



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**ELECTION PETITION APPEAL NO. 2 OF 2018**

CAROLINE AKINYI OKERE.....1<sup>st</sup> APPELLANT  
ELIZABETH TALIA .....2<sup>nd</sup> APPELLANT  
ROSE A. AORO .....3<sup>rd</sup> APPELLANT  
MARY DEDE ODIGA .....4<sup>th</sup> APPELLANT  
JUDITH GAD .....5<sup>th</sup> APPELLANT  
RUTH ATIENO ANYANGO .....6<sup>th</sup> APPELLANT  
CLARRIS DOLLY OYOO.....7<sup>th</sup> APPELLANT  
GRACE AKINYI ODHIAMBO .....8<sup>th</sup> APPELLANT  
FLORENCE ABICH OILE.....9<sup>th</sup> APPELLANT  
ROSELINE ADHIAMBO OYOO.....10<sup>TH</sup> APPELLANT

-VERSUS-

THE INDEPENDENT ELECTORAL  
AND BOUNDARIES COMMISSION..... 1<sup>st</sup> RESPONDENT  
ORANGE DEMOCRATIC MOVEMENT .....2<sup>nd</sup> RESPONDENT  
MOGESI AGNES BANGE.....3<sup>rd</sup> RESPONDENT  
MILLICENT AKINYI ODALO .....4<sup>th</sup> RESPONDENT  
FLORENCE ADONGO OCHIENG.....5<sup>th</sup> RESPONDENT  
LILIAN ANYANGO OTIENO .....6<sup>th</sup> RESPONDENT  
ASENATH ADHIAMBO OLOO.....7<sup>th</sup> RESPONDENT

HALIMA OMAR MARWA .....8<sup>th</sup> RESPONDENT  
HELLEN MORAA OMWOYO .....9<sup>th</sup> RESPONDENT  
HELLEN ATIENO ODUOR .....10<sup>th</sup> RESPONDENT  
GRACE ACHIENG OTIENO..... 11<sup>th</sup> RESPONDENT  
DORINE DANDE.....12<sup>th</sup> RESPONDENT

**-CONSOLIDATED WITH-**

**ELECTION PETITION APPEAL NO. 1 OF 2018**

**DORINE DANDE.....APPELLANT**

**-VERSUS-**

MOGESI AGNES BANGE.....1<sup>st</sup> RESPONDENT  
MILICENT AKINYI ODALO ..... 2<sup>nd</sup> RESPONDENT  
FLORENCE ADONGO OCHIENG ..... 3<sup>rd</sup> RESPONDENT  
LILIAN ANYANGO OTIENO..... 4<sup>th</sup> RESPONDENT  
ASENATH ADHIAMBO OLOO.....5<sup>th</sup> RESPONDENT  
HALIMA OMAR MARWA .....6<sup>th</sup> RESPONDENT  
HELLEM MORAA OMWOYO .....7<sup>th</sup> RESPONDENT  
HELLEN ATIENO OFUOR ..... 8<sup>th</sup> RESPONDENT  
GRACE ACHIENG ATIENO .....9<sup>th</sup> RESPONDENT  
THE INDEPENDENT ELECTORAL  
AND BOUNDARIES COMMISSION..... 10<sup>th</sup> RESPONDENT  
ORANGE DEMOCRATIC MOVEMENT .....11<sup>th</sup> RESPONDENT  
CAROLINE AKINYI OKERE .....12<sup>th</sup> RESPONDENT  
ELIZABETH TALLA.....13<sup>th</sup> RESPONDENT  
ROSE A AORO .....14<sup>th</sup> RESPONDENT  
MARY DEDE ODIGA .....15<sup>th</sup> RESPONDENT  
JUDITH GAD .....16<sup>th</sup> RESPONDENT

RUTH ATIENO ANYANGO .....17<sup>th</sup> RESPONDENT  
CLARRIS DOLLY OYOO.....18<sup>th</sup> RESPONDENT  
GRACE AKINYI ODHIAMBO .....19<sup>th</sup> RESPONDENT  
FLORENCE ABICH OILE ..... 20<sup>th</sup> RESPONDENT  
FLORENCEDANDE .....21<sup>st</sup> RESPONDENT  
ROSELINE ADHIAMBO OYOO.....23<sup>RD</sup> RESPONDENT

**-CONSOLIDATED WITH-**

**ELECTION PETITION APPEAL NO. 4 OF 2018**

**ELIZABETH TALIA**

**MARY DEDE ODIGA**

**JUDITH GAD**

**CLARICE DOLLY OYOO**

**GRACE ANYANGO ODHIAMBO.....APPELLANTS**

**-VERSUS-**

**MOGESI AGNES BANGE**

**MILICENT AKINYI ODALO**

**FLORENCE ADONGO OCHIENG**

**LILIAN ANYANGO OTIENO**

**ASENATH ADHIAMBO OLOO**

**HALIMA OMAR MARWA**

**HELLEN ATIENO ODUOR**

**GRACE ACHIENG OTIENO.....RESPONDENTS**

*(Being appeals from the judgment and decree by Hon. R.K. Langat, Senior Resident Magistrate sitting at Rongo Law Courts in Migori Chief Magistrate's Election Petition No. 8 of 2017 delivered on 04/01/2018)*

**JUDGMENT**

**Introduction:**

1. The three appeals subject of this judgment arose from the decision of the Election Court sitting at Rongo Law Courts in a Petition which challenged the election of the Members of the County Assembly of Migori who had been so elected by way of nomination through a Party List generated by the Orange

Democratic Movement.

2. The Petition was allowed hence the appeals.

### **Background:**

3. By an Election Petition evenly dated and filed on 07/09/2017 **Mogesi Agnes Bange, Milicent Akinyi Odalo, Florence Adongo Ochieng, Lilian Anyango Otieno, Asenath Adhiambo Oloo, Halima Omar Marwa, Hellen Moraa Omwoyo, Hellen Atieno Oduor and Grace Achieng Otieno** (hereinafter referred to as '**the Petitioners**') petitioned the election of **Caroline Akinyi Okere, Elizabeth Talia, Rose A. Aoro, Mary Dede Odiga, Judith Gad, Ruth Atieno Anyano, Claris Dolly Oyoo, Grace Akinyi Odhiambo, Florence Abich Oile, Dorine Dande and Roseline Adhiambo Oyoo** (hereinafter referred to as '**the Nominated MCAs**') by way of nomination which culminated with the publication of the Gazette Notice No. 8380 on the 28<sup>th</sup> day of August 2017 (hereinafter referred to as '**the impugned Gazette Notice**') on *inter alia* the ground that the Nominated MCAs were elected pursuant to a Party List which had been impugned by the Political Parties Disputes Tribunal (hereinafter referred to as '**the PPDT**').

4. The Petitioners sought for a declaration that their rights under **Article 38(1)(b)** and **Article 47** of the **Constitution** had been violated, a declaration that the impugned Gazette Notice is illegal and void, an Order nullifying the election of the Nominated MCAs, an Order directing the compliance of the decision of PPDT and costs of the Petition.

5. The Petitioners as well joined the Independent Elections and Boundaries Commission (hereinafter referred to as '**the IEBC**') and Orange Democratic Movement (hereinafter referred to as '**ODM**') which was the nominating party as Co-Respondents in the Petition.

6. The Respondents filed their respective responses save ODM which did not participate in the hearing of the Petition. On consensus of the Counsels and with the approval of the trial court the petition was heard by way of the Affidavit evidence and written submissions. Judgment was rendered on 04/01/2018 hence the appeals.

### **The Appeals:**

7. The Appellants in **Election Petition Appeal No. 2 of 2018** filed their Memorandum of Appeal dated 04/01/2018 on 05/01/2018. They preferred 10 grounds in seeking that the appeal be allowed, that the judgment of the Election Court be set-aside, that a declaration that the Appellants were validly nominated be issued and that they be awarded costs.

8. The Appellant in **Election Petition Appeal No. 1 of 2018** filed her Memorandum of Appeal evenly dated 04/01/2018. She preferred 24 grounds in seeking that the appeal be allowed, that the Petition before the Election Court be dismissed with costs, a declaration that the Appellant was validly elected and as such has the right, capacity and power to serve as a Member of the County Assembly of Migori for the remainder of the term of the County Assembly be issued and that she be awarded costs.

