



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELECTION PETITION NO. 11 OF 2017

ADEN NOOR ALI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION.....1ST RESPONDENT

JUBILEE PARTY.....2ND RESPONDENT

JENIFER SHAMALLA.....3RD RESPONDENT

JUDGMENT

Introduction

On 8th August 2017, Kenyans went to elect their representatives to various organs of governance both in the national and devolved governance units. The method of electing representatives in the national and devolved governments is either through “election by registered voters” or “election through nomination”. These two methods are provided for under the law and also affirmed by the courts. In the case of Moses Mwicigi & 14 others v Independent Electoral & Boundaries Commission & 5 others [2016] eKLR the Supreme Court stated in its judgment that:

***“..... It is plain to us that the Constitution and the electoral law envisages the entire process of nomination for the special seats, including the act of gazettment of the nominees’ names by the IEBC, as an integral part of the election process.*”**

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

***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.*”**

It is through “election through nomination” that Jennifer Shamalla (the 3rd Respondent) was elected to the National Assembly to represent special interests. The dispute surrounding that nomination and eventual

gazettement is the reason this matter is before me. Both Aden Noor Ali (the Petitioner) and the 3rd Respondent are members of the Jubilee Party (the 2nd Respondent or the Party). They applied to the Party to be considered for nomination to the National Assembly to represent special interests contemplated under **Article 97 (1) (c) of the Constitution** of Kenya 2010 (the Constitution) in the General Elections held on 8th August 2017. **Article 97 (1) (c) of the Constitution** provides for twelve (12) members, to represent special interests including the youth, persons with disabilities and workers, to be nominated to the National Assembly by parliamentary political parties according to their proportion of members of the National Assembly in accordance with **Article 90 of the Constitution**. The Petitioner was ranked number nine (9) on the party list while the 3rd Respondent was ranked number four (4). The list prepared on priority basis was submitted to the Independent Electoral & Boundaries Commission (the 1st Respondent) on 9th July 2017. The 1st Respondent, upon satisfying itself that the list was prepared in accordance with the law, published it in the Daily Nation newspaper and the Standard newspaper on 23rd July 2017 as required by the law. The 1st Respondent proceeded to *designate* the 3rd Respondent, in addition to other five (5) nominees of the 2nd Respondent, as duly elected Member of the National Assembly to represent the special interests identified in the party list.

The Petitioner was aggrieved by the manner the list was prepared. He was unhappy that he was placed at number nine (9) instead of among the first four (4) nominees on the list. He was also aggrieved by the designation and gazettement of the 3rd Respondent to represent minorities. He complained to the Party but his grievance was not addressed. He filed two complaints: one with the 1st Respondent's Disputes Resolution Committee (the Committee) being Dispute Cause No. 1 of 2017, and the second with the Political Parties Disputes Tribunal (PPDT) being Complaint No. 336 of 2017. The Petitioner filed a Notice of Withdrawal of the Dispute Cause No. 1 of 2017 before the 1st Respondent's Disputes Resolution Committee. The Committee allowed the withdrawal of the Complaint on 26th July 2017.

The Petitioner proceeded with the Complaint before the PPDT. It was determined and a judgment was delivered on 29th July 2017 granting the following orders:

- (a) A declaration be and is hereby issued to the effect that in so far as the Respondent included the 3rd Respondent's name in the party list for nomination to the National Assembly without stating the special interest she represents, the same is unlawful, null and void and of no effect in law.
- (b) The Respondent be and is hereby directed to strike off the 3rd Respondent's name from the list of nominees.
- (c) The 1st Respondent shall proceed to re-constitute the party list in accordance with the law.
- (d) A copy of this judgment to be transmitted to the Independent Electoral and Boundaries Commission for necessary action.
- (e) No order as to costs.

In compliance with that judgment and the decree the 2nd Respondent (1st Respondent before PPDT) re-constituted the party list. The Petitioner and the 3rd Respondent were included in the re-constituted party list and the special interest that the 3rd Respondent represented was specified as minority-mixed heritage (Asian-African). The 2nd Respondent then re-submitted its party list to the 1st Respondent. The 1st Respondent confirmed that the party list complied with the law and accepted it and consequently gazetted the same vide *Gazette Notice* No. 8379 dated 25th August 2017.

The 2nd Respondent was allocated six (6) special seats on the basis of proportional representation as envisaged under **Article 90 (1) of the Constitution**. The Petitioner who was placed at number nine (9) in the party list did not make it to the National Assembly. The 3rd Respondent who was placed at number

four (4) on the party list was duly nominated Member of the National Assembly for the 2nd Respondent. This has aggrieved the Petitioner necessitating the filing of this Petition.

This matter was placed before me for mention on 12th October 2017 for purposes of handling preliminary issues and giving directions on the way forward. The pre-trial conference was scheduled for 30th October 2017 during which the following was agreed:

(i) That the hearing of the Petition shall be by way of oral evidence.

(ii) That each party shall call one witness.

(iii) That the Petitioner shall take three (3) hours to present his case including cross-examination of the Respondents.

(iv) That each respondent shall take one (1) hour to present their cases.

(v) That there shall be two (2) issues for determination, namely: (a) whether the Petitioner was validly nominated by the 2nd Respondent to the National Assembly to represent the marginalized/minority group and (b) whether the 3rd Respondent was validly nominated to the National Assembly.

(vi) That all the supporting affidavits to the Petition and the Responses respectively shall be adopted and that the deponents shall be cross-examined on the same.

(vii) That the Petition shall be heard on 15th November 2017 at 9.00am.

(viii) Who bears the costs?

Petitioner's Case

The Petitioner's case was conducted by Mr. Ondabu, advocate, instructed by M/s Ondabu & Co. Advocates. His case, as can be discerned from a Petition and the Supporting Affidavit filed on 5th September 2017 and his oral evidence in court, is that he was one of the 2nd Respondent's nominees whose names were submitted to the 1st Respondent under **Sections 34 and 35 of the Elections Act**; that the 1st Respondent unlawfully and unconstitutionally listed the name of the 3rd Respondent under "special interests" ahead of marginalized or minority nominee in the 2nd Respondent's party list to the National Assembly; that the 1st Respondent unconstitutionally and unreasonably gazetted the 3rd Respondent as a Member of the National Assembly in breach of the orders contained in the judgment of the PPDT; that the 1st Respondent acted in contempt of the judgment of the PPDT delivered on 29th July 2017 directing the 1st Respondent to strike off the 3rd Respondent's name from the list of nominees in so far as she was purporting to represent the marginalized/minority and that the 1st Respondent's action in excluding the Petitioner from the 2nd Respondent's nominees to the National Assembly is in violation of **Articles 81, 82, 90, 100 and 177 of the Constitution**.

The Petitioner further states that the 1st and 2nd Respondents failed to abide by the judgment of the PPDT; that the 3rd Respondent was not validly nominated to the National Assembly; that the 1st Respondent breached the law in unlawfully gazetted the 3rd Respondent as the qualified nominee under unspecified special interest to the National Assembly and that the respondents are guilty of election offences and corrupt practices. The Petitioner seeks the following orders:

1. That the nomination of the Jennifer Shamalla to the National Assembly be determined and declared null and void.

2. That the gazettelement and publication on the Kenya Gazette Notice No. 4986 of 25th August 2017 of the nomination of Jennifer Shamalla to the National Assembly to represent unspecified special interest be determined and declared null and void.

3. That there be a declaration that the Petitioner is the bonafide nominee of the Jubilee Party to the National Assembly to represent the marginalized/minority group.

