



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CONSTITUTIONAL PETITION NO. 9 OF 2017

IN THE MATTER OF ARTICLES 2(1), 2(4), 27, 177(1) (C), 197(2)(b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF COMPOSITION OF THE COUNTY ASSEMBLY OF BARINGO COUNTY

AND

IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION AND THE COUNTY GOVERNMENTS ACT

BETWEEN

SUSAN WASHUKA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

The Petitioner, a resident of Eldama Ravine, Baringo County and member of the Jubilee Party aggrieved by failure by the 1st respondent to gazette her duly nominated as member of County Assembly of Baringo for which she had been nominated by her Jubilee Party, following the elections of 8th August, 2017, has sued the Independent Electoral and Boundaries Commission (IEBC) and the 2nd Respondent, the Hon. Attorney General, as the Chief Government Legal Adviser. In sum, the petitioner's claim is set out her claim that she is a Jubilee Party member registered as No.JP283307; that she made an application and despite being presented by her party the 1st respondent failed to place her on the Gazette Notice of all Nominees in the 47 Counties; that the 1st respondent's actions are discriminatory in nature and in violation of its guiding principles of respect to the law, transparency and accountability; and that the Gazette Notice dated 28th August, 2017 is devoid of any person with disability as required by the law.

The Petitioner therefore seeks for the following specific orders:

A declaration that the Petitioner has been discriminated upon by the 1st respondent on ground of her ethnicity which is inconsistent with Article 27 of the Constitution of Kenya and or on the basis of status.

1) A declaration that the 1st respondent in failing to nominate the Petitioner and/ or any other person from Kalenjin Community to represent the interests of the Minority and or marginalized are in contravention of Articles 91(f), (g), and (h), 177 (c) and 197 of the Constitution of Kenya and Section 7(2) (a) and (b) of the County Governments Act.

2) A declaration that the County Assembly of Baringo County is not properly constituted to carry out its constitutional mandate for failure to conform with Articles 91(f), (g) and (h), 177 (c) and 197 of the Constitution of Kenya and Section 7(2)(a) and (b) of the County.

3) An Order cancelling Gazette Notice dated 28th August 2017 in so far as the nomination of Members of Baringo County Assembly is concerned for being contrary to the Constitution and County Governments Act.

4) In the alternative to prayer 4, an order of Mandamus do issue against the 1st respondent to gazette Petitioner and a person with disability as members of the County Assembly of Baringo.

5) A declaration that the 3rd respondent has abdicated his Constitutional and Legal roles and is therefore escapist.

6) General damages for discrimination.

7) Any other relief the court may deem fit to grant in redress to the clear violation of the Petitioner's right.

8) An order for payment of costs of this Petition by the respondents.

THE PETITION

On 4th October 2017, Susan Washuka, the petitioner herein filed a petition dated 3rd October 2017 supported by her affidavit sworn on the same date. The Petitioner's case is that the 1st Respondent herein issued a notice on 12th June 2017 to all political parties to submit lists of nominees on or before the 24th June, 2017. The Nominations were for seats to the National Assembly Senate and County Assembly. Then Jubilee Party gave notice to the general Public inviting its members to apply for nomination to Jubilee party list for nomination to the National Assembly, the Senate and the County Assembly. A nominee had to be a registered party member. The Petitioner herein then applied to the Jubilee Party in the Gender – Ordinary list.

The 1st Respondent listed the Petitioner in the Ordinary (Gender list) in its website on 30th June 2017. A list was further published in the Daily Nation on 23rd July, 2017 and the Petitioner herein was placed in the Marginalized category but was wrongly indicated that she came from the *Njemps* Ethnic group instead of her *Kikuyu* tribe.

The Petitioner's name was found missing from the names gazetted by the 1st Respondent herein in the Gazette Notice dated 28/08/2017, which contained a list of the nominated members to the County Assemblies, including Baringo County Assembly. The Petitioner states that she enumerated various qualifications when she applied in the Jubilee party list and she is a former member of the County Assembly for Mumberes, Maji Mazuri Ward elected as the 1st MCA under Jubilee Party in a By-Election conducted by the 1st Respondent on 22nd March, 2017.

The Petitioner contends that the Gazette Notice dated 28th August, 2017 does not have a single person with Disability to the County Assembly of Baringo and cites various provisions, that confers the 1st respondent with powers relating to electoral nomination by the Constitution and statutes namely Article 90 of the Constitution; sections 34, 35, 36 and 37 of the Elections Act, 2011 and Regulations 54, 55 and 56 of the Election(General) Regulations, 2012 and Regulations 20 and 21 of the Election (Party Primaries and Party Lists) Regulations, 2017.

The Nomination of Members to National Assembly, Senate and **County Assembly** is provided for under Article 90 of the Constitution; sections 34-37 of the Elections Act, 2011 as amended by The Elections (Amendment) (No. 2) Act, 2012; the Election Laws (Amendment) Act, 2017.

