whether the nominations of the nominees and the 5th to 8th respondents were conducted as per the Constitution and the written law:

6. The appellants filed their written submissions on 19th May 2023 through the Firm of Nyagaka S.M. & Co Advocates. Counsel Mr. Nyagaka and Mr. Ondieki also made oral submissions on behalf of the appellants. They confirmed that the appellants are registered voters in Kisii Constituency and life members of the 3rd respondent since 2017.
7. They contend that as a result of their efforts, time and resources towards party campaigns in the run up to the 2022 general elections, their respective ward aspirants from the party clinched the MCA titles. They contrasted this to the 5th to 8th respondents' case, who did not have any MCA aspirants from the party winning in their respective wards, a position they say remains uncontroverted.
8. For these reasons, the appellants state that they qualified to be listed in the gender top-up list and to be ranked higher than the 5th and 6th respondents since they joined the party way before the 5th to 8th respondents. They take issue with the process by which the 5th and 6th respondents found themselves in the gender top-up list and the 8th respondent in the marginalized list.
9. In particular, the appellants state that no interviews were carried out to establish the appropriateness of the placements of the respondents in their respective categories. The 5th respondent, who is from the Luo tribe was given priority without consideration of the fact that Kisii county is dominated by people from the Abagusii tribe.
10. The appellants were also aggrieved by the fact that the 1st appellant was wrongfully listed in the marginalized category. Having been born and brought up in Kisii, it was her case that she did not face discrimination as anticipated in article 27(4) of the Constitution and she was therefore wrongly listed.



11. The appellants stated that placing the 5th and 6th respondents and the 1st appellant in the wrong categories denied the 1st appellant a chance to be nominated and placed her at a lower rank compared to previous elections, where she was ranked 2nd in the gender top-up list. They produced a document dated 7th July 2022, allegedly made by the party, which had placed the 1st and 2nd appellants at positions 2 and 1 respectively, in the gender top-up category. They pray that this court finds that the document dated 7th July 2022 and produced by the appellants is a document of the 3rd respondent as the 3rd respondent had failed to produce evidence that the document was a forgery.
12. The appellants are also aggrieved by the finding of the Learned Magistrate that there were no laws barring family members from taking up political seats, which the appellants term as nepotism. They disagree with the Learned Magistrate's finding and submit that this was a breach to article 91(d) and article 73(2)b of the Constitution.
13. The evidence of the family relations of the 5th and 7th respondents with the 1st and 2nd respondents was provided by the testimony of the 1st appellant and corroborated by the Chief's letter which was produced as an annexure NNO-5. Although the 2nd respondent denied the information contained in the Chief's letter, the close family relationship was confirmed by the evidence of the 5th respondent who testified that the 2nd respondent is her spouse. The 7th respondent also testified that she is related to the 1st respondent.

Response by the 1st, 2nd and 3rd respondents

14. In response to the petition, the 1st to 3rd respondents filed their submissions dated 16th June 2023 through Ms. Gogi & Associates. Counsel Mr Achoki in oral submissions began by pointing out that the appellants had relied on irrelevant provisions of the law at the trial court, and at the appeal stage introduced new sections of the law including articles 97, 98, 177, 177(1)(b), 81 and 86 of the Constitution. They asked this Court to disregard these new sections since the appellants are on a fishing expedition having failed to highlight which articles of the Constitution were infringed by the respondents.
15. Counsel further stated that the appellants had failed to demonstrate that the nomination of the respondents was marred with irregularities and the particular irregularities.
16. The 2nd respondent dissociated himself with the document of 7th July 2022 and averred that the same was a forgery. He called to question the manner in which the letter was drawn including use of an old letter head. It was his case that the burden of proving that the document emanated from the 2nd respondent was on the appellants and they failed to discharge it as required under section 107 to 109 of the Evidence Act. The appellants did not bring any evidence to show that the 2nd respondent gave the letter to the 1st appellant other than her oral testimony.
17. These respondents did not deny the allegations of family ties but in their defence pointed out that there is no law or constitutional provision barring family members from working together and seeking political positions. They term such allegations as misfounded and misleading.
18. Counsel defended the party lists and submitted that the top up list was reserved for marginalized groups and included both male and female nominees. It was argued that the list presented by the 3rd respondent to the 4th respondent was correctly drawn having provided for the different categories and prioritization. It was noted that the 1st appellant admitted that when she made the application to be considered as a nominee she never specified in the application which particular category she wanted to



be considered. It was therefore the 3rd respondent's duty to place her in a position where she was best suited and as such the 3rd respondent cannot be faulted.

