



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

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

LORNA CHEMUTAI.....1<sup>ST</sup> APPELLANT  
EVANS KURGAT.....2<sup>ND</sup> APPELLANT  
TERESA CHEPKEMEI.....3<sup>RD</sup> APPELLANT  
ERICK KIPYEGON KOECH.....4<sup>TH</sup> APPELLANT  
EVERLINE CHEMUTAI.....5<sup>TH</sup> APPELLANT

VERSUS

INDEPENDENT ELECTORAL  
AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT  
JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT

AND

WINNY CHEPKOECH LANGAT.....1<sup>ST</sup> INTERESTED PARTY  
BII CHERUIYOT.....2<sup>ND</sup> INTERESTED PARTY  
MILKA WANGARE NJUGUNA.....3<sup>RD</sup> INTERESTED PARTY  
KASSIM ABDULRASHID NASSIR.....4<sup>TH</sup> INTERESTED PARTY  
ANNA CHEBET TONUI.....5<sup>TH</sup> INTERESTED PARTY  
CHELANGAT PRISCA KIPKOECH.....6<sup>TH</sup> INTERESTED PARTY  
KOECH CHEMUTAI GRACE BETTY..7<sup>TH</sup> INTERESTED PARTY  
CHERONO ANN.....8<sup>TH</sup> INTERESTED PARTY  
HELLEN CHEPKIRUI.....9<sup>TH</sup> INTERESTED PARTY  
TONUI BEATRICE CHEPKEMOI.....10<sup>TH</sup> INTERESTED PARTY  
ANN KOSKEY CHELANGAT.....11<sup>TH</sup> INTERESTED PARTY  
TANUI ESTHER CHEPKORIR.....12<sup>TH</sup> INTERESTED PARTY

SOI CAROLINE CHEPKOECH.....13<sup>TH</sup> INTERESTED PARTY

EDITH KAPTICH CHEPKOECH.....14<sup>TH</sup> INTERESTED PARTY

RECHO EMILY CHEPKEMOI.....15<sup>TH</sup> INTERESTED PARTY

CHEBET JACKLINE.....16<sup>TH</sup> INTERESTED PARTY

TUMM ANN CHEPKORIR.....17<sup>TH</sup> INTERESTED PARTY

*(Being an appeal from the judgment of the Honourable Resident Magistrate (B.R. Kipyegon) dated and delivered on 9<sup>th</sup> February 2018 in Election Petition No. 2 of 2017 and Consolidated Petition No. 3 of 2017)*