The Petitioner further cites Article 3 (1) of the Constitution which provide that every person has an obligation to respect uphold and defend the Constitution citing Articles 10, 27 (1) – (5), 91 (1), 177 and 197. The Petitioner also relies on section 7 of the County Governments Act which provides as follows:

1) *In addition to the members who are elected under Article 177(a) and those who are nominated under Article 177(b) of the Constitution, a county assembly shall comprise-*

a) Six nominated members as contemplated in Article 177(c) of the Constitution; and

b) *The speaker, who is an ex officio member elected in accordance with Article 178 of the Constitution*

2) The Political party nominating persons under subsection (1) shall ensure that-

a) Community and cultural diversity of the county is reflected in the county assembly; and

b) There is adequate representation to protect minorities within the County in accordance with Article 197 of the constitution.

3) *The number of members nominated under subsection (1) (a) shall be reviewed to accord with the number of Wards determined by the Independent Electoral and Boundaries Commission under section 27(3)(a).*

The Petitioner contends that the following rights as enshrined in the Constitution and various Acts have been violated as follows:

i. Article 27 on Equality and Freedom from discrimination that the 1st respondent has discriminated her based on her tribe which is contrary to Article 27(4) which provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, disability, language etc. by failing to gazette her as a nominated member of the County Assembly of Baringo County. The 1st respondents transposed her name from the Gender List to the list of minority and finally failed to gazette altogether.

ii. Article 177(1) (c) and 197(2) (b) of the Constitution and section 7(2) (a) and (b) of the County Governments Act has been violated in that:

a. she represents the minority group of Kikuyu who reside in Eldama Ravine within the Baringo County where the Kalenjin is the majority and the nomination of Bowen Charles Kimitei, a Kalenjin is invalid; and

b. no person with disability has been nominated in Baringo County and it thus falls short of the Constitution requirement on marginalized group.

She therefore contended that the Gazette Notice dated 28th August, 2017 is null and void with respect to the Nomination of Members to the County Assembly of Baringo for contravening the Constitution and the County Government Act.

As regards the 2nd respondent, it was contended that he failed to discharge his constitutional and statutory mandate to advise the Government leading to the violation of the Petitioners rights.

RESPONSES AND SUBMISSIONS BY THE PARTIES

The 1st respondent filed Response to the Petition, Grounds of Opposition and a Notice of Preliminary Objection dated 10th October, 2017 in the same terms, principally, that the Court has no jurisdiction in the matter which it was contended is the preserve of the Electoral Court as distinguished from the Constitutional Court; that the petition was time barred having been filed outside the 28 days after declaration of results prescribed in the election law; that the petitioner had not exhausted alternative dispute resolution procedures within the party machinery, Political Parties Dispute Tribunal and the 1st respondent; and that the petition is incompetent for failure to join Jubilee Party as a party whose nominations are challenged and the members of the Baringo County assembly whose election/nomination is impugned. The 2nd respondent did not file any response to the petition.

By consent of the parties, written submissions on both the Preliminary Objection and the main Petition were filed and exchanged ahead of the hearing where Counsel for the parties - Mr. Ogola for the Petitioner and Mr. Kobe for the Respondent - made supplementary oral argument, and judgment was reserved.

The 1st respondent's submission on the Preliminary Objection and the Petition

Submissions on the preliminary objection.

The Petitioner herein filed a Constitutional Petition instead of filing an Election Petition. That it is a rule in Electoral Dispute Resolution that courts and tribunals can only exercise the jurisdiction conferred on them by the Constitution and the law as seen in ***Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited*** [1989] KLR 1. And in ***Re The Matter of the Interim Independent Electoral Commission***, Supreme Court Constitutional Application No. 2 of 2011 where a court cannot give itself jurisdiction through legal interpretation or where there is no ambiguity in the words of legislation. It is their submission that this court cannot confer on itself jurisdiction where there is undue regard to procedural technicalities. This was held in ***Jasbir Singh Rai & 3 others v. Tarlocham Singh Rai Estate & 4 others***, Supreme Court Petition No. 4 of 2012.

The members of the Baringo County Assembly have already been gazetted and sworn into office and are already discharging the functions conferred upon them. Therefore the court should not confuse itself with having unlimited jurisdiction like in civil and criminal matters or its supervisory jurisdiction. The only way to challenge the nomination of Bowen Charles Kimitei is by way of an election petition. This position was held in ***National Gender and Equality Commission (NGEC) v. IEBC***, Constitutional Petition No. 147 of 2013, in ***Kones v. Republic and Another ex-parte Kimani wa Nyoike and Others*** where the nomination of Hon. Kones was challenged.

In ***Rose Wairimu Kamau v. IEBC & 3 others***, Constitutional Petition (Nairobi) No 365 of 2013 where the court cited ***National Gender Commission v. IEBC & Anor***, (Ruling No. 2) Petition No. 147 of 2013, that once County Assembly nominees have been gazette the court cannot entertain the Petitioners complaint. Once they have been nominated under Articles 97(c), 98(1) (c) and (d) of the Constitution. The ***Speaker of the National Assembly v. The Hon James Njenga Karume*** Civil Application No. 92 of 1992 also confirms the position above, that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or Act of Parliament that procedure should be strictly followed.

