



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELECTION PETITION APPEAL NUMBER 8 OF 2018

UMUL KER KASSIM.....1ST APPELLANT

AMRAN ADAN ABDIRAHMAN.....2ND APPELLANT

ZAMZAM ABDULLAHI ALI.....3RD APPELLANT

ECONOMIC FREEDOM PARTY (EFP)...4TH APPELLANT

-VERSUS-

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC)...1ST RESPONDENT

ALMAS ISSACK MOHAMED.....2ND RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate’s court of Kenya

at Nairobi delivered on 23rd February, 2018 by Hon. Orange K.I S.R.M.

in Election Petition 21 of 2017)

BETWEEN

ALMAS ISSACK MOHAMED.....PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

UMUL KER KASSIM.....2ND RESPONDENT

AMRAN ADAN ABDIRAHMAN.....3RD RESPONDENT

ZAMZAM ABDULLAHI ALI.....4TH RESPONDENT

ECONOMIC FREEDOM PARTY (EFP)..INTERESTED PARTY

(Being a cross- appeal from the Ruling of the Chief Magistrate’s Court of Kenya

at Nairobi delivered on 21st December, 2018 by Hon. Orange K.I. S.R.M.

in Election Petition 21 of 2017)

JUDGMENT

MEMORANDUM OF APPEAL

The Appellants being aggrieved by the decision of the Election Court, filed a Memorandum of Appeal and Record of Appeal (3 Volumes) dated 28th February 2018 and listed 17 grounds of appeal of the judgment of the Election Court condensed as follows;

Grounds 1,2,4, 5,6,

a. The Election Court erred by assuming an appellate jurisdiction and exceeding the scope of his jurisdiction as evidenced in the orders issued in the judgment; in finding that the 1st Respondent had no jurisdiction to permit the interested party (4th Appellant herein) to submit an altered list on the basis of the decision by Political Parties Disputes Tribunal (PPDT), finding that the decision of the said Tribunal, the basis upon which the impugned nomination list was submitted was irregular as PPDT lacked jurisdiction and finding that the 1st Respondent erred in implementing the decision of PPDT that was plainly erroneous and incapable of being complied with under the Constitution.

Grounds 3,7,8,9,

b. The Election Court did not take into account the issues for determination that were raised by the parties during the pre-trial conference, instead considered what was not contained in the petition; erred in finding that 1st Respondent violated the Constitution in failing to nominate the Petitioner (2nd Respondent) in accordance with the list submitted to the 1st Respondent and published on 23rd July, 2017 and finding that the 2nd, 3rd, & 4th Appellants herein were not validly nominated in accordance to the law.

Grounds 10-17

c. The Election Court disregarded the principles of the incidence of burden and standard of proof as stipulated in the Supreme Court decision in the case of **Raila Odinga & Others vs. Independent Electoral and Boundaries Commission & others No.5 of 2013 (2013) eKLR**; erred in law and fact as to occasion a miscarriage of justice against the Appellants herein and by misinterpreting and misapplying the facts, relevant laws and case law.

The Appellants sought

a) **That the appeal be allowed with costs**

b) **The judgment, orders and decree delivered on 23rd February 2017 by Election Court be set aside and be substituted with order (s) allowing the Appellants' appeal.**

c) **Any further or alternative order/relief the Court may deem fit to grant.**

CROSS APPEAL

On the 22nd of March 2018, the 2nd Respondent filed a notice of cross-appeal in relation to the 'Supplementary Further Supporting Affidavit in Support of the Petition' filed in the Election Court dated 24th November 2017.

The cross-appeal raised 8 grounds of appeal which in summary are;

That the Election Court erred in law and in fact in its Ruling of 21st December 2017 by striking out the Supplementary Affidavit from its record as the said affidavit alluded to new facts that allegedly introduced new issues not pleaded in the petition. Secondly, that the Ruling of the Court misapprehended the cited authorities. The Court erred in law by failing to consider take into account and give due regard to the fact that the impugned Supplementary affidavit contained evidence that related to the capacity of the 1st, 2nd and 3rd Appellants which was an issue for determination and therefore the Election Court erred by taking into account considerations it ought not to have taken account of and neglected those it ought to have taken account of thus misdirecting itself. By striking out the 2nd Respondent's Supplementary affidavit of 23rd November 2017, the Election court determined the matter without benefit of all material facts and evidence and rendered judgment.

It was the 2nd Respondent's prayer that the Court grants orders setting aside the said Ruling and dismiss the Notice of Motion dated 6th December 2017 filed in **Election Petition 21 of 2017**, the Court considers the 2nd Respondent's Supplementary Affidavit dated 23rd November 2017 and in addition, consider the contents of the affidavit in affirming and upholding the Election Court's judgment.

PROCEDURAL FACTS

Contemporaneously with the filing of the appeal; the Appellants filed an application by way of a Notice of Motion under Certificate of Urgency dated 18th February 2018 seeking an application for stay of execution of the judgment pending hearing and determination of the appeal and that the IEBC be restrained from gazetting the name of the 2nd Respondent in priority to the 1st, 2nd and 3rd Appellants.

On the 1st of March 2018, Hon Mr. Justice F.A Ochieng, granted orders that the *status quo* remains pending the re-allocation of the appeal to another judge who will be at liberty to determine whether or not the *status quo* prevailing shall subsist until either the application or the

appeal is determined. On the 1st of March 2018, the present appeal was allocated to this Court.

On the 11th of April this Court issued granted stay of execution until hearing and determination of the appeal. It was also agreed that the main appeal and the cross-appeal shall be heard together. The parties were to exchange and file written submissions to the main appeal and cross-appeal. The highlighting of these submissions was fixed on 23rd of May 2018. On 23rd May 2018 the Court confirmed written submissions filed as follows;

- a) 1st 2nd & 3rd Appellants filed written submissions for 1st appeal on 25th April 2018 and written submissions for cross appeal of 21st May 2018.
- b) 1st 2nd & 3rd Appellants Supplementary List and Bundle of Authorities on 21st May 2018
- c) The 4th Appellant filed written submissions on 28th April 2018 for both appeal and cross appeal.
- d) 1st Respondent filed written submissions on 22nd May 2010 for both appeal and cross appeal
- e) 2nd Respondents written submissions one set for the appeal and the other set for cross appeal both filed on 14th May 2018
- f) 2nd Respondent's Supplementary List of Authorities filed on 29th May 2018

and the respective Counsel highlighted these submissions on various dates as confirmed from the Court record.

EVIDENTIAL FACTS

The 1st, 2nd and 3rd Appellants as well as the 2nd Respondent are all members of the Economic Freedom Party (EFP), a political party duly registered in accordance with the Laws of Kenya and the 4th Appellant herein. They all sought to be nominated by the 4th Appellant for the position of Member of County Assembly of Mandera County under the gender top up category.

On the 23rd of July 2017, the 1st Respondent published a list on the Daily Nation Newspaper as received from the 4th Appellant listing the nominees. Almas Issack Mohammed was listed as No.9, Amran Adan Abdirahman was No.11, Zamzam Abdullahi Ali was No.15 and Umul Ker Kassim was at No.18.

Noordin Ismail Sheikh, one of the party members of Economic Freedom Party (EFP) was dissatisfied with the list and he lodged a complaint with the **Political Parties Dispute Tribunal (PPDT) being Complaint No.528 of 2017** challenging the ranking that was published on 23rd July 2017 in the newspaper as it mainly consisted of people from the dominant Gurreh Clan and it was contrary **Article 197 (2) (a) of Constitution of Kenya (COK) 2010**. The Applicant submitted an application to be nominated as Member of Mandera County assembly representing the Youth and he ought to be given priority as he was from the Murulle clan.

The Respondents did not file any response or attend /participate in the proceedings despite service of the application to them. The matter was heard and the judgment was delivered on the 1st of August 2017.

The PPDT was satisfied that the Complainant had proved his case and the tribunal nullified the 4th Appellant's party list for Mandera County published by IEBC the 1st Respondent herein and ordered the Economic Freedom Party to prepare a new list for member for County Assembly Mandera County in line with the law and its nomination rules and present the list to 1st Respondent for publication.

Pursuant to the order by the PPDT, the 2nd Respondent alleged that she then received a letter dated 21st August with an annexed amended list. In the list, Zamzam Abdullahi Ali was listed at No.8, Almas Issack Abdullahi at No.9, Amran Adan Abdirahman at No.11 and Umul Ker Kassim at No.17. The IEBC allocated 8 seats to the 4th Appellant and on the 28th of August 2017, a list was gazetted vide gazette notice Vol.CXIX-No.124. The 1st, 2nd and 3rd Appellants' names were listed but the 2nd Respondent's name was missing.

Dissatisfied with the declared results, the petitioner filed an election petition before the Chief Magistrate's Court at Nairobi sitting as an election court **Election Petition 21 of 2017**. The Petitioner averred in the petition filed on 19th September 2017 that the final list submitted to 1st Respondent (IEBC) by the interested Party (EFP) the Petitioner was listed as number 9 in priority to 2nd & 3rd Respondents (now 1st & 2nd Appellants) When the 1st Respondent published the list vide Gazette Notice 8380 Vol. CXXIX -124 Pg 4997, the petitioner was surprised she was not nominated as the 1st Respondent altered the list from the interested Party by moving up the 2nd & 3rd & 4th Respondents, therefore placing her at a disadvantaged position not capable of meeting the nomination slot allocated to the interested party by 1st Respondent under the gender top up category. The action of 1st Respondent was unlawful and illegal contrary to **Article 90 (2) (b) COK 2010**. As a consequence of the foregoing, the Petitioner suffered loss of legitimate expectation and sought among others a declaration that the 1st, 2nd and 3rd Appellants were not validly elected.