## JUDGMENT

### **Introduction**

1. This appeal has its genesis in the nomination of the 17 interested parties as members of the County Assembly of Kericho following the general election of 8<sup>th</sup> August 2017.
2. The appellants described themselves in Petition No. 2 of 2017 dated 31<sup>st</sup> August 2017 (which was consolidated with Petition No. 3 of 2017) as adults and bona fide members of the 2<sup>nd</sup> respondent, a political party registered under the Political Parties Act. The 1<sup>st</sup> respondent is a constitutional commission established under Article 88 (1) of the Constitution with the mandate to, *inter alia*, conduct elections to elective positions established under the Constitution.
3. It appears from the pleadings before the election court as contained in the record of appeal that the appellants and interested parties were all members of the 2<sup>nd</sup> respondent. With the exception of the 5<sup>th</sup> appellant, they had applied and been proposed by the 2<sup>nd</sup> respondent for nomination to the County Assembly of Kericho pursuant to **Articles 88 (5), 90 and 177 of the Constitution**. The 5<sup>th</sup> appellant was not in the list submitted to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent for nomination.
4. In accordance with the said Articles and **sections 4(11) of the Independent Electoral and Boundaries Act, 2011, sections 34, 35, 36 and 37 of the Elections Act, Regulations 54, 55 and 56 of the Elections (General Regulations) 2012 and Regulation 26 of the Elections (Party Primaries and Party Lists) Regulations**, the interested parties were duly gazetted as members of the County Assembly of Kericho on 28<sup>th</sup> August 2017.
5. The appellants were dissatisfied with the nomination and gazetting of the interested parties, which was deemed to be an election and therefore could only be challenged in accordance with section 76 of the **Elections Act** by way of an election petition. They therefore filed two election petitions, No.2 and 3 of 2017 (which were subsequently consolidated) in accordance with **section 74 of the Elections Act** before the Chief Magistrate's Court. Their case was that the 1<sup>st</sup> and 2<sup>nd</sup> respondent had breached the provisions of **Articles 177 (1) (b) and (c) of the Constitution and sections 34, 35, 36 and 37 of the Elections Act**, as well as **Regulations 54 and 55 of the Elections (General) Regulations 2012** in the nomination and gazetting of the interested parties as members of the County Assembly of Kericho.
6. The appellants also contended that the 1<sup>st</sup> respondent had failed to conduct and or supervise the nominations by the 2<sup>nd</sup> respondent as required by law; that the party list did not prioritise nor have any persons with disabilities or from a marginalised group; that the 1<sup>st</sup> respondent abdicated its responsibility to ensure that the party list complied with the law and the Constitution; that the 2<sup>nd</sup> respondent's list had been impugned in **Political Parties' Disputes Resolution Tribunal Complaint No. 338 of 2017**; and the 1<sup>st</sup> respondent had failed to require amendment of the 2<sup>nd</sup> respondent's party list in accordance with the law.
7. The appellants sought the following orders from the election court:
  - a. *A declaration that the petitioners have met the criteria for nomination.*
  - b. *A declaration that the respondents failed refused and or neglected to discharge their mandate conferred upon it (sic) under Article 81(a), 88(4)(e), 90(1).*
  - c. *A declaration that the respondent flouted the constitution, the election Act and the Regulations made thereunder more particularly Articles 91(1), 177(2), 193(1) of the Constitution, sections 35, 36 & 37 of the Elections Act and Regulations 54, 55, 56 & 99 of the Elections (General) Regulations (2012).*
  - d. *A declaration that the petitioners were duly and validly nominated and should be so gazetted as members of the County Assembly of Kericho.*
  - e. *An order to issue revoking forthwith the Gazette Notice No. 8380 of 28<sup>th</sup> August 2017 naming the interested parties as the duly and validly nominated members of the County Assembly of Kericho County.*

**f. An order that the costs of the petition be awarded to the petitioners.**

8. In his decision dated 9<sup>th</sup> February 2018, the Honourable Resident Magistrate dismissed the appellants' petition. He found that the appellants had failed to raise their complaints earlier, during the nomination process within their own political party or with the IEBC's (1<sup>st</sup> respondent's) Dispute Resolution committee. In his view, this rendered the petition before him an afterthought. The appellants had come to the election court belatedly to challenge the nomination process on grounds that were within the mandate of a political party or the Political Parties Disputes Tribunal.

9. The Honourable Magistrate relied on the decision of Lenaola J (as he then was) in **Isaiah Gichu Ndirangu & 2 Others vs IEBC (2016) eKLR** to find that the election court was not the appropriate forum nor was the timing of the petition the appropriate time to raise the issues raised before him.

**The Appeal**

10. The appellants were dissatisfied with the decision of the election court. They therefore filed the present appeal in which they raise the following grounds in their Memorandum of Appeal dated 5<sup>th</sup> March 2018:

*i. The Trial magistrate erred both in law and fact in finding that the Appellants had not proved their case on balance of probabilities when the case was dismissed on technicalities yet the respondents had exhausted all internal mechanisms before seeking redress in court as required by the law and failed to take note that the Political Parties Disputes Tribunal was in favour of the 5<sup>th</sup> Appellant.*

*ii. The Trial magistrate erred both in law and fact in failing to consider that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents went against the law and failed to give priority to people with disabilities as required by the law and the nominations of the interested parties was illegal.*

*iii. The Trial magistrate erred both in law and fact by relying on the 1<sup>st</sup> Respondent's gazette list and failed to consider that the 9<sup>th</sup> Interested Party is not a voter in Kericho County and failed to take cognizance that the 2<sup>nd</sup> Respondent ought to have been faulted and the list be returned for corrections on categories of all nominees that could have paved way for the Appellants names being listed and gazetted thereafter.*

