



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION APPEAL NO. 5 OF 2018 AND NO. 7 OF 2018 (CONSOLIDATED)

VICTORIA CHERUTO LIMO1ST APPELLANT

HAMDI AHMED ALI.....2ND APPELLANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION(IEBC)..... RESPONDENT

NATIONAL COHESION AND INTEGRATION

COMMISSION.....INTERESTED PARTY

JUDGEMENT

BACKGROUND

1. The two (2) appeals herein arise from election petition No. 5 of 2017 in the Magistrate's Court at Garissa wherein Hamdi Ahmed Ali was the petitioner while Victoria Cheruto Limo was 1st Respondent, and the Independent Electoral and Boundaries Commission (IEBC) was the 2nd respondent, and the National Cohesion and Integration Commission was, on application, joined as the interested party. At the conclusion of the hearing of the election petition, the trial court on 6th March 2018 allowed the petition and ordered as follows:-

(1) The nomination of the 1st respondent as Member of the County Assembly of Garissa under the category of special seats (gender top-up) is hereby nullified.

(2) The gazettelement of the 1st respondent as the nominated Member of the County Assembly of Garissa under the category of special seats (gender top-up) vide Kenya Gazette Notice No. 8752 of 6th September 2017 is hereby nullified.

(3) Kenya Patriots Party is hereby directed to carry out fresh nomination within forty five (45) days from date hereof and forward the list to the 2nd respondent for gazettelement.

(4) Costs are capped at Ksh.500,000/= to be shared equally between the respondents.

(5) The interested party shall not be entitled to any costs.

THE APPEALS

2. From the above decision of the trial court, two (2) appeals No. 5 of 2018 and No. 7 of 2018 were filed which were consolidated and heard together. In Election Appeal No. 5 of 2018 filed on 12/3/2018 the appellant was Victoria Cheruto Limo while the respondents were Hamdi Ahmed Ali 1st respondent, Independent Electoral and Boundaries Commission as 2nd respondent, and National Cohesion and Integration Commission as interested party; with the grounds of appeal being: –

(1) The learned magistrate erred in law and in fact and misdirected himself in finding that the appellant is not qualified to be nominated as a Member of County Assembly of Garissa under the category of special seats (gender top-up).

(2) The learned magistrate erred in law and in fact in failing to consider any of the raised triable issues by the appellant and the submissions thereof against the claims in the petition.

(3) That the learned trial magistrate erred in law and in fact by considering issues not pleaded in the petition.

(4) That the learned magistrate erred in law and fact and misdirected himself in finding that residence, community, ethnicity and cultural diversity is a requirement for nomination to be a Member of the County Assembly of Garissa County under the top-up category.

(5) That the learned magistrate erred in law in finding that Article 90 (2) (c) of the Constitution and Section 7 of the County Assembly Act requires candidates to be nominated to the Assembly based on their community, cultural diversity and ethnic minority.

(6) That the learned magistrate wholly erred in law and in fact and misdirected himself in failing to analyse any of the evidence adduced by the witnesses and the submissions thereof.

(7) That the learned magistrate wholly erred in law in failing to appreciate the statutory threshold of the burden of proof in an election petition.

(8) That the learned magistrate erred in law and in fact and misdirected himself in failing to find that the petition was incurably and fatally defective for seeking orders against a body corporate (Kenya Patriots Party) which was not a party to the proceedings and subsequently in directing the said body to conduct fresh nomination.

(9) That the learned magistrate erred in law and in fact and misdirected himself in admitting the interested party to the proceedings considering the submissions of the interested party supporting the petitioner's case, having been filed outside the court's direction and after filing and serve on the 1st respondent submissions without an opportunity to reply.

3. On the above grounds of appeal, the appellant asked that the judgement of the trial court be set aside by the court in its entirety with costs.