In Response to the Petition, the 1st respondent herein denied being issued with the list dated 21st August 2017. They submitted that the list they received was dated 6th August 2017. The names that were gazetted were in accordance to the list dated 6th August 2017. They further maintained that the list was not manipulated and the 1st, 2nd and 3rd Appellants were validly elected. The 1st, 2nd and 3rd Appellants herein in the response to the Petition confirmed receiving one list dated 6th August 2017.

Upon hearing the petitioner's evidence and examining the pleadings and submissions, the election court in its judgment dated 23rd February

2018 concluded that the Petitioner had proved the petition and granted the following orders:

I. A declaration that the 1st Respondent's acts which were non-compliant with the Constitution and the written law affected the chances of the petitioner of being gazetted a member of the county assembly Mander County on priority to the 2nd, 3rd, and 4th, respondents respectively.

II. Declaration that the 2nd, 3rd and 4th Respondents were not validly elected as members of the county assembly Mander County and they could not be so elected in priority to the petitioner.

III. An order that the 1st Respondent compelling the 1st Respondent to degazette the names of the 2nd, 3rd and 4th Respondents from the members of the county assembly Mander county under the gazette notice No. vol CXXIX – NO 124 page 4997 and replace it with fresh gazette in compliance with the party lists as submitted to it by the interested party, the constitution and the written law.

IV. An order directed at the 1st respondent compelling the 1st respondent to gazette the name of the petitioner as member of the county assembly Mander County on priority to the 2nd, 3rd and 4th respondent in the Gazette notice.

V. Costs of the petition capped at Ksh 500,000/=.

Hence this appeal.

SUBMISSIONS

1st, 2nd and 3rd APPELLANTS' SUBMISSIONS ON APPEAL

Mr. Biriq of Sagana Biriq and Co. Advocates submitted that the learned Magistrate of the election court held that the Political Parties Disputes Tribunal (the Tribunal) lacked jurisdiction to nullify the original party list submitted to the Commission by the 4th Appellant, the Economic Freedom Party.

Counsel outlined four issues for determination by this court:

1. That the trial court lacked appellate jurisdiction.
2. That the trial court exceeded the scope of its jurisdiction.
3. That the trial court violated the Appellants' right to a fair hearing.
4. That the trial court wrongfully shifted the burden of proof.

JURISDICTION

Counsel submitted that the **Election Petition No. 21 of 2017** which is the basis of this appeal was an appeal against the PPDT decision guised as an election petition. That the petition was based on questioning the jurisdiction of PPDT to nullify the party list published on 23rd July, 2017 in **PPDT Complaint case No 528 Noordin Sheikh Ismael vs Economic Freedom Party & Independent Electoral & Boundaries Commission** as indicated in page 13(iii) of the Petition. In reaching its determination, the election court questioned the functions, powers, authority and jurisdiction of the tribunal and purported to justify why PPDT should never have interfered with the original party list. The Petitioner did not complain that the list as subsequently submitted was not in accordance with the Constitution and electoral laws and regulations.

Counsel submitted that the trial court's determination was arrived at from misinterpreting and misapplying the decision in the case of **Jubilee Party of Kenya vs. Farah Mohammed Manzor, Election Nomination Appeal No. 301 of 2017 and the case of Mauray Asewe Ouko vs. Orange Democratic Movement & Another, Election Nomination Appeal No. 34 of 2017.**

The Petitioner's argument in the election court was that but for PPDT nullifying the original list, she would have been nominated to the County Assembly in priority to the 1st, 2nd and 3rd Appellants.

Counsel submitted that the Magistrates' courts and the PPDT are creatures of the Constitution, equipped with concurrent jurisdiction as provided by **Article 169 of the Constitution**. That since tribunals are recognized as subordinate courts, an appeal from its decision should lie in the High Court, and not the Magistrates' court by virtue of **Article 165 of the Constitution**. Counsel cited section **41(2) of the Political Parties Act** which provides that an appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and to the Court of Appeal and the Supreme Court on points of law. Counsel further cited **Regulation 34(1) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017** which states that a person aggrieved by a decision of the Tribunal may appeal to the High Court within thirty days of the decision or order.

Counsel urged that the Tribunal's decision has/had not been appealed, reviewed or set aside and is therefore binding on all persons whether aggrieved or not. Counsel contended that the Election court agreed with the Petitioner that IEBC should have ignored the Tribunal's orders since the PPDT Tribunal lacked jurisdiction. In so doing, the Election court disregarded the cardinal rule that a court order must be obeyed

until and unless, it is discharged. To buttress this argument, Counsel relied on the Court of Appeal decision in **Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR**.

SCOPE OF TRIAL COURT'S JURISDICTION

Counsel asserted that the Election court assumed judicial authority that neither the Constitution nor statute conferred on the court. That jurisdiction is only obtained through the Constitution or legislation. The Appellants relied on **Article 165 & 169 of COK2010, Section 75 of Elections Act and Section 41 (2) of Political Parties Act** on the scope of the Election Court and appellate jurisdiction of High Court to hear and determine appeals from the Resident Magistrate's Court designated as Election Court by the Chief Justice and from the Political Parties Tribunal.

Counsel submitted that the Election court exceeded the scope of its jurisdiction. That jurisdiction of election courts does not extend to hearing and determining disputes arising from party nominations or lists. This is the preserve of **IEBC as provided under Article 88(4)(e) of the Constitution and Section 74(1) of the Elections Act** which vests IEBC with power to settle electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to declaration of results.

Counsel observed that under **section 40(1) (b) of the Political Parties (Amendment) Act**, the Tribunal is clothed with jurisdiction to determine disputes between a member of a political party and a political party, dispute between members of political party, disputes between political parties, independent candidate and political party, between coalition partners, disputes arising from party primaries and from decisions of the Registrar of Political Parties. Counsel urged that the Constitution and statutes provide clear procedure for redress of any particular grievance which procedure must be fully exhausted before the aggrieved party moves to the Election Court. The Appellants relied on the cases of **Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425&Amb Orio Rogo Manduli vs Catherine Mukite Nobwola & 3 Others Kitale High Court Election Petition No 3 of 2013** to fortify the above position that an aggrieved party ought to exhaust political parties internal mechanisms, Political Parties Disputes Tribunal and/or IEBC Dispute Resolution mechanisms provided by legislation.

An Election court cannot purport to deal with matters arising from party lists and which amount to political party disputes. That the Court of Appeal in **Fredrick Odhiambo Oyugi vs. Orange Democratic Movement & 2 others Nairobi Civil Appeal No. 199 of 2017** at paragraph 27 and 28 held that both the IEBC and the PPDT Tribunal are clothed with power to deal with disputes arising from nominations.

Counsel urged that it is the responsibility of the Political Party to determine which of its members is in the party list and the order of priority subject to compliance with necessary legal requirements as observed in the **Court of Appeal decision in Peninah Nandako Kiliswa vs. IEBC & 2 others, Nairobi Civil Appeal No. 201 of 2013**. Counsel observed that a dispute as this one would therefore rightly fall within the jurisdiction of the PPDT Tribunal as a dispute between a member and his or her party and the recent inclusion of PPDT's jurisdiction by **Section 40 (fa) of the Political Parties (Amendment) Bill, 2016** which includes PPDT to deal with disputes of Party Primaries.

THE RIGHT TO A FAIR HEARING

On this issue, Counsel submitted that the Appellants' rights under **Article 50 and Article 25(c) of the Constitution** were violated as the Election Court failed to consider the list of issues for determination. The Petitioner failed to prove non-compliance with the law and that such failure of compliance affected the outcome, namely the nomination process culminating to gazettement of members of County Assembly of Mandera County. The Election Court failed to take into account the fact that 8 persons were nominated to Mandera County Assembly. The nomination of 3 of the members is what was challenged, the Election Court did not take into account the import of the orders granted that affected the 5 members who were also removed without being heard after nullification of the list. The Election Court misinterpreted and misapplied cited authorities and failed to fully analyze the allegations contained in the Petition and the submissions and as a result, the Appellants right to a fair trial was violated.

SHIFTING BURDEN OF PROOF

Counsel submitted that the Election court shifted the burden of proof without the Petitioner discharging her obligation to prove the allegations contained in the Petition contrary to **sections 107, 108 and 109 of the Evidence Act**. The Appellants challenged the identity and qualification of the 1st Respondent; on whether 'Almas Issack Mohammed' and 'Almas Issack Abdullahi' refer to one and the same person, the Petitioner did not discharge burden of proof by production of documents to confirm identity and qualification. Yet in the absence of any evidence, Counsel urged that the Election court held that there was no contrary evidence to disprove the evidence offered by the Petitioner even though the 1st Respondent failed to attach her Identity Card, Application for Consideration for party Nomination and Life Membership Certificate to the petition to prove identity names and membership of the party.

4th APPELLANT'S SUBMISSION ON APPEAL

Mr. Otieno of Otieno Ogola & Company Advocates addressed mainly 3 issues; jurisdiction of the Election court, the doctrine of *res judicata* and judgments *in personam* and *in rem*.

Counsel referred to definition of jurisdiction from Words & Phrases Legally Defined Volume 3 pg 113 as follows;

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, Charter, or commission under which the Court is constituted and maybe extended or restricted by like means.

Counsel submitted that the jurisdiction of the Tribunal is provided under **section 40 of the Political Parties Act** to include determining disputes between a member of a political party and a political party. Counsel urged that Courts are creatures of statute based on the

Constitution with their jurisdiction prescribed therein. Counsel cited the case of **Abraham Lenuia Lenkeu vs Charles Katekeyo Nkaru [2016] Eklr** in which it was observed that jurisdiction is expressly conferred by statute and cannot be implied or agreed upon by parties.

Counsel contended that the PPDT Tribunal is specifically clothed with jurisdiction to determine disputes related to political parties. Appeals from its decision lie to the High Court on points of both fact and law by virtue of **section 41(2) of the Political Parties Act**. Counsel argued that in the circumstances therefore, the Trial court lacked jurisdiction to deliberate an appeal of PPDT orders and as such its orders are null and void.