*iv. The Trial magistrate erred both in law and fact by not considering that the 2<sup>nd</sup> Respondent's list remained impugned at the Political Party Disputes Tribunal vide Complaint no 338/17 which declared violation of the Constitution and the Rules.*

*v. The Trial magistrate failed to wholly and properly consider and appreciate the evidence and submissions by the Petitioners and instead adopted a speculative and presumptive approach thus dismissing the suit on a point of technicality.*

*vi. The Trial magistrate erred both in law and fact in dismissing the petition without considering that the gazettelement of interested parties was unlawful, unconstitutional and hence invalid and it ought to have been nullified to pave way for the Appellants to be included in the list.*

*vii. The learned Trial magistrate erred both in law and fact in failing to address his mind that people with disabilities were overlooked in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties and that their gazettelement to represent marginalized groups was wrong and does not conform to the law.*

11. Pursuant to directions issued by this court that the appeal would proceed by way of written submissions, the parties duly filed their respective submissions which were highlighted before me on 28<sup>th</sup> June 2018.

**The Submissions**

**Submissions by the Appellants**

12. In his oral submissions on behalf of the appellants, Learned Counsel, Mr. Kemboi, indicated that he wished to highlight three issues. The first was whether the 1<sup>st</sup> respondent flouted the Constitution and the Act and the Regulations. The second was whether the nomination of the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 9<sup>th</sup> interested parties was valid within the meaning of Article 90 of the Constitution vide Gazette Notice No. 2380 of 28<sup>th</sup> August 2017 and the corrigenda thereto. The third issue was whether the appellants were entitled to the prayers sought in the Memorandum of Appeal dated 5<sup>th</sup> March 2018, and finally, who would bear the costs of the appeal.

13. Learned Counsel submitted that under Article 90 of the Constitution, the 1<sup>st</sup> respondent is obliged to conduct and supervise the electioneering process for political parties with regard to special seats. It had a constitutional duty under Article 90 (2) as read with Article 88 (4) (k) and (5) to ensure that (parties') constitutional and statutory mandates are met. Counsel cited Article 249 of the Constitution which requires that the 1<sup>st</sup> respondent promotes constitutionalism, and sections 34, 35 and 36 of the Elections Act which provide the framework for implementation of Article 90.

14. It was his submission further that the 1<sup>st</sup> respondent offended the provisions of section 36 (3) of the Elections Act, which provides that persons with disabilities would have priority in the listing for special seats. Counsel relied on the decision of the Supreme Court in **Moses**

**Mwici & 14 Others vs IEBC & 5 Others (2016) eKLR** to submit that the 1<sup>st</sup> respondent violated Article 260 in nominating the 3<sup>rd</sup> and 4<sup>th</sup> interested parties who do not fall within marginalised groups as defined in Article 260.

15. In their written submissions, the appellants go into some details with respect to the positioning of the appellants in the 2<sup>nd</sup> respondent's party list for nomination, contrary to what they see as the constitutional and statutory requirement that persons with disabilities are given priority in the listing. They submit that the 9<sup>th</sup> interested party was not even a voter in Kericho County. Further, that the 5<sup>th</sup> appellant had successfully petitioned the Political Parties Disputes Tribunal by a claim dated 26<sup>th</sup> July 2017 being **Complaint No. 338 of 2017** as a result of which the 1<sup>st</sup> respondent had been directed to delete the name of the 7<sup>th</sup> interested party in favour of the 5<sup>th</sup> appellant. They argue, further, that the nomination of the 3<sup>rd</sup> and 4<sup>th</sup> interested parties offends the provisions of Article 260 of the Constitution with respect to the definition of marginalized group, as well as Article 177 (1) (c) as no person from marginalized communities had been nominated.

16. The appellants make further submissions with respect to the constitutional and international requirements for inclusion of persons with disabilities and marginalised groups. They submit that some of the appellants are from marginalised groups, while the interested parties nominated in that category are not. They argue that they had exhausted all internal dispute resolution mechanisms before filing their election petition before the election court but their applications were disregarded by the respondents.

17. The appellants further argued, with respect to the third issue identified by their Counsel, that the respondents disregarded Articles 97 (1) (c) and 177 (1) (c). Their argument in this respect, as I understand it, is that as the respondents had disregarded the provisions of these Articles, the appellants were entitled to the prayers that they seek in their appeal.

