REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO.13 OF 2013

IN THE MATTER OF THE ELECTIONS ACT, 2011 AND THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS PETITION RULES, 2013

AND

IN THE MATTER OF THE WOMEN MEMBERS NOMINATED THE SENATE AND GAZETTE NOTICE NO. 3508 PUBLISHED IN THE KENYA GAZETTE DATED 20TH MARCH 2013.

BETWEEN

LYDIA MATHIA……..…..…….….PETITIONER

VERSUS

NAISULA LESUUDA……..……..…….1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (I.E.B.C)…….……...2ND RESPONDENT

JUDGMENT

After the promulgation of the 2010 Constitution, Kenya held its first General Elections on the 4th of March 2013. Under Article 88 (2)(4) of the Constitution, the Independent Electoral Boundaries Commission, hereinafter referred to as IBEC is given the mandate to conduct or supervise referenda and elections to any elective body or office established by the Constitution. Article 93 (1) of the Constitution provides for the establishment of Parliament which shall consist of the National Assembly and Senate. Article 98 provides for the membership of Senate. Sub article 98 (1) (b) of the Constitution provides that *" sixteen women shall be nominated by political parties according to their proportion of members of the Senate elected under clause(a) in accordance with Article 90 of the Constitution*."

After the gazettement of the members of the Senate, the Petitioner, not being satisfied with the process done by the 2nd Respondent in nominating the 1st Respondent, filed this petition. Under Article 105 of the Constitution this court is mandated to hear and determine whether the 2nd Respondent has been validly elected in a period of six months.

This Court considers that election petitions are not ordinary suits where a party is enforcing a right that accrues to her as a person but has to take cognizance of the fact that an election is an implication of the exercise of the democratic rights of the people to have a person of their choice represent them in

parliament. In the case of **Peters v Attorney-General (2002) 3 LRC 32 C.A., Trinidad and Tobago at 101** Sharma J.A Said: *"An election petition is not a matter in which the only persons interested are candidates who strive against each other in Elections. The public are substantially interested in it and that it is an essential part of the democratic process."*

PETITIONER'S CASE

The Petitioner, Lydia Mathia and the 1st Respondent Naisula Lesuuda among others sought to be elected as Nominated Women Senators. Both the Petitioner and 1st Respondent applied for the Senate nomination and were sponsored by The National Alliance Party, hereinafter referred to as TNA. By virtue of TNA's win in the General Election, TNA garnered 11 seats in the Senate and therefore the party was allocated 4 nomination seats in which the 1st Respondent was gazetted as a nominated member of the Senate, leaving out the Petitioner. The Petitioner being dissatisfied with the process of the 2nd Respondent in gazetting the 1st Respondent in place of the Petitioner has filed this petition challenging the nomination and gazettement of the 1st Respondent to the Senate. The Petitioner filed her petition on 12th April 2013 and has sued the 1st Respondent by virtue of being nominated to the Senate and the 2nd Respondent as the body that conducts and supervises Elections to any elective post as established under the Constitution. She has brought her petition pursuant to Article 38, 82 and 90 of the Constitution of Kenya 2010 and sections 75 of the Elections Act 2012. That on the 29th January 2013 TNA submitted a list to the 1st Respondent which was received on the 30th January 2013. Her contention is that the 1st Respondent was ranked fifth (5th) in the TNA party list whilst she was ranked third (3rd) in the said party list yet the 1st Respondent was gazetted in a published gazette notice No.3508 dated 20th March 2013.The Petitioner listed the four nominees as per the TNA list as:-

1. Hon Beth Mugo
2. Emma Mbura Getrude
3. Lydia Mathia
4. Joy Odhiambo Gwendo

She states that notwithstanding the TNA list the 2nd Respondent by Gazette Notice No 3508 published in the Kenya Gazette stating that the following had been nominated and/or elected on the TNA party list pursuant to Article 90 (1) (b) of the Constitution.

1. Hon Beth Mugo
2. Emma Mbura Getrude
3. Naisula Lesuuda
4. Joy Odhiambo Gwendo

The Petitioner therefore contends that Naisula Lesuuda was not validly nominated and/or elected pursuant to Article 90 and Article 98 (1) (b) of the Constitution. That under Article 90 of the Constitution, for any person to become a Senator under Art 98 (1) (b) one must fulfil two conditions namely:-

a. Must be validly nominated and included in the party list

b. The list must be subjected in a general election through submission of the party list to IEBC in accordance with section 35 of the Elections Act 2011

She contends that when TNA submitted the party list on 21st February 2013 the 2nd Respondent raised concerns on the nominees 1,4,12 and 6 and 8 who were registered voters of Nairobi and Wajir

respectively. TNA in a letter dated 22nd February 2013 through its Chairman and its Secretary General replied to the issues raised by the 2nd Respondent to the fact that the nominees 1, 4 and 8 represented different ethnicities and regions of origins though they were registered voters in Nairobi. That upon the submission of the said letter, the 2nd Respondent did not raise any further concerns over the TNA party list. That the submitted list by TNA on the 29th January 2013 was regarded as TNA's valid list for election of nominees in the General Election. She contends that the 2nd Respondent's list of TNA women Senate nominees elected on 4th March 2013 contravened Articles 90 and 98 of the Constitution as read with sections 34 to 36 of the Elections Act 2011(Act No. 24 of 2011) in the sense that the 2nd Respondent usurped the right of TNA party to nominate for election women members to the Senate by substituting the party's ranking in the list with its own preferred ranking .That the 2nd Respondent's role under Article 90 (2) (c) was to confirm that the party submits the list of nominee drawn in accordance with its nomination rules that reflect the regional and ethnic diversity of the Kenyan people. That pursuant to Article 90 (3) of the Constitution read together with Section 36 of the Elections Act 2011 and Regulation 54 to 56 of the Election (General) Regulations 2012 the 2nd Respondent was to allocate the seats to political parties in proportion to the number of seats won by candidates of the political party. That it was wrong for the 2nd Respondent to rearrange the ranking or order of priority of the TNA list not having determined that the list submitted by TNA on the 29th January 2013 was drawn in accordance with its nomination rules therefore it is for this reason that the Petitioner contends that the 1st Respondent was not validly nominated on the grounds that the list submitted on 29th January 2013 shows that the Petitioner was ranked No 3 while the 1st Respondent was ranked position 5 and in the premises the 1st Respondent was not lawfully gazetted by IEBC as a member of the Senate.