9. The Appellants in **Election Petition Appeal No. 4 of 2018** filed their Memorandum of Appeal dated 10/01/2018 on 11/01/2018. They also preferred 10 grounds in seeking that the appeal be allowed, that the whole decision subject of the appeal be reversed or set-aside and be substituted by an order dismissing the Petition and that an order restoring and confirming the appellants as legally elected and gazetted members of the County Assembly of Migori under the Gender Top-Up List vide the ODM Party List be issued.

10. Directions were taken on 05/03/2018 and upon consensus of the Counsels and the approval of this Court the appeals were heard by way of written submissions. All the parties duly complied with the said directions. ODM also filed its written submissions. Highlighting of the submissions was on 21/05/2018 whereafter the matter was set for this judgment.

11. **Mr. Okong'o** Counsel for the Appellant in Election Petition Appeal No. 1 of 2018 relied on the filed written submissions which he described them as comprehensive alongside the filed List of Authorities. After stating the legal framework, Counsel submitted that the Election Court erred in nullifying the election of Dorine Dande. That, the requirements of **Section 83** of the **Elections Act** (hereinafter referred to as '**the Act**') upon which the election could be annulled were not satisfied since her election was in line with the **Constitution** and the law. It was further submitted that the decision of PPDT in **Complaint No. 497 of 2017 Mogesi Agnes Bange vs. Orange Democratic Movement** (hereinafter referred to as '**the PPDT decision**') was a nullity for want of jurisdiction since the Complainant did not in the first instance invoke the ODM's internal dispute resolution mechanism prior to filing the complaint before the PPDT and that PPDT was an appellate body only mandated to deal with appeals from disputes initially resolved by political parties. Counsel relied on the decisions of **Sunctus G. Ndegwa & 3 Others vs. Jubilee Party & Another (2017) eKLR**, **Francis Gitau Parsimei & Others vs. National Alliance Party & Others (2013) eKLR**, **Josiah Taraiya Kipelian ole Kores vs. Dr. David ole Nkediye & 3 Others (2013) eKLR**, **Diana Kethi Kilonzo & Another vs. Independent Elections and Boundaries Commission & 10 Others (2013) eKLR**, **Beatrice Nyaboke Oisebe vs. Independent Elections and Boundaries Commission & 2 Others (2013) eKLR**, **Jubilee Party of Kenya vs. Patrick Kabundu Mukiri & Another (2017) eKLR** and **National Gender and Equality Commission vs. Independent Elections and Boundaries Commission & Another (2013) eKLR**.

12. In further argument, Counsel took the position that even the Election court did not have any jurisdiction over the Petition as the dispute was on party nominations which dispute was to be dealt with by ODM and the PPDT on appeal. It was submitted that even if the Election court were to have jurisdiction, still the PPDT decision could not aid the Petitioners since the Appellant was not a party to the dispute on which the decision was made. That, reliance on the PPDT decision violated the Appellant's right to be heard under **Articles 47** and **50(1)** of the **Constitution** as she was not a party to any dispute before the PPDT. Counsel further submitted that the Election court lacked the jurisdiction to direct a political party on whom to include in a Party List or to direct IEBC to publish a Party List not forwarded to it by a political party. Counsel relied on the decision of **Ernest Orwa Mwai vs. Abdul S. Hashid & Another (1995) eKLR**, **Daniel Nganga Kamande & 2 Others vs. Ngucanirio Farmers Company Limited (2012) eKLR** and **West Kenya Sugar Company Limited vs. Kenya Sugar Board & Another (2014) eKLR**.

13. Counsel further argued that even if the Election court was vested with jurisdiction, the Petition did not challenge the election of Dorine Dande in any way and that the nullification was erroneous. That, to the contrary there was ample evidence that the election was in conformity with the law and that the Petitioners failed to discharge their burden of proof as required in law by failing to at least prove that they applied to ODM for consideration for nomination. Counsel urged this Court to allow the appeal as prayed.

14. **Mr. Ayieko** Counsel for the Appellants in Election Petition Appeal No. 2 of 2018 supported all the three appeals. He fully associated himself with the submissions of **Mr. Okong'o**. He further submitted and reiterated that PPDT lacked jurisdiction as no complaint was lodged to ODM pursuant to the ODM's internal dispute resolution mechanism. That, the resultant PPDT decision was a nullity in law and the Election court erred in relying on it to impugn the election of the Nominated MCAs on account of such jurisdiction on its part. Counsel also submitted that in any event the implementation of the PPDT decision had been stayed in **Nairobi High Court Judicial Review No. 513 of 2017 Republic vs. The Political Parties Disputes Tribunal, Independent Elections and Boundaries Commission, Mogeni Agnes Bange** (Interested Party) and ODM (as the Exparte Applicant). I will henceforth refer to it as '**the Judicial Review**'. Reliance was made on the Supreme Court decision in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 Others (2014) eKLR**.

15. Counsel submitted that the on the gazettment of the Final Party List by IEBC the Nominated MCAs stood elected as Members of the County Assembly of Migori and that any dispute challenging their election formally moved to the election courts. The Supreme Court decision in **Moses Mwicigi & 14 Others vs. Independent Elections and Boundaries Commission & 5 Others (2016) eKLR** and the provisions of **Section 75(1A)** of the **Act** were referred for that position. On that, Counsel was of the view the election court assumed proper jurisdiction when the Petition was filed before it.

16. Having filed a Petition, it was submitted that the Petitioners were then called by the law to prove that the election of the Nominated MCAs pursuant to the Party List generated by ODM and gazetted by IEBC was contrary to the Constitution and the law. Counsel submitted that the Petitioners failed to discharge that burden on various fronts including their failure to prove that they applied to ODM for consideration for nomination.

17. It was further submitted that the election court erred in relying on the PPDT decision since the same did not concern the Appellants. That, the Appellants were not parties thereto and any finding that arose from such a decision could not legally affect them. The Appellants contended that the election court condemned them without according them an opportunity to be heard, that their constitutional rights were infringed as well as **Section 4(3) of the Fair Administrative Act, 2015**. It was also argued that the election court did not address itself to the matters raised in the Petition but only adopted and enforced the PPDT decision. That, the election court erred in not considering crucial and uncontroverted facts and in failing to arrive at a finding that the Party List which was allegedly generated through the meeting called by Hon. Zacharia Okoth Obado was generated in contravention of the ODM's Constitution and the ODM Guidelines to County Electoral Colleges for Generating Party Lists and was an outright fraud.

18. Lastly **Mr. Ayieko** submitted that the election court erred in failing to hold that the Nominated MCAs were elected in accordance with the Constitution, the law and the ODM's Constitution. That, the election court failed to find that the Constitution and the law vested exclusive powers for nomination through the Party Lists to the political parties and that neither IEBC nor Courts have the mandate to give directions on who may be in such lists. The decisions in Moses Mwigigi (supra), Maendeleo Chap Chap Party & 2 others vs. Independent Elections and Boundaries Commission & Another (2017) eKLR, William Odhiambo Oduol vs. Independent Elections and Boundaries Commission & 2 Others (2013) eKLR, Kiarie Waweru vs. Beth Wambui Mugo (2008) eKLR, Joho vs. Nyange & Another (2008) 3 KLR and Ben Njoroge & Another vs. Independent Elections and Boundaries Commission & 2 Others (2017) eKLR were cited in support of the argument.

19. **Mr. Nyasimi** Counsel for the Appellants in Election Petition Appeal No. 4 of 2018 also associated himself with the submissions of **Mr. Okong'o** and **Mr. Ayieko**. He also wholly relied on his filed written submissions and the List of Authorities. He was perplexed that the election court found it fit and condemned the Appellants based on the PPDT decision which they were never a party to. That, the dispute before the PPDT was between a member and a Political Party and that it was very different from the dispute before the election court which was between the candidates and IEBC. On that issue Counsel relied on the decision in Diana Kethi Kilonzo (supra).

20. Counsel argued that the decision of the election court was also contrary to law since it directed IEBC to pick specific names and come up with a Party List. He posed a question: *What if those people did not qualify for nomination under the Constitution and the law?* Counsel further argued that the decision of the election court had the effect of unlawfully changing the Party List since once such a list was accepted by IEBC the law provides that it cannot be changed for the term of the Assembly. That, further to the unlawful nature of the list generated by PPDT, the Complainant before the PPDT did not suggest any names for inclusion in the Party List but that the said names were proposed by an interested party, Hon. Zacharia Okoth Obado, well beyond the confines of the law.