19. In any case, the respondents argue that if the appellants were dissatisfied with the party list, the objection should have been filed with the 3rd respondent and subsequently with the 4th respondent but the same was never raised. The appellant failed to resolve the issues herein by way of internal dispute resolution mechanism (hereinafter IDRМ) and as such the petition could not be determined by the trial court. The appellants' allegation that the office of the 3rd respondent was closed has not been proved.
20. Counsel in submission confirmed that the appellants had filed a complaint before the Political Parties Dispute Tribunal (hereinafter PPDT) vide Kisii Complaint No. E037 of 2022 and Kisumu Complaint No. E038 of 2022. They were struck out on the grounds that the petitioners had not produced any evidence to prove that they had attempted to utilize the IDRМ. The appellants never appealed against the ruling and instead filed the election petition in the election court.
21. The respondents submit that the appellants, having not properly exhausted the required resolution channels, had no locus to institute the lower court petition that is the subject of this appeal. Although the appellants were advised to try and invoke the party dispute resolution process with the 3rd respondent, no proof was presented before the trial court of any such attempt.

The 4th respondent's response

22. Ms. Musebe holding brief for Mr. Biwott highlighted the 4th respondent's submissions which were filed on 15th June 2023 through the Firm of Biwott & Mugeni Advocates. Counsel highlighted the provisions of article 88 of the Constitution which establishes the 4th respondent, article 90(2) which provides for its roles in relation to party list seats as well as articles 100, 177 and 232 of the Constitution.
23. The 4th respondent further relied on the provisions of sections 31, 34, 35, 36 and 37 of the Elections Act and cited the case of Moses Mwicigi & Others V Independent Electoral and Boundaries Commission & Another, [2015] eKLR. The gist of the defense by the 4th respondent was that its role in the nomination process was limited to receipt of party lists from political parties and that it was not involved in the nominations. It was up to each political party to ensure that the list was in accordance with the Constitution and the party's constitution.
24. In any case, the respondents submit that the appellants were aware of the list that was forwarded to the 4th respondent and they had an objection to the list but they were at pains to explain any steps taken after their complaints to the PPDT were thrown out.
25. It is the 4th respondent's case that nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party and that such a role has been left entirely to the political parties. The 4th respondent argues that the reliefs sought in the petition could not be granted for failure to utilize IDRМ and the PPDT forums.
26. In further opposition to the petition, it was submitted that throughout the hearing of the petition, the appellants did not refer to the claims that are now leveled against the 4th respondent as outlined in the petition before the Court. The 4th respondent's submission is that the appellants appeal is an attempt to have a second bite of the cherry and as such, the petition should be dismissed.



Response by the 5th to 8th respondents

27. The 5 to 8th respondents in supporting their nominations submit that they met the qualifications provided for under article 193 of the Constitution since they were female, they belonged to minority groups, they were registered voters and they satisfied the education, moral and ethical requirements under the Constitution. For these reasons it is their case that they were rightfully nominated by the 3rd respondent under either of the categories.
28. With respect to the party document dated 7th July 2022, the respondents aver that the same was not a primary document and as such was inadmissible in evidence. It was further submitted that the finding of the trial court on the issue was a factual one and that this court had no reason to disturb that finding.
29. On the question of the family ties between the respondents, it was submitted in agreement with the trial court that there is no law which prohibits family members from actively participating politics and being nominated for such nominative slots because they have their relatives in the same political party. This is further considering that it is the County Elections Board that received the nominations and made recommendations which were considered by the National Elections Board.
30. The respondents note that there were mechanisms provided for under rule 5.1.3 of the 3rd respondent's party nomination rules for lodging a complaint, which the appellants failed to do. The respondents therefore pray that the petition should be dismissed. In any case, the respondents submit that the appellants had not discharged the burden of proof to show that there was anything unconstitutional about the respective nominations.