4. That the Respondents be condemned to pay the Petitioner's costs of and incidental to this Petition.

5. Such further, other and consequential orders as this Honourable Court may lawfully make.

The Petition is supported by the affidavit sworn by the Petitioner and filed together with the Petition. In the affidavit, the Petitioner deposes that he was nominated by the 2nd Respondent to represent the minority group in the National Assembly and listed at number nine (9) in the list; that under **Article 97 (1) (c)** and **Article 100 of the Constitution**, the person representing the marginalized (minority) group is ranked after a person with disabilities, worker and youth and that he ought to have been ranked at number four (4) instead of the 3rd Respondent; that he lodged a complaint with the 2nd Respondent to amend the list and replace the name of the 3rd Respondent with his name the 2nd Respondent did not address his complaint; that he filed a Complaint with the PPDT and served all the respondents; that PPDT heard the matter and delivered the judgment and directed the 1st Respondent to strike off the name of the 3rd Respondent from the list of nominees to the National Assembly; that the 1st Respondent did not abide by the judgment but proceeded to gazette the 3rd Respondent's name as the 2nd Respondent's nominee to the National Assembly on 25th August 2017 and that by doing so, the 1st Respondent breached the Constitution and the Elections Act. The Petitioner asserts that he was nominated by the 2nd Respondent in tandem with **Articles 90 and 100 of the Constitution** to represent the minorities of Northern Kenya and all the marginalized/minority communities in Kenya and that the 3rd Respondent is not a member of the marginalized/minority community and was not nominated as such.

In his evidence in chief and cross-examination the Petitioner maintained that he was validly nominated by the 2nd Respondent to represent the minority out of the many people who had applied for that position. He said that he was gazetted at number nine (9) on the list by the 1st Respondent and that this was in breach of **Articles 90 and 100 of the Constitution** because under those articles he ought to have been placed among the first four (4) nominees set aside for special marginalized groups. He stated that this aggrieved him and he filed a Complaint with the PPDT who delivered a judgment in which it ordered that the 3rd Respondent's name be removed from the list and that the names in the 2nd Respondent's party list be rearranged. He said that the 3rd Respondent's reason for representing the minority is her mixed heritage of Asian-African which was rejected by PPDT.

On cross-examination, the Petitioner admitted that it was the mandate of the 2nd Respondent to prepare the party list and that there is no order directing the 1st Respondent to remove the name of the 3rd Respondent from the party list. He also admitted that the 1st Respondent cannot change a party list and that PPDT did not order that the 3rd Respondent's name should be replaced with the Petitioner's name. He denied knowledge that the 2nd Respondent re-constituted the party list. The Petitioner further admitted that he had filed contempt of court proceedings before the Chief Magistrate in respect of the judgment of the PPDT.

On further cross-examination the Petitioner stated that **Article 100 of the Constitution** provides priority listing of special interest groups and that he should not have been listed under number nine (9) but between numbers one (1) and four (4). He denied that the 3rd Respondent is a minority of mixed heritage. He stated that the law does not define mixed heritage or minority and that he did not complain against nominees listed below number four (4) on the party list.

The 1st Respondent's case

The case for the 1st Respondent was conducted by Ms Okimaru, advocate, instructed by M/s S.M Kilonzo & Co. Advocates. The 1st Respondent filed its Response to the Petition and a Replying Affidavit sworn by Salome Oyugi on 15th September 2017. The 1st Respondent states that it received the 2nd Respondent's party list in the order of priority for nominees to the National Assembly on or about 9th July 2017; that the nominees in that party list included the 3rd Respondent listed in number four (4) for special interest category and the Petitioner listed in number nine (9) and indicated as a minority; that having satisfied itself that the list was in compliance with the law, it published it in the Daily Nation newspaper and the Standard newspaper on 23rd July 2017; that the Petitioner filed Party List Cause No. 1 of 2017 and that on 25th July 2017 the Petitioner filed a notice to withdraw the matter and did withdraw it on 26th July 2017; that the 1st Respondent gave directions on the manner the disputes arising from party list nominations were to be handled and that the 2nd Respondent re-submitted its party list for the Member of National Assembly as directed by the PPDT and the 1st Respondent, which list included both the Petitioner and the 3rd Respondent with the 3rd Respondent's special interest indicated as mixed heritage (Asian-African).

The 1st Respondent further states that it accepted the 2nd Respondent's re-constituted party list and gazetted the members validly nominated by the 2nd Respondent to the National Assembly in the order of priority in which they were listed in the party list; that the 3rd Respondent was gazetted as the 4th duly elected member of the National Assembly for the 2nd Respondent and that in allocating the special seats the 1st Respondent took into consideration the principle of proportional representation and the 2nd Respondent having garnered the highest number in the elections held on 8th August 2017 was awarded six (6) special seats.

The 1st Respondent denied violating the Constitution and stated that it acted lawfully and constitutionally in accepting the re-constituted party list of the 2nd Respondent. The 1st Respondent further stated that **Article 177 of the Constitution** cited by the Petitioner deals with membership of the County Assembly; that the Petitioner has not shown how this article is relevant in this Petition and that the Petitioner has not demonstrated that the 3rd Respondent would not have been entitled to nomination were all the twelve (12) seats for nominated member of National Assembly to be allocated to the 2nd Respondent. The 1st Respondent states that **Article 97 (1) (c) of the Constitution** describes "*special interest*" as including the youth, persons with disabilities and workers and further, **Article 100 of the Constitution** recognizes additionally women, ethnic and other minorities and marginalized communities as falling within the marginalized group but does not create a priority list of special interest as claimed by the Petitioner.

The 1st Respondent further denies the allegations that it acted in contempt of the orders of the PPDT; that the PPDT declined to direct the 1st Respondent to substitute the name of the 3rd Respondent with that of the Petitioner and that it is misleading and inaccurate to state that the PPDT directed the 1st Respondent to strike off the party list the name of the 3rd Respondent insofar as she was purporting to represent the marginalized/minority. The 1st Respondent states that the Petitioner does not qualify to be nominated to the National Assembly ahead of or in place of the 3rd Respondent or any of the eight (8) people listed in priority to him by his own political party, the 2nd Respondent.

The 1st Respondent states that it has no powers to remove a name from a complying party list and that the prayers sought by the Petitioner do not lie because the nomination of the 3rd Respondent was done within the law and that it is trite law that a political party in creating its party list may define for itself what special interest they want represented; that granting prayer three (3) of the Petition would be tantamount to usurpation of the role granted to political parties by the Constitution. The 1st Respondent states that the remedies sought in the Petition are unwarranted and there is no lawful basis whatsoever advanced by the Petitioner that would warrant either the nullification of the membership of the 3rd Respondent in the

National Assembly or the declaration that the Petitioner is the bonafide nominee of the 2nd Respondent to the National Assembly. The 1st Respondent urged that this court determines that the 3rd Respondent was duly nominated to the National Assembly and the nomination was in accordance with the Constitution and the statutory provisions of the Elections Act and dismisses the Petition with costs.

Ms Salome Oyugi reiterated the contents of the Response of the 1st Respondent in her Replying Affidavit and attached several documents to support her averments; namely, the 1st Respondent's Guidelines - **The Elections (Party Primaries and Party Lists) Regulations 2017, Submission of Party Lists** to guide political parties on the submission of party lists together with the **Formula for Allocation of Special Seats, "SO1"**; copy of **Public Notices marked "SO2"** giving directions in regard to the hearing of disputes arising from party list nominations and the forum for lodging such complaints published in the Daily Nation newspaper and Standard newspaper; copy of Complaint No. 1 of 2017 *Aden Noor Ali v. Jennifer Shamalla & Jubilee Party* filed at the 1st Respondent's Dispute Resolution Committee, **"SO3"**; copy of the order of the 1st Respondent's Committee marking Complaint No.1 of 2017 as withdrawn, **"SO4"**; copy of a letter from a letter from the 2nd Respondent forwarding the re-constituted party list clarifying the special category the 3rd Respondent was representing as Minority-Mixed Heritage (Asian-African), **"SO4A"** and the re-submitted party list, **"SO4B"** and copy of the *Gazette Notice* No. 8379 dated 25th August 2017, **"SO5"**.

Ms Salome Oyugi deposes that the 3rd Respondent's name was among the names of the persons in the *Gazette Notice* marked **"SO5"** but the Petitioner's name was not because the allocated quota of seats for the 2nd Respondent was filled before his name was arrived at; that the requirements of **Article 90 (2) of the Constitution** are that a party list must contain appropriate number of qualified candidates alternating male and female in the priority in which they are listed and therefore the Petitioner cannot be substituted for the 3rd Respondent as he is of a different gender; that after the re-submission of the re-constituted party list the 3rd Respondent's category of special interest was no longer unspecified.