21. **Mr. Nyasimi** also submitted that it was against public interest that a whole team of nominated MCAs be sent home.

22. **Mr. Mogusu** filed written submissions and List of Authorities on behalf of IEBC. It was **Mr. Ayieko** who held his brief during the highlighting of the submissions. Counsel supported all the appeals and associated himself with the submissions of the Counsels for the Appellants in all the appeals.

23. It was submitted that ODM complied with the Constitution and the law in respect to party lists and it was issued with the Certificate of Compliance by IEBC pursuant to **Section 34(6A)** of the **Act** and that there has been no challenge thereto. That, ODM complied with all the processes and legal requirements and forwarded its various Party Lists which were duly accepted by IEBC and accordingly published as

required by the law. It was hence argued that the election was in accordance with the law.

24. Counsel further submitted that PPDT did not have any jurisdiction over the matter since the complainant had failed to comply with **Section 40(2)** of the **Parties Act**. The decisions in **Fredrick Odhiambo Oyugi vs Orange Democratic Movement & 2 Others (2017) eKLR**, **Joseph Obiero Ndiege vs. Orange Democratic Movement & Another (2017) eKLR** and **Gabriel ukachi Chapia vs. Orange Democratic Movement & Another (2017) eKLR** were relied on in emphasis. He prayed that the appeals be allowed.

25. **Mr. Roche Odhiambo**, Senior Counsel appeared for ODM which had been condemned by the election court to jointly shoulder the costs of the Petition with IEBC. Counsel mainly buttressed the position that ODM had generated a lawful Party List through the Migori County Electoral College which was chaired by Hon. Junet Mohammed pursuant to the ODM Constitution and the ODM Guidelines to County Electoral Colleges for Generating Party Lists and that the purported list generated by Hon. Zacharia Okoth Obado had no legal backing and that PPDT erred on relying on it to come up with its Party List which directed ODM and IEBC to implement. That, the election court as well erred in adopting the PPDT decision which was reached without jurisdiction.

26. On the issue of costs, Counsel submitted that since all these unnecessary litigations were prompted by the illegal list generated by the group under the stewardship of Hon. Zacharia Okoth Obado then it was only prudent that the said Hon. Zacharia Okoth Obado be called to personally shoulder the costs which should include aggravated costs for illegally assuming jurisdiction on party matters.

27. The Petitioners were represented by **Mr. Sagana** and **Mr. Rotich**. Counsels relied on their written submissions and a List of Authorities. **Mr. Sagana** concurred that the law rests clear that nominations are party issues and a member dissatisfied with the outcome of such nomination must first pursue redress through the party's internal dispute mechanism and an appeal to PPDT. That, **Mogesi Agnes Bande** did exactly that. That, upon dissatisfied with the party list generated by ODM she formally lodged a complaint to ODM which complaint ODM declined to deal with and the complainant rushed to PPDT.

28. That, the complainant filed a complaint against ODM and service was accordingly made but ODM declined to participate in the proceedings before the PPDT. That, PPDT rendered itself in the decision which was served upon ODM and IEBC. That, in disregard to the PPDT decision ODM forwarded a different party list to IEBC which list IEBC also, in disobedience of the Court order, gazetted it. That, ODM instead did not appeal or seek review of the PPDT decision but filed the Judicial Review which it withdrew on the gazettelement of the impugned Gazette Notice.

29. On the way forward upon the gazettelement of the impugned Gazette Notice, Counsel concurred with the Supreme Court decision in **Moses Mwicigi** (supra) and the decision in **Rahma Issak Ibrahim vs. Independent Elections and Boundaries Commission & 2 Others (2017) eKLR** that any challenge thereof rested with an election court. He submitted that it was the reason the Petitioners then filed the Petition which ODM again failed to oppose. On the importance of the PPDT as an institution in law, Counsel relied on the decisions **in John Musakali vs. Speaker County of Bungoma & 4 Others (2015) eKLR** and in **Francis Mutuku vs. Wiper Democratic Movement - Kenya & 2 Others (2015) eKLR**.

30. It was further submitted that the issue of which party list was to be gazetted by IEBC was well settled by PPDT and since the PPDT decision was not set-aside or reviewed then the election court had no otherwise than to enforce the PPDT decision. Counsel further clarified that indeed the stay order obtained by ODM in the Judicial Review did not bar the implementation of the PPDT decision but stopped the furtherance of any dealing in respect to the party list which had been published by IEBC in the local dailies which list was different from the harmonized list in the PPDT decision. That, the decision of the election court was hence right and ought to be upheld.

31. Responding to the submission that the Petitioners did not avail any evidence that they applied for consideration for nomination to ODM before the election court, **Mr. Sagana** submitted that the issue had been settled by the PPDT decision and could not be opened before the election court since the election

court as well as this Court has no jurisdiction to sit on an appeal over the PPDT decision.

32. On the submission that the Nominated MCAs did not take part in the proceedings before the PPDT and as such any reliance on the PPDT decision infringes on their right to a fair hearing, Counsel submitted that all the Nominated MCAs benefited from an illegal process and cannot be heard to claim protection of the very law they disobeyed. On the need for a party to obey court orders once the currency of such orders come to the notice of a party and even in the absence of formal personal service, Counsel relied on the decisions in **Justus Karuiki Mate & Another vs. Martin Nyaga Wambora & Another (2014) eKLR** and **Africa Management Communication International Limited vs. Joseph Mathenge Mugo & Another (2013) eKLR**. Counsel further submitted that none of the Appellants was barred in law to appeal against or seek the review of the PPDT decision in view of the decision by the Court of Appeal in **Law Society of Kenya Nairobi Branch vs. Malindi Law Society & 6 Others (2017) eKLR**.

33. Whereas Counsel agreed that **Section 34(10)** of the **Act** provided that a Party List cannot be amended during the term of the Assembly once gazetted, he submitted that it is only the political party which can not do so but that is not a bar to a Court. That, a Court of law has jurisdiction to alter any such list which was not derived in accordance with the law.

34. **Mr. Rotich** pointed out that jurisdiction of this Court as conferred under **Section 75** of the **Act** was only limited to points of law and that this Court should not entertain any argument touching on any facts. He argued that indeed most of the grounds of appeal in all the three appeals were based on issues of facts and urged this Court to disregard them. Counsel re-emphasized that the PPDT and the election court had jurisdiction over the matter since the complainant invoked the ODM's internal dispute resolution mechanism before instituting the complaint at the PPDT and that on the gazettement of the Party List by IEBC ceased jurisdiction on the part of PPDT to the election court.

35. Counsel wondered why ODM had persistently not taken part in the previous proceedings but had all over a sudden sprung up amid a malicious and scathing attack on Hon. Zacharia Okoth Obado. Counsel praised the decision of the election court as one against Party impunity and urged this Court not to reward parties who willfully obey court orders. On costs, Counsel submitted that costs ought to be borne by only the parties before Court.

36. In a rejoinder, **Mr. Okong'o** submitted that the election court was seized of the Petition in the first instance and it was only bound by the pleadings and the evidence adduced before it and it erred when it ended up enforcing the PPDT decision and in full view of the fact that the Appellants were not parties in the proceedings before the PPDT. It was also submitted that the Petition was not heard by the election court and hence the decision lacked any legal basis.

37. **Mr. Ayieko** reiterated that the election court was not the execution arm of PPDT. That, it was seized of the matter for the first time and it was duty bound to determine every issue in dispute but not to rely on what had transpired before the PPDT.

38. Counsel also clarified that the withdrawal of the Judicial Review was on the basis that the High Court lacked any jurisdiction to deal with the matter any further after the gazettement of the Party List by IEBC. On the submission that this Court can only deal with points of law, Counsel submitted that this Court must understand the factual basis of the dispute for it to deal with the emerging issues of law especially given that the Appellants contended that the decision of the election court was not rendered in accordance with the law. It was lastly submitted that PPDT lacked the jurisdiction to come up with a Party List and that such an illegality could not find a basis of a decision which is allegedly sound in law.