That the 2nd Respondent had no power under the Constitution or the Elections Act 2011 to alter a party's list or vary the order of priority in the list after the General Elections and therefore, the 2nd Respondent contravened Article 90 of the Constitution and Sections 34 (7) of the Elections Act 2011. That the gazettement of the 1st Respondent as a member of the Senate constitutes a patent violation of the Constitution of the TNA party and section 34 (6) of the Elections Act 2011. That it is a belated scheme to change the TNA party nomination results on the grounds that under section 35 (1) of the Elections Act 2011, a political party is required to submit its party list to the commission for an election before the nomination of candidates under Articles 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the Constitution. That the 2nd Respondent usurped the jurisdiction of the Election Court in changing the TNA party list. That following the compilation and the submission of the TNA party list, no person filed a dispute with the Commission to challenge either its or the order of priority as indicated in the list.

The Petitioner further contends that the acceptance by the 1st Respondent of the illegal conferment of office and the acquiescence meted against the Petitioner constituted a violation of Article 3,10,27,28,38 and 50 of the Constitution on the following grounds. That Article 3 required the 1st Respondent to respect, uphold and defend the Constitution including the refusal to accept that the Senator seat was procured though illegal means and refusal to be sworn into such office despite the fact that she was not elected under Article 90.That the actions and omissions of the 1st Respondent constituted a breach of national values and principles of governance and in effect the Petitioner's right to equality and freedom from discrimination has been violated. That the Petitioners right to human dignity protected by Article 28 of the Constitution has been disrespected and dishonoured by the conduct , actions and omissions of the 2nd Respondent. That the Petitioners right under Article 38(3)(c) to be validly nominated and elected as Senator on the TNA party list and to hold the office of Senator has been violated by the 1st Respondent laying unlawful claim upon it after the General Election and proceeding to take a solemn oath in the Senate to assume it. That under Article 50 of the Constitution, if the 1st Respondent had any legitimate claim to the Petitioner's order of priority ranking her No. 3 on the TNA party list, she was enjoined to has such dispute adjudicated before the High Court or any independent and /or impartial tribunal. That the actions of the 2nd Respondent has depicted TNA party as undemocratic ,unaccountable and a politically insensitive party which does not honour its commitment and legal obligation to its own members .She therefore contends that her right to equality and freedom from discrimination has been violated and therefore she has suffered indignity and that she is being punished for making political choices and advocating the best interest and political cause of TNA which would be severely prejudiced if TNA has no representatives from Central region. That the 2nd Respondent owed the Petitioner the duty to notify her that it had altered the TNA list and that the Petitioner would be excluded from the party list.

At paragraphs 27 to 30 of the petition, the Petitioner contends that the 2nd Respondent violated her rights to equality, freedom and discrimination enshrined in Articles 27, 38, 47 and 50(1) of the Constitution. She contends that the 2nd Respondent was enjoined to refer any dispute concerning the validity of TNA's final list of Women Members nomination to the Senate for hearing before a Court of law, as the 1st Respondent did not challenge the TNA party list submitted on the 29th January 2013 before the 2nd Respondent's nomination disputes Resolution Committee under Article 88 (4) (e) of the Constitution and therefore the 2nd Respondent is barred from purporting to deal with any dispute over the TNA party list after the declaration of the results. That Article 3 enjoined the 1st Respondent to respect, uphold and defend the Constitution including refusal to accept to be sworn in as senator since it was procured through illegal means under Article 165 of the Constitution. That under Article 105 the 2nd Respondent was enjoined to move to the High Court to determine any question as to whether the Petitioner was validly elected as a Member of Parliament on the basis of her ranking on the TNA party list subjected to the General Elections held on 4th March 2013.

It was for the above reasons, the Petitioner sought the following orders from this court:-

a) A declaration that the 1st Respondent was not validly elected as Senator on the Women's Members Nominated to Senate list for TNA party pursuant to Article 90 and 98 of the Constitution.

b) A declaration that the Gazette Notice No 3508 published on 20th March 2013 is *void ab initio* to the extent that it provides and specifies that the 1st Respondent stood validly nominated or elected to the Senate on the TNA party list of Women Members Nominated to the Senate following the General Elections held on the 4th of March,

c) A declaration that under Articles 88,90 and 98 of the Constitution the 2nd Respondent had no power to alter the list of Women Members nominated to the Senate by TNA party by removing the Petitioners name and replacing it with the 1st Respondent,

d) A declaration that the 1st Respondent Naisula Lesuuda was not validly elected as a member of the Senate under Article 90 of the Constitution

e) A declaration that during the General Election held on the 4th March 2013 the Petitioner was validly nominated to the Senate on the TNA party list of Women's Members Nominated to the Senate submitted to the 2nd Respondent on the 29th January 2013, pursuant to Article 90 of the Constitution,

f) An order quashing and /or invalidating Kenya Gazette Notice No. 3508 dated 20th March 2013 to the extent that it specifies that the 1st Respondent is validly nominated or elected as a member of the Senate under the list of Women's Members Nominated to the Senate submitted by TNA for the General Election held on the 4th March 2013, pursuant to Article 90 of the Constitution

g) That an order be made by this Court that the 2nd Respondent gazette the Petitioner as the person duly elected on the 4th March 2013 to the Senate on the Women's Members Nominated to the Senate on TNA part list submitted to the 2nd Respondent pursuant to Article 90 and 98 of the Constitution,

h) Any other relief and redress the Court may grant and that the Petitioner's costs be borne by the 2nd Respondent.

In support of her petition the Petitioner swore a supporting affidavit dated 11th April 2013 in which she reiterated the contents of the petition. She avers in addition that the 2nd Respondent did not alter the lists of other parties besides that of TNA .That the 2nd Respondent declined to alter the party list as per the request of CORD Alliance on the ground that their respective lists could not be altered after the General Elections were held and she is therefore intrigued and stunned as to why and how the 2nd Respondent altered the TNA party list in order to exclude the Petitioner which actions and omissions were irredeemably unconstitutional, a gross abuse of power, profoundly discriminatory ,undemocratic ,subversive of multiparty democracy and ultimately unreasonable and unjustifiable in a democratic society based on human dignity ,equality and freedom.