On the issue of *res judicata* it is prescribed by **Section 7 of Civil Procedure Act** that where an issue has been heard and determined by a concurrent and competent Tribunal the doctrine of *res judicata* is bar to relitigating the same issue as it is deemed as finally settled and cannot be reopened. This is based on 2 principles, that there must be an end to litigation and that a party cannot be vexed twice over the same issue as was stated in the case of **Okiya Omtatah Okoiti vs. Communications Authority of Kenya & 14 others [2015] eKLR**.

Counsel submitted that the PPDT Tribunal is a court of competent and concurrent jurisdiction as the Election court and made its pronouncement on the issue of Party List submitted by the 4th Appellant. The issue before PPDT was whether the 4th Appellant complied with the law regarding submission of party lists by political party. The 2nd Respondent's claim in the Election Court was substantially that the Party List submitted to the 1st Respondent was in disregard of the Constitution and statute. That the matter to be determined by both the Election court and the Tribunal was similar and therefore *res judicata*.

Counsel asserted the other aspect of the doctrine of *res judicata* as provided by **Explanation 6 of Section 7 of Civil Procedure Act** which provides that where persons litigate bona fide in respect of a public right claimed in common for themselves and others, all persons interested in such right shall for purposes of this Section, be deemed to claim under the persons so litigating.

Republic vs Independent Electoral Boundaries Commission & 2 Ex-parte Wavinya Ndeti [2017] eKLR, the Court distinguished judgments pronounced in *rem* and *personam* as follows;

However, there are other orders or judgments which bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court.

Counsel stated that the judgment by the Tribunal was a judgment in *rem* and applied to all persons on the impugned nomination list and the relevant legal institutions therefore falling within the ambit of the principle of *res judicata*. Counsel stated that if the 2nd Respondent was aggrieved by the decision of PPDT she ought to have appealed to the High Court and not frame the dispute as election petition. The Election Court lacked jurisdiction to consider the issue as framed as it had already been dealt with by PPDT. The question of Party list nomination to the 4th Appellant's list for Mandera County was *res judicata* in relation to the Election Court and the same could only be challenged in an appellate Court. Counsel urged the court to allow the appeal stating that the Tribunal's decision was sound in law.

On the issue raised by the 2nd Respondent where she stated that the decision by the PPDT affected her constitutional and political rights, Counsel stated that the decision was a decision in *rem* therefore was applicable to every member of the political party and not only the parties in the complaint. On why the issue of jurisdiction of the Court was not raised in the Election Court, Counsel stated that there was no opportunity to raise the issue on a preliminary point under the election petition rules and therefore it is the determination of the Election Court that initiated the appeal. In conclusion, Counsel submitted that the Court was properly clothed as an Election Court but did not have the jurisdiction to decide whether the decision by the PPDT was valid or not. The PPDT decision therefore still stands. It was their opinion that the issues before the Election court were *res judicata* as they had already been decided by the PPDT and the decision was not appealed against.

1ST RESPONDENTS SUBMISSIONS ON APPEAL

Ms. Maitai of Maina and Maina Company Advocates represented the Independent Elections and Boundaries Commission (IEBC) 1st Respondent and dealt with 3 issues for determination based on the grounds raised in the memorandum of appeal. Counsel maintained that they supported the appeal and further submitted on jurisdiction of PPDT, election Court, deliberated issues not pleaded and burden of proof.

On the issue of jurisdiction, Counsel contended that the decision by the PPDT could only be dealt with in the High Court but the Election Court went ahead and set aside the decision and gave itself the jurisdiction to determine the list that was valid. This exceeded its jurisdiction and therefore the appeal should succeed.

On evidence in the Election Court, where the 2nd Respondent averred that 1st Respondent altered final Party List of 21st August 2017 and moved names of 1st, 2nd & 3rd Appellants up the list in priority to the Petitioner.

The Appellants herein confirmed that the final list that was submitted by the 4th Appellant, as per PPDT order, to 1st Respondent was on 6th August 2017 and no list was submitted to 1st Respondent on 21st August 2017.

The 1st Respondent contended that no alteration was made to the submitted party list submitted to 1st Respondent on 6th August 2017.

1. Whether the trial court was clothed with appellate jurisdiction.

This was in response to grounds 1, 2, 4, 5 and 7 as raised in the Memorandum of Appeal.

The 2nd Respondent in the Election Court contended that the 1st Respondent abdicated its duty by allowing the PPDT to dictate to it and order it to accept the party list submitted by 4th Appellant. The Appellants submitted that PPDT had jurisdiction to deal with the instant complaint. The 1st Respondent contended that the PPDT decision was valid and had not been set aside and could not be ignored or disobeyed. The 1st Respondent contended that the 2nd Respondent's remedy lay with PPDT by of having the decision set aside or with the High Court on appeal.

Counsel submitted that by proceeding to declare the PPDT decision null and void, the Election court lacked appellate jurisdiction to declare the decision of the Tribunal null and void. 1st Respondent further urged that the Election court declared that PPDT lacked jurisdiction and did not have the benefit of looking at any of the documents filed by parties in PPDT and the Tribunal Record except for the judgment of the Tribunal. The Election Court did not accord a chance to the parties to the complaint apart from the 2nd Respondent before the Tribunal to be heard on whether the Tribunal had jurisdiction over the particular claim or not as it affected their rights too.

Counsel contended that the court erroneously and selectively relied on the decisions of **Mauray Asewe Ouko & Another vs. Orange Democratic Movement & Another (2017) eKLR** and that of **Owners of Motor Vessel 'Lilian S' vs. Caltex Oil (Kenya) Limited (1989) KLR** to find that the Election court was at liberty to find the Tribunal's decision null and void. He urged that since the PPDT was the one seized of the matter, it was for the Tribunal to determine whether or not it was clothed with jurisdiction over the matter before it and if so down its tools.

Counsel observed that the Election court faulted the 1st Respondent for obeying the order of the Tribunal. That this was in essence indicating that the 1st Respondent should have ignored the Tribunal's order, an act which would have amounted to contempt of court. Counsel urged that each party was bound by the Tribunal's decision unless and until it was discharged regardless of whether they believed it to be null, void or irregular.

2. Election Court deliberated on issues not pleaded

Counsel submitted that the Election court failed to deal with issues raised in the petition and the pleadings as stated in grounds 3, 8 and 9 of the Memorandum of Appeal. The Election court instead outlined its own issues which completely differed from those formulated by the parties. Counsel urged that the Election Court failed to mention the party list dated 21st August, 2017 in its judgment yet the list was the basis of the petition. To buttress his argument, counsel cited the Court of Appeal case of **Independent Electoral Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** where the Court stated "*That parties are bound by their pleadings which limits the issues upon which the Trial Court may pronounce.*"

3. Burden of Proof and Standard of Proof

Counsel submitted that these were raised in grounds 10, 12, 13, 14, 15, 16 and 17 of the Memorandum of Appeal. Counsel stated that the Election court erred on both the standard of proof and the burden of proof. Counsel contended that the burden of proof solely lies with the Petitioner and that the standard of proof in Election petitions is higher than a balance of probabilities but does not reach the criminal threshold of beyond reasonable doubt. He urged that the 2nd Respondent failed to meet the required standard of proof and for the court to conclude that the error of the 2nd Respondent's name was a typographical error without evidence from the 2nd Respondent.

2ND RESPONDENT'S SUBMISSIONS ON APPEAL

Mr. Busaidy of Busaidy, Mwaura & Ng'arua Company Advocates submitted on three issues: jurisdiction of the election court, fair hearing, and the burden of proof in election petitions.

On jurisdiction, whether the Election Court erred in law and in fact in exercising jurisdiction in **Election Petition 21 of 2017**, Counsel submitted that the jurisdiction to hear and determine electoral disputes is *sui generis* and that although civil nature, it is governed by its own process.

Counsel relied on the case of **Owners of Motor Vessel Lillian S vs Caltex Oil Kenya Ltd [1989] KLR 1** and observed that the question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away. The issue of jurisdiction was not raised in the Election Court.

Counsel informed the Court that the 2nd Respondent was never a party to the proceedings before the Tribunal and therefore had no means of appealing the Tribunal's decision. The PPDT decision was not communicated to 2nd Respondent by 4th Appellant. The PPDT was closed after the General Elections were held on 8th August 2017.

The 4th Appellant modified its original party list acting upon the Tribunal's orders; an act which affected the 2nd Respondent's position in the party list changing her from the 9th to the 14th position. Counsel urged that in failing to notify the 2nd Respondent of the change, the 4th Appellant infringed upon the 2nd Respondent's right to fair administrative action as enshrined in **Article 47 of the Constitution**. It was imperative for 4th Appellant to provide 2nd Respondent with written reasons for the decision of PPDT.

Whereas the 2nd Respondent agrees with Appellants assertion that the Election Court lacks jurisdiction over PPDT's decision, it was Counsel's submission that the Election court never exercised appellate jurisdiction, but rather properly exercised jurisdiction as an election court properly constituted with jurisdiction over an election dispute. Counsel stated that the Constitution provides for two modes of election: election in the conventional sense and an election by way of nomination. Once the election is over any contest to the election whatever its manifestation is by way of an election petition.

Counsel asserted that the subject of nomination of members to county assemblies and party lists has its origins **Article 177 of the Constitution**. The legislation on electoral disputes is contemplated under **Article 87(1) of the Constitution is the Elections Act. Section 74 of the Act mandates IEBC** to resolve disputes arising from nominations but not election disputes. As such, IEBC is barred from dealing with disputes relating to elections or disputes after an election. This Counsel stated is a preserve of the Election courts within meaning of **Section 2 of the Elections Act**. In the premise therefore, neither IEBC nor the Tribunal had jurisdiction over this matter.