39. **Mr. Nyasimi** urged this Court to distinguish between the dispute before the PPDT and that before an election court. That, the two disputes were distinct and that the PPDT decision could not be enforced by an election court. That, the election court erred in not finding that one of the party lists was clearly illegal. Counsel submitted that what constitutes matters of law in election appeals had been settled by the Supreme Court in the cases of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 7 Others Sup. Ct. Petition No. 2B of 2014 (2014) eKLR** and **Moses Mwicigi** (supra).

40. **Mr. Roche Odhiambo** re-emphasized that ODM forwarded only one Party List which was duly gazetted by IEBC and that the alleged harmonized list remains unknown to ODM and as such it was availed without the sanctity of ODM. Counsel clarified that ODM has been actively involved in this matter and fully participated in the proceedings before the PPDT wherein it filed affidavits. That, ODM also instituted the Judicial Review. That, there is no bar for ODM to participate in this appeal since it is as well aggrieved by the decision of the election court having been decreed to shoulder the costs of the Petition. Counsel urged this Court to allow the appeals and find that costs be personally borne by Hon. Zacharia Okoth Obado.

41. With the foregone, Counsels rested their respective arguments.

#### **Analysis and Determinations:**

42. I have keenly read and understood the substance of these appeals. I have perused the Petition and all the responses and their accompanying Affidavits, the proceedings, submissions and the judgment of the election court as well as the three Records of Appeal, the parties' submissions before this Court and all the decisions referred to by the respective parties.

43. As the first appellate Court, this Court derives its jurisdiction from **Section 75(4)** of the **Act**. Its role is to revisit the entire record but to limit itself to only settling matters of law. As this is an appeal from the decision of an election court, what constitutes matters of law in election matters was aptly settled by the Supreme Court in the case of **Gatirau Peter Munya** (supra).

44. Although the Supreme Court was dealing with an appeal from the Court of Appeal to itself nevertheless the principles enunciated in that judgment apply to this Court which is sitting on an appeal from the Magistracy as an election petition trial court. The Supreme Court expressed itself on what constitutes matters of law as follows: -

***[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase “matters of law only”, means a question or an issue involving:***

***a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor:***

***b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor:***

***c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were “so perverse”, or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.***

***[81A] It is for the appellate Court to determine whether the petition and memorandum of appeal lodged before it by the appellant conform to the foregoing principles, before admitting the same for hearing and determination.***

***[82] Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or***

*invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence, and probity in electoral – dispute adjudication, on the other hand.*

45. With the foregone guidance and which is binding on this Court, this Court must therefore be so vigilant and strictly keep within the above confines. The Court should not accept any invitation 'to re-examine the probative value of the evidence tendered at the trial court' or .....to calibrate any such evidence, especially calling into question the credibility of witnesses...'. Put differently, this Court should resist the temptation of venturing into the realm of evidence, evaluating that evidence and reaching its own conclusions on factual matters. However, this Court reserves the jurisdiction to venture into the said realm of evidence with a clear purpose of determining the applicability or interpretation and/or construction of a provision of the Constitution, an Act of Parliament, subsidiary legislation or any legal doctrine.

46. I will therefore deal with this matter with the said deference in mind. From the record and the parties' arguments I hereby formulate the following issues for determination: -

- (a) The Legal Framework;
- (b) Whether the PPDT and the Election court had jurisdiction over the dispute;
- (c) If the Election Court had the requisite jurisdiction, then was the Petition proved as required in law?
- (d) Costs.

### **The Legal Framework:**

47. I have taken the liberty to revisit the law guiding the subject of nomination of Members to the County Assemblies in Kenya in detail due to its centrality in these appeals.

48. The subject has its origin in the **Constitution**. Since this matter relates to the membership of a County Assembly, **Article 177** of the **Constitution** (Membership of a County Assembly) provides 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 are 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.*

**(4) A county assembly is elected for a term of five years.**

49. This constitutional provision is the source of the political parties' mandate to nominate members to the County Assembly. The purpose of the said provision is to guarantee that no more than two-thirds of the membership of any Assembly is comprised of the same gender and to further safeguard and ensure the representation from the marginalized groups including persons living with disabilities and the youth.

50. The members contemplated under **Article 177(1)(b)** and **(c)** of the **Constitution** are nominated by political parties proportionate to the number of seats garnered in **(a)** above. Those members can only be 'drawn' from a list which is prepared by a political party and presented to IEBC which list is eventually published in the Kenya Gazette by IEBC. That list is what is referred to as '**a Party List**'.

51. **Article 90** of the **Constitution** (Allocation of party lists seats) provides for party lists seats in the following manner: -

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

**(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that-**

**(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation.**

**(b) except in the case of the seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and**

**(c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.**

**(3) The seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.**

52. The above provision clearly spells out specific duties on IEBC relating to *inter alia* the *conduct and supervision of elections for seats for nomination purposes*. In undertaking the said duty IEBC stands further guided by *inter alia* **the Act** under **Sections 34, 35 and 36** thereof. For purposes of this discussion I will only reproduce the relevant provisions in the said sections of **the Act** which include: -

**'34. (6) The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned.**

**(6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and -**

**(a) issue the political party with a certificate of compliance; or**

**(b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.**

**(6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.**

**(7) The party lists submitted to the Commission shall be valid for the term of Parliament.**

**(8) A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.**

**(9) The party list shall not contain a name of a candidate nominated for an election.**

**(10) A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the County Assembly, as the case may be, for which the candidates are elected.**

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

**36.(1) A party list submitted by a political party under-**

**(e) Article 177 (1) (b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county;**

**(f) Article 177 (1) (c) of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group**

**(2) A party list submitted under subsection (1) (a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.**

**(3) The party list referred to under subsection (1) (f) shall priorities a person with disability, the youth and any other candidate representing a marginalized group.**

**(4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation.**

**(7) For purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under subsection (1) (e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.**

**(8) For purposes of Article 177 (1) (c) of the Constitution, the Commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the party.**

**(9) The allocation of seats by the Commission under Article 177(1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution.**

**37.(1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.**

**(2) Notwithstanding the provision of Section 34 (10), if there are no more candidates on the same party's list, the Commission shall require the concerned political party to nominate another candidate within twenty -one days.**

**(3) A vacancy in any seat in a political party list shall not be filled three months immediately**

*before a general election.*

***(4) Where a political party fails to comply with the provisions of subsection (2) the Commission shall not allocate the seat for the remainder of the term of Parliament or the County Assembly.***

53. Further guidance on Party Lists is provided under **Part X of the Elections (General) Regulations, 2012** (hereinafter referred to as '**the Regulations**') being **Regulations 54 to 56B** inclusive which re-emphasizes that Party Lists must be in consonance with the **Constitution, the Act** and all the attendant regulations. **Regulation 54** provides for the procedure for the preparation and presentation of Party Lists until when a Final Party List is published in at least two newspapers of national circulation. Due to the centrality of the procedure in this matter I will reproduce verbatim the said **Regulation 54**, and as follows: -

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

***(2) The party list referred to in sub-regulation (1) shall contain the name, address, age, sex, disability and category of disability, phone number, occupation, identity card number or passport number and coloured passport size photograph image, elective post sought, and such other qualifications as are provided under the Constitution and the Act in the prescribed Form 24B.***

***(3) A party list submitted under Sub regulation (1) shall be in accordance with section 36 of the Act, and shall be –***

***(a) signed by the authorized official of the political party submitting the party list; and***

***(b) be submitted in hard copy, in electronic form and such other form that the Commission may specify.***

***(4) Each political party list nominee shall after nomination, submit to the Commission a letter stating his or her intention to serve if nominated.***

***(4A) Each political party list nominee representing persons with disabilities shall submit, to the Commission, a certification from the National Council for Persons with Disabilities.***

***(5) The Commission may reject a nominee submitted by a political party for any elective post if that nominee is not qualified to be elected to the office for which the nomination is sought as specified under the Constitution or the Act.***

***(6) The rejection by the Commission of a nominee under this regulation shall not invalidate the entire party list submitted by the political party.***

***(7) The Commission, after making the decision to reject a nominee, inform the political party concerned of that decision and request that political party to submit another name within such time as the Commission shall determine.***

***(8) The Commission shall publish the final part list in at least two newspapers with nationwide circulation.”***

54. **Regulation 55** of the **Regulations** is of equal importance as it also deals with the procedure on Party Lists. The same is tailored as follows: -

***(1) The part list contemplated under regulation 54 shall be prepared in accordance with the nomination rules of the political party.***

*(2) The Commission shall within fourteen days of receipt reject any party list that does not comply with the requirements of the Constitution, the Act or these Regulations.*

*(3) The political party whose party list or nominee has been rejected by the Commission under sub-regulation (2) shall resubmit the party list or nominee within seven days from the date that the party list was rejected under sub regulation (2).*

*(3A) Where a political party fails to amend the party list or resubmit the list as directed by the Commission, the Commission shall reject the party list.*

*(4) A political party submitting a party list under regulation 54 shall submit a declaration to the effect that the political party has complied with its rules relating to the nomination of the names contained in the list.*

55. **Regulation 56** of the **Regulations** calls for the publication of the formula for allocation of Party Lists seats by IEBC. **Regulation 56A** of the **Regulations** deals with the procedure on the expulsion of a member elected by way of Party Lists from the nominating political party and **Regulation 56B** of the **Regulations** deals with the procedure on the resignation of a member elected through a Party List.