Further the Court in ***Moses Mwigigi & 14 others Vs IEBC & 5 others*** Supreme Petition No.1 of 2015 emphasized on when an election court and not a Constitutional question should consider an issue for the High Court. The Supreme Court cited ***Hassan Ali Joho & Anor v. Suleiman*** that allocation of nomination seats by the IEBC is a time bound process that starts with the proportional determination of the number of seats due to each political party.

The 1st respondent's counsel argued that the Petitioner was entitled to move to the Resident Magistrate Court which was the gazetted to hear and determine petitions challenging the validity of the election/nomination of a member of a County Assembly pursuant to Section 75(1A) of the Elections Act, 2011 and Rule 6(3) of the Elections (Parliamentary and County Elections) Petitions Rules 2017. He prayed the Petition be

struck out.

The 1st respondent raised an issue that this petition is incompetent for being filed and served outside the prescribed 28 days stipulated in section 76 (1)(a) Election Act 2011. A timeline is prescribed under Article 87(1) of the Constitution and the Elections Act, 2011 especially on filing and service of election petitions and appeals from decisions of election courts. The following cases were cited: **Lemanken Aramat v. Harun Meitamei Lempaka & 2 others**, Supreme Court Petition No. 5 of 2014, **Mary Wambui Munene v Peter Gichuki King'ara & 2 others** Supreme Court Petition No. 7/14, **Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 others** Supreme Court Petition No. 18 of 2014.

It is the 1st respondent's submission that nominated members of the Baringo County Assembly were gazetted on 28th August, 2017 whereas the Petition herein was filed on 4th October, 2017 and served on 6th October, 2017. Thus it falls short of Article 87(2) of the Constitution and Section 76 (1) (a) of the Elections Act, 2011. Further that the Petitioner was to deposit security for the payment of costs within 10 days of filing an election petition. The Petitioner's intention is to circumvent the electoral disputes resolution regime having realized that the 28 days within which to file an election petition had lapsed.

The 1st respondent submits that the Petitioner herein has failed to exhaust all the internal legal remedies within the Jubilee Party and the Political Parties Disputes Tribunal. The electoral disputes framework has specific jurisdiction as held in **Moses Mwicigi & 14 others**, supra. The Petitioner in her petition and supporting affidavit has not shown if she attempted to resolve the dispute at hand. It has been held that the High court or a tribunal cannot exercise jurisdiction over an electoral dispute. This was held in **Francis Gitau Parsimei & Others v. National Alliance Party & others** Constitution Petition (Nairobi) No. 356 of 2012. In **Interim Independent Electoral Commission and Anor v. Paul Waweru Mwangi** CA Civil Application No. 130 of 2011 (unreported) the Court of Appeal discharged an injunction issued by the High court restraining the then Commission from conducting of the Kamukunji by-election on account of allegations of the breach of fundamental rights and freedoms during the nomination stage. This was upheld in **Republic v. Independent Electoral & Boundaries Commission ex parte Charles Olari Chebet**, Misc Civil Application (Nak) No. 3 of 2013. Also in **Narok County Council v. Transmara County Council** [2000] I E.A 161, the Court held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that Procedure should be strictly followed. See also **Kipkalya Kones v. Republic & Anor** [2006] eKLR and **Kimani Wanyoike v. Electoral Commission of Kenya & Anor** [1995] eKLR, there was an emphasis need to strictly observe the procedure in the Constitution and statute.

The 1st respondent argued that the court cannot entertain nomination disputes filed outside the prescribed procedure as was held in **Francis Gitau Parsimei & 2 others v. The National Alliance Party & 4 others** [2012] eKLR. This was the similar position held in **Michael Wachira Nderitu & others v. Mary Wambui Munene & others** (Nairobi Petition no. 549 of 2012) held that where the Constitution or a statute establish a dispute resolution procedure, then the procedure must be used. In **Joseph Kipkurui Bett & others**, Petition No. 24/2013 the High court held that it did not have jurisdiction over a dispute of the Nomination lists. It is their submission that failure by the Petitioner to approach the Political Parties Disputes Tribunal or the Independent Electoral and Boundaries Commission, the Petitioner has ignored the statutory structures put in place thus prayed for the Petition to be struck out.

The 1st respondent submitted that failure by the Petitioner to join the Jubilee Party, the IEBC, Members of Baringo County Assembly as Interested Parties to this Petition violates their right to access justice and their right to fair trial in fatal. This is entrenched in the Bill of Rights at Articles 48 and 50(1) of the Constitution. The Petitioner has made allegations on violation of her rights as enshrined in the Constitution by the respondents.

In addition to the above the Petitioner seeks orders that will affect the interest and rights of members of the Baringo County Assembly but failed to enjoin them. It is also mandatory in the Election Petition Rules that the Returning Officer should be joined but the Petitioner failed. The High Court in **Joseph Kipkurui Bett & other**, supra, held that a Petition challenging the nomination of members of a political Party is incompetent for failure to join the Political Party where nomination is challenged.