Counsel submitted that in determining whether an Election court is clothed with jurisdiction, a determination must first be made as to whether a dispute arising from a party list is an election dispute. He urged that upon gazettment, nominated members are deemed elected members of county assembly. Counsel cited **Supreme Court Petition No. 1 of 2015, Moses Mwicigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others [2016] eKLR**

Counsel further cited the Court of Appeal decision in **Civil Appeal No. 169 of 2013, Rose Wairimu Kamau & 3 others vs. Independent Electoral and Boundaries Commission** to further support this argument. Counsel stated that after IEBC publishes a Gazette Notice of names of nominees to the county assembly, the nomination process comes to an end, and the people whose names appear in the notice stand 'elected'. Counsel urged that any challenge to an election by nomination is only entertained by way of election petition and not otherwise.

Counsel asserted that upon gazettment, any dispute relating to nominations falls squarely and solely within the ambit of the Election court. That the Election court correctly exercised its jurisdiction and did not in any way exceed the scope of its jurisdiction as provided under the **Constitution, Election Act and Regulations**. Counsel urged that as such, grounds 1,2,4,6 and 7 of the Memorandum of Appeal have not been made out and ought to be dismissed.

Counsel urged that the Appellants had not demonstrated real and apparent bias on the part of the Election Court to warrant their claim that their right to a fair hearing had been violated. On the issue of burden of proof, Counsel submitted that this was satisfactorily discharged by the 2nd Respondent. It was Counsel's submission that once the Election court was satisfied that the 2nd Respondent discharged the burden, the evidentiary burden shifted to the Appellants to disprove the averment while the legal proof still lay on the 2nd Respondent.

Counsel observed that this is a first appeal, and the court is therefore entitled to re-evaluate the facts or evidence de novo and come to its own independent findings and conclusions. The duty of the court on a first appeal was well stated by the **Court of Appeal in Selle v Associated Motor Boat Company Limited [1986] E.A.123**

In conclusion, Counsel submitted that based on their arguments as advanced, the grounds of appeal contained in the Memorandum of Appeal fail, and urged the court to dismiss the entire appeal with costs.

SUBMISSIONS ON CROSS APPEAL

SUBMISSIONS OF 2ND RESPONDENT SUPPORTING CROSS APPEAL

Mr Busaidy Counsel for 2nd Respondent, in support of the cross-appeal, averred that the evidence contained in the Supplementary Affidavit that the Election Court struck out would have allowed the court to determine the issue of the status and capacity of the Appellants with regard to the validity of the election of the 1st, 2nd and 3rd Appellants. He also submitted that the issues raised were in line with **Section 34, 35, & 36 of the Elections Act and Regulation 54, 55 & 56 of the Elections Act General Regulations 2012** that set out the process of members of nomination of County, proved that the 1st, 2nd and 3rd Appellants were not lawfully and duly elected as the Members of County Assembly of Mandera County. The Supplementary Affidavit sought to introduce material evidence for the just determination of the dispute. The Appellants were granted sufficient time and opportunity to reply and opted not to do so. Relying on the case of **Joel Makori Onsando Kunga & Anor vs. IEBC [2017] eKLR** and submitted that the Supplementary Affidavit did not depart from the Petition but only amplified what was in the Petition. Counsel submitted that one of the central issues for determination was whether the Appellants were validly elected through nomination members of County Assembly of Mandera County. The information sought to be adduced in the Supplementary Affidavit is whether in compliance of **Section 22 & 25 of the Elections Act** the Appellants were qualified for nomination. To support this position, the 2nd Respondent cited Supreme Court decision **Petition No 5 of 2013 Raila Odinga vs. Independent Electoral & Boundaries Commission & 3 Others [2013] e KLR** which provides other than the timelines in filing pleadings, the Court ought to consider when exercising its discretion to allow further affidavit is the nature, context and extent of new material. Therefore the Election Court erred in determining the same on incomplete evidence. The Counsel submitted that the Court allows the prayers sought are granted.

1ST, 2ND AND 3RD APPELLANTS' SUBMISSIONS IN OPPOSITION TO NOTICE OF CROSS APPEAL DATED 22ND MARCH 2018

The Election Court delivered Ruling on 17th November 2017 granting the Petitioner leave to file Supplementary affidavit. The petitioner filed Supplementary Affidavit on 23rd November 2017. The Appellants filed Notice of Motion of 6th December 2017 and sought the Supplementary Affidavit be struck out. By the Election Court's Ruling of 21st December 2017 the Supplementary Affidavit was struck off and is the subject of the instant Cross Appeal.

Mr. Biriq, Counsel for Appellants submitted that this court lacks jurisdiction to entertain a cross-appeal concerned with matters of facts and issues determined at an interlocutory stage during proceedings in the lower court. Counsel observed that appellate jurisdiction under **Section 75(4) of the Elections Act** is limited to matters arising from an election court's final judgment and confined to issues raised in the Memorandum of Appeal. That in the present case, the 2nd Respondent's remedy was limited to filing an appeal and not a cross-appeal. The Appellants relied on Article **87(2) COK 2010, Sections 75, 76(1) & 80(3) of the Elections Act** and buttressed their view in the case of **Ferdinand Ndungu Waititu vs. I.E.B.C. & 8 others Civil Application No 137 of 2013**.

Counsel urged the court to dismiss the cross-appeal and proceed on the basis of only the issues raised in the Appeal. Counsel submitted that the in striking out the 2nd Respondent's supplementary affidavit, the Trial court has correctly interpreted the provisions of **Article 87(2) of**

the Constitution as regards timelines for filing and hearing petitions. The Elections court found that the 2nd Respondent was seeking to expand the scope of her petition and change its character contrary to **Article 87(2)**.

4th APPELLANT'S SUBMISSIONS ON CROSS APPEAL

Mr. Otieno, Counsel for 4th Appellant further reinforced the Appellants on cross-appeal. He submitted although the filing of Supplementary Affidavit was by leave of the Election Court, the content could not extend from what was pleaded in the Petition. An election petition shall be filed within 28 days after declaration of results. If the Supplementary Affidavit content was not anchored to the Petition then it amounted to extending the petition outside the legal period. Secondly, that the 2nd Respondent should have filed a separate appeal on the issue of the supplementary affidavit so that they are canvassed together with the main appeal. The appeal was also time barred as they lodged the appeal 5 months after the ruling and the time limit of filing appeals is 30 days thus failing to comply with the rules. It was therefore their opinion that the same be dismissed with costs.

1st RESPONDENT'S SUBMISSIONS ON CROSS APPEAL

Mr. Ondieki, Counsel for IEBC, 1st Respondent on the cross-appeal, submitted that none of the issues raised in the supplementary affidavit were raised in the petition and therefore the cross-appeal should be struck out. The 2nd Respondent was then and is still now attempting to hide in general averments in the Petition to the effect that the 1st Respondent failed to adhere to the Constitution and National Legislation in electing 1st, 2nd & 3rd Respondents.

The 1st Respondent relied on the case of **Martha Wangare Karua & Anor vs IEBC & Others 2017 eKLR & Raila Odinga vs. Independent Electoral & Boundaries & 3 Others Supreme Court Petition No 5 of 2013** on the discretion of the Election Court to allow Supplementary Affidavits and guidelines on admission of additional evidence.

Counsel urged that for this court to interfere with the discretion of the Trial court, the 2nd Respondent must demonstrate that the Magistrate misdirected himself or acted on matters on which he should not have acted on or failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision, as held in the case Court of Appeal cases of **Mbogo & Anor vs Shah 1968 E.A. & Matiba vs. Moi & 2 others [2008] 1KLR 670**

On the issue of jurisdiction of this Court to hear and determine the Cross appeal, Counsel submitted that this court lacks jurisdiction to determine matters arising out of an interlocutory ruling in an election petition. He stated that **Rule 34 of the Election (County and Parliamentary) Petition Rules, 2017** deals with appeals from judgments and not rulings on interlocutory applications. That **Rule 34(3)** is explicit that a memorandum of appeal shall be filed after judgment. He further stated that interlocutory matters in connection with an election petition are heard and determined by the election court by virtue of **section 80(3) of the Elections Act, 2011**.

ISSUES FOR DETERMINATION

The Appeal before the Court is brought under **Section 75(4) Elections Act** and this Court is called upon to determine whether the Election Court conducted itself under the Constitution of Kenya and National Legislation in determination of the validity of election by nomination of the 1st, 2nd & 3rd Appellants and 2nd Respondent as members of County Assembly of Mandera County.

From the memorandum of Appeal filed on 28th February 2018 that lists 17 grounds and submissions filed by both Appellants and Respondents, and the Cross-Appeal filed on 22nd March 2018 and submissions by all parties this Court condenses the main issues for determination as follows;

- 1. Was the Election Court properly constituted and did it have a competent election petition?**
- 2. Did the Election Court exceed its jurisdiction in finding that the decision of Political Parties Dispute Tribunal (PPDT), the basis upon which the impugned nomination list was submitted was irregular as PPDT lacked jurisdiction?**
- 3. Did the Political Parties Dispute Tribunal (PPDT) have the jurisdiction to nullify the first list submitted to the IEBC by the Economic Freedom Party?**
- 4. If so, were the issues before the Election Court res judicata?**
- 5. Did the Election Court interrogate the validity of election by nomination of the 1st, 2nd & 3rd Appellants and 2nd Respondent as members of County Assembly of Mandera County?**
- 6. Whether the Court has jurisdiction to hear Interlocutory application appeal? In relation to the cross-appeal, did the Election Court err in law and fact by striking out the Supplementary Affidavit filed on 23rd November 2017 vide Ruling of 21st December 2017 on the basis that it amounted to material change of the Petition of 19th September 2017?**
- 7. Who should bear the costs of the appeal?**

PETITION IN ELECTION COURT:

The Election petition filed on 19th September 2017 was pursuant to nomination of members of County Assembly of Mandera County and the Petitioner was/is aggrieved by the following;