4. Appeal No. 7 of 2018 was filed on 19/3/2018 by Hamdi Ahmed Ali and the respondents were Victoria Cheruto Limo as 1st respondent, Independent Electoral and Boundaries Commission 2nd respondent, and National Cohesion and Integration Commission as interest party. The grounds of appeal were three (3) as follows –

(1) Failure to issue a certificate of the election to the appellant under section 80 of the Elections Act as read together with section 37 of the Elections Act 2011.

(i) The learned magistrate misdirected himself in law when he failed to issue a certificate of election to the appellant under Section 80 of the Elections Act as read together with Section 37 of the Act even after having made a determination that the 1st respondent was not qualified to be nominated in a gender top-up nominee at the County Assembly of Garissa.

(2) Failure to make a determination whether the 1st respondent had committed electoral offences under Section 87 of the Election Act 2011.

(i) The learned magistrate erred in law when he failed, at the conclusion of the hearing of the petition, to make a determination on whether an electoral malpractice of a criminal nature may have been committed by the 1st respondent.

(3) Analyzing the evidence adduced at the hearing of the petition in a perfunctory manner.

(i) The learned magistrate erred in law when he failed to take into account the evidence adduced at the hearing of the petition and analyzed the evidence in a perfunctory manner and thus failed to scrutinize it as was expected of an election court.

5. Upon the above three (3) grounds, Hamdi Ahmed Ali has sought that a declaration do issue declaring her as the duly elected candidate for gender top-up, a declaration be issued that the IEBC contravened Article 90 and 177 of the Constitution together with Section 34 and 36 of the Elections Act as well as Regulations 54 and 55 of the Elections General Regulations 2012 by electing Victoria Cheruto Limo to the County Assembly of Garissa as the Kenya Patriots Party nominee for the gender top-up, a declaration that the IEBC failed to carry out its duty of ensuring that all persons on the respective party lists were qualified as required under Regulation 54 (5) of the Elections General Regulations 2012, and lastly that mandatory orders do issue to compel the IEBC to elect her as Member of the County Assembly of Garissa as Kenya Patriots Party gender special seat nominee (gender top-up) by publishing a gazette notice her to the County Assembly of Garissa.

6. As stated above, the two appeals were consolidated and Victoria Cheruto Limo became 1st appellant while Hamdi Ahmed Ali became 2nd appellant.

7. Before the appeal was heard, counsel for Hamdi Ahmed Ali (2nd appellant herein) filed a Notice of Motion dated 19th March, 2018 under Section 75 (4) of the Elections Act 2011, Rule 34 (1), (2) of the Election (Parliamentary and County Election Petition) Rules 2017, under certificate of urgency, and sought that the Memorandum of Appeal filed by Victoria Cheruto Limo dated 9th March 2018 in Appeal No. 5 of 2018 be struck out because it was incurably defective for failure to comply with the mandatory provisions of Rule 34 (1) and (2) of Elections (Parliamentary and County Elections) Petition Rules 2017 (hereafter Election Petition Rules 2017) in that the Memorandum of Appeal was not signed by the appellant, and did not set out under distinct heads the grounds of appeal, which defect could not be cured by the provisions of Article 159 of the Constitution of Kenya.

8. The two appeals and the application were heard together. All advocates for the parties filed and served written submissions and highlighted the same.

SUBMISSIONS OF THE PARTIES COUNSEL

9. Mr. Kibet appeared for Victoria Cheruto Limo, and argued that the application to strike out her petition of appeal lacked merit, and relied on the written submissions filed and the list of authorities. Counsel submitted that Rule 34 (1) as well as Rule 8 (4) of the Election Petition Rules 2017 provided that an appellant may authorize another person to sign the Memorandum of Appeal and that such other person included an advocate. As such, the fact that the Memorandum of Appeal in Appeal No. 5 of 2018 was signed by the advocate, did not render the appeal defective as Rule 34 (2) did not provide a specific template but merely set out conditions. Counsel submitted further that the grounds of appeal were proper, not written in a narrative as alleged, and no factual issues were raised therein. In any event, counsel argued, if there were deviations, then same must have been minor and could not vitiate the appeal and relied on the case of **Martha Karua –Vs- IEBC-Nyeri (CA) Election Petition Appeal No. 1 of 2018**.