56. There are further provisions relating to Party Lists under the **Elections (Party Primaries and Party Lists) Regulations, 2017** (hereinafter referred to as 'the Party Lists Regulations'). These Regulations provide for *inter alia* the guiding principles for conducting of party primaries and party nominations of Party Lists under **Regulation 4** thereof. **Regulations 6** provides that the rules guiding the nomination procedures must be approved by IEBC to conform to the **Constitution, the Act** and all the attendant regulations whereas **Regulation 7** provides for a Party Nomination Code of Conduct. **Regulation 15** deals with the requirements to be complied with by any aspiring candidate in their applications to their party's Election Board.

57. IEBC is to reject any Party List which does not conform to the law. That is in line with **Regulation 26** of the **Party Lists Regulation** which provides as follows:-

*(1) The Commission shall reject a party list or a name on the party list submitted by a political party where -*

*(a) the party list does not conform to the requirements of the Constitution, the Act or these Regulations; or*

*(b) the period for submitting revised part lists has lapsed.*

*(2) Where the Commission rejects a party list or a nominee on the party list, it shall require the political part to resubmit the party list or nominee within such period as the Commission may specify.*

*(3) A political party resubmitting a part list under sub regulation (2) shall resubmit a declaration under Regulation 18 to the effect that the political party has complied with the nomination rules and procedures of the party relating to the nomination of the names contained in the list.*

*(4) In the event that a political party fails to resubmit the party list or a name on the party list after it has been rejected under sub-regulation (1), the party shall not be considered in the allocation of seats.*

*(5) A person who has been nominated on a party list may decline the nomination by informing the political party and the Commission in writing, and the Commission shall replace that name with the next name of the same gender on the part list.*

58. The foregone is the prevailing legal rubric about election by way of nomination by Party Lists to a

County Assembly in Kenya.

**Whether the PPDT and the Election court had jurisdiction over the dispute:**

59. Jurisdiction is the heart on which a dispute brought for adjudication before a Court or a Tribunal derives its life from.

60. Ibrahim, JSC in **Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others** when in demystifying jurisdiction quoted from the decision in **Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others** where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows: -

*‘...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...’*

61. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows:

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*“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”*

62. The Court of Appeal more recently in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction: -

*“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”*

63. It therefore follows that once a Court or a Tribunal finds that it has no jurisdiction then it must down its tools accordingly. There are no two ways about it! However, if a Court or a Tribunal finds that it has jurisdiction over a matter it must not hesitate to discharge its duty accordingly.

64. The PPDT is one of the institutions in electoral disputes resolution. The genesis of the law on resolution of electoral disputes is the **Constitution. Article 87** (Electoral disputes) provides as follows: -

*“(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.***

***(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.”***

65. The **Constitution** further created the institution of IEBC in **Article 88**. One of the constitutional responsibilities bestowed upon IEBC relates to settling of electoral disputes. **Article 88(4)(e)** provides as follows: -

***“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.”***

66. One of the legislations on electoral disputes contemplated under **Article 87(1)** of the **Constitution** is **the Act**. Like in the case of **Article 88(4)(e)** of the **Constitution**, **Section 74** of **the Act** also mandates IEBC to resolve disputes arising from nominations but not election disputes. That section provides 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.***

***(4) 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.*** (emphasis added).

67. **The Independent Electoral and Boundaries Commission Act No. 9 of 2011**, being as well a product of the **Constitution**, further provides for the jurisdiction of IEBC in the resolution of electoral disputes.

68. Another legislation which came into life by dint of the **Article 87(1)** of the **Constitution** is **the Political Parties Act No. 11 of 2011** (hereinafter referred to as **‘the Parties Act’**) which came into operation on 27/08/2011. **Section 39** of **the Parties Act** creates the PPDT whose jurisdiction is provided under **Section 40** thereof as follows: -

***‘1. The Tribunal shall determine –***

***(a) disputes between the members of a political party;***

***(b) disputes between a member of a political party and a political party;***

***(c) disputes between political parties;***

***(d) disputes between an independent candidate and a political party;***

***(e) disputes between coalition partners; and***

***(f) appeals from decisions of the Registrar under this Act;***

***(fa) disputes arising out of party primaries.***

2. 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.

69. The procedure within which PPDT operates is governed by the **Political Parties Disputes Tribunal (Procedure) Regulations, 2017** (hereinafter referred to as '**the PPDT Regulations**').

70. From the reading of **Section 40** of the **Parties Act**, the PPDT only assumes jurisdiction over disputes falling under paragraphs (a), (b), (c) and (e) upon an initial determination of such disputes through the political parties' internal dispute resolution mechanisms. The **Parties Act** is however silent on instances where a political party declines to adjudicate upon a dispute which must first be dealt under the party's internal dispute resolution system. My quick response is that such an aggrieved party can competently file the complaint before PPDT and PPDT shall assume jurisdiction upon being satisfied that the complainant, in the first instance, invoked the political party's internal dispute resolution mechanism towards resolution of the dispute but the adjudication was not undertaken.

71. The question which now begs an answer is whether PPDT had jurisdiction to in anyway deal with the dispute which allegedly arose during the nomination process. The positions are divided. From the record before me I gather that the dispute was between one of the Petitioners, **Mogesi Agnes Bange**, and ODM. **Mogesi Agnes Bange**, whom I will also refer to as '**the complainant**' for purposes of this discussion, was aggrieved by the non-publication of the party list which had allegedly been harmonized by the ODM's Credentials Committee following the submission of two party lists from the Migori County Electoral College. That was a dispute between a member and a political party and it fell within **Section 40(1)(b)** of the **Parties Act**. Settled as the law is, that dispute was in the first instance to be adjudicated through the ODM's internal dispute resolution mechanism before it could find its way to PPDT.

72. On one hand, the complainant contended that she invoked the ODM's internal dispute resolution mechanism by formally writing a letter dated 24/07/2017 to ODM but the letter never elicited any response therefrom. On the other hand, the Nominated MCAs and ODM contended that the complainant never invoked ODM's internal dispute resolution mechanism or at all.

73. To settle that issue, I have perused the Record of Appeals and came across the complainant's letter dated 24/07/2017. It was a letter addressed to ODM by the complainant whose subject was '**COMPLAINT FOR OMISSION FROM THE ORANGE DEMOCRATIC MOVEMENT PARTY LIST SUBMITTED TO THE IEBC ON GENDER TOP UP NOMINEES TO THE MIGORI COUNTY ASSEMBLY**'. I will refer to the said letter as '**the letter**'. The letter was also copied to IEBC. According to stamps on its face, the letter was accordingly received by ODM and IEBC.

74. The letter had the following demand: '*I hereby DEMAND that the correct party list as generated through the prescribed party guidelines and Regulation 55 of the Election (General) Regulations, 2012 be submitted to the IEBC WITHIN THE NEXT 24 HOURS*'.