- a) Pursuant to the Orders of PPDT, the Interested party vide a letter and list dated 21st August 2017 complied with PPDT's orders
- b) The Petitioner (2nd Respondent) was placed 9th place in priority to 2nd& 3rd Respondents (now Appellants)
- c) The Petitioner was surprised that the 1st Respondent published vide Gazette Notice 8380 Vol CXXIX No 24 Pg 4997 contrary to the Constitution and Elections Act and proceeded without any color of right to alter the list as submitted to it by Interested party and moved the 2nd 3rd& 4th Respondents up the list on priority to the Petitioner and Thereby placed the Petitioner in an disadvantaged position not capable of meeting the nomination slot.
- d) The Petitioner stated the actions by 1st Respondent were not only unlawful but illegal and contrary to the Constitution & Election Act
- e) And amounted to abuse of its Constitutional powers conferred to it by the Constitution.
- f) Particulars of illegality by 1st Respondent were outlined as follows;
 - i. Contrary to **Article 90 (2) (b) of Constitution** the 1st Respondent failed to nominate the Petitioner.
 - ii. Contrary to **Article 90 (2) (b) of Constitution** the 1st Respondent altered the list submitted by the Interested party
 - iii. Contrary to Constitution & Elections Act, the 1st Respondent abdicated its Constitutional duty by allowing contrary to law the Political Parties Tribunal to dictate to it and order it to accept, alter list submitted to it by Interested party herein a mandate which is squarely on the shoulders of the 1st Respondent herein.
- g) The acts /omissions of 1st Respondent caused the Petitioner to suffer loss of legitimate expectation.

ANALYSIS & DETERMINATION

1. Was the Election Court properly constituted and did it have a competent election petition?

Section 75 (1A) of the Elections Act provides that:

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

75. County election petitions

(1) A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county.

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

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

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

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

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

(a) filed within thirty days of the decision of the Magistrate’s Court; and

(b) heard and determined within six months from the date of filing of the appeal.

Therefore, by **Section 75 of the Elections Act**, the Election Court was properly constituted and had jurisdiction to hear and determine the

validity of the election by nomination of the 2nd 3rd& 4th Respondents & the Petitioner. The Petitioner presented a competent petition for hearing and determination.

From the above Election Court Petition, there was a dispute as to the election by nomination process of the County members of Assembly Manderu County. Before **Complaint 528 of 2017** was filed in PPDT the challenged list of nominees was as follows;

	Name of Nominee	ID No.	Gender	Age	Occupation	Special Category	Interest	Marginalized Category	Disability Category	Ethnicity
9	Almas Issack Mohammed	27807133	F	31	Business	Gender		Gender	Gender	Gurreh
10	Noordin Ismail Sheikh	25078851	M	30	Business	Youth		Youth	Youth	Murulle
11	Amran Adan Abdirahman	36570423	F	30	Business	Gender		Gender	Gender	Gurreh
15	Zamzam Abdullahi Ali	33933633	F	22	Business	Gender		Gender	Gender	Gurreh
18	Umul Ker Kassim	22593774	F	38	Business	Gender		Gender	Gender	Gurreh

After the PPDT nullified the Nomination list submitted to the 1st Respondent and published on 23rd July 2017 due to ethnic imbalance contrary to **Article 90 & 177 of Constitution**, the PPDT nullified this list and ordered the 4th Appellant to submit a new list to the 1st Respondent. The Petitioner alleged and annexed copy of the letter from the 4th Appellant dated 21st August 2017 that submitted the Party list to the 1st Respondent with the list of gender top-up. The Petitioner complained that this list was not published. The list of 21st August 2017 is outlined here-in-below;

	Name of Nominee	ID No.	Gender	Age	Occupation	Special Category	Interest	Marginalized Category	Disability Category	Ethnicity
3	Noordin Ismail Sheikh	25078851	M	30	Business	Worker		Worker	Worker	Murulle
8	Zamzam Abdullahi Ali	33933633	F	22	Business	Gender		Gender	Gender	Gurreh
9	Almas Issack Abdullahi	2787133	F	31	Business	Gender		Gender	Gender	Gurreh
11	Amran Adan Abdirahman	36570423	F	35	Business	Gender		Gender	Gender	Gurreh
17	Umul Ker Kassim	25593774	F	38	Business	Gender		Gender	Gender	Gurreh

The 2nd, 3rd& 4th Respondents by Replying Affidavits filed on 5th October 2017 deposed that pursuant to PPDT order the Interested Party issued a list to the 1st Respondent on 6th August 2017 and 2nd Respondent was placed 5th place, 3rd Respondent was placed 6th place, 4th Respondent was placed 10th place and the Petitioner 14th place in the gender top up list. The said list included the following;

	Name of Nominee	ID No.	Gender	Age	Occupation	Special Category	Interest	Marginalized Category	Disability Category	Ethnicity
5	Umul Ker Kassim	25593774	F	38	Business	Gender		Gender	Gender	Gurreh
6	Amran Adan Abdirahman	36570423	F	35	Business	Gender		Gender	Gender	Gurreh
10	Zamzam Abdullahi Ali	33933633	F	22	Business	Gender		Gender	Gender	Gurreh
14	Almas Issack Abdullahi	2787133	F	31	Business	Gender		Gender	Gender	Gurreh

The petitioner alleged in the Petition before the Election Court that the list of 21st August 2017 was not published and she did not know of the list of 6th August 2017 as she was not notified by the party.

The alleged list of 21st August 2017 if at all, was submitted long after the General election held on 8th August 2017. The Interested Party for purposes of clarity and emphasis resubmitted the list of 6th August 2017 on the 21st of August 2017. The 1st Respondent relied on the list submitted on 6th August 2017 as it was filed on time and the one of 21st August 2017 was submitted out of time.

The Interested Party, Economic Freedom Party through the Secretary General filed Replying affidavit to Petition on 5th October 2017 and stated as follows; The Party submitted the 1st List to 1st Respondent that was published on 23rd July 2017. Pursuant to **Complaint Case 528 Noordin Ismail Sheikh vs. Economic Freedom Party & Independent& Electoral Commission**, PPDT nullified the 1st list and ordered the Party to submit another list to 1st Respondent in compliance with Constitution and other laws. The Party moved to comply with the PPDT order and made changes to the Party List to reflect equality of all clans of Mandera County.

On 6th August 2017, the interested Party submitted final revised Party List to 1st Respondent in compliance with judgment of PPDT dated 1st August 2017 and the same was published on 28th August 2017.

As provided by **Article 177 of Constitution** it was/is the Political Party's mandate to nominate members to County Assembly and ensure that no more than 2/3 of the County Assembly Membership constitutes one gender, ensure and safeguard representation from marginalized groups; persons with disability and the Youth. The provision provides that the conduct of nominations is to be proportionally matched to the number of seats in a County by each Political Party. Thus the allocation could only be done after the outcome of the electoral process. The EFP party was allocated 8 slots under Gender top up list.

For purposes of emphasis and clarity, the Party resubmitted the list of 6th August 2017 on 24th August 2017, the 1st Respondent relied on the list submitted on 6th August 2017 as it was only 1 list to be submitted and the one of 24th August 2017 was filed way out of time.

The Secretary General of the Party was advised by Counsel that in reliance on the cases; **National Gender & Equality Commission vs IEBC & Anor; Moses Mwigigi & 14 others vs. IEBC [2016] eKLR; Party of National Unity vs. Dennis Mugendi & 3 Others [2017] eKLR**, that IEBC lacks jurisdiction over resolution of disputes related to the process of political parties preparing party lists for nomination to Parliament and County Assembly. The jurisdiction is vested in Political Parties Tribunal.

The 1st Respondent IEBC filed Response to Election Petition on 11th October 2017 and deposed that by virtue of **Article 90 of Constitution** it was/is vested with responsibility of conducting and supervising elections for seats on the basis of proportional representation by use of Party Lists.

Sections 34, 35, 36 & 37 of the Elections Act 2011 provide for submissions of Party Lists within defined time lines.

The Interested party complied with timelines and submitted the Party List published on 23rd July 2017. By orders granted by PPDT in **Complaint 528 of 2017** the earlier list was nullified, the interested party was to submit another list to 1st Respondent which was received on 6th August 2017 which did not contain the Petitioner's name. Therefore the 1st Respondent could not appoint the Petitioner whose name was not on the list.

The order by PPDT was that the interested Party was to submit a new list to 1st Respondent and not several fresh lists. If at all the list of 21st August was submitted to 1st Respondent, it was not received and is denied.

Section 35 of the Elections Act mandates that Party Lists are submitted before elections and not after the elections and therefore the interested Party submitted the Party List of 6th August 2017 and any list purportedly submitted after elections would therefore under law not be applicable.

The 1st Respondent at no point interfered with or mishandled the party List submitted by interested Party and denied each and every allegation made in particulars of illegality.

After the Election Court heard evidence and considered pleadings hereinabove, the issues for determination in the judgment delivered on the 23rd of February 2017.

The issues for determination in the Election Court were/are as follows;

a. Whether the 1st respondent had jurisdiction to allow and permit the interested party to submit an altered list on the basis of the decision of the Political Parties Dispute Tribunal?

b. On whether the decision of the tribunal, the basis upon which the impugned nomination list was submitted was regular.

c. 3rd issue whether the 2nd 3rd and 4th respondents were duly elected as members of the Mandera county assembly in accordance with constitution and legislation?

d. As to whether the petitioner was the person that was listed in the list that was submitted for gazette?

Clearly from the above issues the election Court determined the issue of jurisdiction of PPDT.

2. Did the Election Court exceed its jurisdiction in finding that the decision of Political Parties Dispute Tribunal (PPDT), the basis upon which the impugned nomination list was submitted was irregular as PPDT lacked jurisdiction?

3. Did the Political Parties Dispute Tribunal (PPDT) have the jurisdiction to nullify the first list submitted to the IEBC by the Economic Freedom Party?