18. With respect to costs, the appellants submitted that should their appeal be successful, they should be awarded the costs.

## **The Response**

### **Submissions by the 1<sup>st</sup> Respondent**

19. The 1<sup>st</sup> respondent filed a response to the appeal dated 6<sup>th</sup> June 2018 and submissions dated 21<sup>st</sup> June 2018. It also relied on the submissions which it had filed before the election court. Its submissions were highlighted by its Learned Counsel, Ms. Koech.

20. The 1<sup>st</sup> respondent noted that the election court had found in its judgment that it did not have jurisdiction to determine the issues raised before it and had downed its tools. The court had found that the issue of political party nominations and the party lists ought to have been raised before the dispute resolution mechanism of the IEBC, the 1<sup>st</sup> respondent, before gazetting of the nominees. The appellants had not done this.

21. It was its case, further, that the list submitted to it by the party, the 2<sup>nd</sup> respondent, conformed with the requirements of Article 177.

22. However, it was its submission that the appellants' appeal to this court was regulated by section 75 (4) of the Elections Act, which is clear that appeals to this court should be on matters of law. Learned Counsel, Ms. Koech, submitted on behalf of the 1<sup>st</sup> respondent that the appellants had appealed on both matters of fact and law. They were asking the court to make substantial findings on issues of fact which the election court had not made findings on. The 1<sup>st</sup> respondent's submission was that the case before the elections court had turned on a jurisdictional question, the court finding that it did not have jurisdiction to hear and determine the matter. It had therefore not made any findings of fact on the matter.

23. The 1<sup>st</sup> respondent urged this court to dismiss this appeal, noting that the parties should be bound by their pleadings, and the appellants had not shown how the election court had erred in reaching its decision. The appellants had listed seven grounds of appeal, but the election court had not addressed itself to the matters raised in those grounds.

24. With respect to the submission that the 5<sup>th</sup> appellant, who was not in the 2<sup>nd</sup> respondent's party list, had a decision in her favour from the Political Parties Disputes Tribunal, the response of the 1<sup>st</sup> respondent was two-fold. First, it was not a party to the matter before the Tribunal. Secondly, it was incumbent on the 5<sup>th</sup> appellant, if aggrieved by the failure of the 1<sup>st</sup> respondent to abide by the said order, to follow other avenues which were open to her for enforcement of the order.

25. Finally, Ms. Koech submitted that in the event that this court finds that it has jurisdiction to deal with the matters raised in this appeal, then it should remit the matter to the election court to hear and determine the factual issues raised by the appellants. Such option was not, however, in the 1<sup>st</sup> respondent's view, open to the court as the time for hearing election petitions had elapsed.

### **The Case of the 2<sup>nd</sup> Respondent and the Interested Parties**

26. The 2<sup>nd</sup> respondent and the 1<sup>st</sup> - 17<sup>th</sup> interested parties also opposed the appeal. They filed submissions dated 18<sup>th</sup> June 2018 and a list of authorities dated 20<sup>th</sup> June 2018. Their submissions were highlighted by their Learned Counsel, Ms. Ngeno.

27. Their case is that the election court lacked the jurisdiction to deal with the issues presented before it; that the nomination of the interested parties was done in accordance with the Constitution, and that the appeal is incompetent as it does not limit itself to the provisions of section 75 of the Elections Act. Rather, it is an election petition disguised as an appeal. It calls on the court to determine matters of fact rather than points of law, and in this case, the point of law was the question whether the election court had jurisdiction to determine the election case before it, which is the issue that the appellants were appealing against.

28. Ms. Ngeno submitted that the appellants were required to exhaust the internal party dispute resolution mechanism and thereafter approach the Political Parties Disputes Tribunal before filing the election petition. She cited section 40 of the Political Parties Act in support and the decision in **Election Nomination Appeal No. 22 of 2017 Jubilee Party of Kenya vs Mohammed Abdikadir Salah** to submit that unless a party had exhausted the internal party mechanism, the court should not prematurely assume jurisdiction.