Submission to the Petition

The Counsel submitted that nomination by the Jubilee Party was conducted in accordance to the Constitution, the Independent Electoral and Boundaries Act and the Elections Act. Those nominated to hold various positions met the Constitutional and statutory requirements for holding office. It was satisfied that the Jubilee Party complied with its rules and requirements before approving party lists of persons to hold office including the Baringo County Assembly. The Petitioner's claim that she was discriminated upon because she is a Kikuyu is not viable. Bowen Charles Kimitei was chosen to represent the Kalenjin minority. The Petitioner has not produced any evidence to prove the same. The burden lies on the Petitioner to prove the nature and the extent of that noncompliance. In **Shadrack Kosgei & Anor. v. Governor of Nakuru County & 2 others** [2016] eKLR it was held that the name of any individual is not a sure way to determine their ethnicity. The same position was held in **Anerita Karimi v. Republic** as restated in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others** [2013] eKLR.

It is their submission that the Kalenjin has many sub tribes such as the Terik, Ogiek Dorobo, Samor, Eldorois who are considered as minorities and the marginalized tribes. Article 90(2) (c) provides for party lists to reflect the regional and ethnic diversity of the People. The Petitioner alleges that there was no person with disability who was nominated; instead three youths were named as nominees. It is their submission that the youth is a legitimate and constitutionally recognized marginalized group. Further that it is within the Jubilee Party rule on how to order their nominee list, in which category and in what order of priority to place them and not upon the 1st respondent. In **Peninah Nandako Kisilwa v IEBC**, Civil Appeal (Nairobi) No.201/2013 the Court of Appeal held that it was the responsibility of a political party to determine which of their members is in the party list and the order of priority, subject to compliance with the necessary legal requirements. Finally that IEBC does not have the power to ignore, rearrange or disregard a political party's preferred candidate as set out in the party list therefore they urged the court to uphold their Preliminary Objection and to dismiss the Petition.

Petitioner's Submissions on the Preliminary Objection and the Petition

It is the Petitioner's submissions that pursuant to a notice issued by the 1st respondent, she submitted her name to her Political party and she was placed as no. 3 in the Ordinary list and also listed as no. 6 in the second list published by the 1st respondent. The Petitioner raised the following issues for consideration by the Court:

- I. Whether the respondents in making the decision to omit the Petitioner's name from the list of nominated members of County Assembly, Baringo County presented to them by the Jubilee Party acted discriminatory, irrationally and in breach of all known procedures of law and consequently have failed in their mandate to ensure that strict and express provisions of the Constitution and thus warranting the remedies sought by the Petitioner in this Petition to issue.
- II. Whether the County Assembly of Baringo County therefore for purposes of Articles 177 and 197 of the Constitution and Section 7 of the County Governments Act is not properly constituted to conduct its affairs for failure to have representation from a recognized member representing minority group.

The Petitioner herein submits that in Compliance with the notice issued on 12th June, 2017 by the 1st respondent in exercise of its powers conferred in Article 90 of the Constitution, Section 34, 35, 36 and 37 of the Elections Act, 2011 and regulation 54, 55 and 56 of the Election (General) Regulations, 2012 and Regulation 20 and 21 of the Election (Party Primaries and Party Lists) Regulations, 2017. The Petitioner had to submit her application before the 24th June, 2017. A copy of the two publications and a copy of the Gazette notice were produced as evidence in court.

Article 10 (1) of the Constitution of Kenya provides for the National Values and Principles of Governance which binds all state organs, state officers, public officers and all persons whenever any of them:

- a. Applies or interprets this constitution
- b. Enacts, applies or interprets any law or
- c. Makes or implements public policy decision

Under sub-article (2) thereof, the national values and principles of Governance include:

- a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non discrimination and protection of the marginalized;
- c) Good governance, integrity, transparency and accountability; and
- d) Sustainable development

The respondents through their actions have failed to adhere to the above values and omitting the Petitioner's name from Gazette notice dated 28th August, 2017 is a gross violation to her rights. The 1st respondent failed to exercise its powers and perform its functions in accordance with the Constitution and National legislation.

The Petitioner also relied on Article 27 (1) – (5) of the Constitution which provides as follows:

- 27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

The Petitioner relied on *Gabriel Nyabola v Attorney General & 2 others* (2014) eKLR and *Peter K. Waweru v. Republic* (2006) eKLR which was mentioned in *Joy Brenda Masinde v. Law Society of Kenya and Anor* where the court defined discrimination as follows: "Discrimination means affording different treatment to different persons wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description..." The Petitioner submits that she has been discriminated against on account of her tribe that is Kikuyu. Mr. Bowen Charles Kimitei hails from the Kalenjin tribe, which is a majority in the Baringo County. It was the Petitioner's further submission that every person is equal before the law and has a right to equal protection and benefit of the law as enshrined in Article 10 of the Constitution.