Whether the 5th to 8th respondents are non-members of the 3rd respondent and whether the 5th to 8th respondents applied for nominations.

31. It is the appellants case that although the 5th, 6th and 8th respondents testified that they are life members of the 3rd respondent, no proof was produced to support their party membership or to show that they had applied for nominations through the 3rd respondent. They took issue with the finding of the Learned Magistrate that the appellants had the duty to prove that the respondents applied for nomination, pursuant to section 107 of the Evidence Act.
32. The appellants instead argue that since the respondents never applied to be nominated, there was nothing for the appellants to show save for their testimonies. For them to qualify for nomination, they ought to have been members of the 1st respondent as required by section 34(8) of the Elections Act, which they were not. They reiterated that the burden was on the 5th, 6th and 8th respondents to produce their applications if indeed there were any, citing section 108 of the Evidence Act. The appellants stated that the respondents were not even conversant with the party application procedure.

Response by the 5th to 8th respondents

33. The respondents argue that the application of the 5th to 8th respondents for nomination is a factual issue which this court lacks jurisdiction to delve into. In any case, the respondents averred that the appellants had failed to discharge the burden of proof to demonstrate that the 5th to 8th respondents were not members of the 3rd respondent as required by law. The respondents added that the 5th to 8th respondents had demonstrated at the trial court how verification of membership of any member in a political party is conducted.
34. The respondents were cleared by the Office of Registrar of Political Parties and by the 4th respondent before the party list was published in the newspapers. Since the appellants have not proved that there



was any wrong doing by these two public bodies, the 5-8th respondents implore this court to find that indeed, what ought to have been done should be presumed as properly done in the absence of proof to the contrary.

Whether the 8th respondent qualified to be a nominated member in the Kisii County Assembly.

35. The appellants submit that this issue though raised during trial, was never considered by the election court. The 8th respondent testified that he was nominated into the county assembly in the marginalized category and that he possessed a very unique training in disability but he was not a disabled person. He was not a voter in Kisii but Machakos County, an issue that the 8th respondent did not dispute.
36. The appellants take issue with the submission by the 8th respondent that the law only required him to be a registered voter in Kenya but not necessarily a registered voter in Kisii county. Relying on articles 90 (2)(c) and 177(1)(A) of the *Constitution*, the appellants submit that the law does not require the county assembly to reflect the regional and ethnic diversity of the people of Kenya. Under the circumstances, the 8th respondent ought to have been nominated in Machakos County. Finally, it was submitted that the training of the 8th respondent, which was in any case unsubstantiated, did not qualify him to be a marginalized person as he is an outsider and represents no special interest at all.

Response by the 8th respondents

37. In his defense, the 8th respondent submits that the qualification for nomination of a member of county assembly is provided for under article 193 of the *Constitution*. Along this threshold, the 8th respondent argues that the appellants have failed to prove that the 8th respondent was not eligible for nomination. The respondent does not deny that he is not a registered voter in Kisii. Instead, he referred this Court to the decision of *Esther Okenyuri Anyieni v Mokumi Edmond Anthony & 3 Others*, [2018] eKLR where the Court stated as follows:

“Both Article 193 and Regulation 15 of the Election (Party Primaries and Party Lists) Regulation 2017 have no such requirement that one must be a registered voter in the place where they are applying to be nominated and therefore the nomination application form by Jubilee Party cannot supersede the *Constitution* and written laws since the only requirement provided for under the law is that, one must be a registered voter and the respondent has met this requirement.”

38. The 8th respondent further submits that the appellants have not proved what provision of the law was not complied with in his nomination and especially since the 3rd respondent presented the list to the 4th respondent and upon confirming that the list was compliant with the law, it proceeded and approved the party list. The respondent reiterated like the other respondents, that the appellants had 2 opportunities to raise their complaint, before coming to this Honourable Court which they failed to do.