29. It was the 2<sup>nd</sup> respondent's submission further that once the party list has been submitted to the 1<sup>st</sup> respondent and before it was gazetted, any dispute with respect to the nominations was required by law to be heard and determined by the IEBC Disputes Resolution Committee. This role, according to the 2<sup>nd</sup> respondent and the interested parties, was anchored in law by the provisions of section 74 of the Elections Act. Failure to invoke the process provided by law rendered the election petition, as held by the election court, an afterthought.

30. The 2<sup>nd</sup> respondent and the interested parties further observed that the appellants were asking the court to determine matters of both fact and law. They noted that under section 75 (4) of the Elections Act, appeals to the High Court are confined to matters of law only. They further noted that the appellants had not addressed themselves to this point, instead raising matters of fact, going so far as to supply a compact disc on factual matters in their submissions. The 2<sup>nd</sup> respondent and the interested parties relied on the case of **M'riungu vs R [1983] KLR 455** in which the Court of Appeal considered the meaning of the phrase "questions of law" as employed to prescribe the limits of the appellate jurisdiction and stated that:

*"In conclusion, we would agree with the views expressed in the English case of Martin vs Glyneed Distributors Ltd (t/a MBS Fastenings)...that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law."*

31. With respect to the nomination of the interested parties, their submission was that the 2<sup>nd</sup> respondent complied with all legal provisions required with respect to submission of party lists, which were properly supervised by the IEBC and found to be compliant. They relied on the decision in **National Gender and Equality Commission vs Independent Electoral and Boundaries Commission & Another (2013) eKLR** and **Micah Kigen and 2 Others vs The Attorney General and 2 Others Nairobi Petition No. 268 and 398 of 2012 [2012] eKLR** to support the nomination of the interested parties which, in their view, was in accordance with the Constitution.

32. The 2<sup>nd</sup> respondent and the interested parties urged the court to dismiss the appeal with costs.

#### **Submissions in response**

33. In their oral submissions in response, the appellants argued that their appeal comprised matters of law. They further maintained that this court has jurisdiction to deal with the matters raised in the appeal. They did not, however, either in their written submissions or in the oral submissions by Mr. Kemboi address the court on the issue of jurisdiction.

#### **Analysis and Determination**

34. I have considered the record of the election court and the judgment appealed from, the memorandum of appeal, the submissions of the parties and the authorities cited in support. I have also considered the law relating to appeals from the election court in matters relating to elections of members of County Assemblies.

35. The starting point in determining this appeal is the Elections Act, No. 24 of 2011. Section 74 thereof which is titled "**Settlement of certain disputes**" 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.*

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

36. Section 75 (1A) provides for the hearing of election petitions relating to elections for County Assemblies. It provides that:

*(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.*

*(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.*

*(3) ....*

*(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only.* (Emphasis added)

37. Two important points emerge from the provisions of sections 74 (2) and 75 (1A) of the Elections Act. First, a nomination dispute must be

filed before the 1<sup>st</sup> respondent, and it must be resolved within 10 days of filing. The mechanism for resolution of disputes before the 1<sup>st</sup> respondent is the Disputes Resolution Committee set up by the 1<sup>st</sup> respondent. Thereafter, once the nominees are gazetted, the matter must be resolved by way of an election petition. The second point is that an appeal from the election court on a dispute relating to an election to a County Assembly lies to the High Court, but only on matters of law, as prescribed by section 75 (1A) (4).

38. With the above provisions of law and the two points isolated therefrom in mind, I now turn to consider the decision of the election court from which this appeal arose.

39. In its decision, the election court found that the case against the 1<sup>st</sup> respondent was that it had failed to act in accordance with its mandate under Article 90 of the Constitution, sections 35, 36 and 37 of the Elections Act, and the regulations made thereunder. It noted that all the parties appreciated that the 1<sup>st</sup> respondent has a clear mandate under the Constitution and sections 35, 36, 37 and 74 of the Elections Act to give guidance and receive nomination party lists, as well as to ensure compliance with the law and settle disputes on nomination processes or give redress ***“as may be moved by any party”***.

40. Such jurisdiction, in the court’s view, was exercisable only before the declaration of final election results or gazettelement of nominees. After gazettelement of nominees, the election court would have jurisdiction to hear disputes.