10. With regard to the substantive grounds of appeal, counsel argued that the nomination of his client Victoria Cheruto Limo to fill the gender top-up position in the Garissa County Assembly was done in accordance with Article 177 (1) (b) of the Constitution as well as the written law. It could thus not be right to say that his client was not validly nominated and gazetted as a Member of the County Assembly. Counsel opposed all the grounds of appeal in Appeal No. 7 of 2018 filed by Hamdi Ali Mohamed and urged that Election Appeal No. 5 of 2018 filed by his client be allowed with costs.

11. Mr. Mwalim for Hamdi Ahmed Ali (Election Petition Appeal No. 7 of 2018) relied on the application dated 9th March 2018 to strike out the Memorandum of Appeal in Appeal No. 5 of 2018, and submitted that, though the Memorandum of Appeal therein started with the words Victoria Cheruto Limo, it was actually signed by the advocate who was not the intended legal person to sign the same, and in addition, there was no document filed to show that Victoria Cheruto Limo authorized another person to sign a Memorandum of Appeal. Secondly, counsel argued that though the law required that the grounds of appeal be under distinct heads that was not done. Further, the said Memorandum of Appeal violated the mandatory requirements of Section 75 (4) of the Elections Act 2011, which required that appeals to the High Court be on matters on law only. Lastly, on this technical point of the format of the Memorandum of Appeal, counsel adopted the written submissions of the interested party and urged that the Memorandum of Appeal in Appeal No. 5 of 2018 be struck out.

12. With regard to the substantive appeal, counsel argued that the magistrate misinterpreted Article 92 (c) of the Constitution. According to counsel representation in the National Assembly, the Senate and the County Assemblies was meant to give Kenyans effective and better representation and that in his view, since no constituency cut across two (2) Counties, each County was meant to be a separate entity to be treated as such. In that respect therefore, counsel argued, the gender top-up position being for Garissa County, the nominee should have been a resident of the County and Victoria Cheruto Limo coming from Uasin Gishu County was thus not qualified. Counsel contended that though Section 34 of the Elections Act did not define where a voter was to be registered, the broader principles of the Constitution which recognized cultural, religious and ethnic considerations should not be ignored or departed from. Counsel argued further that though Kenya Patriots Party was not a party in the election petition, since the chairman testified as a witness the party was in court, as such the court having found that Victoria Cheruto Limo was not validly nominated ought to have directed IEBC to gazette his client, Hamdi Ahmed Ali as the nominee. Counsel sought to distinguish the case of **Richard Nyagaka –Vs- IEBC [2013] eKLR** as in our present case, there was no need for scientific data to establish whether Somalis were the majority community in Garissa County, and felt that the nomination and gazetting of Victoria Cheruto Limo was not done democratically, and urged that appeal No. 5 of 2018 be dismissed and his client, Hamdi Ahmed Ali be gazetted as the nominee for the gender top up position in Garissa County Government.

13. Mr. Mohamed for the respondent IEBC relied on the written submissions filed and list authorities and stated that in order to save time; he would not make lengthy oral submissions on the application for striking out the Memorandum in Appeal No. 5 of 2018, but supported the submissions of counsel for Victoria Cheruto Limo.

14. Counsel said that the magistrate was wrong in finding that Victoria Cheruto Limo was not qualified for nomination as MCA because she was not resident of Garissa County, and not familiar with local culture, religion, needs and interests of Garissa County people. According to counsel, this finding of the magistrate was a misdirection as the qualifications and eligibility for the post did not require such conditions, and relied on Article 193 (1) of the Constitution which contains the qualifications for a Member of a County Assembly.