In her evidence in court the Petitioner restated what she deposed in her Petition and affidavit. She testified further in her evidence in chief and cross examination that the 1st Respondent applied as a youth and not as a minority and that TNA picked and listed Saadia Kontoma for the minority candidate as she is an Ajuran Somali. That there was every significance in ranking in the list which meant that the position in the list increased or decreased one's chances of nomination. That she read the affidavit of Isaac Hassan and the minutes, minute No. 24.2. 24.2.2 which had the names of the nominated persons excluded her name and replaced by Naisula Lesuuda and that the said minutes were general as they did not show why they approved or disapproved the TNA list. That there was no discussion on the issue of the nomination of both the 1st Respondent and the petitioner. That under TNA and URP there was no nominee from the Central region. That she had not heard or seen Naisula Lesuuda until the 20th of March 2013. She disputed a letter signed by Mr Oloo, annexure NL 2 dated 27th May 2013 with the contents that TNA as a party had stated that the preferred candidate was the 1st Respondent. The Petitioner stated that the same was Mr. Oloo's personal opinion and that for a letter to be a decision of the party it had to be signed by two persons to state the position of the party. She testified that the list was sanctioned by the party and to remove anyone from their seat because of the tribe was wrong. That TNA believe in equality and the rule of law and the actions by IEBC did not promote these principles. On being cross-examined she stated that she was in court contesting IEBC's understanding of that law. That she suffered a loss but it will not be an issue of her benefiting if the court reversed the IEBC decision but the issue was whether IEBC did the right thing. That IEBC has mechanism to employ to deal with a list taken at the last minute and if the party does not comply then they should reject the entire list. That so long as it is 45 days before election it is possible for the party to engage with IEBC and get a solution and if the election has reached and there is no such an option then IEBC would hold to reject the entire list. She stated that Samburu did not fall in the category of marginalized group. That TNA ensured each region in the former provinces was represented in the list since the law required the party to observe region and diversity. That the party fulfilled its obligation in giving the list on merit and they ensured there was regional and ethnic diversity. When she was referred to Gazette Notice no. 19653 of 28th December 2012, she stated that TNA complied with part (d) of the said Gazette Notice. She testified that the 1st Respondent was not a registered member and had no papers to show she is a registered member of any party and that the Registrar of Political Parties had said she was not a member of TNA.

The Petitioners witness Saadia Abdi Kontoma swore a witness affidavit in support of the petition on 11th April 2013. She averred that she applied for nomination of membership of Woman Senate and TNA's National Oversight Board processed the applications of the members who had qualified. The party considered the merits of all individual applicants on the basis of TNA's Constitution and guidelines specified under Rule 7 of the nomination rules and the party selected 15 applicants who were ranked on priority of their individual merits as required by Section 34 (6) of the Elections Act 2011.She was ranked 8 in priority. That none of the persons who were shortlisted challenged or appealed on the party's decision. That the 2nd Respondent rejected TNA's list submitted on 16th March 2013 on the grounds that after the General Elections it could not alter or vary the list submitted by various parties. That the 2nd Respondent took this position despite the fact that the list submitted by TNA on 16th March 2013 was intended to and would have made the entire list of twenty (20) Senate nominees more ethnically and regionally diverse and she was extremely perturbed by this fact. That on inquiry she was informed that the 2nd Respondent's chairman had informed TNA that the Petitioner was a Kikuyu, like Hon. Beth Mugo and it was not appropriate to gazette her because of considerations of ethnic and regional diversity. That she found the explanation puzzling since when TNA submitted the party list on 29th January 2013, IEBC did not object to the order of priority or veto the inclusion of Lydia Mathia and for that reason she stated that she was no longer sure whether the TNA party list submitted to the 2nd Respondent on 29th January 2013 was valid or not and joins the Petitioner in asking the court to determine whether the 2nd Respondent had power to alter or vary the list submitted by TNA party. She reiterated what she deposed in her affidavit and stated further that if IEBC wanted a minority then she was there as she was the only one picked as the candidate representing minority and marginalized groups.

Pursuant to Rule 14(1) of The Elections (Parliamentary and County Elections) Petition Rules, 2013 (the Election Petition Rules), the Respondents filed responses to the petition. They both opposed the petition.

1ST RESPONDENT'S CASE

The 1st Respondent filed her response and affidavit on 2nd May 2013.She denied the allegations made in the petition. Her response was as follows; that pursuant to Article 90 (2) (c) and Article 98 (1) (b) TNA through a letter dated 22nd February 2013 submitted to the 2nd Respondent its party list of women nominees which included the 1st Respondent as the 5th nominee and the Petitioner as the 3rd nominee. That the 2nd Respondent exercised its legal discretion after noting that two members out of the four nominees represented the same ethnic region since Beth Mugo and Lydia Mathia were both Kikuyu. That in keeping with the provisions of Article 90 (2) (c) of the Constitution the 2nd Respondent was entitled to demote the Petitioner's name and promote it with the 1st Respondent's name and she was subsequently gazetted through a Gazette Notice No 3508 on 20th March 2013 in which gazette the 1st Respondent was validly nominated pursuant to Article 90 and 98 (1) of the Constitution of Kenya. The 1st Respondent denied that her conferment to office violated any of the Petitioner's rights and sought that the petition be dismissed with costs .She further averred that she had been a member of TNA and submitted her application form as a woman nominee in the senate for the party and was nominated for that position within the party. She refuted claims that she was greedy and unconscionable and stated that it was unfortunate that the Petitioner could accuse her of being a beneficiary of negative tribalism and failing to appreciate the affirmative action provisions in the Constitution. She averred that she has been an active member of TNA for about a year and was registered in November 2012, and that this issue was not pleaded in the petition.

During her testimony in Court in examination in chief and cross -examination the 1st Respondent reiterated what is stated in her response to the petition and what is deposed in her affidavit. In addition, she testified that she considered the Samburu a marginalized county whose lifestyle is pastoralist with poor infrastructure in their region. She described herself as a young woman trying to bring young people together since the Constitution wants to empower the youth. She stated that she understands Article 90 of the Constitution and that IEBC raised issues on regional and ethnic diversity but there was no response from the party. That though she knew that TNA was entitled to 4 slots, she was surprised and shocked to be nominated. She denied the fact that she was a beneficiary of the illegality of IEBC and stated that if there was a dispute in the ranking they would go to the IEBC tribunal. She did not dispute the ranking she was given as No. 5.as she took it as what the party deliberated and agreed on. She stated that no one challenged her membership and application to be a Senator or her nomination to the TNA list.