41. The court then identified two questions which, in its view, would answer the case against the 1<sup>st</sup> respondent. These were:

***i. Whether the petitioners utilised the mechanism provided by law, and whether they complained or otherwise sought redress during the nomination process;***

***ii. whether the 1<sup>st</sup> respondent then failed to act in accordance with its constitutional and legal role.***

42. The court noted that the petitioners had not given any evidence that they had moved either their party or the 1<sup>st</sup> respondent’s Disputes Resolution Committee before the declaration of the election results, even though they were aggrieved by their party’s misconduct during the nomination process. It concluded that the petitioners had not made any complaints before the Disputes Resolution Committee but had chosen to ride on a decision made in favour of the 5<sup>th</sup> petitioner (the 5<sup>th</sup> appellant) which had been made on 29<sup>th</sup> July 2017 by the Political Parties Disputes Tribunal in **Political Parties Tribunal Complaint No. 338 of 2017**. The election court found that there was no evidence that the 5<sup>th</sup> appellant had tried to enforce the decision of the Political Parties Disputes Tribunal made in her favour pursuant to her complaint.

43. The court relied on the decision of the High Court in **Isaiah Gichu Ndirangu & 2 Others vs IEBC & 4 Others (2016) eKLR** to find that the appellants had bypassed the 1<sup>st</sup> respondent’s dispute resolution mechanism. In the court’s view, the 1<sup>st</sup> respondent therefore had no conceivable blame in law, and the petitioners, not having sought redress from the 1<sup>st</sup> respondent or utilised its dispute resolution mechanism, could therefore not allege any breach of the law or the Constitution by the 1<sup>st</sup> respondent.

44. The election court further found, as against the 2<sup>nd</sup> respondent and the interested parties, that the appellants’ case against them was an amalgamation of the appellants’ case against the 1<sup>st</sup> respondent. The appellants had not particularised the breaches of the Constitution and the law by the 2<sup>nd</sup> respondent and the interested parties. The court concluded that from the facts before it, the appellants insinuated that the respondents and the interested parties breached the same constitutional provisions and laws in the same manner.

45. The election court took the view, however, that the Constitution and the law provide a mechanism for dealing with issues arising between political parties and their members, and which may be engaged at any time before the finalisation of the party lists for nomination to the County Assemblies. The court noted that under section 35 of the Elections Act, parties are required to prepare and submit party lists 45 days before the elections. In the court’s view, the issues that the petitioners were raising before the election court could have been placed before and dealt with by the Political Parties Disputes Tribunal as far back as June 2017 if the petitioners had been genuinely aggrieved by the 2<sup>nd</sup> respondent’s nomination process. The court found that the appellants had come before it to litigate matters that fall within the jurisdiction of the Political Parties Disputes Tribunal.

### **The issue for determination**

46. From the above analysis of the decision of the election court, it seems to me that the court decided the issues before it on a purely jurisdictional basis. It is true that it considered the cases made against the respondents and the interested parties, but only to find, first, that no violation of the Constitution or the law had been made out against the 1<sup>st</sup> respondent; secondly, that no clear case had been made against the 2<sup>nd</sup> respondent and the interested parties, the case against them and the allegations of breach of the Constitution and the law being conflated with the case and alleged breaches against the 1<sup>st</sup> respondent.

47. Accordingly, any appeal against the decision of the election court must, as required under section 75 (1A) which I have set out above, be confined to matters of law. The only matter of law in this case would be the question whether the election court erred in reaching the conclusion that it had no jurisdiction to deal with the matters raised in the petition; and that the petitioners ought to have raised the matters before the Political Parties Disputes Tribunal and/or the 1<sup>st</sup> respondent’s Disputes Resolution Committee, which they had failed to do.

48. I have set out above, verbatim, the grounds of appeal raised by the appellants. I have also considered the submissions by the appellants.

49. The first ground charges that the election court erred in fact and law in finding that the appellants had not proved their case on a balance of probabilities, that their case was dismissed on technicalities, yet the respondents (I believe this was meant to be a reference to the appellants) had exhausted all internal mechanisms before seeking redress in court. They also charged the election court with failing to take

note that the Political Parties Disputes Tribunal had found in favour of the 5<sup>th</sup> appellant.