The Petitioner has relied on Article 177 of the Constitution which states as follows:

177 (1) A county assembly consists of—

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

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

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

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

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

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

Section 7 of the County Government Act provides as follows:

1) In addition to the members who are elected under Article 177(a), or nominated under Article 177(b) of the Constitution, a county assembly shall comprise,

a) Six nominated members as contemplated in Article 177(c) of the constitution

b) The speaker, who is an ex officio member elected in accordance with Article 178 of the Constitution

2) The political party nominating persons under subsection (1) shall ensure that:

a) Community and cultural diversity of the County is reflected in the County assembly; and

b) There is adequate representation to protect minorities within the county in accordance with Article 197 of the Constitution

3) The number of members nominated under subsection (1) (a) shall be reviewed to accord with the number of Wards determined by the Independent Electoral and Boundaries Commission under section 27(3)(a).

The Petitioner herein submits it is a cardinal rule that due process and provisions of the law have to be obeyed by persons bestowed with authority. The Court can investigate and only interfere where there is abuse of discretion, where the decision maker exercises discretion for an improper purpose, where there is breach of duty to act fairly, where the decision maker has failed to exercise discretion reasonably, where he acts in a manner to frustrate the purpose of the Act, where he fetters the discretion given and where the decision maker is irrational. This was held in **Republic v. Minister for Home Affairs and others ex parte Sitamze** Nairobi HCCC NO. 1652 of 2004 (HCK) [2008] 2 EA. 323.

The Petitioner further urged the court to look at **Frank Mulisa Makola v. Felix G. Mbiuki & 4 others** [2013] eKLR where it was held that unconstitutional exercise of executive or legislative power cannot be shielded from judicial scrutiny by reason of respect of the doctrine of separation of power or in the name of immunity or privilege. In addition to this she urged the principles of Article 1, 1(3), 3 and 10 of the Constitution and emphasized the duty of the court citing **Republic v. IEBC and Others ex-parte CLLR Elliot Lidubwi Kihusa and others** Nairobi HC JR Misc. App. No. 94 of 2012 where it held that the primary duty of the court is to the Constitution and the Law, which they must apply impartially and without fear, favor or prejudice. Finally that it is in the interest of justice and fairness that the orders so sought by the petitioners in the application dated 31st August, 2017 are granted so that the purpose and the objectives of the Constitution are upheld.

ISSUES FOR DETERMINATION

I have considered the petition, the response, grounds of opposition and the preliminary objection and the written and oral submissions thereon, and I find that three questions arise for determination as follow:

a) Whether the matter before the Court is an election matter the jurisdiction over which lies with an election court or it is a matter of violation of rights and fundamental freedoms which should be dealt with by the Constitutional Court.

b) If the Court has jurisdiction in the matter, whether the Petition herein is defective on account of being filed out of time; whether the failure to join the IEBC and the County Government of Baringo is fatal; and whether or not by failing to gazette the Petitioner's name in the Gazette Notice dated 2^{8th} August 2017 was a violation of her constitutional rights.

In accordance with the decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd** (1989) KLR 1, the Court will only consider the Petition on its merits as raised in the second issue if it finds that it has jurisdiction over the matter pleaded in

the Petition.

DETERMINATION

Whether Petition an election dispute for purposes of Article 87(2) of the Constitution

The 1st respondent submitted that the Petition herein was incompetent for the reason that issues raised were to be determined in an election Petition Court. The Petitioner chose to file her case vide a Constitutional way thus making it incompetent. The Petitioner herein on the other hand cites various provisions of the Constitution that have been breached by the 1st respondent. The 1st respondent under Article 90 of the Constitution, Sections 34, 35, 36 and 37 of the Elections Act 2011, regulations 54, 55 and 56 of the Election (General) Regulation 2012 and Regulation 20 and 21 of the Election (party primaries and party lists) regulations, 2017, gave a notice to the Political Parties to submit party lists. The petitioner's name was in the two lists but was missing in the final list. The 1st respondent instead listed the name of Bowen Charles. The Petitioner's claim is not against the Jubilee party.

The 1st respondent submitted that this Court does not have jurisdiction to determine the election petition whereas the Petitioner insists this is not an election petition matter thus the court has jurisdiction. Article 165(3) (a) of the Constitution gives the High Court unlimited original jurisdiction to hear and determine criminal and Civil matters. The issues raised by the Petitioner are pursuant to the constitution, therefore the court has jurisdiction under Article 165(3) (b) on determination on questions whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. This court has also been given jurisdiction to hear and determine Election Petition matters. Section 75(1A) of the Election Act gives gazetted Resident Magistrate Court the power to hear and determine the question as to validity of the election of a County Assembly. The Petitioner seeks for reliefs for the enforcement of Bill of Rights under the Constitution.

On the jurisdiction of the particular judge of the High Court as opposed to the jurisdiction of the Court, I respectfully agree with the decision in *Gideon Mwangangi Wambua & Another V Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR where the Court expressed itself inter alia as follows:

“There is no Court established under Article 165 of the Constitution known as “Election Court”. The term “Election Court” however appears in section 2 of the Act under which the term “election court” is defined to mean the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution. It therefore follows that even under the Act Election Court refers to the Supreme Court and the High Court exercising their jurisdiction under the Constitution respectively. In the absence of the limitation placed upon the High Court under Article 165 of the Constitution with respect to the handling of Election Petitions save for petitions arising from Presidential Election petitions, no limitation can be placed upon the jurisdiction of any High Court judge to hear and determine Election Petitions whose jurisdiction is conferred upon the High Court to determine. In my view the Gazettement of judges to hear election petitions is meant for administrative purposes and to ensure that election petitions are determined within the time stipulated within the Constitution. Whereas the hearing of an election petition by a Judge who is not gazetted may invite disciplinary action in my view the mere fact that a Judge who hears a petition is not gazetted to do so does not deprive him or her of the jurisdiction conferred upon him or her under the Constitution.”