2ND RESPONDENTS CASE

The 2nd Respondent filed its response and witness statement on 3rd May 2013.It denied the allegations made in the petition and responded as follows; that in compliance with Article 98 (1) (b) of the Constitution, TNA submitted its list on 30th January 2013. That pursuant to the mandate donated to IEBC under Article 90 (2) (c) of the Constitution, IEBC by a letter dated 21st February 2013 raised issues that the number of nominees required was 16 candidates and not 15 ,the ages and personal details of some nominees were not indicated in the submitted list and nominees 1,4 & 12, 6 and 8 were all registered voters of Nairobi and Wajir respectively and that the counties where the nominees 9 and 10 are registered are not indicated in the submitted list .That TNA responded that the nominees represent different regions and ethnicities and nominees 6 and 8 represented different clans of the Somali community. That in the said letter dated 22nd February 2013, TNA acknowledged that it had not adhered to the rules issued by the 2nd Respondent regarding Senate and National Assembly in its party list and sought indulgence of the 2nd Respondent not to strictly apply rules to the TNA party lists.

That TNA recognised the requirements for the party lists to reflect ethnic balance and also recognised that the 2nd Respondent had the mandate and discretion to ensure that regional and ethnic balance is maintained.

That after the General Elections, TNA was allocated four seats in the women senate but out of the four, two were of Kikuyu ethnicity which were in contravention of the provisions of section 34 (1) of the Elections Act 2011 which required that the party list takes into consideration the proportional representation and be submitted in accordance with Article 90 of the Constitution .That it was clear from the provisions of the Election Act that if a party list does not comply with the criteria set out in section

34(1) of the Elections Act 2011, then such a list could not be a valid list for the term of the 11th Parliament as contemplated under section 34(7) of the same Act. Accordingly, in a bid to ensure that ethnic balance was maintained it replaced the Petitioner a Kikuyu with the 1st Respondent a Samburu who was the next person in priority on the nominees list. That the choice of the 1st Respondent was informed by the fact that she was the next person on the list of nominees having been listed as number 5 and bearing in mind that the nominees as submitted by the political parties are in order of priority pursuant to section 34 (5) of the Elections Act 2011. That TNA on 18th March 2013 resubmitted another list to replace the previous list of 30th January 2013.By then the 2nd Respondent had resolved not to admit any replacement list after the General Elections .Therefore the 2nd Respondent could not admit the list of 18th March 2013 but gazetted the 30th January 2013 list, subject to the alteration to reflect ethnic balance. That the actions of the 2nd Respondent were sanctioned by both the Constitution of Kenya and the Elections Act 2011 validating the nomination and election of the 1st Respondent as a woman representative to the Senate. That IEBC's decision was communicated to the TNA Chairman, that they had refused to admit a replacement list after the General Election and that this does not fetter its discretion to ensure that the party list was reflected in the regional and ethnic balance. The 2nd Respondent sought a dismissal of the petition and that a determination be made that Naisula Lesuuda was duly nominated to the Senate.

Mr Ahmed Issack Hassan, Chairman of the 2nd Respondent testified. He reiterated what was deposed in his affidavit and their response and testified further that he did not agree with the proposal that IEBC could not alter the list without consultation with the party. That the word used in the Constitution is "shall" which imposes a duty on IEBC. He stated that an election is not complete until a winner is declared. That IEBC cannot designate before election results are declared and that election ends with the declaration of the results. That IEBC's decision was not contrary to the rules and where the rules contravene provisions of the Constitution, the provisions of the Constitution prevails. That it is not IEBC's understanding of the law that it had to consult TNA before changing the list, but once the list is submitted it is closed. When he was referred to the 2nd Respondent's bundle of documents which were the minutes of the special plenary dated 18th March 2013, he said IEBC had 30 days after the Elections to do the designation. That the Petitioner's rights under Article 27, 28 and 29 were not violated but the application of the principle affected her rights since the Constitution emphasises affirmative action which may have to override the rights of others in making a decision.

He stated further that IEBC when interpreting the party list IEBC was bound by Article 27(6) and Article 90 of the Constitution without unreasonable restrictions. That the list is prepared before the Elections and every political party in its list must have a national character. He referred to section 34(5) and (7) of the Elections Act 2011 and stated that if the party did not comply, IEBC had the positive duty not to gazette the person pursuant to Article 90 (3) which gives the Commission the authority and an obligation to do so. That before the close of nomination date, parties could be requested to resubmit the party lists and a party could not resubmit names after close of the nomination date pursuant to regulation 54 and that regulation 55(3) was only applicable until the last day of nomination. He stated that the elections under Article 90 (1) were done on party lists and that the parties would submit a list on how people were to be elected. He relied on Article 88(4) (d) on the role of IEBC which regulates the process by which parties nominated candidates for elections. He defended IEBC and said that it had to be independent and observe the principle of public participation and requirement for consultation with stakeholders in which TNA was a stakeholder and not Lydia Mathia. He further stated that there were 2 types of Elections; through the polls and those whose names were in the party lists. That the party list had both names of those that go to the polls and those to be nominated. He defended the Commission by stating that it was not *functus officio* and said that the Commission's mandate ended at the time of gazettement of names of successful nominees and until then, where there were errors or violation of the Constitution it could still be corrected. Further, that IEBC was not conducting an administrative action but a constitutional mandate. That the particular list IEBC received was discussed on the 18th March 2013 that there was a problem, but IEBC had the overriding power under Article 90 to do anything apparent. That Article 90 does not give the Commission judicial power to nullify an election and that the Commission had no power to alter the party list but only to subject it to the provisions Article of 90(l). When Isaack Hassan was cross examined by counsels for the 1st Respondent's and the Petitioner's he reiterated part of his evidence in chief .He stated further that Article 90 gives very specific restrictions in regards to ethnic and regional

diversity .That in complying with the provisions of Article 90 IEBC's duty under the said Article would not be curtailed by election regulations .That IEBC wasn't *functus officio* after publishing the list but that it had its mandate extended up to the time the lists were gazetted and that if there were errors in the party lists, IEBC had the constitutional mandate the to deal with the lists and correct them.