50. The question that arises with regard to this ground is what issue of law the appellants seek to raise. The court found that it had no jurisdiction to deal with the matters raised in the petition as they were matters that should have been raised before the Political Parties Disputes Tribunal or the IEBC's Disputes Resolution Committee. In their submissions, the appellants have argued at length on matters of fact which they take the view that the election court should have resolved in their favour. However, my reading of the law on the question of jurisdiction leaves no doubt that the election court was correct in its finding on jurisdiction. The appellants, not having lodged a complaint with respect to the party lists with their party, or with the Political Parties Disputes Tribunal, or the Disputes Resolution Committee of the 1<sup>st</sup> respondent could not wait until gazettelement of the persons nominated to the county Assembly of Kericho, then file an election petition to challenge the nominations. To allow this would defeat the express intention of the law in setting up clear, hierarchical mechanisms to resolve such disputes.

51. The second ground of appeal charges that the election court erred in law and fact in failing to consider that the 1<sup>st</sup> and 2<sup>nd</sup> respondents went against the law and failed to give priority to people with disabilities as required by the law, and in failing to find that the nomination of the interested parties was unlawful. The appellants also challenge the decision of the court on the basis that the court erred both in law and fact by relying on the 1<sup>st</sup> respondent's gazette list and failed to consider that the 9<sup>th</sup> interested party is not a voter in Kericho County; that it failed to take cognizance that the 2<sup>nd</sup> respondent ought to have been faulted and the list be returned for corrections on categories of all nominees that could have paved way for the appellants' names being listed and gazetted thereafter.

52. A further ground of appeal is that the court erred in both law and fact by not considering that the 2<sup>nd</sup> respondent's list remained impugned at the Political Parties Disputes Tribunal in **Complaint No 338 of 2017** which declared violation of the Constitution and the rules. The appellants also complain that the trial court failed to wholly and properly consider and appreciate the evidence and submissions by the petitioners and instead adopted a speculative and presumptive approach and dismissed the petition on a technicality.

53. A consideration of the above grounds and the appellants' submissions with respect thereto shows that they have one thing in common: they invite the court to enter into a consideration of the facts that the appellants presented before the election court, and to make its independent findings on those facts. Nothing illustrates this better than the introduction by the appellants, in their submissions, of a compact disc which they submit contains information which shows who belongs to a marginalised group as defined by the Constitution.

54. Aside from the fact that new evidence cannot be adduced at the appeal stage-and certainly not by way of submissions-what the appellants seek to do is to have this court, in a sense, retry the election petition and determine various points of fact and law. Unfortunately for the appellants, the court cannot accept this invitation.

55. The trial court, correctly in my view, found that it had no jurisdiction to inquire into the nomination dispute of the 2<sup>nd</sup> respondent as this was a matter that was reserved for the internal party mechanism of the 2<sup>nd</sup> respondent, the Political Parties Tribunal and, if still aggrieved, the Dispute Resolution Committee of the 1<sup>st</sup> respondent prior to gazettelement of the nominees. After gazettelement, the dispute would be an election dispute to be brought before an election court under section 34 of the Elections Act. This accords with the authorities relied on by the appellants, **National Gender and Equality Commission vs The Independent Electoral and Boundaries Commission and Another [2013] eKLR** and **Moses Mwigigi vs IEBC** (supra).

56. In **National Gender and Equality Commission vs IEBC**, the three-judge bench of the High Court observed as follows:

*“Section 34 (6) of the Elections Act, 2011 specifically provides that, “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.” This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under section 39, Part VI of the Political Parties Act, 2011 or to the High Court in appropriate circumstances.....”* (Emphasis added)

57. At paragraph 65 of its decision in the **National Gender and Equality Commission** case, the High Court went on to observe as follows:

*“The Constitution imposes the primary obligation to ensure that the lists are compliant with the Constitution on the IEBC. The IEBC is required to scrutinise the lists forwarded to it to ensure that the lists comply with the Constitution, laws and regulations and in each case to ensure that the special interests are represented in the said lists.”*