75. But did ODM have an internal dispute resolution mechanism? The answer is in the affirmative. I have so confirmed from the ODM Constitution and the ODM's Election and Nomination Rules which are part of the records before Court. It is the Election and Nomination Rules (hereinafter referred to as '**the Nomination Rules**') that provided for the resolution of disputes arising from nominations. The Nomination Rules were amended and adopted by the ODM's National Governing Council on 05/12/2014. **Rule 19** of the **Nomination Rules** is on Disputes Resolution and Appeal Tribunals. For ease of this discussion I will reproduce the rule verbatim: -

#### **'19.1 County Appeals Tribunal:**

*19.1.1 There shall be established a County Appeals Tribunal in every County each composed of five members of the Party who shall be distinguished persons of good moral standing in society and of high integrity.*

19.1.2. *Members of the County Appeals Tribunal shall be appointed by the NEB, and approved by the NEC at least 30 days before the commencement of the nomination exercise or Party elections. The Tribunal shall be guided by the Rules of procedure which shall be formulated the NEB.*

19.1.3 *The NEB shall, at the time of appointment, designate one member of the Tribunal as the Presiding Chairperson.*

19.1.4 *The County Appeals Tribunal shall determine appeals arising from Polling Station, Sub Branch, Branch party elections, and appeals arising from nominations in respect of County Ward representatives.*

19.1.5 *No member of the Tribunal shall during his/her tenure of office be a Party official or an aspirant in any Party election or nomination.*

19.1.6 *Any candidate aggrieved by the outcome of Party elections in the Branch, Sub-Branch, or Polling Station shall have the right of appeal to the County Appeals Tribunal within 48 hours of the announcement of results.*

19.1.7 *The appeal shall be in writing and duly signed by the appellant, accompanied by a non-refundable fee of Kshs. 30,000/= payable to the Party.*

19.1.8 *The County Appeals Tribunal shall consider and determine the appeal in accordance with the Constitution of Kenya, applicable Law, Party Constitution and Election and Nomination Rules within 48 hours of receipt of the appeal.*

19.1.9 *The Appeals Tribunal may, in its discretion but for good reasons to be recorded, consider the written appeal and make its decision or make directives without the need to hear the appellant in person.*

19.1.10 *The Appeals Tribunal shall, in suitable cases, have powers to summon the Returning Officer responsible, Party witnesses with relevant evidence and after due consideration dismiss the appeal, order re-count or re-tallying of votes or otherwise nullify the result of the elections and order a repeat thereof.*

76. To guide the nomination processes in respect to the generation of Party Lists ODM formulated the **Guidelines to County Electoral Colleges for Generating Party Lists** as well as **Guidelines for Applications for Party Lists**. Both guidelines are part of the records before Court. The guidelines formulated the process from how an interested member of ODM applies for consideration up to the submission of the final Party Lists to IEBC. In respecting the party's internal dispute resolution mechanisms, the guidelines did not provide for any other avenue for adjudication of any dispute likely to arise during the said processes. For clarity purposes, the NEC Credentials Committee was charged with the duty of scrutinizing the party lists. To me the scrutiny of the lists is not the same thing as adjudicating upon a dispute that arose during the process. Any such dispute was clearly left to the confines of the appropriate party organs.

77. This Court gathers that the complainant did not comply with the dictates of the ODM Constitution and the Nomination Rules. The complainant did not lodge any appeal to the Migori County Appeals Tribunal the moment IEBC published the party list in the newspapers. However, even if I deem the letter as the complainant's appeal to the Migori County Appeals Tribunal, which is not, there is still no evidence that the requisite non-refundable fee of Kshs. 30,000/= was paid. The failure to comply with the ODM Constitution and the Nomination Rules on the part of the complainant may have been the likely rationale why ODM did not act on the letter.

78. The foregone analysis brings me to inevitable finding that the complainant did not invoke the ODM's internal dispute resolution mechanism prior to filing of the complaint at the PPDT. The complaint was hence filed in contravention of **Section 40(2)** of the **Parties Act**. Consequently, I find and hold that PPDT

did not have the jurisdiction to deal with the grievance.

79. Having so found, the next question is whether the Election court had jurisdiction to deal with the Petition. This issue is by now well settled. The Supreme Court in the **Moses Mwicigi** case (supra) answered *inter alia* two crucial questions which were ‘**At what point did the appellants [who were nominated by way of party lists] become ‘elected’ MCAs for Nyandarua County and at what point in time does the Court become clothed with jurisdiction to determine disputes relating to the nomination of members of a County Assembly, by virtue of Article 177(2) (b) of the Constitution.**’ The Court, in an in-depth analysis and in consideration of the **Constitution, the Elections Act, the Independent Electoral and Boundaries Commission Act, the Political Parties Act, the Elections (General) Regulations** and other relevant judicial decisions answered the said twin questions as follows:

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***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.*** (emphasis added).

80. The issue of the ‘*election of nominated members*’ to the County Assembly and Parliament was also dealt with by the Court of Appeal in the case of **Rose Wairimu Kamau & 3 others vs. IEBC C.A. No. 169 of 2013**. In a concurrent finding the Court had the following to say: -

***‘.....In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 97 (1) (c) and 177 (2) respectively have been gazetted ... they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Articles 105 of the Constitution or Part VIII of the Elections Act as the case may be.’***(emphasis added)

81. Differently constituted, the Court of Appeal in the case of **Jaldesa Tuke Deballo vs. Independent Electoral and Boundaries Commission and Another (2015) eKLR** again had the following to say: -

***“We are cognizant of the principle that upon gazettelement of members of the County Assembly, they are deemed to be elected members of the County Assembly...”***

82. It is therefore settled that once IEBC publishes the Gazette Notice of the names of the nominees to the County Assembly then that marks the end of the nomination process and the people whose names so appear in the Gazette Notice stand ‘**elected**’ into the County Assembly. It is also settled that any challenge to that ‘*election by nomination*’ can only be entertained by way of an election petition as provided for in the **Act** and not otherwise.

83. **Section 2 of the Act** describes an ‘**election court**’ 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 or the Resident Magistrate’s Court designated by the Chief Justice in accordance with Section 75 of this Act.”***

84. The Petitioners moved to and filed a Petition before the Magistrates Court at Migori immediately the impugned Gazette Notice was published. The Petition challenged the election of the Nominated MCAs. Pursuant to **Section 75(1A)** of the **Act**, the Magistrate’s Court hence had the jurisdiction to deal with the

Petition irrespective of what had happened before the PPDT and in the Judicial Review. I must clarify that the election court in this case had the jurisdiction to even arrive at a similar decision as the PPDT decision as long the election court arrives at the like decision upon addressing its legal mind to the **Constitution** and the law and on being satisfied that such a like decision ought to issue.

85. It is now the duty of this Court to consider if the Petition was proved.

**(c) Whether the Petition was proved as required in law:**

86. The yardstick in determining whether an election ought to be impugned is **Section 83** of the Act provides as follows: -

*“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”*

87. The Supreme Court in its majority judgment in **Presidential Election Petition No. 1 of 2017** between **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR** (hereinafter referred to as ‘**the 2017 majority judgment**’) had the following to say on the **Section 83** of the Act: -

*“[203] Guided by these principles, and given the use of word “or” in section 83 of the Elections Act as well as some of our previous decision, we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.”*

*[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”*

88. In undertaking such a duty an election court must always remain alive to the burden of proof and the standard of proof required in respect to the various grounds challenging the election. I will reproduce what I stated about the burden of proof and the standard of proof in **Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga vs. Independent Electoral and Boundaries Commission & 2 Others (2018) eKLR**: -

*’21. The issue of the burden and standard of proof in election petitions is by now well settled by the law and binding precedents. That election petitions are not ordinary suits is not in doubt. Election Petitions are special disputes which tend to interrogate whether the electoral system and processes contemplated under **Article 81** of the **Constitution** were adhered to and/or attained in an election. The crux of that interrogation is **Section 83** of the **Act** which provides for instances where an election may be nullified.....*

*22. That is the rationale why the incidences of proof are to be intently looked at.*

**i. The legal burden of proof: -**

23. The legal basis for the legal burden of proof is provided in **Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya**. The said section states as follows: -

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

24. The onus is therefore upon a Petitioner who seeks the annulment of an election **‘on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds ‘to the satisfaction of the court’. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.....’** (See paragraph 131 of **‘the 2017 majority judgment’**).

25. That is the legal burden of proof.

**ii. The evidential burden of proof: -**

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.

27. The principle of ‘evidential burden of proof’ is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in **Singh vs. Mota Singh & Another (2008) 1 KLR 1** stated that an election is a matter of public importance not to be lightly set-aside and in the case of **Jeet Mohinder Singh vs. Harminder Singh Jassi, AIR 2000 SC 258** the Supreme Court of India stated that ‘the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law....’.