15. Counsel also submitted that the respondent IEBC did not contravene the Constitution or any written law as the eligibility for nomination for the gender top up position was anchored on the political party list and maintained that the only party list submitted to the IEBC by Kenya Patriots Party was that sent through a letter dated 19th July, 2017, and according to him the other list referred to in court was not submitted to IEBC, and to-date had not been submitted to the IEBC and could not thus be acted upon. In this counsel relied on the case of **Moses Mwicigi vs IEBC & others [2016] eKLR**.

16. With regard to the order of the trial court to Kenya Patriots Party conducting fresh nomination, counsel relied on Section 75 (3) of the Elections Act which required that any relief granted by the court be appropriate, and stated that the order for fresh nomination was not grounded in the law as under Section 34 (10) of the Elections Act, the list already supplied to IEBC was a closed list, which meant that if a nominee died or resigned or was disqualified, then the 2nd person named in the list would take over the vacant slot.

17. Mr. Muinde for the interested party on his party, submitted that both party lists of nominees were uploaded to the IEBC system on 19th July, 2017, one at 1.31 pm and the other at 1.40 pm, and added that though there were under-currents in the political party, the Chairman wrote a letter to IEBC to clarify and explain the position in that the list to be relied upon as genuine was the first list, in which Hamdi Ahmed Ali was the first nominee.

18. Counsel submitted further that though he had no problem with counsel for Victoria Cheruto Limo signing the Memorandum of Appeal, he had a concern that under Appeal No. 5 of 2018 the appellant had not asked the court to make any specific orders or declarations which was wrong. The Memorandum in Appeal No. 5 of 2018 also violated the provisions of Section 75 (3) of the Elections Act as it raised factual

issues, a defect which could not be cured under Article 159 (2) of the Constitution. Counsel relied in the case of **Gatirau Peter Munya –Vs- Dickson Githinji [2014] eKLR** and the case of **Raila Odinga –Vs- IEBC [2013] eKLR** in which the Supreme Court stated that a memorandum of appeal which required the election appellate court to re-examine the probative value of evidence ought not be admitted.

19. Emphasizing the need for effective representation through nominations, counsel relied on Articles 92, 100 and 177 of the Constitution and the case of **Omari Wanjiku Esha –Vs- IEBC [2018] eKLR** a decision of the Nyeri Chief Magistrate’s Court where Muslims were to be represented in Nyeri County as a minority group. According to counsel, in the present case, Hamdi Ahmed Ali was better suited to represent women in the gender top-up category in Garissa County Assembly due to her knowledge of the socio economic aspirations and challenges in the County. Counsel also sought to rely on the case of involving a small tribe, (Il Chamus case) **Rangal Lemeiguran & Others –Vs- Attorney General & Others [2006] eKLR**, to emphasize that special interest groups must be treated as such and represented effectively.

20. On whether the Interested Party was wrongly joined as a party, counsel submitted that a ruling had been made by the trial court on the same which had not been challenged. Counsel concluded by stating that Appeal No. 5 of 2018 be disallowed and the orders of the trial court upheld.

21. In a brief response, Mr. Kibet for the 1st appellant Victoria Cheruto Limo stated that the issue here did not relate to marginalized groups, but was on gender top-up and as such the case of **Omari Wanjiku (Supra)** relating to an ethnic minority in Nyeri was distinguishable. Counsel stated also that the role of a Political Party in processing nomination of candidates was clearly dealt with in the case of **Mwicigi –Vs- IEBC (Supra)**, and maintained that the evidence of the chairman of the Kenya Patriots Party herein was given on behalf of the petitioner and not for the Political Party, which was not a party to the proceedings to enable the court scrutinize its procedures. According to counsel therefore, the trial court failed to make a determination on relevant factors, and also failed to make findings on the two uploaded lists, which was a mistake. Counsel thus asked this court to allow appeal No. 5 of 2018.