But the issue before the Court is not one of the empanelment of an Election Court but of the jurisdiction of the High Court exercising the Bill of Rights jurisdiction to determine an election related dispute.

Article 88(4) of the Constitution gives the Commission the responsibility for conducting or supervising referenda and elections to any elective body or office established by the Constitution. Further that it has the responsibility under Article 88(4)(e) to settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. Section 74 of the Elections Act states as follows:

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

(2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

The 1st respondent urged this court to find that issues on nomination or election of members of a County Assembly can only be challenged through an election petition. The 1st respondent cited various cases. In *National Gender and Equality Commission (NGEC) v. IEBC*, Const. Petition (Nairobi) No.147 of 2013, the Petitioner therein had asked the court to issue a temporary prohibitory injunction restraining the respondents from proceeding to allocate special seats to political parties under Article 90 of the Constitution on the basis of party lists that had already been submitted by the political parties. It also gives emphasize on Article 105 on power of the high court to determine disputes on elected Member of Parliament. It is my view that the suit was instituted at the preliminary stage before the final nominees names were gazetted by IEBC. They were seeking orders so that the Political parties could consider the two thirds gender rule. This is not the case in the current suit since the Petitioner herein is not questioning the validity of the names submitted at the initial stage but the final list where her name was erroneously omitted by the 1st respondent. In the instant case the Petitioner raises issues on nominated member of County Assembly.

Matter is now governed by Authority of Supreme Court

In, *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR the Supreme Court has considered the matter of the nature of nominations in the election process and settled the law that upon gazettment, nominated candidates become elected and any challenge to their election must be election petition in the usual way, as follows:

[105] *It is clear from the foregoing provisions that the allocation of nomination- seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettment of the nominees’ names by the IEBC, as an integral part of the election process.*

[106] *The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court. . .*

[107] *It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.*

[108] *We have taken note of the argument by counsel for the 3rd, 5th and 6th respondents, that what was before the Court of Appeal (and the High Court), was not an “election petition”, but a constitutional petition seeking to prevent the violation of the rights of the respondents. Counsel for the 3rd respondent urged us to distinguish between an “election petition” and a contestation over the “validity of a political-party list”. On this question, however, the broader spectacle is compelling: the electoral-process is dominant; and it allows no separation between Article 90 (which deals with party-list seats) and Article 177 (which deals with membership of County Assemblies).*

[109] *The respondents had sought a declaration that the list of nominees for Nyandarua County Assembly published by the IEBC, had violated Articles 90, 98, 174 and 177 of the Constitution, as it purported to exclude Ndaragwa, O’l Kalau and O’Jororok Constituencies. Indeed, one of the respondents’ contentions in the Court of Appeal was that the High Court erred by failing to consider the diversity of Nyandarua County, in the formulation of TNA’s party list. Is it conceivable that such a petition had nothing to do with elections, and was only concerned with constitutional questions? Not in our view: this was a petition contesting the nomination of the appellants^{3/4} nomination which we hold to have been an integral part of the electoral process, in the terms of the Constitution and the electoral law.*

[110] *It follows that only an Election Court had the powers to disturb the status quo. Any aggrieved party would have to initiate the process of ventilating grievances by way of an election petition, in accordance with Section 75 of the Elections Act. The High Court had declined jurisdiction on the perception that this dispute ought to have originated at the Political Parties Disputes Tribunal. The Appellate Court, however, assumed jurisdiction, and issued Orders as follows:*

“(a) An order of certiorari to issue to quash the decision of the IEBC’s Nominations Dispute Resolutions Committee.

“(b) The two TNA nominee party lists published on 15th and 16th May, 2013 revoked, and TNA ordered and directed to submit within 7 days two distinct and valid lists of nominees to the IEBC (pursuant to Section 36(1)(e) and (f) of the Elections Act and Articles 90(1)(e) and 177(1)(b) and (c) of the Constitution).

“(c) The IEBC directed to qualify and select qualified persons from the resubmitted lists within 7 days of the resubmission.”

[111] *The foregoing Orders, it is to be noted, were the very ones sought by the 3rd respondent, in their memorandum of appeal to the Court of Appeal, in Civil Appeal No. 224 of 2013 dated 28th August, 2013. These Orders had the effect of annulling the appointment of the applicants, whose names had been gazetted, and who had taken the oath of office as the TNA-nominated members of Nyandarua County Assembly.*

[112] *The Constitution, in Article 87, thus provides:*

“(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

“(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.”

Pursuant to Article 88 (4) (e) of the Constitution:

[113] *The role of the Independent Electoral and Boundaries Commission (1st respondent) is provided for in Article 88(4) of the Constitution, as follows:*

“The Commission is responsible for...