In her evidence in court, Salome Oyugi reiterated the contents of the 1st Respondent's Response to the Petition and her Replying Affidavit. She told the court that the 1st Respondent received party lists from all qualifying parliamentary parties including the 2nd Respondent; that the 1st Respondent reviewed the lists for compliance with the Constitution and the Elections Act and to confirm whether the nominees possess the requisite qualifications, whether the party lists was alternating between male and female and whether regional balance was taken into consideration in compiling the list. She stated that after the 2nd Respondent's re-constituted its party list and re-submitted the same to the 1st Respondent, it was accepted and gazetted. She explained that in the *Gazette Notice*, the 3rd Respondent is indicated as "*special interest*" instead of "*mixed heritage*" because that is the language of **Article 97 (1) (c) of the Constitution** which terms all the twelve (12) nominees as "*special interests*"; that PPDT did not direct the 1st Respondent to act in any manner and therefore the 1st Respondent did not breach any law in nominating the 3rd Respondent as it acted within the law by allocating six (6) nominees of the 2nd Respondent to the six (6) slots allocated to the 2nd Respondent.

In cross- examination Ms Oyugi was taken to task about the document attached to her affidavit which she had referred to as the re-submitted party list and which is marked **"SO4B"**. This document bears the 1st Respondent's logo and the names of nominees forming the 2nd Respondent's party list. She explained that this document is an electronic template prepared by the 1st Respondent and made available to all the political parties to use for party lists. She told the court that compilation of party lists is the prerogative of political parties and that the 1st Respondent has no role to play in preparing or amending the list. She said that the first party list compiled by the 2nd Respondent had failed to specify the special interest represented by the 3rd Respondent and after the order of PPDT directing the 2nd Respondent to re-constitute the party list according to the law this was done and the re-constituted party list was found to be compliant with the law and was accepted by the 1st Respondent.

Ms Oyugi further told the court in cross-examination that the 1st Respondent has nothing to do with **Article 100 of the Constitution** because the Article refers to enactment of legislation to promote the representation in Parliament of marginalized groups specified under the Article and that such legislation is not yet in place.

2nd Respondent's case

The case for the 2nd Respondent was conducted by Mr. Sigei, advocate, instructed by Sing'oei Murkomen & Sigei Advocates. The 2nd Respondent filed its Response to the Petition and the Replying Affidavit on 4th October 2017 with leave of the court. The Replying Affidavit is sworn by Peter Mwangi Kahara who describes himself as the Director of Elections of the 2nd Respondent. On the day of the trial he was required to testify as the witness for the 2nd Respondent but he did not turn up. The 2nd Respondent was allowed by this court to replace him with another witness who was conversant with the issues in court. The witness, whose name was not disclosed, did not turn up. The case for the 2nd Respondent therefore was not argued. However, Mr. Sigei counsel for the 2nd Respondent attended court. He was allowed to submit on behalf of his client but on points of law only.

The 3rd Respondent's case

Mr. Amalemba, advocate, and Mr. Maloba, advocate, instructed by Jennifer Shamalla & Co. Advocates argued the case for the 3rd Respondent. The 3rd Respondent filed her Response to the Petition and the Replying Affidavit on 14th September 2017. She states in her pleadings that she is the Member of the National Assembly duly nominated by the 2nd Respondent through a party list submitted by the 2nd Respondent to the 1st Respondent in accordance with **Article 90 (2) of the Constitution**; that she was gazetted by the 1st Respondent as Member of the National Assembly; that she was placed at number four (4) in that list and the Petitioner was placed at number nine (9) in the list; that after the general elections conducted on 8th August 2017 the 2nd Respondent was allocated six (6) slots to be filled on priority basis by its nominees in conformity with **Article 90 (2) (c) of the Constitution**; that the elections and gazettelement of the 3rd Respondent did not deviate from the normative process and procedures and was not unlawful; that the claim that the 3rd Respondent was listed by the 1st Respondent under "*Special Interests ahead of Minority*" is not founded under any law because **Article 97 of the Constitution** as read with **Article 90 of the Constitution** does not give priority of "*Marginalized*" or "*Minority*" over "*Special Interests*"; that **Article 177 of the Constitution** relied on by the Petitioner has no legal force of application in this Petition since it relates to Members of the County Assembly while this Petition is in respect to Members of the National Assembly; that the claim by the Petition that he ought to have been nominated in position number four (4) in place of the 3rd Respondent is a total misapprehension of the law as there is no legal provision that indicates the priority of special seats for nomination to the National Assembly.

The 3rd Respondent states that **Article 100 of the Constitution** specifically provides for enactment of legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities and marginalized minorities; that the Somalis of Kenya are in the top leadership of Kenya and are not minorities, their population having been placed at 2,385,572 in the 2009 census; that the Petitioner is not from a marginalized class as he is currently a member of the 2nd Respondent's National Election Board; that paragraph 5 of the Petition is generalized and does not give specifics of the particular contravention of the Constitution; that paragraph 6 of the Petition is an attempt by the Petitioner to enforce the order of the PPDT through this court and that the order was complied with and is not enforceable in the present time.

The 3rd Respondent further states that the judgment of the PPDT did not bar the 2nd Respondent from including the 3rd Respondent from any subsequent and/or re-constituted party list; that the judgment of the PPDT categorically declined to substitute the 3rd Respondent with the Petitioner; that the 2nd

Respondent duly re-constituted the party list and re-submitted it to the 1st Respondent in compliance with the order of the PPDT; that PPDT had no jurisdiction over disputes on nominations by dint of **Article 80 (1) of the Constitution** and **Section 74 of the Elections Act**; that the Petitioner did not specify how the 1st Respondent violated **Articles 81, 82, 90, 100 and 177 of the Constitution** and that the 3rd Respondent believes that the 2nd Respondent acted within its powers and mandate in nominating the 3rd Respondent. The 3rd Respondent prays that this court determines that she was duly nominated by the 2nd Respondent and elected as a Member of the National Assembly and that this Petition be dismissed with costs to the 3rd Respondent.

In her oral evidence in court the 3rd Respondent told the court that she is born of an African father, from the Isukha sub-tribe of the Luhya Community of Western Kenya, and a Pakistani mother; that she has embraced both cultures; that her mother has suffered discrimination as an Asian and that Asians are considered a minority in Kenya. She said that she considers herself as a Kenyan of mixed heritage and that she qualifies under the law to represent special interests. The 3rd Respondent denied all the allegations in the Petition and reiterated the contents of her Response to the Petition and her depositions in her Replying Affidavit. She said she is not aware of any law that prioritizes the manner of listing nominees in the party list and that she has not flouted any law.

On cross-examination she stated that she made her application for nomination and explained herself and specified the special interest and that the 2nd Respondent specified the special interest group she was nominated under as mixed heritage. She stated that the numbering of the first party list prepared by the 2nd Respondent and the re-constituted list did not change as in both lists she remained in position number four (4) while the Petitioner remained in position number nine (9) and that in the first party list she was listed under special interest but after the judgment of PPDT the 2nd Respondent specified her special interest as mixed heritage. She said that her name was to be struck out as far as the special category she represented was not defined.

Petitioner's submissions

The Petitioner filed, through his counsel Mr. Ondabu, written submissions which were highlighted in court. The Petitioner submits that he is a member of the 2nd Respondent; that he applied by filling Form 3 to be nominated to the National Assembly under the category of minority/marginalized group and out of the twelve (12) nominees of the 2nd Respondent he is the only one nominated under that category and that every applicant must state the category of special interests he/she is applying under. He submitted that the 1st Respondent was under a duty under **Article 97 and Article 100 of the Constitution** to ensure that the first four persons in the list represented the Worker, Youth, Person with Disability and Minority/Marginalized and that the 2nd Respondent was under obligation under Rule 41 of the 2nd Respondent's Party Nomination Party Rules to prepare the list in strict compliance with the Constitution and Elections Act.