By the Election Court's judgment of 23rd February 2017, the Court was of the view with regard to the 1st&2nd issues which are similar to the 2nd and 3rd issue for determination on appeal that the Political Parties Dispute Tribunal lacked jurisdiction to hear and determine **Complaint 528 of 2017** and nullify the Party List submitted by Interested party to the 1st Respondent and published it on 23rd July 2017; the Election Court stated as follows at pg 59 of the Record of Appeal;

Article 88(4) (e)& Section 74 (1) of the Election Act give IEBC jurisdiction to settle election disputes, including disputes relating to or arising from nomination but excluding election dispute and disputes subsequent to the declaration of results. It therefore follows; that once IEBC accepted the Party List under Regulation No 26 any dispute arisingtherefrom should have been referred to IEBC Dispute Resolution Committee and not the Political Parties Tribunal. I therefore find and hold that PPDT did not have jurisdiction to entertain the dispute herein as it could only exercise jurisdiction on an election dispute that falls within its exclusive jurisdiction.

The landmark authority on the question of jurisdiction is

“**Lillian S**” –v- **Caltex Kenya Limited (1989) KLR 1** and in particular

the decision of the late Nyarangi, J.A. He stated as follows:-

I think that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matterbefore it the moment it holds the opinion that it is without jurisdiction

The Judge of Appeal continued:-

It is for that reason that raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. A party who fails to question jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during proceedings. As soon as that it is done, the court should hear and dispose of that issue without much a do.

A Court of Law is moved by the parties, disputants who present the dispute before Court for determination. The parties are also bound by their pleadings which set out the substance of the claim and alternative or parallel considerations for redress. On the question/issue raised on the jurisdiction of the Political Parties Disputes Tribunal (PPDT) in the instant matter, the election petition filed on 19th September, 2017 by the Petitioner and as outlined above, nowhere in the Petition did the Petitioner allude to any lack of jurisdiction of the PPDT with regard to the PPDT decision of 1st August,2017.

Instead, the Petitioner was aggrieved by the 1st Respondent who on receiving the Party List submitted by the Interested Party was alleged to have contrary to Constitution and National Laws illegally and unlawfully interfered and manipulated the Party List and deprived the Petitioner of her legitimate expectation as Member of County Assembly Manderu County. The 1st Respondent was accused of publishing the wrong Party List the one of 6th August 2017 instead of the one of 21st August 2017 again to the detriment of the Petitioner.

The only nuanced aspersion cast at the Political Parties Disputes Tribunal is that it seemingly dictated and ordered IEBC 1st Respondent to accept an altered List of 6th August 2017 contrary to law and without any color of right to do so.

Although this Court under **Article 165 of Constitution and 41 of Political Parties Act 2011** has jurisdiction to hear and determine an appeal from PPDT, the PPDT pleadings, evidence, judgment and orders have not been presented before this Court as an appeal in the instant appeal; but as evidence before the Election Court. However in determining the validity of election by nomination of the Appellants and 2nd Respondent, the Court is called upon to interrogate the whole electoral process and outcome culminating with the impugned Party List that, which arose pursuant to the judgment and orders of PPDT and was the subject of the Election Court. In order to determine whether the PPDT lacked jurisdiction or was clothed with jurisdiction to hear and determine the **Complaint 528 of 2017**, an outline of legal institutions mandated with jurisdiction on electoral dispute resolution mechanisms is important to determine the issue at hand.

JURISDICTION OF DISPUTE RESOLUTION LEGAL INSTITUTIONS IN THE ELECTORAL PROCESS.

1. Political Party- the mandate is donated by **Article 177 & 90 of COK 2010** to prepare Party List internally in compliance with Constitution and the national laws and present to IEBC which on ensuring compliance publishes the submitted list. The Party's internal dispute resolution mechanism shall resolve disputes 90 days before the General election.

177. Membership of county assembly

(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 marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and

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

90. Allocation of party list seats

(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 Article 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists.

ELECTION (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

27. Dispute Resolution

(1) Every political party shall establish an internal dispute resolution mechanism in relation to the party primaries and party list.

2. **Independent Electoral Boundaries Commission;** its statutory mandate is to supervise elections and dispute resolution mechanism. An election dispute shall be determined within 10 days after filing and before the date of nomination or election.

Article 90(2) Constitution of Kenya

(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 referred to 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.

Section 4 (e) Independent Electoral and Boundaries Commission Act 2011 & 74 of Elections Act 2011 88 (e) Constitution provide;

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;

3. Political Parties Dispute Tribunal under Political Parties Act, 2011

40. Jurisdiction of Tribunal

(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.

41. Determination of disputes

(2) An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.

(3) A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court.

(4) Election Court – as provided by Section 75 of Elections Act

From the above outline of the Legal institutions that are involved in the electoral dispute resolution I confirm the following;

In the case of Moses Mwigigi & 14 Others vs IEBC & 5 Others [2016] eKLR the Supreme Court with regard to the questions at what point were the Appellants were “elected” Members of County Assembly for Nyandarua County, what was the role of IEBC and did IEBC execute its mandate as per the law; and it provided as follows;

[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.***

[96] ***A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the “elections” for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted ...***

[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 ...***

The Election Court at pg 59 of judgment of 23rd February 2017 relied on the cases of **Jubilee Party of Kenya vs. Farah Mohammed Manzoor [2017] eKLR** where the Court held that the impugned Judgment of the Tribunal was declared null and void for want of jurisdiction & **Maury Asewe Ouko & Another vs Orange Democratic Movement and Anor [2017]** it was held that a party unhappy with the contents of a party List in the hands of an interested party has a right of recourse only to internal disputes mechanisms of the Interested party in accordance with **Section 88(4) of Constitution and Section 74 of the Election Act.**

The Election Court also relied on the case of **Re Hebatullah Properties 1979 KLR 96** which states that; **Tribunals are creatures of statute and derive its power from the statute that creates it.....**

On appeal, Counsel for the 2nd Respondent, Mr. Busaidy submitted that the Election court was exercising its jurisdiction as an election Court and the issues raised were properly before the Trial Court. It was his opinion that the only proper way was to approach the Court through the election petition and additionally, no one raised the issue on the Court’s jurisdiction at the Trial Court proceedings.

Counsel for the 4th Appellant, Mr. Otieno, submitted that where parties are aggrieved by the decision of the PPDT, their remedy lies at the High Court. On the issue raised by the 2nd Respondent where she stated that the decision by the PPDT affected her constitutional and political rights, Counsel stated that the decision was a decision in *rem* therefore was applicable to every member of the political party and not only the parties in the complaint. On why the issue of jurisdiction was not raised, Counsel stated that there was no opportunity to raise the issue on a preliminary point as it was not an issue during proceedings and it arose from the determination of the Trial Court that initiated the instant appeal. On appeal, Counsel for the 1st, 2nd and 3rd Appellant, Mr. Birik, submitted that the decision by the PPDT was never challenged before PPDT under review or an appeal in the High Court of the PPDT decision. The Election Petition was basically an appeal disguised as an election petition. He also contended that the Petitioner in her submissions at the Trial Court claimed that IEBC abdicated their role by allowing the PPDT to issue orders altering/amending party lists which indicates that the Petitioner was appealing against the decision of the PPDT. It was therefore his opinion that since the Magistrates Court and the PPDT are of concurrent jurisdiction, as espoused by **Article 169 of Constitution**, the Magistrates Court could not adjudicate on the decision by the PPDT as it lacked jurisdiction. **Section 41 Political Parties Act** provides that an appeal against the decision of the PPDT can only be made to the High Court. In addition, he submitted that the opportunity to challenge the decision had passed as the list had already been gazetted and the 30 day deadline had passed. It was therefore their submission that the Learned Magistrate exceeded and acted outside his jurisdiction. They relied on the case of

National Gender and Equality Commission Vs. The IEBC And Another, [2013] Eklr where it was held that:

The Party Lists submitted to the Commission under Section 34(6) of the Election Act shall be in accordance with the Constitution or the nomination rules of the 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.....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

In light of parallel and divergent views established by the authorities cited, I wish to apply the emerging jurisprudence on whether the PPDT had jurisdiction or not, to the instant appeal;

The impugned Party list is one that the interested Party submitted on 21st August 2017 to the 1st Respondent and was not published instead the Party list submitted on 6th August was published. The Petitioner alleged that the state of affairs was occasioned by lack of 1st Respondent rising to the occasion and exercising its statutory mandate as opposed to dictates of PPDT and instead accepting and altered party List. Whereas the Election Court found merit in the proposition that the Political Parties Disputes Tribunal lacked jurisdiction, apart from the legal provisions cited above, it did not consider the condition precedent to filing Complaint in PPDT is that the aggrieved party must pursue the Political Party internal dispute resolution mechanism. In the instant case, the Complainant Noordin Ismael Sheikh deponed at pg 279 of the Record of appeal, that as a consequence to the published Party List of 23rd July, 2017, on 25th July 2017, he wrote to Chairman of the 1st Respondent Economic Freedom Party (EFP) expressing concern and dissatisfaction and sought internal dispute mechanism be triggered to address the issues. Despite his request and demand to activate the Party's internal dispute mechanism to resolve the dispute, there was no response. Hence the filing of Complaint in the Political Parties Dispute Tribunal. The Complainant fulfilled condition precedent.

Secondly, The Petitioner wholly blamed the 1st Respondent because of the impugned party list of 21st August 2017 expected to be the one published on 28th August 2017. Although, the IEBC is clothed with jurisdiction to hear and determine electoral disputes including nominations, in the instant case would there have been fairness and justice for the Petitioner who was/is aggrieved by the alleged acts or omissions perpetrated by 1st Respondent expect due process before IEBC as perpetrator and adjudicator at the same time? Of course not. How can IEBC superintend over its own alleged actions?