CONSIDERATIONS

22. Having considered the two (2) appeals and submissions both written and oral by counsel for all the parties, I now go to the consideration of the issues raised. In doing so, I have to start by reminding myself that this being an appeal from the magistrate’s election court, the jurisdiction of this court is limited to matters of law only as provided under Section 75 (4) of the Elections Act which states as follows:-

“ 75 (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.”

23. The first issue relates to the joinder of the National Cohesion and Integration Commission as a party. It has been argued by counsel for Victoria Cheruto Limo (1st appellant) that the interested party, the National Cohesion and Integration Commission should not have been joined by the trial court in the proceedings as a party. It is imperative to note that the interested party was incorporated through an Act of Parliament, the National Cohesion and Integration Act No. 12 of 2008 to encourage national cohesion and integration. They were joined in the proceedings by the trial court after making a formal application dated 18th October 2017. In my view, the fact that their position seems to favour one or the other of the parties in the proceedings did not disqualify them from being interested parties. It cannot thus be said on appeal that the interested party was not properly joined as a party as the trial court properly exercised its discretion. I thus find that the interested party was and is still a valid party in these proceedings.

24. The second issue is whether the election petition filed in the magistrate’s court by Hamdi Ahmed Ali (2nd appellant) was fatally defective for seeking orders against the Kenya Patriots Party which was not a party to the proceedings. I have perused the election petition filed in the trial court. Though in prayer (a) (c) (d) (f) and (g) of the petition, the Kenya Patriots Party was mentioned, orders were only sought against Victoria Cheruto Limo and IEBC. No order was sought against the party, which was merely mentioned as the nominating authority. The election petition was thus not defective on that account.

25. The third issue relates to signature on the Memorandum of Appeal in Appeal No. 5 of 2018 herein filed by Victoria Cheruto Limo. Indeed the Memorandum of Appeal was not signed by the appellant but by the advocate on record H & K LAW ADVOCATES. It has been argued by counsel for 2nd appellant that Rule 34 (1) of the Election Petition Rules 2017 required the signature of the appellant. Indeed that was so, as the requirement is that the Memorandum of Appeal be signed in the same way as a petition. Rule 8 (4) of the Elections Petition Rules 2017 however provides that the petition may be signed by a person authorized by the petitioner.

26. In my understanding, an advocate appointed by a party to conduct proceedings becomes an agent of the litigant by virtue of that appointment to do all things that require to be done on behalf of the client except matters that are expressly excluded by law. There is no suggestion that the advocate who signed the Memorandum of Appeal was not the advocate for the 1st appellant. The appellant therein has not complained. That being so, in my view, the Memorandum of Appeal was validly signed by the advocate, though there was no specific document filed authorizing the advocates to sign the Memorandum of Appeal. In case the advocate made a mistake, in my view, it is curable under Article 159 (2) of the Constitution.

27. The second reason why the said Memorandum of Appeal is said to be fatally defective is contravention of Rule 34 (2) of the Election Petition Rules 2017 which requires the Memorandum of Appeal to be concise, under distinct heads and without argument. Though the Memorandum of Appeal was numbered but had no headings, in my view, this is a minor omission, and no prejudice was occasioned to any party. I dismiss the complaint, and find that the Memorandum of Appeal is not fatally defective on that account.

28. The other reason why the Memorandum of Appeal in Appeal No. 5 of 2018 has been challenged relates to the provisions of Section 75 of

the Elections Act of 2011, which provides that appeals be on matters of law only, the relevant part of which state as follows; -

“75 (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.

(4) An appeal under sub-section (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.”

29. I have perused the Memorandum of Appeal. A number of paragraphs in the Memorandum of Appeal state that the learned magistrate erred “in law and in fact”. These are paragraph 1, 2, 3, 4, 6, 7, 8 and 9. It is of note that only paragraph 5 does not mention the word “fact”.