PETITIONER'S SUBMISSIONS

The Petitioner in her submissions crystallised her issues as follows;

a. ***The import of Elections under Article 90 of the Constitution***

The Petitioner submitted that under Article 98 of the Constitution the membership of the Senate included sixteen women members nominated by political parties according to their proportion of members of the senate elected under clause (a) of Article 98 in accordance with Article 90. She submitted that the features of an election under Article 90 as read with Article 98 were that;

a. The seats in Parliament filled through Elections on the basis of proportional representation by use of party lists are constitutionally reserved for women and representatives of special interests and relied on the case of **Rongal Lemenguran et al –vs. - AG** in which the High Court listed the people who qualify to be viewed as special interests as ethnic minorities, the youth, the blind, the deaf and the physically disabled. She also cited the case of **Commission for the Implementation of the Constitution –vs.- AG &Anor** where the Court of Appeal in allowing the appeal stated that , *"….religious minorities, linguistic or cultural minorities and racial minorities fall seamlessly into the category of special interests while the Constitution has also in the wisdom of the framers and the people of Kenya made inclusion of "workers" as a special group…….they must be a class as can fairly be said to have suffered marginalisation and disadvantage keeping them away from the centre of the political process"*

b. The Petitioner submitted that under Article 90 of the Constitution, the people of Kenya approved the election of the persons listed on the party lists on the basis of proportional representation through closed party lists. Therefore IEBC is enjoined to ensure that the party lists submitted to the election comply with the Constitution and all other applicable laws and regulations prior to the elections. That the use of the phrase "stand elected" in Article 90 (2) (a) of the Constitution emphasises two things; Firstly that before the election, IEBC must ensure that the party lists comply with the law and secondly after the elections the IEBC merely allocates the seats to entitle political parties whose nominees are deemed as elected on the basis of the ranking or order of priority in the submitted lists.

b. ***The validity of the TNA party list for women members of the Senate.***

On this limb, she relied on section 34 (6) of the Elections Act 2011 which provided that "*the party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned."* She supported this fact by relying on Article 29 of the TNA Constitution which provided for the drawing of the party list envisaged by Article 90 and 177 of the Constitution which in general stated that there is a five member panel that receives and processes applications from qualified applicants thereafter a report is presented to the National Oversight Board for ratification and finally the list is drawn by the Board. She relied on Section 73 of TNA nomination Rules which stated that in identifying the persons for party lists for the National Assembly and the Senate the selection panel shall ensure that the every person in the party list shall have applied for the position and should have met the requirements. That the list represented the diversity of the people of Kenya which had considered the youth, women, and persons with disabilities and marginalised and minority groups. She further submitted that Regulation 55 of the Election (General) Regulations 2012 required political parties to prepare party lists in accordance with their respective nomination rules .She raised two issues with the 2nd Respondent's powers under Article 90 (2) (c) on ensuring that the party list reflected the regional and ethnic diversity of the people of Kenya and pointed out that it was the 1st and 2nd Respondent's evidence that indeed the party list submitted on 29th January 2013 reflected both regional and ethnic diversity of the people of Kenya. On the second issue, whether IEBC conducted its duty under Article 90 (2) (c) before the general election held on 4th March 2013, she submitted that the 2nd

Respondent's witness stated that prior to the General Elections, IEBC exercised its duty under Article 90 (2) (c) to ensure that TNA party list reflected regional and ethnic diversity of the people of Kenya and that TNA in the letter dated 22nd February 2013 clarified and explained the issues raised by IEBC on its party list.

a. ***Whether the 2nd Respondent could alter the order of priority in the TNA party list after the general Elections.***

The Petitioner submitted that prior to the elections the 1st Respondent did not raise any objection on the inclusion or ranking of the Petitioner on the TNA list. She went ahead to quote the 2nd Respondent's witness during the examination in chief and concluded that the 2nd Respondent's witness confirmed that prior to the General Elections IEBC confirmed that TNA's list complied with Article 90 of the Constitution, firstly that Lydia was duly qualified, secondly that she was elected on 4th March 2013 ,thirdly that after the General Election it exercised its power under Article 90 but found that the Petitioner was not qualified so it replaced her with the 1st Respondent. She submitted that IEBC became *functus officio* and could not after the general election alter the list by electing the names of the persons it did in purported exercise of residual power under Article 90 of the Constitution and submitted that upon publication of the final list by the Commission the TNA senate women party list became valid for purposes of Article 90 of the Constitution and the Commission could not subsequently alter the order of priority as it purported to do in respect of the Petitioner and the 1st Respondent. The petitioner and relied on the case of **Margaret Wambui Kamau –vs- Independent Electoral and Boundaries Commission & Anor [2013] e KLR** where the Court held that, "*The Respondent IEBC is mandated by the law to ensure that the lists submitted to it by the parties comply with the provisions of the law .Where it finds that a list does not comply with the provisions of the Constitution and the law it is mandated to return the list to a political party and ask the party to resubmit a new list in compliance with the guidelines given by the respondent"*

b. ***Whether the 1st Respondent was validly nominated by the TNA party on account of her membership.***

The Petitioner submitted that section 13 (1) of the Elections Act provides that, "*A political party shall nominate its candidates for an election under this Act at least forty five days before a general election under the Act in accordance with its Constitution and nomination rules*". Further section 2 (f) of TNA Nomination Rules 2012 provides that a person is not qualified for nomination as a TNA candidate if the person is not a paid up and registered party member for a period of less than one (1) month before the date by which parties are required to have submitted a membership list. That at paragraph 18 of the 1st Respondent's affidavit sworn on 30th May 2013 she deposed that she is a member of TNA party which elicited the Petitioners reply where she disputed the 1st Respondent's averments that she was a member and went ahead and swore an affidavit in which she produced a letter from the Registrar of Political Parties that showed that the 1st Respondent was not a member of TNA. That during cross examination the 1st Respondent stated that she had her membership card but she did not see the need to exhibit them in court. That if the 1st Respondent was a member of TNA she could have proved the fact in court as envisaged in section 17 and 18 of the Political Parties Act, 2011.

c. ***Whether the 1st Respondent was lawfully gazetted as a woman member of the Senate on the TNA party list.***

The Petitioner submitted that the 2nd Respondent's witness testified that the Commission had a duty to gazette the candidates who had been elected on 4th March 2013 after they had confirmed that they complied with Article 90 of the Constitution. That in a meeting on 18th March 2013 the 2nd Respondent reviewed the TNA party list and replaced the Petitioner with the 1st Respondent. That the 2nd Respondent's chairman tried to justify the Commission's action by referring to section 34 (6) of the Elections Act which provides that "*within thirty days after the declaration of the election results the commission shall designate from each qualifying list the party representatives on the basis of proportional representation.*" The Petitioner submitted that under section 36 (4) of the Elections Act the role of the commission was simply to allocate four seats to TNA as the members of the senate and

nothing in the said section allowed the commission to alter the list in accordance with the alleged discretion under Article 90 (2) (c) of the Constitution.