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results....”

[114] By virtue of legislation as envisaged under Article 87 of the Constitution, the Election Court is recognized as the Judiciary’s forum of resolution of electoral disputes. “Election Court” is defined in the Elections Act as: the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a); or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution, and the Resident Magistrate’s Court as designated by the Chief Justice in accordance with Section 75 of the Act. Appeals from the High Court on election matters lie to the Court of Appeal, by virtue of Section 85 A of the Elections Act; while appeals therefrom lie to the Supreme Court, if admitted by the latter, pursuant to Article 163 (4) (a) or (b).

[115] The Elections Act confers jurisdiction upon Magistrates Courts to determine the validity of the election of a member of a County Assembly; Section 75 (1A) of the Act provides that:

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

[116] The Act, in addition, provides for the appropriate remedies that Courts may grant, in the following terms (Section 75):

“(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.”

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

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

Upon gazette of the nominated candidates’ names, the individuals become duly elected and the role of the 1st respondent ends at that point. The procedure for challenging this election is by way of an election petition as set out in Article 87(2) which provides that all petitions concerning an election other than a presidential elections shall be filed within 28 days, (only presidential election petitions are filed within 7 days) after declaration of results by the Independent Electoral and Boundaries Commission.

Even accepting that the nomination of candidates becomes an election, a further question arises as to whether the challenge of such an election must be by an election petition or it could be challenged by the one or the other procedure before a competent court. On all fours with this Petition is the case of The Speaker of The National Assembly v. The Hon. James Njenga Karume, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported) the Court of Appeal held that:

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”.....

“The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, Chapter 26 of the Laws of Kenya and in Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular.”

Similarly, in Kisii HC CIVIL APP. JR NO. 7 OF 2013, Wilkister Kemunto Otochi V. Resolution Committee this Court also considered the matter and held as follows:

9. I accept the judicial policy of the courts that where there is special procedure under the constitution and or statute for the resolution of specific claims, that procedure should be strictly followed. The Constitution has under Article 87 requires the timely resolution of election disputes through the filing of petitions within 28 days of the declaration of the results of the elections, in accordance with the Elections Act, the statute enacted pursuant to the constitution and the rules and regulations made thereunder. In the context of judicial review, I also agree with the general principle that the procedure for judicial review is not available where

there is alternative procedure for redressing the grievance.

10. In interpreting the constitutional provisions for the nomination of members of the county assembly, the court in the **National Gender and Equality Commission** held that “upon gazettelement of any person as a member of the county assembly, any challenge to his or her membership to the county assembly must be in accordance with the provisions of Part VII of the Elections Act.” I respectfully agree with the court on that holding.

11. For my part **I find it clear that the constitution contemplated a unified regime of election law including procedure for resolution of disputes** when it provides for the deeming of nominated members of Parliament and county assemblies as **elect**ed and in its reference to the nominations of members in accordance with party lists, as follows:

a. Under Article 177 (4) that “a county assembly [whose membership include nominated members] is **elect**ed for a term of five years.”

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

c. Article 90 (2) (a) that the nominated members would **stand elect**ed.

12. Moreover, it is clear that Article 87 (2) contemplate petitions for all the elections including the election of nominated members as shown above when it provides that “**petitions concerning an election**, other than a presidential election [which is to be filed within 7days], shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission,”

13. Accordingly, I find that the challenge on the nomination of the Interested Party herein as a member of the Nyamira County Assembly should have been mounted by way of a petition pursuant to Article 87 (2) of the Constitution and in accordance with the Elections Act and the Rules made thereunder. **The procedure by way of Judicial Review was not available to litigate election related matters whose special procedure has by the constitution and the Election Act been determined as petition proceedings.**”

The finding that election matters must be litigated through an election petition is put beyond doubt by the Supreme Court decision in **Mwicigi**, supra, as follows:

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

[120] In fortifying our pronouncement in paragraph 119, we revisit our earlier decision, **Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others [2014]** eKLR Sup. Ct Pt No. 14 of 2014 as consolidated with Petition No. 14A of 2014, 14B of 2014 and 14C of 2014⁴in which this Court considered interpretive theory, in respect of Kenya’s Constitution of 2010. Had the interpretative approach we proposed in that decision been taken into account by other Superior Courts, and by the Magistrates Courts, this may have provided a solution to the Court of Appeal’s task of interpretation. The proposed theory would have been of service to the Court of Appeal, by focussing that Court’s attention upon the constitutional, statutory, and regulatory texts within the history of Kenya’s Constitution-making, besides other non-legal phenomena.

[121] One of the objectives of our Constitution is the establishment of firm institutions, that have a pivotal role in its implementation. Our electoral dispute- resolution regime has a continuum of institutions that require strengthening, through the judicial system: namely, the political parties; the Political Parties Disputes Tribunal; and the IEBC. These have to comply with the Constitution, and the electoral laws and regulations. Participation of the people under Article 10 of the Constitution, in the affairs of the political parties, is not only a constitutional duty on the part of the citizens, but also a vital pillar in the growth of parties, as democratic institutions under the Constitution. That political parties may evolve into stable institutions, requires the full participation of members in their affairs, particularly those that pertain to elections.”