Whether the 4th respondent effected its oversight role in the nomination.

39. The appellants agree that the preparation of party lists is a reserve of political parties. They however state that the 4th respondent has a responsibility to oversight the political parties in the preparation of party lists to ensure compliance with the law and the party’s own rules. The 4th respondent had the power to require the party to review and amend its party list to ensure conformity with the law and the Commission’s guidelines but failed to do so.



Response by the 4th respondent

40. The 4th respondent's response to this limb of the appeal is as highlighted in the first limb. The 4th respondent also stated that it discharged its mandate as provided for by law, a point that was supported by the trial court when it found that the 4th respondent was right in publishing the nomination list. The trial court further held that it was the appellant's role and not the 4th respondent's, to prove that the respondents were not members of the 3rd respondent.

Who is to bear the costs of the petition?

41. The 4th respondent submits that costs follow the event and that it should be awarded costs for the application having shown by way of its written submissions that the petition against it is unmerited.

42. The 5th to 8th respondents refer the Court to section 84 of the [Elections Act](#) and rule 30 of the Elections (Parliamentary and County Election) Petition Rules, 2017. While noting that the issue of costs is discretionary, the respondents submit that they are entitled to costs because the cause of action that is being appealed against ought to have been raised before the PPDT and IEBC. They argue that the appellant ought to pay the costs of the petition.

Analysis

43. I have carefully considered the submissions and authorities presented by rival parties in support of their cases, together with the totality of the record of appeal and re-evaluated the pleadings and proceedings filed at the lower court.

44. Before I can proceed any further, I note that each of the respondents has taken issue with the appellant for failing to adhere to the doctrine of exhaustion before embarking on the Court process, thereby questioning the validity of these proceedings. I am sufficiently guided by the *locus classicus* case of ["Lillian S" V Caltex Kenya Limited](#), (1989) KLR 1 where the Court held that without jurisdiction a Court has no power to make one more step. I must therefore consider the issue of jurisdiction before all else.

45. Let me start by briefly stating my understanding of the legal and institutional framework set to ensure the timely settling of electoral disputes as dictated under article 87(1) of the [Constitution](#).

46. The 4th respondent is established under article 88 of the [Constitution](#) as the institution responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution. Under article 88(4)(e), the 4th respondent is also responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. The same role is replicated in section 4(e) of the [Independent Electoral and Boundaries Commission Act](#) No. 9 of 2011 (IEBC Act).

47. Alongside the [IEBC Act](#), Parliament also enacted the [Elections Act](#) No. 24 of 2011 ([Elections Act](#)) to provide for the conduct of elections and provide for election dispute resolution. It is pursuant to the [Elections Act](#) that the 4th respondent gazetted the Elections (Party Primaries and Party Lists) Regulations, 2017 to provide specifically for the nomination of party list members and provide for the dispute resolution framework. Regulation 27(1) is relevant and provides that:

“Every political party shall establish an internal dispute resolution mechanism in relation to the party primaries and party list.”