The Petitioner further submitted that since the orders of the PPDT in its judgment were that the name of the 3rd Respondent be struck off the 2nd Respondent's party list and that she did not appeal against that judgment, the 1st and 2nd Respondents were under obligation to reconstitute the list and take into account Persons with Disability, Youth and Marginalized group by dint of **Section 36 (1) (f) and (3) of the Elections Act**. He submitted that the 2nd Respondent did not re-constitute the party list of nominees to the National Assembly as ordered by the PPDT and that no party list of nominees was presented to the 1st Respondent as ordered by PPDT. He submitted that the 2nd Respondent's party list of nominees presented to the 2nd Respondent on 17th August 2017 was on the letterhead of the 1st Respondent and that no other list was presented and further that the contention by the 1st Respondent that the annexure marked **"SO4B"** is the party list from the 2nd Respondent is a lie because the document is not stamped or signed by the 2nd Respondent's official. He submitted that the power to amend the party list to conform to Article 100 is vested in the 1st Respondent by virtue of **Regulation 21 (2) of the Elections (Party**

Primaries and Party Lists) Regulations, 2017.

The Petitioner submitted that the 2nd Respondent did not present a witness in court despite having filed the Answer to the Petition and Replying Affidavit and that the Petitioner's Petition stands uncontroverted by the 2nd Respondent and therefore the 2nd Respondent has no audience in court and its pleadings should be expunged from the record.

The Petitioner reiterated that the 3rd Respondent was not nominated by the 2nd Respondent to represent minorities/marginalized group to the National Assembly; that it is the Petitioner who applied under this category and that the basis upon which the 3rd Respondent is claiming to represent minorities/marginalized group is her mixed heritage. The Petitioner submitted that he is a Gare, a sub-tribe of the Somali and he represents the Gare, Borana, Murule, Gabra, Ogaden, Rendile, Ajuran and Degodia who are known as minorities in Kenya. The Petitioner cited *Commissioner for the Implementation of the Constitution v. the Attorney General & 2 others [2013] eKLR* where the Court of Appeal stated that:

“Although the Constitution does not define special interests contemplated by Section 23(1) of the former constitution, they include these interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic election in terms of adequate representation for all in a democracy. In other words the special interests mean those interests which the normal electioneering process has failed to capture and represent.”

The Petitioner also referred to the Court of Appeal's reference to *Rangal Lemeiguran & Others v. Attorney General & Others [2006] eKLR* (popularly known as the *Il Chamus Case*) where the High Court categorized certain people as qualifying to be viewed as representing special interests, namely: *ethnic minorities, the youth, the blind, the deaf, and the physically disabled.*

The Petitioner submitted that the PPDT exhaustively addressed the issue whether the 3rd Respondent represents minorities/marginalized group and made a finding that she did not; that under **Article 100 of the Constitution** this court has a duty to protect the rights of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities. The Petitioner revisited the *Commissioner of the Implementation of the Constitution case* (supra) where the Court of Appeal stated as follows:

“This provision further confirms the conclusions we have arrived at from our analysis that “marginalized group” and “special interests” can be used interchangeably. The fact that Parliament has not enacted the expected legislation and has up to 5 years since promulgation of the Constitution to do so by dint of the 5th Schedule, makes it even more needful that these special interests be jealously guarded in the intervening period.”

The Petitioner also cited *Lydia Mathia v. Naisula Lesuuda & Another (2013) eKLR* to emphasize the point that the 1st Respondent had a duty to ensure that the list submitted by the 2nd Respondent was based on proportional representation of minorities.

In highlighting the submissions, counsel for the Petitioner seems to be of the view that the legislation contemplated under **Article 100 of the Constitution** is the Elections (Party Primaries and Party Lists) Regulations 2017 and that “special interests” are defined under these regulations. With utmost respect this is not the case. These are regulations to regulate procedure in party primaries and party lists and not an Act of Parliament contemplated under **Article 100 of the Constitution**.

1st Respondent's submissions

The 1st Respondent reiterated the salient features of its case that the creation of the party list is a right given to the political party under **Article 90 (2) of the Constitution**; that the 1st Respondent does not have the right to ignore the party's priority in the party list and any attempt by the 1st Respondent to

amend or cherry-pick the party list was found to be illegal; that all members of a party list generated under **Article 97 (1) (c) of the Constitution** represents “special interest” that includes Persons with Disabilities, Worker and Youth; that the party list must alternate between male and female members; that any party list that does not comply with this requirement is automatically rejected by the 1st Respondent and that though the parties are encouraged to consider the marginalized group mentioned in **Article 100 of the Constitution** in their generation of party lists, Parliament has not promulgated the laws under **Article 100 of the Constitution** and in any event the applicable provision as concerns party lists for Member of National Assembly is **Article 97 (1) (c) of the Constitution**.

On the 1st agreed issue as to whether the 3rd Respondent was validly nominated as a Member of the National Assembly, the 1st Respondent submitted that nothing has been placed before this court to show that the nominations of the 3rd Respondent was in breach of any of the qualifications set in the Constitution and relevant laws and in particular that nothing has been placed before the court to show that the 3rd Respondent does not qualify to be a Member of the National Assembly or that any of the 2nd Respondent’s nomination rules were flouted in including the 3rd Respondent in its party list for the Member of the National Assembly and that it is not in dispute that the 3rd Respondent is a member of the 2nd Respondent.

The 1st Respondent submitted that the process of preparation of the party list is an internal affair of the political party and it remains the political party’s obligation to present the party list to the 1st Respondent. The case of **Peninah Nandako Kiliswa v Independent Elections and Boundaries Commission & 2 others [2014] eKLR** was cited to amplify the above submission. In this case the Court of Appeal stated that:

“It is quite clear to us that ultimately, 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, of course, to compliance with the necessary legal requirements.”

The 1st Respondent submitted that it has the power to reject the party list that fails to comply with the Constitution and the relevant law; that the 1st Respondent’s witness testified that indeed the 1st Respondent did reject the first party list submitted by the 2nd Respondent and required the same to be rectified and that the powers of the 1st Respondent to reject the party list does not extend to re-arranging, cherry-picking, disregarding and or in any way nominating its preferred candidate. The 1st Respondent cited the Court of Appeal decisions **Linet Kemunto Nyakeriga & another v Ben Njoroge & 2 others [2014] eKLR** which states that:

“It is clear to us that under (d) above the IEBC can only regulate the process by which parties nominate their candidates and under (k) it is required to ensure compliance with the provisions of the Elections Act on qualification, procedure of nomination including submission of party lists, gender, youth, nomination rules, and other requirements. That does not in any way give it the mandate to participate in the actual nomination, in view of the fact that under (e) above it would be the arbiter in the event of any dispute arising from nomination exercise.”

In view of this, the 1st Respondent submits that the Petitioner was under a legal misapprehension in contending that the 1st Respondent could have gone outside the desired priority of the 2nd Respondent and gazetted him instead of the 3rd Respondent; that the 2nd Respondent was within its right to decide the special interest that it desired to be represented in its party list and that this autonomy could not be interfered with. The 1st Respondent cited **Micah Kigen & 2 others v Attorney General & 2 others [2012] eKLR** where the High Court found that the political party defines special interests it desires to be represented and further stated that:

“...special interest referred to in Article 97 (1) (c) are not limited to a particular interests but rather concerns special interests defined by the political party nominating the candidates.”

The 1st Respondent submitted that the attempt by the Petitioner to limit the special interests referred to under **Article 97 (1) (c) of the Constitution** to the particular groups outlined in **Article 100 of the Constitution** is a clear misapprehension of that article. The 1st Respondent urges that the 3rd Respondent was validly nominated as demonstrated in the submissions.