30. However, bearing in mind the issues raised in the Memorandum of Appeal, in my view, the word “fact” was simply misplaced as the contents of the grounds of appeal do not require this court to re-evaluate the evidence on record and come to its own conclusions. Courts have had to grapple with this perennial problem caused by the erroneous drafting by advocates. The Supreme Court and the Court of Appeal have had occasion to deal with this problem in a number of cases and the thread of jurisprudence is that unless the appellate court is called upon to re-evaluate the evidence of the trial court, then the appeal should be left to stand- see **Gatirau Peter Munya –Vs- Dickson Mwenda (Supra)**. It is unfortunate however that advocates have continued using words which would cause unnecessary anxiety and disputes. In my view, advocates are better advised to avoid the careless use of such words where the law is very specific on what should be contained in a legal document.

31. On the totality of the matter however, in line with the reasoning by higher superior courts, I go by the recent decision in **Hon. Sumra Ishardali Mohamed –Vs- IEBC – Nairobi (CA) Election Petition Appeal 22 of 2018** wherein the Court of Appeal held that the fact that the first sentence of a ground of appeal talked about “law and fact” did not mean that the ground of appeal was based on fact, and thus fatally defective. On that reasoning, I find that the Memorandum of Appeal in Appeal No. 5 of 2018 is not fatally defective, even though most of the grounds of appeal, in the first line, start with the words “law and fact”.

32. I now go to the substantive considerations in the appeals. What is gender top up position? Who qualifies to be nominated to such a position? Gender top up in a County Assembly is defined under Article 177 of the Constitution which states as follows;-

“177. (1) A County Assembly consists of –

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

(b) The number of special seats members necessary to ensure that no more than two thirds of the membership of the Assembly are of the same gender;

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

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

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

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

(4) A County Assembly is elected for a term of five years.”

33. Section 34, 35, 36 and 37 of the Elections Act No. 24 of 2011 are also relevant. Section 34 relates to nomination of party lists members, while Section 35 requires political parties to submit party lists to the IEBC at least 45 days before the date of the general election. Section 36 on the other hand, provides for the allocation of candidates to be proposed for nomination for special seats, and requires that the political party prioritizes the lists which should contain alternates between male and female candidates, while Section 37 deals with re-allocation of special seats.

34. It is to be noted that in the case of County Assemblies unlike the case of the National Assembly and Senate, the party lists are not required to reflect the regional and ethnic diversity of the people of Kenya. In this regard, Article 90 (2) (c) of the Constitution provides as follows;-

“ 90 (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-

(c) except in the case of County Assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.”

35. In short therefore, the gender top-up positions applies to both males and females, and will arise where the composition of elected members of a County Assembly, do not meet the Constitutional requirement of not having more than two thirds from one gender, under Article 177 (1) (b) of the Constitution.

36. For a person to qualify for nomination by a political party he or she must be a member of the political party as at the date of such nomination as spelt out under Section 34 (8) of the Elections Act. The person has to be a registered voter. This settles the issue of definition of gender top up position and qualifications for nomination to the position.

37. I now turn to the issue whether Victoria Cheruto Limo was validly nominated to fill the gender top up position in the County Assembly of Garissa. It is not in dispute that Victoria Cheruto Limo was a member of the Kenya Patriots Party at the time she was nominated. She might also have been an employee of the party at that time. There was no dispute that she was a registered voter but registered in Uasin Gishu County not in Garissa County.

38. With regard to the process of nomination, there have been arguments that two lists were sent to IEBC. The IEBC say they received only one list. The party was not joined, though the Chairman attended court for the petitioner in the election petition court and maintained that the party sent two lists, one genuine and the other not. This court is not capable at this appellate stage to go into the internal workings of the Kenya Patriots Party or the IEBC, and in any case is restricted to consider only matters of law. I will thus not delve into the issue of two lists, and will have to rely on what the IEBC says and proceed from there.