28. The Supreme Court in **the 2017 majority judgment** had the following to say on the evidential burden of proof in **paragraphs 132 and 133** thereof as follows: -

**“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.**

**[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law....”**

29. It therefore follows that the legal burden of proof is static and rests on the Petitioner

throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.

**iii. The Standard of Proof: -**

30. The **Black's Law Dictionary**, (9<sup>th</sup> Edition, 2009) at page 1535 defines '**the standard of proof**' as '[t]he degree or level of proof demanded in a specific case in order for a party to succeed.' In many jurisdictions and decisions world over three main categories of the standard of proof emerge being the criminal standard of proof of beyond reasonable doubt; the application of civil case standard of 'balance of probabilities'; and the application of an intermediate standard of proof.

31. My Lordships and Ladyship in **the 2017 majority judgment** in dealing with this subject and after reviewing many decisions found and held as follows: -

**“[152] We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.**

**[153] We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.”**

89. The Petition had 54 paragraphs divided into five sections namely the Description of the parties, the Legal basis for the Petition, the Facts and grounds for relief, Infringement of the Petitioners’ rights and the Prayers.

90. The Petitioners described themselves as Life Members of ODM who applied for nomination for consideration for Party Lists seats and complied with all the requirements. The Petitioners gave a detailed chronology of the events that followed thereafter until the publication of the impugned Gazette Notice and prayed for the following orders: -

**a) A declaration that the Petitioners’ right to participate in the 2<sup>nd</sup> Respondents’ activities in line with Article 38 (1) (b) and Article 47 has been violated by the Respondents.**

**b) A declaration that Gazette Notice No. 8380 published by the Independent Electoral and Boundaries Commission on 28<sup>th</sup> August, 2017 in as far as it lists the 3<sup>rd</sup> to 13<sup>th</sup> Respondents as nominated Members of the County Assembly of Migori under the Gender Top- Up List is illegal and void**

**c) An order nullifying the nomination and subsequent gazette of the 3<sup>rd</sup> – 13<sup>th</sup> Respondents vide Gazette notice No. 8380 as nominated Members of the County Assembly of Migori in the ODM Part List.**

**d) An order directed to the Orange Democratic Movement and the Independent Electoral and Boundaries Commission to nominate and gazette respectively the Petitioners herein in accordance with the decision of the Political Parties Tribunal dated 2<sup>nd</sup> August 2017 in Complaint No. 497 of 2017 to wit:**

**a) Millicent Akinyi Odalo**

- b) Mogesi Agnes Bange**
- c) Florence Adongo Ochieng**
- d) Lilian Anyango Otieno**
- e) Asenath Adhiambo Oloo**
- f) Roseline Adhiambo Oyoo**
- g) Florence Abich Oile**
- h) Halima Omar Marwa**
- i) Hellen Moraa Omwoyo**
- j) Hellen Atieno Oduor**
- k) Grace Achieng Otieno**
- l) Doreen Dande**

**e) The Honourable Court do issue such other orders and give such further directions as it may fit to meet the ends of justice.**

**f) Costs of and incidental to this suit be awarded to the Petitioner.**

91. As required under the **Act** the Petition was supported by the affidavit of one of the Petitioners which introduced copies of the complaint filed at the PPDT, the PPDT decision, the Judicial Review among many other documents.

92. The Petition was opposed by the Nominated MCAs and IEBC. ODM did not participate in the proceedings before the trial court. From the responses and the affidavits in support of the Responses several issues were highly contested. They included the process undertaken by one of the groups under the stewardship of Hon. Zacharia Okoth Obado towards the generation of the one of the alleged two party lists as being in contravention of the Constitution, the law and the ODM Constitution; the resultant validity of that party list; that the Petitioners never applied for the nominations; that the Petitioners did not prove to be qualified for the nominations; the alleged meeting convened by the NEC Credentials Committee; the alleged harmonized Party List; the jurisdiction of the PPDT; the validity of the PPDT decision; the effect of the PPDT decision on the Nominated MCAs who were not parties to the complaint, among others.

93. From such a background the matters were in issue and pursuant to the **Evidence Act** they remained to be proved. On concurrence of the Counsels and with the approval of the trial court, the Petition was heard by way of reliance on the affidavits evidence and tendering written submissions. The court did not have the advantage of highlighting of the written submissions. A decision of the election court followed. I must state there is absolutely no error in law in the procedure undertaken in the hearing of the Petition before the trial court. In other words, the hearing of the Petition by way of adducing *viva voce* evidence was not mandatory.

94. I have carefully read the decision of the election court. The court formulated 4 issues for determination being: -

**1. Whether this Court has jurisdiction to determine this petition**

**2. Whether the Political Parties Dispute Tribunal Judgment dated 2<sup>nd</sup> August 2017 still stands.**

**3. Whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Respondent while causing the election of the 3<sup>rd</sup> to 13<sup>th</sup> respondent acted in utter disregard of the law.**

**3. Who bears the costs of the petition.**

95. The court elaborately and so correctly found that it had the jurisdiction over the Petition. As to whether the PPDT had the jurisdiction over the matter, the trial court brought forth the rival positions on the issue. The court also referred to the various decisions which had been tendered. In conclusion the court had this to say: -

***“95. From the foregoing the jurisdiction of PPDT in handling party list has been settled. The question to be addressed therefore is whether the issue of jurisdiction of PPDT can be raised at this Court. ....I note that this court is not an appellate court. There was no appeal against the decision of PPDT. A judicial review proceeding was filed by 2<sup>nd</sup> respondent and thereafter the same was withdrawn. In my view, the issues raised by the respondents ought to have been litigated at the PPDT or the high court through an appeal. It is true save for the second respondent the respondents were not party to the proceedings in PPDT. However, the 2<sup>nd</sup> respondent which is charged with the party list was aware of the proceedings thus its omission to raise the issues being raised by the respondent especially on jurisdiction and right to be heard definitely would have affected the elected respondents herein as the decision of PPDT still stand, which decision this court cannot overturned (sic) as the decision of PPDT has equal status as decision of Magistrates Court by dint of Section 41 of the Political Parties Act....”***

96. From the position taken by the trial court, there was a very cardinal aspect of the law which the court, with tremendous respect, did not properly comprehend and as such did not rightly apply its legal mind thereto. The issue was the applicability of the doctrine of finality of judgment which is otherwise commonly known as the doctrine of *res judicata* and the unique and special nature of an election court. A court sitting as an election exercises a special jurisdiction and is strictly bound the pleadings and evidence before it. The Supreme Court of Kenya in the case of **Lemanken Aramat v. Harun Maitaml Lempaka & 2 others (2014) eKLR (Petition No. 5 of 2014)** when dealing with the special nature of the High Court as an election court (which holding accordingly applies in this case) had the following to say: -

***“[82] The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3)(a) of the Constitution, is unlimited. In addition, the High Court has a special jurisdiction in electoral matters, conferred by the Constitution, and given effect under the Elections Act: this is the jurisdiction to determine any question as to whether a person has been validly elected as a Member of Parliament (Article 105(1)(a) of the Constitution). This jurisdiction is activated upon a declaration by the authorized electoral body (IEBC) that a particular person has been returned as Member of Parliament, when there is a challenge to that electoral declaration (Article 87(2) of the Constitution) .....”*** (emphasis added).

97. An election court is principally guided by the matters placed before it and the law. If an election court must consider decisions made elsewhere touching on the matters before it, then those matters must have been finally settled by the respective Courts or Tribunals otherwise the election court will be called by duty to determine those matters before it accordingly. In other words, such decisions must have been finally decided by competent institutions.

98. In this case, it was the PPDT decision. Regardless of my earlier finding on the jurisdiction of PPDT and for the purposes of this discourse, this issue remains very crucial. The PPDT decision was challenged through the Judicial Review. I have perused the said Judicial Review proceedings and noted that the jurisdiction of PPDT and many other issues were challenged. As the challenge was still on, IEBC published the impugned Gazette Notice on 28/08/2017. As I have demonstrated above the gazette ment extinguished any jurisdiction on any institution and the only body legally mandated to deal with such disputes after the impugned Gazette Notice are the election courts. Therefore, when the parties appeared before the High Court in the Judicial Review on 31/08/2017 the Court was handicapped for want of jurisdiction. There were only two options: withdrawal by the parties or striking out by the Court. The

proceedings were withdrawn.