On the second agreed issue as to whether the Petitioner was validly nominated to the National Assembly by the 2nd Respondent to represent the minorities it was submitted that the Petitioner was nominated as the 9th nominee on the 2nd Respondent's party list representing the minority group; that under **Section 34 (10) of the Elections Act** once submitted, a party list is closed and cannot be amended for the term of Parliament for which the candidates are elected and that under **Section 37 of the Elections Act** the closed party list shall be the source of any re-allocation of special seats as held in *Linet Kemunto Nyakeriga* (supra) where the Court of Appeal found that:

“.....It is clear from what we have said up to this point that the IEBC, in a closed list system has no power to re-arrange the list or pick out from the list any other candidate apart from the parties' preferred candidate listed at the top of the list if only one candidate is required.”

It was submitted that even in the unlikely event that the 3rd Respondent loses her seat, **Section 37 (1) of the Elections Act** requires that she be replaced with the first member on the party list who is of the same gender as she is to ensure gender alternates as provided by the law; that even though the Petitioner is listed under minority special interest this does not entitle him a priority ahead of persons who rank higher on the party list and that it would be a breach of the Constitution to grant the Petitioner the prayers he is seeking in this Petition. The 1st Respondent submitted that nothing has been placed before this court to upset the rule that costs follow the event and urged this court to order that the Petitioner be ordered to pay costs in the event he loses this Petition. The 1st Respondent further urges this court to determine that the Petition is unmerited, uphold the nomination of the 3rd Respondent to the National Assembly and dismiss the Petition with costs.

2nd Respondent's submissions

The 2nd Respondent was allowed by this court to submit on points of law only since it did not present a witness in court. The contents of its pleadings were not adopted in evidence and therefore will not be considered by this court. Mr. Sigei prepared written submissions which were highlighted on his behalf by Mr. Amalemba. Reference was made of **Article 90** and **Article 97; Sections 35 of the Elections Act and Regulations 54 and 55 of the Elections (General) Regulations 2012**. The 2nd Respondent also cited the *Commissioner for the Implementation of the Constitution case* (supra); *National Gender and Equality Commission v Independent Elections and Boundaries Commission & another [2013] eKLR* and *Micah Kigen & 2 others v Attorney General & 2 others [2012] eKLR* (supra). These authorities, save for National Gender and Equality Commission case, have been cited elsewhere in this judgment. The legal issues discussed in these authorities have been considered in this judgment.

3rd Respondent's submissions

On the issues before this court Mr. Maloba submitted that the 3rd Respondent was validly nominated to the National Assembly. He submitted that the Petitioner misdirected himself with regard to the **Article 97 (1) (c)** and **Article 100 of the Constitution**; that **Article 97 (1) (c) of the Constitution** gives an exclusive mandate to the political parties to prepare and formulate the party list; that the only restriction on the political party under **Article 90 of the Constitution** is that such a list shall be subject of supervision by the 1st Respondent, a role restricted and limited only to confirming that the list conforms with the provisions of the law; that the exclusive mandate is further restricted under **Article 97 (1) (c) of the Constitution** to the effect that such a list must contain nominees who are to represent “*special interests*” including youth, persons with disabilities and workers; that these articles do not require that the party list must be in a priority, with the fourth slot “*to be reserved for a person representing minorities/marginalized groups*” as alleged by the Petitioner; that **Article 100 of the Constitution** relied

on by the Petitioner provides that Parliament shall enact legislation to promote representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities; that the obligation under **Article 100 of the Constitution** is only to Parliament to enact such legislation and that there is no requirement that a political party list must oblige with the provisions of this article.

It was submitted that the 3rd Respondent is of mixed race from a rare union of a Pakistani and an African; that she is also a woman and therefore qualifies to represent special interests as a minority; that the testimony on record is that a person of mixed heritage qualifies as a minority with respect to the ethnicity, social class and cultural characteristics of the individual; that the 3rd Respondent testified that she has suffered several instances of discrimination due to her mixed ethnicity and that the Petitioner did not present evidence that the 3rd Respondent's hybrid ethnicity did not qualify as a minority nor that his own ethnicity ought to be considered as more marginalized than the 3rd Respondent's.

It was submitted that it is the sole prerogative of a political party to formulate its list of candidates and the order of priority in accordance with the legal provisions as was held in the Court of Appeal in **Lydia Nyaguthi Githendu v IEBC & 17 others [2015] eKLR** where the Court stated that:

“We must express the view that the constitutional scheme vests, to some extent, an unregulated power to the political parties to regulate and formulate the list of candidates, and a secondary power to the Commission to supervise, with the Court retaining the ultimate and final authority to address and determine instances of violation or infringement of fundamental rights.”

It was submitted that the 1st Respondent was satisfied that the list submitted to it conformed to the applicable provisions of the Constitution and the Elections Act; that a person of mixed heritage qualifies as a nominee to represent minorities/marginalized persons; that the judgment of the PPDT was complied with and the 2nd Respondent's party list re-constituted and re-submitted with the name of the 3rd Respondent retained and the special interest she represented clarified as mixed heritage (Asian/African) and that there is no evidence that any of the respondents was in contempt of the PPDT judgment nor was any of them cited for contempt.

It was submitted that contempt of court proceedings are criminal in nature and that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The 3rd Respondent relied on **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR** on this issue.

It was submitted that to substitute the name of the 3rd Respondent with the name of the Petitioner would amount to violation of **Article 90 (2) (b) of the Constitution** that requires alternate listing of nominees between the male and female and therefore this court cannot grant such a prayer. The 3rd Respondent urges that the Petitioner has failed to prove his case to warrant the grant of the orders sought and therefore the Petition ought to be dismissed with costs to the 3rd Respondent.

Analysis and determination

The issues agreed on by all the parties are as follows:

- (i) Whether the Petitioner was validly nominated by the 2nd Respondent to the National Assembly to represent the marginalized/minority group;
- (ii) Whether the 3rd Respondent was validly nominated to the National Assembly; and
- (iii) Who bears the costs?

I have painstakingly read all the pleadings, oral evidence, submissions, the relevant law and the authorities cited by respective parties and I have acquainted myself with the issues raised in this Petition.

In my view, the determination of any one of the first two agreed issues automatically settles the remaining issue, and to some extent settles the third issues as to costs. To my mind what is being questioned here is the validity of the nomination and gazette of the 3rd Respondent to the National Assembly and to some extent the roles played by the political parties, in our case the 2nd Respondent, and the 1st Respondent in respect to “*election through nomination*” of candidates to occupy special seats contemplated under **Article 90** and **Article 97(1) (c) of the Constitution** and the applicable law. It is apparent to me that in resolving the above agreed issues this court must address the following:

(i) What is the role of the 1st Respondent in respect of “election through nomination”?

(ii) What is the role of the 2nd Respondent in respect of “election through nomination”?

(iii) Did the 1st Respondent violate the Constitution, Elections Act and the relevant Regulations in respect of this matter?

(iv) To who was the judgment of the PPDT directed and are the respondents in contempt of court in respect of that judgment?

(v) Did the respondents commit elections offences or engage in corrupt practices?

(vi) Does the law dealing with “election through nomination” provide priority listing of nominees to special seats?

I use the phrase “*election through nomination*” to refer to the entire process of nominating candidates to fill special seats contemplated under **Articles 90** and **97(1) (c) of the Constitution**: from the time an aspiring candidate applies to be nominated to represent ‘*special interest*’ to the time the party list is accepted by the 1st Respondent as compliant and gazetted and the successful candidate designated to the special seats allocated to each political party.

In my view, it makes sense to start with the analysis of the applicable law in respect of “*election through nomination*,” or on matters relating to party lists. The Petitioner claims that the Respondents, particularly the 1st Respondent, violated **Articles 81, 82, 90, 100 and 177 of the Constitution**. What do these articles provide?

Article 81 of the Constitution provides the general principles for the electoral system, to wit: freedom of citizens to exercise their political rights under **Article 38**; the two-thirds rule; fair representation of persons with disabilities, universal suffrage based on the aspirations for fair representation, and free and fair elections which are by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 82 of the Constitution provides that Parliament shall enact legislation, that is simple, transparent and that takes into account the special needs of persons with disabilities and other persons or groups with special needs, to provide for, among others, the nomination of candidates; the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda, including nomination of candidates for elections.

Article 90 of the Constitution provides for allocation of party list seats and for effect I will reproduce it in full:

(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.

(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 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.