d. ***Duty of the Court***

The Petitioner stated that the duty of the court stems from Article 259 (1) of the Constitution and stated that the court is enjoined to adjudicate this matter in a manner that promotes multi democracy in Kenya because Article 4 (2) of the Constitution declares that the Republic of Kenya shall be a multiparty democracy state .She also cited Article 91 (1)(e) where it states that every political party shall respect the right of all persons to participate in the political process including minorities and marginalised groups. That TNA submitted a list procured through nomination rules that comply with the relevant provisions of the Constitution. She asked this court to disallow the attempt by the Commission to invalidate the lawful actions of TNA party and specifically that the 2nd Respondent can usurp the powers of political parties to nominate candidates.

The Petitioner also requests this court to ensure that the outcome of the said petition is respected on the grounds that there were no deliberations to be done by IEBC after polls to identify who has been elected among the names on the party list since this was done by the people in the ballot ,that the electoral outcome must be respected as no person has the power to bar a decision exercised by the people of Kenya, that no value can override democracy and that value cannot be sacrificed on regional or ethnic balance. Therefore IEBC had no mandate to balance constitutional values in determining which values should be sacrificed and which should be substituted.

That this court has the duty to advance the rule of law and that since a valid party list had been submitted, it was incumbent upon IEBC to gazette all the winners and that only courts can nullify election results; therefore it is upon this court to preserve the rule of law by invalidating the actions of the 2nd Respondent by allowing this petition by finding that the 1st Respondent was not validly elected as a Senator. She prayed for costs of Kshs 9 Million.

1ST RESPONDENT'S SUBMISSIONS.

The 1st Respondent's submissions were that the Petitioner was a national official of the TNA party. She narrated the procedure of nomination by political parties. That the political parties had the duty to prepare a nomination list that complies with Article 90 which was to comply with regional and ethnic diversity. That the nomination was to be in order of priority and would include only persons who are members of the political party on the date of the submission of the party list. That if they failed to submit a valid list that did not comply with the requirements of IEBC, it could reject the list and request the party to submit a new list. If IEBC accepted the list, the members in the list are deemed to be presented to the electorate in order of priority for election. That the election for purposes of party lists commenced on 4th March 2013 but only concluded upon determination by IEBC of the validly elected candidates upon designation and gazettement. That the order of priority indicated by party list under section 35 of the Elections Act constitutes a communication to IEBC of the desired preference by the party but need not be followed in the case of Parliament if the demand for regional and ethnic diversity requires otherwise as stated in section 36 (4), (5), (6) of the Political Parties Act. That the party list submitted to the voters was subject to IEBC's Constitutional mandate and statutory discretion to designate complying candidates as envisaged in Article 90 (1) of the Constitution. Therefore IEBC did not alter the party list by choosing the 5th nominee in place of the 3rd nominee as the party list remained as represented by TNA. She further submitted that the Petitioner was not in Senate because despite her priority she was not designated due to the lack of ethnic diversity and that if she had been nominated to the Senate it would have resulted to two persons from one ethnic community being chosen out of the four nominees that had been allocated to TNA which would have conflicted with the constitutional provisions for ethnic and regional diversity but the Petitioner still retains her position in the party list.

On the Petitioner's legitimate expectation, the 1st Respondent submitted that the list of nominees does not operate on the basis of political or electoral entitlement but the need to meet other demands of the Constitution such as inclusiveness and diversity; therefore, legitimate expectation can never operate to

defeat clear constitutional obligations or statutory requirements and that IEBC did not punish the Petitioner for failing to discharge its duty before the elections .That IEBC had a duty that continued until they designated and gazetted the nominees. That when IEBC accepted the party list before Elections it was to ensure that it complies with constitutional requirements taken as a whole. It is the 1st Respondent's submissions that IEBC did not communicate to the Petitioner because the party list is primarily the political party's list therefore there was no need for IEBC to seek to communicate individually or independently with each party or candidate during designation since it is analogous to declaring results when all persons are deemed to be interested in the outcome and thus would be potentially be able to demand communication. That IEBC did not ignore Regulation 54 (5), (6), (7) of the Elections (General) Regulations that required IEBC to notify the party if they rejected any name in the list since the Petitioner is still on the list and eligible at any time if the preceding Kikuyu nominee abandons the seat for whatever reasons and stated that Regulation 54 (7) only applied before nomination deadlines and a regulation cannot conflict with a superior statutory provision.

On the issue on registration of the 1st respondent to TNA, the 1st Respondent submitted that a party is bound by their pleadings and is not allowed to introduce introducing new matters and ambushing the respondents during the hearing unless the new matter can be said to be found in the existing pleadings. She further submitted that the Petitioner is not allowed to affirm and deny at the same time and that the Petitioner had affirmed repeatedly in her pleadings that the TNA list represented to IEBC was valid, yet she now chose to deny the validity of the 1st Respondent's placement in that list.

2ND RESPONDENT'S SUBMISSIONS

The 2nd Respondent submitted that it was responsible for conducting and supervising the Elections under Article 98 (1) (b) of the Constitution. That Article 98(1) (b) required the 2nd Respondent to ensure compliance with Article 90(2) (a) of the Constitution which states that "*each political party participating in the general election nominates and submits a list of all 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*", and Article 90 (2) (c) stated that "*except the case of county assembly each party list reflects the regional and ethnic diversity of the people of Kenya"*.