Rahma Distinguished

I respectfully agree with Mwita, J. in **Rahma Issak Ibrahim v Independent Electoral & Boundary Commission & 2 others [2017]** eKLR, in applying the Supreme Court’s decision in **Mwicigi**, as follows:

“41. The legal position emerging from the above analysis is that once a member has been gazetted as duly nominated, that becomes an election result and anyone unhappy with that result can only challenge it as an election dispute in an election court. Counsel for IEBC and interested parties attempted to argue, quite erroneously, that the petitioner should have filed this petition before the election court and that was one of the grounds advanced to contend that this court did not have jurisdiction to hear this petition. That is not the correct position in law. **It is the interested party who should in fact have filed an election petition to challenge the petitioner’s nomination.**”

42. In view of what I have said above, **and after considering the facts of this case and the applicable law, I am satisfied that IEBC acted outside its mandate and violate the constitution and the Elections Act. Its action of purporting to delete the petitioner’s**

name as a duly nominated member of Mandera county assembly and substitute it with that of the 1st interested party was ultra vires null and void. The 2nd respondent could also not lawfully swear in the 1st interested party following that illegal gazette notice no 8752 of 6th September 2017.

This case is to be distinguished from **Rahma's** case, where the Court quashed a Gazette Notice by the IEBC purporting to change the names of previously gazetted nomination to a County Assembly, which the Court ruled was outside the mandate of the IEBC. There was already crystallized in this case a cause of action in election dispute which in accordance with Article 87 (1) of the Constitution should have been mounted by way of an election petition. Unlike in the **Rahma** case, the IEBC has in this case not purported to amend the Gazette Notice declaring the persons nominated to the County Assembly of Baringo at which point the persons gazetted therein became elected to the County Assembly, which election could only be challenged by an election petition in accordance with Constitution and binding authority of the Supreme Court.

Section 75 (1A) of the Elections Act 2011 lays the jurisdiction for determination of election disputes relating to member of a County Assembly with the magistrates appointed for that purpose as follows:

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

It is the Resident Magistrate’s Court that has jurisdiction in this matter; and not the High Court, whether as an Election Court or a Constitutional Court.

Merits of the Petition

The Petitioner herein had the opportunity to file a complaint before the 1st respondent, which she did not. The 1st respondent issued Gazette Notice on **28th August, 2017** giving out the list of nominated members duly elected. The Petitioner filed the Petition on the **4th October, 2017, it would appear out of time**, seeking an order of cancellation of the Gazette Notice issued by 1st respondent in so far as the nomination of the members of Baringo County Assembly. The Petitioner failed to follow the laid down procedure for determination of election disputes as prescribed in the Constitution. Section 77(1) of the Election Act 2011 echos Article 87(2) of the Constitution in providing that:

“A petition concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Commission.”

The Petition herein not being a competent election petition within the Constitution and applicable law, and the Court not being the prescribed Election Court, under section 75(1A) of the Elections Act, for determination of election disputes relating to election of members of the County Assembly, the merits of the Petition are, therefore, not properly before this Court.

CONCLUSION

It is now clear that the issues whether a **nomination** amounts to an **election** for purposes of National Assembly, Senate and County Assembly under Articles 90, 97, 98 and 177 of the Constitution and whether a dispute arising out of such election is an electoral dispute to be adjudicated through an election petition under Article 87 (2) of the Constitution raised in this Petition are governed by the authority of the highest court in the land in the **Mwicigi** decision, supra and, in terms Article 163 (7) of the Constitution, it is not open to reconsideration by any court inferior to the Supreme Court.

The Supreme Court’s **Mwicigi** pronouncement also put paid the question whether a collateral challenge to an election/nomination dispute may competently be lodged as a constitutional reference or judicial review application as follows:

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

Consequently, this Court holds that once a nomination is transmuted to an election by virtue of gazettelement, the only lawful procedure for challenging the said election is through a valid election petition lodged in accordance with the procedure set out in the Constitution and relevant Statute.

Having reached the conclusion that jurisdiction in the matter lies with an election court and that the Constitutional Court has no jurisdiction in the matter, the Court shall, as guided by the Court of Appeal in **Owners of Motor Vessel “Lillian S”**, supra, down its tools and, therefore, shall not proceed to consider the merits of the matter as to whether the filing was within prescribed time; whether the claim is laid out with sufficient particularity; whether the proper parties are before the Court; or whether the claim is proved on the evidence.

ORDERS

Accordingly, for the reasons set out above, the Court makes the following orders on the Petition dated 3rd October, 2017:

1) The Preliminary Objection dated 10th October 2017 on jurisdiction of the Court is upheld.

2) The Petition dated 3rd October 2017 is struck out.

On account of the public nature of the Petition herein, there shall be order as to costs.

DATED AND DELIVERED THIS 9TH DAY OF FEBRUARY, 2018

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Gordon Ogola, Kipkoech & Co. Advocates for the Petitioner.

M/S B. O. Akangó Advocates for 1st Respondent.

N/A for the 2nd Respondent.