48. Regulation 27(4) provides timelines for the internal dispute resolution processes in the following terms:
- “The dispute resolution mechanism of a party shall hear and determine all nomination disputes not later than ninety days before the date of general election.”
49. Section 39 of the *Political Parties Act*, 2011 in turn establishes the PPDT which is clothed with jurisdiction under section 40(1) to amongst others, determine disputes between members of a political party and disputes arising out of party primaries. As far as the jurisdiction of the PPDT relates to that of the IDR, section 40(2) provides that:
- “Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”
50. The above exposition illustrates that political parties are placed at the center of party list nominations. The whole process including dispute resolution is deliberately timebound as are other electoral processes. In case of any disputes arising from the party lists, the political parties IDR mechanism is the first point of call, followed by the PPDT, within the timelines provided for by law before a petition can be filed in the election court under section 75(4) of the *Elections Act*.
51. The need for parties to exhaust the laid-out procedure for election dispute resolution through IDR and PPDT before filing a petition in the Courts is now of esteemed juridical lineage in Kenya. The Supreme Court in *Moses Mwangi* [supra] agreed with the High Court’s decision in *National Gender and Equality Commission v The Independent Electoral and Boundaries Commission and Another*, [2013] eKLR that where there is failure to follow the process prescribed by law with respect to election disputes, a party cannot successfully lodge a petition alleging non-compliance with the *Constitution* and the law.
52. The Court of Appeal has emphasized the justification of the doctrine of exhaustion in *Geoffrey Muthiga Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*, [2015] eKLR noting that:
- “It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The *Ex Parte* Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”
53. The Court of Appeal also concurred with the High Court in *Jared Oduyo Okello v Independent Electoral & Boundaries Commission (IEBC) & 3 Others*, [2013] eKLR that if a petitioner loses an opportunity to challenge the decision of a nominating body, such a petitioner cannot be heard to raise the issue in an election court.



54. This Court has also in concurrence with the Supreme Court and Court of Appeal made numerous similar findings. In *Francis Mutuku v Wiper Democratic Movement - Kenya & Others*, [2015] eKLR, Mumbi, J (as she then was) held thus:

“The law is clear with regard to circumstances such as are now before me, and courts have expressed themselves quite succinctly on this point; where there are specialized procedures provided by law or the *Constitution* for the resolution of disputes they should be followed. ... The circumstances of this case dictate that this Court, despite its wide jurisdiction under the *Constitution*, does not assume such jurisdiction. The dispute is clearly a dispute that falls within the mandate of the institutions in which the *Political Parties Act* vests jurisdiction. It involves a member of a political party and his political party. That party has an internal dispute resolution mechanism. The law requires that the said mechanism be exhausted; that a party dissatisfied with the outcome of the internal party dispute resolution process takes his grievance to the Political Parties Tribunal, and if unhappy with the outcome, has a right to appeal to the High Court. It would be to undermine and defeat the mechanism and institutions provided by law, which are underpinned by the *Constitution*, to hold otherwise.”

55. Looking at the record before me, the appellants submit at pg 15 of their written submissions that at the time when they approached the PPDT and were sent back to utilize the IDR, the 5th to 8th respondents had already been gazetted and the cause of action therefore transitioned from a dispute within the auspices of the political party to an election petition requiring to be settled under the provisions of the *Elections Act*.

56. Fortunately, the Courts have equally pronounced themselves on this point in cases including *Lorna Chemutai & 4 Others v Independent Electoral and Boundaries Commission & 18 others* [2018] eKLR as well as in *Isaiah Gichu Ndirangu & 2 Others V IEBC & 4 Others*, (2016) eKLR. The position is that the appellants had an opportunity to present their grievances about the party nominations to the 3rd respondent.

57. They did not avail themselves of this opportunity. Instead, they waited until after the gazette to file the election petition and seek the reliefs that they should have sought from the IDR of the 3rd respondent and the PPDT. This is not procedural. There is general agreement with examples of the cases that I have cited, that it is only parties that utilize the specialized forums provided for by the law and who were unsuccessful in those forums who can file an election petition after gazette of the nominees.

58. As indicated in the Record of Appeal, the 1st appellant during cross examination stated that the appellants attempted to go to IDR which was thwarted when the 3rd respondent refused to receive their letter of complaint. The 1st appellant referred to a return of service filed by one David Nyang'au. She stated that she could not recall when she filed the complaint at the PPDT but states that the PPDT rendered its decision on 9th September 2022 striking out the complaint. She further stated that when the appellants tried to invoke the IDR, the 3rd respondents' offices were closed forcing them to petition before this court.

59. From what I see, the parties were certainly aware of the party list before the same was gazetted, and a dispute had ensued way before. It is not clear exactly when the appellants wrote to the 3rd respondent to trigger the IDR process or if there was any delay in doing so and if there was, whether such delay can be explained.