39. The question that requires more serious consideration is whether Victoria Cheruto Limo was qualified to be nominated in Garissa County, which will also determine the validity of her nomination. On this I will at the risk of repetition go to the constitutional definition of a County Assembly under Article 177 of the Constitution, which provides as follows:-

“177 (1) A County Assembly consists of ;-

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

(b) The number of special seats members necessary to ensure that no more than two thirds of the membership of the Assembly are of the same gender;

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

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

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

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

(4) A County Assembly is elected for a term of five years”.

40. It can be easily discerned from the above provisions of the Constitution that the operative words are **the Ward, the County, the election, the voters in the Wards, and the seats received in the County**. It is also important to note that under Article 90 (2) (c) of the Constitution, the party lists for County Assembly seats are not required to reflect the regional and ethnic diversity of the people of Kenya, unlike in the case of the National Assembly and Senate.

41. In Kenya also voters are registered to vote in only one polling station, which will of course be in one Ward and one County. Under regulation 38 of the Elections (Registration of Voters) Regulations 2012, Kenyan citizens residing outside Kenya are only allowed to vote in Presidential Elections or Referendum. Under Regulation 39 E, the same conditions apply to prisoners. As such, my constitutional interpretation is that only those who were registered to vote in Wards in Garissa County could qualify for nomination by the party to the County Assembly of Garissa. In my view therefore, Victoria Cheruto Limo being a registered voter of Uasin Gishu County was not qualified and not validly nominated to fill the gender top-up position in the Garissa County Assembly.

42. As for the complaint of Hamdi Ahmed Ali that the magistrate considered irrelevant issues and failed to consider relevant issues, I see nothing to support that contention. I will also not delve into analyzing the evidence before the trial court, as this court’s jurisdiction is restricted to matters of law only.

43. The powers of the trial court to issue a certificate under Section 80 of the Elections Act are discretionary and only applicable upon recount which was not the case herein. As no criminal allegation was proved beyond reasonable doubt, the magistrate cannot be faulted, for not making any criminal findings.

44. I now turn to the orders made by the trial court. Though it has been argued that the trial court was right in making an order directed at Kenya Patriots Party to carry out fresh nominations, in my view that order was a mistake. On this I agree with Victoria Cheruto Limo. The

first reason is that Kenya Patriots Party was not a party in the proceedings, and the order therefore amounted to condemning a party without giving them a chance to be heard. The second reason why the trial court erred was because the petitioner did not seek any orders against the political party, and as such the magistrate went out of the pleadings in issuing such an order.

DETERMINATION

45. Consequently, I dismiss the Appeal No. 5 of 2018 filed by Victoria Cheruto Limo in part. I also dismiss Appeal No. 7 of 2018 of Hamdi Ahmed Ali, and only agree with her prayer that the IEBC failed to carry out its duty to ensure that persons in the party lists were qualified for nomination to the County Assembly of Garissa.

46. My orders are as follows:-

1. The nomination of Victoria Cheruto Limo as a Member of that County Assembly of Garissa under the category of special seats (Gender Top-up) is null and void.
2. The Gazettement of Victoria Cheruto Limo as the nominated Member of County Assembly of Garissa under the category of special seats (Gender Top-up) vide Kenya Gazette Notice No. 8752 of 6th September, 2017 is nullified.
3. Since the party lists submitted to IEBC are required under Section 34 (10) of the Elections Act not to be amended during the term of Parliament, I certify and order IEBC to re-allocate the gender top-up seat to the next female Garissa County registered voter in the list from which Victoria Cheruto Limo was gazetted in accordance with the provisions of Section 37 of the Elections Act.
4. In view of the nature of the appeal, I order that each party will bear their respective costs of appeal and the trial court proceedings.

Dated, Signed and Delivered at Garissa this 30th day of August, 2018.

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George Dulu

JUDGE