On nomination lists, the 2nd Respondent submitted that Section 35 of the Elections Act is clear on when the presentation of the party lists by the parties was to be effected. It further went on to state that TNA party presented its first party list on the 29th January 2013 which did not comply with the requirements of the 2nd Respondents in respect of the number of persons to be nominated as well as their regional and ethnic composition. That these issues of noncompliance were raised by the 2nd Respondent and TNA responded in their letter dated 22nd February 2013 in which the party sought indulgence from the 2nd Respondent on the application of the Constitution provisions of having 16 nominees in a list that reflected regional and ethnic balance. Further in TNA's letter of 16th March 2013 addressed to the 2nd Respondent, it admitted that the women senate list as presented on 29th January 2013 was lacking in regional and ethnic balance and hence the need to substitute the same. The 2nd Respondent submitted that this was a clear admission by TNA that its list did not adhere to the laid down guidelines and indeed an admission of the 2nd Respondent's mandate to ensure ethnic and regional diversity therefore the Petitioner was now estopped from asserting that the 2nd Respondent lacked that mandate to ensure compliance with ethnic and regional diversity. That TNA readily admitted that the women senate list as presented on 29th January 2013 was lacking in regional and ethnic balance hence the need to substitute the same and that the attempt by TNA to rectify a non-compliant list amounted to closing the stable when the horses had already bolted since the time within which the party was to present its nomination list had long passed in line and therefore TNA was *functus officio* in as far as the list was concerned. It is the 2nd Respondents submission that it was because of TNA's actions that the 2nd Respondent issued a directive to all parties to the effect that it would not consider any nomination lists that had been presented to it after the date of the general elections.

On the 2nd Respondent's mandate under Article 90 (2) (c) of the Constitution it submitted that the said provision confer a mandatory responsibility on the 2nd Respondent to ensure that the party lists as submitted reflect both the regional and ethnic diversity of the people of Kenya and relied on the case of

Community Advocacy and Awareness Trust & 8 others –vs. - Attorney General [2012] e KLR. It further submitted that in Kenya there were 42 tribes with sub tribes included and stated that a list would not reflect regional diversity where more than one nominee on a party list comes from the same tribe where a party is entitled to only four slots in the Senate or Parliament and cited Rule 84 of the TNA nomination rules where it stated that "*the senate women party list shall reflect the ethnic diversity of Kenya*". It submitted that TNA as a party had a duty to ensure that the list complied with constitutional requirements of ensuring ethnic diversity.

The 2nd Respondent submitted further that after the general elections, TNA having secured 11 seats in the Senate was entitled to four nomination seats. That two of the first four nominees including the Petitioner were from one ethnic group being Kikuyu and having the two designated to the Senate would have amounted to allocating persons from the Kikuyu 50% of the available slots despite there being other 41 tribes from which representatives could be designated. Therefore it fell upon the 2nd Respondent to exercise its overriding Constitutional obligation to rectify that anomaly pursuant to Article 90 (2) (c) as read together with Section 36 (4) of the Elections Act to ensure that diversity was achieved. It is then that the 2nd Respondent arrived at designating the 1st Respondent who was number 5 in the list and who was from the Samburu community. That this replacement was not because the 1st Respondent was a Samburu but it was because she was ranked 5th in the list and was of a different tribe from any of those represented by the first four nominees. That the Petitioner, in consequence, was not removed from the list but was replaced on the priority list so she is still eligible for nomination should a vacancy arise on condition that regional diversity was maintained. He cited the case of **Community Advocacy & Awareness Trust & Others** where Majanja J stated that, "*the process of compliance with the various provisions set out in the Constitution that seek to ensure there is regional and ethnic diversity and that disadvantaged groups are represented is not intended to be an exact science carried out with pythogran precision. The court in evaluating the facts and evidence before it is not expected to substitute itself as the appointing authority*"

The 2nd Respondent asserted that its mandate subsisted until gazettement pursuant to Article 90 (2) (C) of the Constitution and stated that the electoral process for purposes of Article 98 (1) (b) starts with the presentation of the nomination papers and completed when the names are gazetted. It further submitted that even after the election results were announced and the proportionate seats determined the 2nd Respondent's mandate was not discharged until designation and gazettement of the names which was done on 20th March 2013.That after the elections the responsibility of the political parties in so far as nominations lists are concerned had been discharged and it would have therefore presented an anomaly to refer the list back to the same political parties .It went further to state that the Constitution pursuant to Article 90 (2) (c) of the Constitution conferred all powers with respect to party lists and designation of nominees on the 2nd Respondent. Therefore any other provision which required conferment with the political parties on the nomination list was inconsistent with the provisions of the Constitution and hence invalid. It relied on the case of **Njoya & others –vs.- AG &Other [2004]1 EA** where the court held that "*the Constitution is not an Act of Parliament and is not to be interpreted as one; it is the supreme law of the land; it is a living instrument with a soul and conscious ;it embodies certain fundamental values and principles and must be construed broadly ,liberally and purposely or teleological to give effect to those values and principles and that wherever the consistency of any provisions of an Act of parliament with the Constitution are called into question the court must seek to find out whether those provisions meet the values and principles embodied in the Constitution" and* concluded that the Constitution was supreme.

On when the powers conferred by Article 90 (2) (c) can be exercised, the 2nd Respondent submitted that section 36 (4) of the Elections Act provided that ; "*Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation*," and submitted that the designation could not take place until the results of the General Elections had been announced to determine the proportionate slots for each party and that was when a final determination could be made on whether or not a list reflects both regional and ethnic diversity. It further submitted the proposal by the Petitioner that the 2nd Respondent was bound to consult with TNA before making the replacement that this would lead to an absurdity and submitted that at the time of designation the political parties were *functus officio* with respect to nomination list. Therefore compelling the 2nd Respondent to confer with the same party would lead to a legal absurdity which is not the intention of the makers of the Constitution when they drafted Article 90 That was the reason why

the 2nd Respondent rejected all the replacement lists that were submitted to the 2nd Respondent after 4th March 2013 and that this rejection was done across the party divide and not unique to TNA.

On the designation in accordance to section 36 (4) of the Elections Act the 2nd Respondents it defined designate using the **Black's Law Dictionary ,6th Edition** to mean "*To indicate ,select appoint nominate or set apart for purpose of duty …to mark out and make known ;to point out*" and submitted that its mandate to designate under section 36(4) of the Elections Act meant to appoint or nominate persons from the party list who satisfied the criteria of regional and ethnic diversity and they could not do so before the general election results were announced as suggested by the Petitioner. The 2nd Respondent further submitted that its mandate is restricted to the party priority in respect of county assembly nominees the mandate is unfettered under section 36 (4) of the election Act under which category the Petitioner lies. That the rights under Article 90 (1) (b) of the Constitution do not vest or accrue until after gazettement of the nominees. That until designation was conducted and the names gazetted the Petitioner had not accrued any right over the seat in contention and that any claim she may have had on the Senate seat was subject to designation by the 2nd Respondent therefore it was not vested in her, therefore the Petitioner could not claim that the 2nd Respondent had taken away from her a right which had not vested.