58. In its decision in **Moses Mwigigi & 14 Others vs IEBC**, the Supreme Court stated as follows:

*[92] From the legislative provisions set out above, it is clear that political parties have a responsibility to prepare and submit to IEBC, a party list of all persons who would stand elected if the party were entitled to all the seats. Sections 34 (4), 35 and 36 of the Elections Act together with Regulation 54 of the Elections (General) Regulations bear the phraseology, “political party submitting” or a “party list submitted by the political party”.*

*[93] The foregoing provisions place upon the IEBC the duty to ensure that the party lists submitted comply with the relevant provisions of the law, as set out earlier on. IEBC is expressly designated as the regulatory body to ensure compliance with the law. The Constitution, by Article 88 (4) (e), mandates the IEBC to intervene and settle disputes relating to, or arising from nominations. The Constitution, at the same time, denies the IEBC the competence to adjudicate election disputes, and disputes*

*subsequent to the declaration of election results.*

***[94] Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations. This position has been aptly remarked in the case of National Gender and Equality Commission...”***

59. The Supreme Court then cited with approval the words of the High Court at paragraph 50 of the **National Gender and Equality Commission** case set out above, then went on to observe:

***[95] The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55.***

60. In allowing the appeal filed before it, the Supreme Court upheld the position that where there is failure to follow the process prescribed by law with respect to election disputes, a party cannot successfully lodge a petition alleging non-compliance with the Constitution and the law. Parties in the position of the appellants in this case have a clear process and an opportunity to present their grievances about the party nominations by the 2<sup>nd</sup> respondent to the Disputes Resolution Committee of the 1<sup>st</sup> respondent. The appellants did not avail themselves of this opportunity.

61. They also had an opportunity to lay their claim before the Political Parties Disputes Tribunal which is mandated under section 40 of the Political Parties Act to adjudicate disputes arising from political parties' nominations, but only after the protagonists have exhausted the internal party mechanism. They did not, with the exception of the 5<sup>th</sup> appellant. However, from the material that was placed before the election court, the 5<sup>th</sup> appellant did not seek to enforce the decision of the Tribunal, even though she could have done so as provided under section 41(3) of the Political Parties Act. Nor, so it seems from the evidence, did she present the decision in her favour to the 1<sup>st</sup> respondent.

62. Instead, all the appellants waited until after the gazettelement of the interested parties to file their election petition and seek the reliefs that they should have sought either from the internal party mechanism of the 2<sup>nd</sup> respondent, the Political Parties Disputes Tribunal or the IEBC Dispute Resolution Committee.

63. In his decision in **Isaiah Gichu Ndirangu** (supra) relied on extensively by the election court in the appeal before me, Lenaola J (as he then was) dealt with a scenario similar to the present one. However, the petitioners in that case had filed a constitutional petition alleging violation of constitutional rights. The Learned Judge, after considering several decisions arising from the nomination disputes prior to the 2013 elections, came to the conclusion that the proper approach in dealing with disputes relating to nominations on the basis of party lists is to follow the process provided by law. That process requires recourse through the political parties' internal dispute resolution mechanism; the Political Parties Disputes Tribunal; the Dispute Resolution Committee of the IEBC and the High Court in appropriate cases. After gazettelement, parties who were unsuccessful in the processes provided by law could then file an election petition. The position taken by the court in the **Isaiah Gichu Ndirangu** case was in effect upheld by the Supreme Court in its decision in **Moses Mwigigi & 14 Others vs IEBC**.

64. In my view, the election court in this matter properly found that the petitioners could not allege violations of the Constitution and the law on the part of the 1<sup>st</sup> respondent, not having placed their disaffection with the 2<sup>nd</sup> respondent's process of preparing the party lists before it. The election court properly addressed itself on the issue of jurisdiction, and I find no basis for interfering with its decision. Accordingly, I find no merit in this appeal, and it is hereby dismissed.

65. I note that the election court had directed that each party bears its own costs in the matter before it. I similarly direct that each party bears its own costs as I do not wish to burden the appellants with costs.

**Dated, Delivered and Signed at Kericho this 31<sup>st</sup> day of July 2018.**

**MUMBI NGUGI**

**JUDGE**