Article 100 of the Constitution provides that Parliament shall enact legislation to promote the representation in Parliament of-

(a) women;

(b) persons with disabilities;

(c) youth;

(d) ethnic and other minorities; and

(e) marginalized communities.

Article 177 of the Constitution provides the membership of county assembly and in my view, and as submitted by the Respondents, this article has no relevance in this Petition and the Petitioner, in citing this article in aid of his case, is in my view a misapprehension of the law.

The legislation envisaged under **Article 82 of the Constitution** is the **Elections Act (Act No. 24 of 2011)**. This piece of legislation has undergone several amendments since 2nd December 2011 when it came into effect. For our purpose, the relevant sections are 34, 35, 36 and 37. **Section 34(1) of the Elections Act** accords with the **Article 90(1) of the Constitution**, and in reference to the National Assembly, it states that the election of members of the National Assembly for party lists specified under **Article 97(1) (c) of the Constitution** shall be on the basis of proportional representation. **Article 97(1) (c) of the Constitution** provides that the National Assembly consists of twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with **Article 90**, to represent *special interests including the youth, persons with disabilities and workers* (emphasis added). Under **Section 34 (5) and (6) of the Elections Act** the party lists shall be submitted in order of priority and be in accordance with the constitution or nomination rules of the political party. The party list submitted to the Commission shall be valid for the term of Parliament (**s. 34(7)**); a person who is nominated by a political party in the party list must be a member of that party on the date of submission of the party lists by the political party (**s. 34(8)**) and the party list submitted to the Commission shall not be amended during the term of Parliament.

Upon receipt of the party list the Commission shall review the list to ensure that it complies with the prescribed regulations and either issue the political party with a certificate of compliance or require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list (**s. 34 (6A)**). The Commission is required to issue guidelines by notice in the gazette prescribing what requires to be complied with in preparation of party lists.

The legal requirements are further provided for under **section 36 of the Elections Act**. Generally the

party list submitted must contain alternates between male and female candidates in the priority in which they are listed; the allocation of seats under **Article 97(1) (c) of the Constitution** will be proportional to the number of seats won by the party in the general elections.

Under **section 37 of the Elections Act** if a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.

In addition to the provisions of the Constitution and the Elections Act there are Regulations and Rules dealing with party lists. **Regulation 20 (1) of the Elections (Party Primaries and Party Lists) Regulations 2017** provides that a party list shall contain the names of all the persons who would stand elected if the party were to be entitled to all the seats available under **Articles 97(1) (c), 98(1) (b), (c), (d) and 177(1) (b) and (c)** and shall alternate between male and female candidates. Such a party list is required to ensure fair representation to take into consideration the principles of **Article 82(b)** (two-thirds gender rule) and **Article 100** (promotion of marginalized groups) of the Constitution (**Regulation 20(2)**). **Regulation 21(1)** provides the manner of submitting the party lists to the 1st Respondent and **Regulation 21(2)** provides that where after scrutiny of the lists, the Commission is of the opinion that a party list does not conform to the requirements of the Constitution, the Elections Act and the Elections (Party Primaries and Party Lists) Regulations, the Commission shall require the political party to review and amend the party list so that it conforms to the requirements of the law and guidelines by the Commission.

Further provisions are also found under **Regulation 54, 55 and 56 of the Elections (General) Regulations 2012**. Generally, **Regulation 54** provides for submissions of party lists for special seats and specifies that such a list shall contain the name, address, age, sex, disability and category of disability, etc. of the candidate and **Regulation 55** provides that the party list must be prepared in accordance with the party rules. **Regulation 56** provides that the Commission shall publish formula for allocation of seats. From the foregoing, it is clear to me that the law provides an elaborate legal regime to govern “*election through nomination*”.

Before addressing my mind to the three agreed issues, I wish to address the additional issues I have formulated first, but before I do that, I wish to state that this court is sitting as an Election Court, not as an appellate Court. The judgment of the PPDT is therefore not on appeal before me.

A reading of the judgment of the PPDT shows that the Tribunal declined to direct the 1st Respondent (Jubilee Party) to substitute the name of the 3rd Respondent (also 3rd Respondent in this Petition) with that of the Claimant (the Petitioner). PPDT declared that **the inclusion of the name of the 3rd Respondent in the party list for nomination to the National Assembly without stating the special interest she represented was unlawful, null and void** (emphasis added). It also ordered the Respondent, it is not specified which Respondent, to strike off the 3rd Respondent’s name from the list of nominees. PPDT also ordered Jubilee Party to re-constitute the party list in accordance with the law. There is no order directing the 2nd Respondent not to include the 3rd Respondent in the re-constituted party list. Whether PPDT had jurisdiction to determine the Petitioner’s Complaint is not for me to decide in this forum.

Listening to the Petitioner testifying in court and also after reading his pleadings and submissions, it is clear to me that the Petitioner was of the view that since PPDT ordered that the name of the 3rd Respondent be struck off the 2nd Respondent’s party list, her name could not be included in the re-constituted party list. I have not been presented with any law, nor am I aware of any law, barring the 2nd Respondent from including the name of the 3rd Respondent in the re-constituted party list. After all, the Party was ordered to re-constitute the list because the first list was not compliant for failure to specify the special interest represented by the 3rd Respondent. To my mind since Jubilee Party was ordered to re-constitute the party list, the Party was not out of order in including the name of the 3rd Respondent in the re-constituted party list. The re-constituted party list included both the Petitioner and the 3rd Respondent,

both in the respective priority order they appeared in the first party list. This court did not have the benefit of seeing the first party list prepared by the 2nd Respondent. The attached copy of that list to the Petition is illegible due to poor quality. During the hearing of this Petition a legible list was presented to a witness during cross-examination but this court did not benefit from that fair copy. Be that as it may, evidence has been adduced by parties that the Petitioner was placed in number nine (9) and the 3rd Respondent in number four (4) in the first party list. The Complaint filed before the PPDT confirms that this was the situation and the Petitioner states in that Complaint that he was listed as number nine (9) and his prayer was to be published and gazetted as number four (4) under minority/marginalized group. The judgment of the PPDT also captures this fact.

Ms Oyugi testified that the party list submitted by the 2nd Respondent was not compliant. She did not clarify as to what was wrong with it. However, since there is the judgment of the PPDT showing what was wrong with the first party list, I am of the view that omission to specify the special interest represented by the 3rd Respondent may have been the main reason why the party list was returned to the Party for re-constitution.

The roles played by the 1st Respondent and the 2nd Respondent are distinct under the law. Each organ has its role legally cut out for it. To kick off the process of “*election by nomination*”, a parliamentary party nominates its candidates to fill the special seats by inviting applications for nomination. The interested candidates fill Form 3 provided under Elections (Party Primaries and Party Lists) Regulations. Form 3 is detailed and requires elaborate particulars of the aspirant to be provided including name of the party list to be nominated into, ethnic community and category of special interest group. The special interests identified in the Form are women, youth, person with disability including type of disability, ethnic minority, marginalized community and in the case of Member to the National Assembly, representative for worker.

The 2nd Respondent has formulated Party Nomination Rules in line with the requirements of the law. Part XIII of these Rules gives the qualifications and procedure of party lists. The list must be in compliance with the law. To comply with the law in this case means that the candidates nominated to the National Assembly must qualify to be nominated; must be twelve (12) in number as demanded by **Article 97(1) (c)**; the party list must alternate between male and female and candidate must be ranked in the priority in which the political party desires and the list must reflect the regional and ethnic diversity of the people of Kenya.

The role of the 2nd Respondent, just like all the parliamentary political parties, is to nominate candidates who are its members and who qualify, for election to occupy special seats. This is a role that is exclusive to the Party as provided by **Article 97(1) (c) of the Constitution; Section 34(2), (5), (6), (8); Section 35; Section 37(2), (4) of the Elections Act; Regulations 20 and 21(1) of the Elections (Party Primaries and Party Lists) Regulations 2017 and Regulations 54(1), (2), (3) (4) and 55 of the Elections (General) Regulations 2012**. This is what the law demands. Several court decisions also have affirmed this position. For instance in *Peninah Nandako Kiliswa case* (supra) the Court of Appeal stated thus:

“It is quite clear to us that ultimately, 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, of course, to compliance with the necessary legal requirements.”