99. But it must be seen that the contest was not over. The dispute would have been dealt with and determined by the High Court were it not for the gazette. A party cannot therefore be heard to allege that the PPDT decision was not challenged. That is a misconception and a misapprehension of the law since the matters in issue had not been finally determined in the Judicial Review before the gazette of the impugned Gazette Notice. I must clarify that had there been no such a challenge to the PPDT decision and in an instance where PPDT was properly vested with jurisdiction or had the matters been finally determined by either the PPDT or the High Court, the position taken by the trial court would perfectly hold. However, that was not the case. As matters now stand, the election court and this Court should not be seen as sitting on an appeal over the PPDT decision in respect to the issue of jurisdiction. The issue was not finally settled in the previous proceedings.

100. Respectfully, the trial court erred in declining to consider whether PPDT had jurisdiction in the dispute and further erred by presuming that the PPDT decision was a decision in finality. Had the court addressed itself on the twin issues, I have no doubt that it would have considered the parties' arguments and might have come up with a different finding or findings.

101. There is also an equally important issue which came up before the trial court worth dealing with even in the face of this Court's finding that the PPDT did not have jurisdiction over the dispute. The issue is on the effect of the PPDT decision on the Nominated MCAs who were not parties to the proceedings in the PPDT. The Nominated MCAs contended that since they were not made parties to the complaint before the PPDT, the resultant decision could not be used to adversely affect them as that will be in contravention of their rights to a fair hearing as envisaged under **Article 50(1)** of the **Constitution** and the provisions of the **Fair Administrative Act**. The Petitioners contended that either way the Nominated MCAs were direct beneficiaries of an illegal and botched process and that they cannot be allowed to derive from such an illegality.

102. The trial court however blamed ODM which was the Respondent before the PPDT for not pursuing the matters. If I understood the trial court well, and I so think, the trial court settled for the position that ODM, as the entity which had forwarded the impugned party list to IEBC, was better placed to handle all issues arising therefrom and possibly to represent the members it nominated for election. That sounds a persuasive finding. However, the trial court did not test that finding to ascertain whether it stood the dictates of **Article 50(1)** of the **Constitution** and the provisions of the **Fair Administrative Act**. Again, had the trial court done so it would have easily found out that the decision of PPDT infringed the rights of the Nominated MCAs. That decision could not therefore be used against parties who did not participate in the proceeding before the PPDT. I must state that a decision of a Court or Tribunal cannot be used against parties who did not participate in the proceedings upon which the decision was made. Conversely, a party which did not participate in the proceedings that yielded a decision cannot derive legal benefits from that decision.

103. In this case the complainant before the PPDT knew the names of the Nominated MCAs who had been published in the newspapers before she instituted the complaint. Surprisingly, when she filed the complaint at the PPDT she conveniently left out the said names and direct her dispute only against ODM. If the Petitioners were convinced that the said names were published as a result of an illegal process, one wonders why they were not enjoined as parties before the PPDT for at least to be heard.

104. The upshot is therefore that the complainant was strictly bound by her pleadings and even if the PPDT had jurisdiction still the decision would not have been used as the basis of impugning the election of the Nominated MCAs who were not parties in the proceedings before the PPDT.

105. Further to the foregone and in view of the position taken by the trial court that it was bound by the PPDT decision, the court did not render itself on many issues which were in controversy in the Petition before it. Just to mention a few: Whether the Petitioners were qualified to and indeed applied for the nominations in accordance with the ODM Constitution; Whether the process undertaken by the group under the stewardship of Hon. Zacharia Okoth Obado towards the generation of the one of the alleged

two party lists was vindicated by the Constitution, the law and the ODM Constitution and what was the validity of the resultant harmonized party list; Whether the NEC Credentials Committee convened a meeting to adjudicate upon the alleged dispute and if so if the NEC Credentials Committee had the jurisdiction to do so; Whether PPDT had the jurisdiction to come up with a harmonized Party List and order IEBC to publish that list in place of the one which was generated by ODM; among many other legal issues.

106. I have weighed the above legal issues against the record. I must state that most of them, if not all, remain largely not in compliance with the Constitution, the law and the ODM Constitution. For instance, the record as it is, has no evidence that the Petitioners were qualified and applied for nominations in accordance with the ODM Constitution; the process undertaken by the group under the stewardship of Hon. Zacharia Okoth Obado towards the generation of the one of the alleged two party lists was in total contravention of the ODM Constitution and the Guidelines; that the NEC Credentials Committee did not have the jurisdiction to adjudicate upon any dispute that arose during the nomination process; that PPDT did not have the jurisdiction to come up with a harmonized Party List and order IEBC to publish that list in place of the one generated by ODM (See the decision in **National Gender and Equality Commission vs. Independent Elections and Boundaries Commission & Another (2013) eKLR**).

107. As I come to the end of this issue, I must deal with an argument raised by the Appellants that pursuant to **Section 34(7)** of the **Act** a Party List once submitted to IEBC cannot be changed for the remainder of the term of that County Assembly. My understanding of that law is in line with the submission made by **Mr. Sagana**. I take the position that it is only the political party which submitted the party list which is barred by the law from attempting to change the list, but the provision cannot bar a Court of Law from doing so once a Court is satisfied that such a change is in line with upholding the Constitution and the law.

108. A careful analysis of the Petition in light of the law reveals that the election of the Nominated MCAs as Members of the County Assembly of Migori by way of nominations was conducted within the Constitution and the law and that there were no irregularities that affected the result of the election. I therefore find and hold that the Petition was not proved as required in law.

(d) **Costs:**

109. I have considered the genesis of this dispute and how it has progressed so far, and it appears that the submission by **Mr. Roche Odhiambo** that the person who instigated the dispute is to shoulder the resultant costs is persuasive from the outset. However, a party in any proceedings which agrees to be used by a person who is not a party in those proceedings must remain alive to all the resultant legal outcomes of the proceedings including payment of costs if so ordered. In this case had Hon. Zacharia Okoth Obado participated in these proceedings, I would not have hesitated to order him to shoulder the costs. Since that is not the case the costs shall be borne by the Petitioners.

**Disposition:**

110. As a consequence of the foregone analysis and considerations the following final orders do hereby issue that: -

**(a) Migori High Court Election Appeal No. 1 of 2018, Migori High Court Election Appeal No. 2 of 2018 and Migori High Court Election Appeal No. 4 of 2018 be and are hereby allowed.**

**(b) The judgment of Hon. R. K. Langat delivered on 04/01/2018 be and is hereby set-aside in its entirety and is substituted with an order dismissing the Petition dated 07/09/2017 with costs. For clarity purposes, it is hereby declared that the election of Caroline Akinyi Okere, Elizabeth Talia, Rose A. Aoro, Mary Dede Odiga, Judith Gad, Ruth Atieno Anyano, Claris Dolly Oyoo, Grace Akinyi Odhiambo, Florence Abich Oile, Dorine Dande and Roseline Adhiambo Oyoo as Members of the County Assembly of Migori by way of Party List nominations was conducted within the Constitution and the law and that there were no**

**irregularities that affected the result of that election.**

**(c) The Petitioners shall jointly and severally bear the costs of the Petition as well as the costs of the appeals.**

111. Those are the orders of this Court.

**DELIVERED, DATED and SIGNED at MIGORI this 31<sup>st</sup> day of May 2018.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Okong'o** Counsel instructed by the firm of Messrs. Okong'o Wandago & Company Advocates for the Appellant in Appeal No. 1 of 2018.

**Mr. Ayieko** Counsel instructed by the firm of Messrs. Lumumba & Ayieko Advocates for the Appellants in Appeal No. 2 of 2018.

**Mr. Nyasimi** Counsel instructed by the firm of Messrs. Nyamori Nyasimi & Company Advocates for the Appellants in Appeal No. 4 of 2018.

**Mr. Sagana** and **Mr. Rotich** Counsels instructed by the firm of Messrs. Sagana, Biriq & Company Advocates for the Petitioners/Respondents.

**Mr. Mogusu** Counsel instructed by the firm of Messrs. Masire & Mogusu Advocates for the Independent Electoral and Boundaries Commission/ Respondent.

**Mr. Roche Odhiambo** Counsel instructed by the firm of Messrs. Odhiambo & Company Advocates for ODM/Respondent.

**Evelyn Nyauke** - Court Assistant