60. I note from the record that the 1st appellant filed Complaint No E038 of 2022 before the PPDT. The judgment of the PPDT indicates that the complaint was struck out as the 1st appellant was not able to prove that she had served a demand on the 3rd respondent to trigger IDR. The PPDT declined to order the 3rd respondent to constitute a committee to hear the dispute as this was not prayed for by the 1st appellant. Consequently, the complaint was struck out.
61. Separately I also note that the 2nd appellant also filed a complaint against the 3rd and 5th respondents before the PPDT in Tribunal Case No E037 of 2022. The PPDT found that a demand letter alleged to have been sent to the 3rd respondent bore no acknowledgement of receipt and no proof of service was produced by the appellant. The PPDT therefore struck out the complaint for want of jurisdiction.
62. These findings of fact by the PPDT and the election court are not within the province of this Court but are key in answering the question as to whether the appellants followed the law. After the proceedings before the PPDT, both appellants have not produced evidence that they pursued IDR as guided by the PPDT. They did not file an appeal against the decisions of the PPDT or apply to have the decisions reviewed. Instead, the appellants filed an election petition before the Court.
63. The law as earlier indicated, provides strict timelines for dispute resolution processes after party nomination and before gazetting of nominees. These timelines are there to enable sufficient time for the dispute resolution process to take its course before the general elections. As stated earlier, while I agree with the appellants that the dispute of this nature transitions into an election petition once the nominees are gazetted, I disagree that a party is entitled to sleep on their rights and wait for the time lapse only to state that the dispute had transitioned into an election petition.
64. The excuse given by the appellants that the offices of the 3rd respondent remained closed is wondrous to say the least and difficult to accept and was not been proved.
65. I note that the Learned Magistrate at page 19 and 20 of her judgment correctly pointed out that:
- “The petitioners’ complaints are purely anchored on matters that ought to have been addressed by the party’s internal dispute resolution mechanisms. They had knowledge of the party list as submitted to the 4th respondent but chose to sleep on their rights until the same was gazette. ... It has not been explained to the satisfaction of the court why the petitioners failed to appeal the decision of the PPDT or seek a review...They are therefore estopped from raising issues with regard to the nomination process.”
66. Having correctly addressed herself to the issue, the Learned Magistrate ought to have come to the conclusion that the petition and issues before the election court had not yet crystallized for determination, that the petition was therefore not properly before her and that she lacked jurisdiction to entertain it.
67. The Learned Magistrate had found earlier on in a ruling dated 25th November 2022 that the election court was clothed with jurisdiction to determine the petition. In my opinion, the Court ought to have at declined to exercise jurisdiction at that point.

Determination and orders

68. As such, and for the reasons that I have stated, I must find in congruence with the overwhelmingly supported judicial view that the proceedings before the trial court were *void ab initio*. The issues before this Court have not crystallized for consideration. Regrettably I must lay down my tools and shall not



consider the merits of the appeal as this would be an exercise in vain. I however make the following orders:

- a. The appeal herein lacks merit and is accordingly struck out.
- b. The proceedings, judgment and consequential orders of the Hon C.A. Ocharo delivered on 7th March 2023 in Election Petition No. E007 of 2023 are hereby declared null and void.
- c. For the avoidance of doubt, the gazettelement by the 2nd respondent of the 5th to 8th respondents as Members of the Kisii County Assembly representing the 3rd respondent under the gender and marginalized top-up categories is upheld.
- d. In order to avoid over burdening the appellants with costs but also noting that this is an appeal which ought not to have been filed in the first place, the 1st to 8th respondents who opposed the appeal shall have the costs of the appeal, each capped at Kshs.300,000/=. The 1st and 2nd appellants shall be jointly and severally liable for the costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 31st DAY OF AUGUST 2023.

F. MUGAMBI

JUDGE

In the presence of:

Mr. Matoke h/b for Mr Nyagaka for the appellant

Mr. Achoki h/b for Ms. Gogi for the 1st, 2nd, 3rd respondents

Ms. Musebe h/b for Ms Biwott for the 4th respondent

Mr. Achoki for the 5th, 6th, 7th and 8th respondents