Thirdly, once IEBC gazettes the nomination list it is the end of the election process by nomination as indicated in **Moses Mwigigi case** (*supra*). Under **Section 35 of Elections Act** the Party Lists are to be submitted to IEBC at least 45 days before the date of elections. The IEBC settlement of disputes regime under **Section 75 of Elections Act** an electoral dispute maybe lodged and determined within 10 days or before date of nomination or election whichever is applicable. The Complainant in **Complaint 528 of 2017** on the published list of 23rd July 2017, after pursuing internal party dispute resolution mechanism and failed and the Complainant lodged the matter in PPDT as it was a dispute between political party and member as provided under **Section 41 of the Political Parties Act, 2011**. The General Elections had not taken place and it was premature to embark filing election petition.

Despite the fact that the bulwark of the Petitioner's claim in the election petition consists of alleged misconduct by the 1st Respondent contrary to the Constitution and Election laws that resulted in failure to nominate the Petitioner, altered the submitted Party List and abdicated its Constitutional duty and instead complied with order from PPDT all actions culminated to the Petitioner suffering loss of legitimate expectation.

The Election Court did not find that any or all these allegations were proved by evidence to the required standard of proof by the Petitioner. The 1st Respondent was bound by the PPDT orders as they were not set aside, appealed against or reviewed, as stated in **Justus Kariuki Mate & Anor vs Martin Nyaga Wambora & Anor (2014) which states;**

the duty to obey the law by all individuals and institutions is cardinal in the maintenance of law and order and due administration of justice.

The upshot of the above legal provisions and application to the instant appeal is that , with respect, the PPDT was/is clothed with jurisdiction to hear and determine nomination disputes especially in light of the recent amendment of **Section 40 of the Political Parties Act; Section 40 (fa)** which was inserted mandating PPDT to hear and determine disputes arising from party primaries. The amendment was introduced through **Political Parties (Amendment) Bill 2016. Section 2 of Political Parties Act** defines a party primary as; *process through which a political party elects or selects its candidates for the forth coming election.*

In **Eric Kyalo Mutua vs Wiper Democratic Movement, Kenya & Anor Nairobi High Court Election Petition Appeal No 4 of 2017** Hon Onguto J held;

Evidently, the statute also expressly grants powers to PPDT to directly handle disputes having their origins in party nominations.

Fredrick Odhiambo Oyugi vs Orange Democratic Movement & 2 Others Nairobi Civil Appeal No 199 of 2017 also on the same point held;

On the face of those provisions conferring jurisdiction on IEBC and PPDT respectively. There is no doubt that both the IEBC & PPDT are clothed with power to deal with disputes arising from nominations.

In **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, the Court provided as follows;

where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

The Complainant in Complaint 528 of 2017 was right to go to the PPDT Tribunal.

The many authorities cited above have unequivocally held that PPDT is clothed with jurisdiction to hear and determine nomination lists disputes.

The Election Court exceeded its jurisdiction by delving into the question of jurisdiction of PPDT whereas they are both legal institutions of

equal and concurrent jurisdiction as envisaged by **Section 41 of Political Parties Act** that provides; a decision of the Tribunal shall be enforced in the same manner as a decision of the Magistrate Court. The Election Court ought to have exercised its jurisdiction in the election petition.

The Political Parties Dispute Tribunal (PPDT) had the jurisdiction to nullify the first list submitted to the IEBC by the Economic Freedom Party by virtue of **Section 40 (fa)** of Political Parties Act.

A similar fact case on the jurisdiction of PPDT before Chief Magistrate's Court at Meru conceded that it lacked jurisdiction to determine the jurisdiction of PPDT in **Election Petition 2 of 2017 Mohammed Abass Sheikh & 3 others [2018] eKLR**

4. Were the issues before the Election Court *res judicata*?

The 4th Respondent submitted that the Political Parties Dispute Tribunal is a court of concurrent jurisdiction as the Election court and since the court had already determined the issue of party lists, only a higher court could determine the issue as an appeal. The decision therefore still stands. It was therefore their opinion that the issues before the Election court were *res judicata* as they had already been decided by the PPDT and the decision was not appealed against.

The 2nd Respondent submitted that the petition before the Election court was not *res judicata* as the issues for determination in the election petition and PPDT were not the same. The issue at the Political Parties Dispute Tribunal was on the ethnic representation of Members of County Assembly, Mandera County as portrayed on the list while the issue at the Election court was on the validity of the election. The parties at the Political Parties Dispute Tribunal were Noordin Ismail Sheikh, the EFP and IEBC. The parties in the Election court were the elected candidates, the Petitioner, EFP and the IEBC.

This Court finds from the submitted party List published on 23rd July 2017, the Petitioner was among the nominees of member of County Assembly. The **Complaint 528 of 2017** record confirms all relevant parties were served but failed to respond or attend the proceedings the matter proceeded *ex-parte* with the resultant orders that are now contested. These facts confirm that the decision of the Tribunal was a judgment in *rem* not *personam*. As submitted by 4th Appellant relying on the case of **Republic vs IEBC & 2 Ex-parte Wavinya Ndeti [2017]** and making reference to **Section 7 of Civil Procedure Act** defined judgments in *rem* as;

However, there are other orders or judgments which bind the whole world as they determine the state of affairs rather than the rights of the parties before Court.

The decision of PPDT of 1st August 2017 bound the nominees in the Party List published on 23rd July 2017, the 4th Appellant and the 1st Respondent. The issue of party list raised in PPDT was raised in Election Court which was *res judicata*. No wonder the Petitioner in her Petition though not directly questioning jurisdiction of PPDT, attributed her predicament as arising from the Tribunal orders of 1st August 2017 that nullified the Party List of 23rd July 2017 and ordered the 1st Respondent to submit a fresh list to the interested party for publication.

Therefore, the matters canvassed in PPDT with regard to the nomination Party List being in compliance with Constitution and national laws were well settled and *res judicata*.

5. Did The Election Court interrogate the validity of election by nomination of the 1st, 2nd & 3rd Appellants and 2nd Respondent as members of County Assembly of Mandera County?

The Petition filed on 19th September 2017, the Petitioner outlined questions/issues for determination by the Court. Condensed as follows;

Whether the 1st Respondent's non-compliance with Constitution and/or law affected validity of election of 2nd 3rd & 4th Respondents as members of County Assembly Mandera County.

The Election Court judgment pg 60 provides;

As to whether the 2nd 3rd & 4th Respondents were duly elected as members of the Mandera County Assembly in accordance with Constitution and Legislation? Court finds that the 1st Respondent erred and violated the Constitution in failing to nominate and gazette the Petitioner in accordance with the list as submitted to 1st Respondent and published on the 23rd July 2017. This finding therefore of the Court is that 2nd 3rd & 4th Respondents were not validly nominated in accordance with the law.

In the case of **Moses Mwigigi (supra)**, the Court outlined in great detail what the process of election by nomination entails; from the allocation of nomination seats due to each party, to the process of preparation of the Party List by the Political Party in compliance with Constitution, National laws and nomination rules prescribed by Regulation 55, the Political party submission of party List to the IEBC which after ensuring compliance with Constitution, national laws shall designate or draw from the allocated list the number of nominees required and gazette the nominees names. This signifies the completion of election by nomination process.

The election Court under **Section 75 of Elections Act**, the Election Court shall interrogate the process and outcome of the nomination process to confirm validity of the nomination of the appellants and the 2nd Respondent.

The process may entail establishment of identity; name and identity card number, age, occupation, application for party nomination, life membership certificate, proof of payment of fees, qualifications and category of each proposed nominee of member of County Assembly of Mandera County. This Court noted from the pleadings in the Election Court, the 4 nominees, 1st, 2nd & 3rd Appellants and the 2nd

Respondent only filed the 4th Appellant's Life Membership Certificate. Herein below are some of the Provisions that ought to be complied with in a valid election by nomination of member for County Assembly;

CONSTITUTION

Art. 90. Allocation of party list seats

Art.100. Promotion of representation of marginalized groups.

Art. 177. Membership of county assembly

Art. 193. Qualifications for election as member of county assembly.

ELECTION ACT

Section 25. Qualifications for nomination as member of county assembly

Section 28. Submission of Party Membership Lists

Section 34. Nomination of party lists members

Section 35. Submission of party lists

Section 36. Allocation of special seats

ELECTION(GENERAL REGULATIONS) ACT 2012

Section 54. Submission of political party list for allocation of special seats

Section 55. Party list to be prepared in accordance with party rules

Section56. Commission to publish formula for allocation of seats

ELECTION (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

Reg.4. Guiding Principles

Reg.6. Political party nomination rules and procedure

Reg.14. Fees

Reg.15. Application for nomination

Reg. 20. Party lists

Secondly, the election Court shall also consider and evaluate the validity of various Party Lists; herein the Party List of 23rd July 2017 that was nullified by PPDT and 1st Respondent in **Complaint 258 of 2017** ordered to submit new list to the interested party for publication. In compliance with PPDT order of 1st August 2017, the EFP Party by letter of 6th August 2017 provided a new list as shown hereinabove. The said list was published on 28th August 2017 The Petitioner did not know and was not aware of this list, she knew of the Party List submitted on 21st August 2017 which was not published by the 1st Respondent instead the one of 6th August 2017 was published. The Petitioner blamed IEBC for accepting new list from EFP Party in compliance of PPDT order of 1st August 2017, claimed IEBC altered the party list to her detriment and the Appellants were now in priority to her unlike in the 1st Party List that was nullified where she was in priority to them.

Thirdly, consider any electoral disputes that arose in the election by nomination process and how and in which legal institution the disputes were resolved.

The totality of this inquiry would confirm validity of election by nomination process for Members of County Assembly of Mandera County.

The Election Court considered mainly the dispute resolution process in PPDT and the 1st Party List that was published on 23rd July 2017 and had been nullified by PPDT.