The same Court in *Lydia Nyaguthi Githendu case* (supra) was of the same view.

It is therefore clear to me that it is the prerogative of the 2nd Respondent to nominate suitable candidates amongst its members in accordance with the law. Once this is done, the party list is submitted to the 1st Respondent who must review it for compliance in accordance with the law. The 1st Respondent has no power to amend the party list or to pick candidates. All it is required to do is to regulate the nomination process by receiving the party list and reviewing it to ensure compliance with the law in respect of the qualifications of candidates, alternates between male and female candidates, regional and ethnic diversity, and procedure of nomination employed, among others (see *Linet Kemunto Nyakirega case and Lydia*

Nyaguthi case (supra)). It is true that the entire process of election of candidates to special seats starts with political party nominating candidates and ends with the IEBC gazetting the candidates nominated by the Party to various seats identified.

In the National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another [2013] EKLK, in respect of the responsibility of the 1st Respondent, it was stated that:

“The election contemplated in Article 90 is one for party list seats which means that the responsibility of the IEBC to conduct and supervise elections under Article 90 is limited to the allocation of party list seats set out in Article 90(1) from the list submitted to it by the political parties by ensuring that such lists comply with the Constitution, Elections Act, 2011 and the regulations made thereunder and other relevant statutes. Membership of the party lists is determined by the political parties in accordance with their own procedures and mechanisms.”

The Petitioner claims that the respondents, specifically the 1st Respondent, violated the law and identifies certain articles of the Constitution as enumerated elsewhere in this judgment as having been violated. I have noted that some of the instances cited by the Petitioner to support his claim that the 1st Respondent violated the law include the following:

(i) The 1st Respondent violated the law by listing the name of the 3rd Respondent under special interest ahead of marginalized or minority nominee;

(ii) The 1st Respondent violated the law by gazetting the 3rd Respondent as a member of the National Assembly against the judgment of the PPDT;

(iii) The 1st Respondent acted in contempt of the judgment of the PPDT;

(iv) The 1st Respondent violated the law by excluding the Petitioner from the 2nd Respondent’s nominees to the National Assembly;

(v) The 1st Respondent breached the law by gazetting the 3rd Respondent as a qualified nominee under unspecified special interest.

From the 1st Respondent’s Response to the Petition, the Replying Affidavit of Ms Oyugi’s oral evidence and submissions, the 1st Respondent has demonstrated that it acted in accordance with the law by receiving the list as prepared by the 2nd Respondent, reviewing it for compliance, requiring amendment to specify the special interest represented by the 3rd Respondent, receiving the re-submitted list, satisfying itself that the re-constituted list complies with the law and proceeding to publish it in the Daily Nation and the Standard, both publications of national circulation and gazetting the party list. The 1st Respondent then proceeded to designate candidates to the National Assembly in the priority order in which they were listed. I am aware that the Petitioner was categorical in denying that the 2nd Respondent re-constituted the party list in compliance with the judgment of the PPDT and that the document marked “SO4B” is not the re-constituted party list because it is in the letter head of the 1st Respondent. Ms Oyugi was taken to task by repeatedly being asked about this document. She explained in detail that this is not a letterhead but a template prepared by the 1st Respondent and given to all the political parties to use in party lists and that the document was submitted to the 1st Respondent electronically and also by a hard copy. Ms Oyugi explained that this re-constituted party list was forwarded through a letter dated 16th August 2017 marked “SO4A.” The forwarding letter states that the Party was acting in compliance to the regulations of the 1st Respondent guiding the party list. The amended list specifies the special interest of the 3rd Respondent as mixed heritage (Asian/African). I have no reason to doubt Ms Oyugi’s evidence in the absence of evidence to the contrary.

Ms Oyugi was also taken to task in regard to the gazettelement of the nominees. She was asked why the 1st Respondent gazetted the 3rd Respondent under special interest rather than minority, mixed heritage (Asian/African) in accordance with the clarified special interest she represented. Ms Oyugi told the court that the 1st Respondent used language of the Constitution. I am not sure that this explanation is convincing especially when some categories such as person with disability, worker and youth retain their special categories. Jennifer Shamalla, Maina Kamanda and Cecily Mbarire are gazetted as “Special Interest” but their special interests are mixed heritage, farmer and technocrat. However, I do not think this can be used adversely against the 3rd Respondent since her special interest is specific in the re-constituted party list and taking into account she is not the only nominee affected by this categorization. In any event, the law defines all the categories as “special interests” or “marginalized” as we have seen in this judgment.

The 1st Respondent prepared general regulations and the formula for allocation of seats to qualifying political parties. In proportion to the number of seats won by the 2nd Respondent, the 1st Respondent allocated the 2nd Respondent six (6) slots to the National Assembly as special seats to be filled by nominated candidates. The list that was accepted by the 1st Respondent as compliant looks like this:

- 1) David Ole Sankok - Person with disability
- 2) Mucheke Halima Yussuf - Worker
- 3) Gideon Keter - Youth
- 4) Jennifer Shamalla - Minority-Mixed Heritage(Asian/African)
- 5) Maina Kamanda - Farmer
- 6) Cecily Mbarire - Technocrat
- 7) Bishop Jackson Koske - Person with disability
- 8) Faith Nyaguthi Waigwa - Lawyer
- 9) Aden Noor - Minority
- 10) Sandra Vall Adhiambo Ochallo - Worker
- 11) Samwel Mburu Kamau - Business Persons
- 12) Agnes Gakure Kariuki - Special Interest

Using the formula developed by the 1st Respondent and having arrived at six (6) slots to be allocated to the 2nd Respondent in proportion to the number of seats garnered, it was obvious that the Petitioner was locked out of election. He however remains nominated and gazetted in the party list to form the reservoir of candidates in the event a seat falls vacant in the life of the current National Assembly. In my view the 1st Respondent and the 2nd Respondent played their distinct roles in accordance with the law.

I have applied my mind to the claim by the Petitioner in respect of the alleged violations of the law by the 1st Respondent. I am of the view that there is no evidence to show that the 1st Respondent violated the law by listing the 3rd Respondent under special interest. The 1st Respondent was acting according to the law in following the prioritized list re-constituted by the 2nd Respondent and which the 1st Respondent had approved. It was following the law in gazetting the 3rd Respondent together with other five (5) nominees who were lucky to be among the six (6) candidates. There is no order from PPDT prohibiting such gazettelement. I also find that there is no evidence to support the claim that the respondents or any of

them was in contempt of the PPDT judgment. This court was told that the contempt of court proceedings filed before the Chief Magistrates Court by the Petitioner against the respondents were terminated.

I find no evidence that the 1st Respondent did exclude the Petitioner from the list of nominees to the National Assembly. His name was left out lawfully by use of priority list and the limited list of six (6) nominees instead all the twelve (12) as the law required after taking into account the proportional representation formula. Lastly, the 3rd Respondent's special interest was specified after the 2nd Respondent complied with the judgment of the PPDT and the directions of the 1st Respondent to re-constitute the party list. It is therefore erroneous to claim that her special interest is not specified or that the 1st Respondent violated the law by gazetting the 3rd Respondent when her special interest was not specified.

Turning to the specific issues for determination agreed by the parties I determine them as follows:

Whether the 3rd Respondent was validly nominated to the National Assembly

On the issue my answer is in the positive. The 2nd Respondent has the sole mandate to prepare its party list in the priority in which it desired. The law governing "*election through nomination*," as it is currently, does not define "*special interests*." In the **Commissioner for the Implementation of the Constitution case** (supra) the Court of Appeal recognized this fact by stating that "*special interest*" contemplated by Section 23(1) of the former constitution is not defined by the law. The Court was of the view that "*special interests*" ***are those interests which the normal electioneering process has failed to capture and represent***. In the **Il Chamus case** (supra) the High Court categorized **ethnic minorities, the youth, the blind, the deaf, and the physically disabled** as falling under "*special interests*." Marginalized group and special interests are used interchangeably as confirmed by the Court of Appeal in the **Commissioner for the Implementation of the Constitution case** (supra).