The 1st Respondent, the subject of the Petitioner's Petition deponed that it accepted a new list from EFP party pursuant to PPDT Tribunal Orders of 1st August 2017.

The 1st Respondent published the Party List of 6th August 2017 as the only list received from the EFP Party as per PPDT order as it was the

List received BEFORE the General elections held on 8th August 2017 in compliance with **Section 35 of Elections Act 2011**.

With regard to the Elections (Party Primaries and Party Lists) Regulations 2017, IEBC published in **Kenya Gazette LN 6735 of 12th June 2017** on Submissions of Party Lists among the rules are;

*i. **The names in the Party List shall be in the order of priority.***

*ii. **The Party List shall be a closed list, that is, the list may not be amended after it has been submitted to the Commission.***

*iii. **Each Party List reflects the regional and ethnic diversity of the people of Kenya. This criterion is not applicable in the case of Party Lists for county assembly seats.***

*iv. **The nominees on the lists must be members of the party.***

*v. **The nominees on the list must be registered voters.***

The 1st Respondent published the list that was submitted in compliance with these rules in terms of timelines, format and requirements and in line with Tribunal Order by PPDT. This is the List of 6th August 2017. In any case the Party List of 21st August 2017 was not confirmed as received by 1st Respondent and even then it was way long after the General elections; it would not have been gazetted.

The 4th Appellant stated that the EFP party submitted 1 new List as compelled by PPDT after the earlier List was nullified. The List of 21st August 2017 was resubmission of the one of 6th August 2017.

This Court cannot fully interrogate the process and outcome of the nomination that the 1st, 2nd 3rd Appellants as members of County Assembly because all material evidence was not available to the Election Court. From the Record of Appeal, the Responses to Petition by Appellants the nominees only annexed their membership certificates.

The Petitioner did not substantiate the illegal acts by 1st Respondent, the altering of Party Lists as pleaded in the Petition. In fact on appeal the Petitioner now blames the 4th Appellant as she was not aware of the Party list submitted on the 6th of August 2017 and she was not notified of the Party List of 6th August 2017 and her name was included at number 14 yet the List of 21st August 2017 she was at Number 9 again. The 4th Appellant violated her right under **Article 47 of the Constitution of Kenya, 2010**.

I am inclined to uphold the Party List of 6th August 2017 in view of the valid, regular and legal orders of PPDT which the tribunal had jurisdiction to issue and which were not appealed against reviewed or set aside and with the statutory requirements set out by the 1st Respondent on submission of party lists.

6. Whether the Court has jurisdiction to hear Interlocutory application appeal? In relation to the cross-appeal, did the Election Court err in law and fact by striking out the Supplementary Affidavit filed on 23rd November 2017 vide Ruling of 21st December 2017 on the basis that it amounted to material change of the Petition of 19th September 2017?

On whether this Court has jurisdiction to hear an appeal of an interlocutory application, this Court relies on the Ruling by Hon L.J Thurairaja of the 25th of January 2018, a Court of equal, competent & concurrent jurisdiction, that the appeal be heard together with appeal at the end of trial and determination.

On 13th November 2017, Counsel for Petitioner sought leave to file a Supplementary affidavit as the documents were not available at the time of filing the petition as they were with the Registrar of Political Parties. The Election Court granted leave. The Supplementary affidavit was filed on 24th November 2017. The Petitioner subsequently filed a supplementary further supporting affidavit in support of the petition dated 24th November, 2017. The petitioner deposed that her name was published in the list dated 23rd July 2017 alongside the 2nd, 3rd and 4th Respondent's name. She also stated that 2nd, 3rd and 4th's Identification card Numbers were indicated as 25593774, 36570243 and 33933633 respectively. She then sent their Identification Numbers to the number 70,000 so as to verify their voter details and their voter status turned out as "no record". She submitted that a letter was written to the IEBC requesting for the voter status and they replied indicating that there were no records present in relation to the issued ID numbers. However the parties may have registered using a different document such as passports. Further, she deposed that the Election rules state that the Party list shall be regionally and ethnically diverse, that one must be a member of the party and one must be a registered voter. These conditions were not fulfilled by the 2nd, 3rd and 4th Respondents as they were not registered voters. Additionally, the 2nd Respondent was not a member of the EFP.

The Election Judgment was delivered 23rd February 2018, the memorandum of appeal was filed on 28th February 2018. The Cross Appeal was filed on the 22nd of March 2018. The statutory period to file appeal or cross appeal as prescribed by **Section 75 (4) Elections Act** is 30 days from date of decision of Magistrate's Court. The Cross appeal was filed within legal time line. Therefore, although the Ruling was 5 months ago, the High Court appeal stipulated hearing to be at the end of the Trial and judgment.

Section 76 (4) of the Elections Act 2011 provides that

An amendment of the Petition with leave of the Court may be granted for purpose of questioning a return or an Election upon an allegation of election offence but filed within the requisite period of filing the Petition.

Section 15(2) provides;

An election Court shall not allow any interlocutory application to be made on conclusion of the Pre-Trial Conference, if by its own nature, been brought before the commencement of the hearing of the petition.

In **Raila Odinga Vs Independent Electoral & Boundaries Commission & 3 Others Supreme Court Petition No. 5 of 2013** the Supreme Court gave the following guidelines for determining applications for the Affidavits and admission of new and additional evidence;

- a) The admission of additional evidence is not an automatic right, instead the Elections Court has discretion on whether or not to admit the evidence;*
- b) Further affidavits must not seek to introduce massive evidence which would or in effect, change the nature of the Petition or affect the Respondent's ability to respond to the said evidence;*
- c) The parties to an election Petition should strive to adhere to the strict timelines set out in EDR Laws; and*
- d) Admission of new evidence must not unfairly disadvantage the other parties to an election petition.*

Further, in Election Petition No. 2 of 2017 High Court of Kerugoya **Hon. M. Karua & Hon. Joseph Gachoki Gitari Vs IEBC & 3 others** the Court stated thus;

Where one party, is prejudiced by expanding the scope of the petition in the exercise of Courts discretion, it would not be doing so judicially. It would amount to miscarriage of justice. The 3rd & 4th Respondents would be exposed to new grounds causes and evidence in form of affidavits. I am of the view that filing further affidavits will prejudice the Respondents whether at the same time amount to amendment of the petition through the back door after gathering material not pleaded (particularized in the petition)...

In giving directions for filing of further affidavits, the Court may consider the significance and effect of new and additional evidence

On the evidence contained in the Supplementary Affidavit on the suitability qualification of the Respondents to the Petition to be nominated members of County Assembly, this was not raised or contained anywhere in the Petitioner's Petition of 19th September 2017. The gist of Petitioner's claim was not non suitability of the Respondents but rather that IEBC, 1st Respondent's, alleged misconduct in interfering and manipulating the Party List and thereby depriving her of the nomination as member of County Assembly. The Supplementary Affidavit raised new issues not contained in the petition and the Election Court on sound legal ground expunged the same.

In **Election Petition Appeal 19 of 2018 (C.A), Idris Abdi Abdullahi v Ahmed Bashane & 2 others [2018] eKLR** on striking of Supplementary Affidavit;

As we have already adverted, parties are obliged to confine themselves to their pleadings, unless the court specifically allows them to amend the pleadings and introduce new issues..... the purpose of pleadings is to focus on the issues in dispute and it is those issues and those issues alone, that the trial court is obliged to resolve.

Even as claimed by the Petitioner 2nd Respondent that she obtained crucial information from the Registrar of Political Parties on the Respondents' voter status, the letter dated 16th November 2017 states as follows;

This does not explicitly mean that the person is not in the Register of Voters. The said person may have used a different document such as passport to register as a voter. The search could be extended to the acknowledgment slip issued which shows voters application number, ID, serial number, telephone number or search from the original records in the constituencies where the said person were registered.

In order to assist the Commission to extend the search of the Registration status, we wish to request you to provide the following information

- 1. The Constituencies where the said person registered*
- 2. ID card Numbers with serial numbers of the IDs*
- 3. Copies of Acknowledgment slips which show voter application number*

These issues were not raised in the petition.

DISPOSITION

- a) The Election Court did not interrogate the validity of election by nomination of the 1st, 2nd & 3rd Appellants and 2nd Respondent as members of County Assembly of Mandera County as per the subsequent list of 6th August 2017.**

- b) The Election Court exceeded its jurisdiction in finding that the decision of Political Parties Dispute Tribunal (PPDT), the basis upon which the impugned nomination list was submitted was irregular as PPDT lacked jurisdiction.
- c) The Political Parties Dispute Tribunal (PPDT) had the jurisdiction to nullify the first list submitted to the IEBC by the Economic Freedom Party and therefore this issue was res judicata
- d) The 1st Respondent did not abdicate their constitutional and statutory responsibilities by not exercising its dispute resolution mandate but complied with PPDT order of the new Party List
- e) The Election Court did not err in law and fact but was on firm legal ground by striking out the Supplementary Affidavit filed on 23rd November 2017 vide Ruling of 21st December 2017 on the basis that it amounted to material change of the Petition of 19th September 2017.
- f) The 1st Respondent is compelled to gazette the Party List of nominee of County Assembly of Mandera County submitted by the 4th Appellant on the 6th of August 2017.
- g) The appeal is allowed and cross appeal dismissed. The Election Court orders of the 23rd of February 2018 are hereby set aside
- h) Costs by 2nd Respondent to Appellants at Kshs. 500,000/-

DELIVERED SIGNED & DATED IN OPEN COURT ON 31ST OF JULY, 2018

M.W.MUIGAI

JUDGE OF FAMILY DIVISION OF HIGH COURT

IN THE PRESENCE OF:

MR BIRIK FOR THE 1ST, 2ND AND 3RD APPELLANTS

MR OTIENO FOR THE 4TH APPELLANT

MS MAITAI & MR ONDIEKI FOR THE 1ST RESPONDENT

MR BUSAIDY FOR THE 2ND RESPONDENT