In National Gender and Equality Commission case (supra), the judges expressed themselves as follows:

"Candidates qualified for nomination under Article 90 are those persons who represent special interests, the youth, workers, persons with disabilities and marginalized groups identified under the provisions governing party list seats identified by Article 90(1) and other relevant statutes. The IEBC in conjunction with the other constitutional and statutory commissions and political parties have the responsibility to define and generate guidelines for representation of special interests in accordance with the objects of the Constitution."

Article 97(1) (c) of the Constitution provides for "*special interests*" **including the youth, persons with disabilities and workers** (emphasis added). **Article 100 of the Constitution**, that contemplates enactment of the law to promote representation of marginalized groups, lists **women, ethnic and other minorities** and **marginalized communities** as some of the special interest to be included in the contemplated legislation. All these categories are recognized by the law as falling under "*special interest*". As the law stands today, there is no definition of categories of "*special interest*" other than the various categories contained in the Constitution and in the pronouncements by the courts. This lack of definition of "*special interests*" leaves the situation rather fluid leaving the matter with the political parties to define the categories they consider as "*special interests*," of course within the confines of the law. In **Micah Kigen & 2 others v Attorney General & 2 others**, (supra) the High Court stated as follows:

".....special interests referred to in Article 97(1) (c) are not limited to a particular interest but rather concerns special interests defined by the political party nominating the candidates."

The 2nd Respondent, when it was faced with a directive and order to re-constitute its party list and to specify the special interest of the 3rd Respondent, defined her special interest as mixed heritage (Asian/African). In my view, the 2nd Respondent in so acting did not violate any law. I have noted the 2nd Respondent has a category known as "**Technocrat**" among their special interests! Besides, its re-constituted list was accepted by the 1st Respondent as being compliant with the law. I also note that in the

2nd Respondent's party list there are two nominees of persons with disabilities, two workers, two minorities, the Petitioner and the 3rd Respondent but the latter's category is qualified by adding mixed heritage (Asian/African). One nominee of person with disabilities, one nominee of worker and one nominee of person representing minority of mixed heritage made it to the National Assembly because of the priority in which they had been placed. All this was done within the exclusive mandate granted by the law to the 2nd Respondent. It is therefore not correct for the Petitioner to state that he was the only candidate nominated to represent minorities/marginalized. Indeed going by the pattern of candidates nominated other categories such as persons with disabilities and worker has two nominees but only one of the nominees made it to the National Assembly due to the place of priority they enjoyed in the party list.

In respect of the Petitioner's assertion that the law provides that a nominee representing minority/marginalized group should be ranked number four (4) in the party list has no basis in law. In my view it is a misapprehension of the law to make such a claim. I find no evidence that the judgment of the PPDT was not complied with. On the contrary, what was presented before this court supports the opposite view that indeed the 2nd Respondent complied with that judgment. I find that this court cannot fault the 2nd Respondent for identifying mixed heritage as a "special interest". The current electoral law gives the political parties that latitude to define "special interests." starting with the Constitution does not define special interests. Both the *Il Chamus case* and *the Commissioner for the implementation of the Constitution case* cited by the Petitioner clearly point out that "special interests" have not been defined but include the categories identified in the Constitution, the relevant law and the precedents.

Further in *Micah Kigen case* (supra) the court had this to say:

"The nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to time. As the Constitution must be read broadly, I think reading special interests ejusdem generis with the youth, persons with disabilities and workerswould be too restrictive to take into account any special interests that may emerge in future and which the political party may consider require representation."

And further that:

"Taking all these provisions into account, means that "special interests including" must have a broad and expanded meaning to cover interests identified by the political parties, and not restricted to the categories of interest or groups identified by the Constitution. Where the Constitution has provided for the representation of specific groups or interests it has explicit provisions for these specific groups and interests to be represented. It would be inconsistent with the Constitution to limit the right of any special interests identified by political parties to be represented in the National Assembly."

Whether the Petitioner was validly nominated to the National Assembly to represent the marginalized/minority group

On this issue the answer is in the negative. The Petitioner was placed in number nine (9) in the priority in which the 2nd Respondent had placed him in its party list. He did not make it to the cut-off point of six (6) nominees to the National Assembly allocated to the 2nd Respondent in compliance with the principle of proportional representation. He however remains in the gazetted party list with the remaining nominees forming a reservoir of candidates to be considered to fill seats in the event any seat falls vacant in the current term of the National Assembly.

The Petitioner repeatedly claimed that the law prioritizes the manner the nominees to represent "special interests" should be listed. The 1st and the 3rd Respondent have opposed this claim asserting that this is a misapprehension of the law. I agree with them. To my understanding, neither the Constitution, nor the Elections Act and the relevant Regulations provide for the prioritizing of the names in the party list. To prioritize the nominees in my view would not be the right thing to do. This would mean that the categories appearing on the first positions would almost always be picked to fill special seats. I think I am

not wrong in stating that by placing some categories of special interests before others in the Constitution and other relevant statutes was not intended to prioritize these categories over the others. This to me was just a chance listing of the categories. I take the view that to prioritize some categories over others would amount to discrimination. There is likelihood that some categories of special interest placed lower in rank would never make it to the top elective positions due to the place they occupy in the list. I want to believe that this is not the intention of the drafters of the Constitution and the electoral laws.

Conclusion

My analysis of the issues before me has brings me to the conclusion that this Petition is unmerited. The Petitioner has failed to demonstrate that the 1st Respondent violated the Constitution, specifically Articles 81, 82, 90, 100 and 177, and the relevant electoral laws in nominating and gazetting the 3rd Respondent as Member for National Assembly. He has failed to demonstrate that the Constitution and the relevant electoral law prioritize any category of special interest over the others. He has failed to demonstrate that the respondents are in contempt of the judgment of the PPDT and he has failed to demonstrate that he deserved to be ranked in position four (4) in the 2nd Respondent's party list. The law is not on the Petitioner's side. It does not support his claim as contained in the Petition. He did not adduce evidence in support of the claims he makes in the Petition and for this reason the prayers he is seeking in the Petition dated 6th September 2017 cannot issue. My determination of this matter confirms that Jennifer Shamalla was validly nominated and gazetted as Member of the National Assembly and I so declare. Her nomination to the National Assembly is valid and the special interest she represents is specified, is valid and is recognizable in law. Consequently the Petition dated 6th September 2017 is hereby dismissed.

I have agonized over the issue of costs. The law is clear that costs follow the cause. Section 85 of the Elections Act states that: "**An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.**" Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 also empowers this court to make an order specifying the total amount of costs payable; the maximum amount of costs payable; the person who shall pay the costs and to whom shall the costs be payable. Sub-section 2 of Rule 30 gives this court discretion to disallow any prayer for costs or to impose a burden to pay costs on any party as specified in the sub-rule. All the Respondents sought to be awarded costs in the event the Petitioner is unsuccessful. I am alive to the fact that litigation is expensive and that expenses are incurred in preparing and presenting a dispute in court. However, where exorbitant costs are awarded, this inhibits parties from presenting disputes to court and may deny litigants access to justice. The argument normally is that had the Petitioner not sued the respondents, these expenses would not have been incurred. I am inclined to award costs, which I hereby do, to the 1st and 3rd Respondents. I decline to award costs to the 2nd Respondent for two reasons, firstly that the Petitioner is its members and secondly that the 2nd Respondent did not avail its witness in court to present its case. The costs awarded to the 1st and 3rd Respondents shall be capped at **Kenya Shillings One Million (Kshs 1,000, 000)** per respondent. They shall become payable after the Deputy Registrar subjects the bill of costs under taxation. For the avoidance of doubt the 1st Respondent and the 3rd Respondent shall be paid a maximum of **Kenya Shillings One Million (Kshs 1,000,000) after taxation**. Orders shall issue accordingly.

Delivered, dated and signed this 19th day of December 2017.

S. N. Mutuku

Judge