The 2nd Respondent went further to submit that the election court had no jurisdiction to declare the Petitioner a senator in place of the 1st Respondent and that those powers rest with the designating authority which is the 2nd Respondent. It cited the case of **FIDA K &others –vs. AG** in which court stated that, "…….*the court considered that the duty of the court is to consider legality and process not merits of the appointment and the court cannot arrogate itself the jurisdiction to part of the appointing process*"

The 2nd Respondent concluded that it has the power and mandate pursuant to Article 90 (2) (c) of the Constitution to substitute the name of the Petitioner with that of the 1st Respondent in a bid to achieve regional and ethnic diversity in the TNA senate women party list.

DETERMINATION OF ISSUES

During the pre-trial of this petition counsels for the respective parties agreed that the following were the issues for determination:

1. **Whether the 2nd Respondent had the mandate and or discretion pursuant to the provisions of the Constitution and Election Act 2011 to substitute the names of the Petitioner with that of the 1st Respondent in the list of women members nominated to the senate by The National Alliance Party. [TNA]**

2. **Whether the 1st Respondent herein was validly elected /nominated as a member of the senate.**

3. **Which party should bear costs?**

Before determining the above issues, this court notes that there are two categories of elections that were conducted on 4th March 2013.Elections by voting in the polling stations and elections by way of nomination through party lists. The nominees secured their seats on the strength of what their various parties garnered. This petition relates to elections by way of nomination through party lists.

First of all, I will address the issue of burden and standard of proof. It is now accepted that in an Election Petition, the burden of proving the allegations made in the petitions lies with the Petitioner. The presumption is that the Petitioner is required by law to adduce sufficient facts to support her claims; secondly, when that is done, the court will have to consider whether it is satisfied that the Petitioner adduced sufficient evidence to support the facts but I must also bear in mind that the elections laws can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible electoral body, however it rests on the person who alleges, to produce the necessary evidence. The burden of proof was well explained by our Supreme Court in **Raila Odinga and others Vs Independent Electoral and**

Boundaries Commission &Others [2013] e KLR as follows; "*Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has be non-compliance with the law, but that such failure of compliance did affect the validity of the Elections. It is on that basis that the respondents bear the burden of proving the contrary. ……. So the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.*" In the Tanzanian case of **MBOWE vs. ELIUFOO (1967) EA 240**, Georges CJ, held that, "*There has been much argument at the meaning of the term "proved" to the satisfaction of the court. In my view it is clear that the burden of proof must be on the Petitioner rather than the Respondents because it is he, the Petitioner who seeks to have this election declared void"*. In the Nigerian case of **Abubakar v. Yar'Adua [2009] All FWLR (Pt. 457) 1 S.C**., the Court held that, "the *burden is on the Petitioner, to prove non-compliance with electoral law, and to show that the non-compliance affected the results of the election"*. Thus the statutory and evidential burden of proof in this petition rests with the Petitioner. The Petitioner alleges that there has been breach of law by the 2nd Respondent she must therefore lay evidence before the Court to support the allegations.

This Court will now address the issues that emerged for determination during the hearing of this petition having considered the pleadings, evidence and submissions.

ISSUE NO.1 ***Whether the 2nd Respondent had the mandate and or discretion pursuant to the provisions of the Constitution and Election Act 2011 to substitute the name of the Petitioner with that of the 1st Respondent in the list of women members nominated to the Senate by The National Alliance Party[TNA]***

In determining this issue, this Court will consider the provisions of the Elections Act, 2011 in particular the relevant Sections 34 to 36, of the Elections Act Regulations 54 to 57 of the Elections (General) Regulations 2012 and Articles 88 and 90 of the Constitution.

It is the Petitioner's contention that the 2nd Respondent having received a valid list from TNA on 30th January 2013, went ahead after the General Elections of 4th March 2013 to gazette the names of the candidates who stood nominated/elected while excluding her name despite being ranked third in the party list. That it was wrong for the 2nd Respondent to substitute her with the 1st Respondent who was ranked 5th in the list and by so doing the 2nd Respondent contravened Article 90 and 98 of the Constitution. The Petitioner argues that the actions of the 2nd Respondent amounted to usurping the roles of TNA as the role of forming the party list exclusively is the purview of a political party as stated in section 34 of the Elections Act 2011.That the role of the 2nd Respondent as regards the nomination of candidates was to confirm that the party list as submitted was as prescribed under Article 90 (2) (c) and allocate the seats pursuant to Article 90 (3).The Petitioner thus says that the 1st Respondent was not validly nominated on the grounds that the party list submitted on 29th January 2013 ranked the 1st Respondent as 5th and the only available slots for TNA party were four and since the ranking had every significance, the first four nominees[slots] the Petitioner included were already taken up. She also wondered why the decision was taken without informing her party of her replacement as stated in Rule 54 of the Election (General) Regulation Rules. She argues that the explanation given by the 2nd Respondent that she was moved from position 3 to 5 was because since there was a Kikuyu nominee ranked as No 1 in the list they could not permit her ranking as third.

On the other hand the 2nd Respondent in its response argued that their mandate was guided by Article 90 (2) (c) of the Constitution to see to it that each party list reflects the regional and ethnic diversity of the people of Kenya. That TNA presented a party list on 30th January 2013 that had issues with nominees 1, 4 &12, who were registered voters of Nairobi and nominee 6 and 8 who were both registered voters of Wajir County. The 2nd Respondent also raised issues with nominees 9 and 10 who did not have the indication of the counties they hailed from. It submitted further that TNA acknowledged through a letter dated 22nd February 2013, that it had not adhered to the rules issued by the 2nd Respondent regarding the Senate nomination although TNA explained that nominees 1, 4 &12 may have registered in Nairobi but they represented different regions and ethnicities while nominees 6 & 8 represented the different clans of Somali community. The 2nd Respondents stated that TNA sought indulgence from them not to strictly adhere to the rules in the TNA list. The list was however taken as it was by the 2nd Respondent. By a

letter dated 16th March 2013 TNA admitted that the women senate list as presented on 29th January 2013 was lacking in regional and ethnic balance and hence the need to substitute the same and it declined to do. The 2nd Respondent stated further that the list was gazetted and after the General Elections the four seats secured by TNA had to be filled with regard to Article 90 (2) (c) of the Constitution and it was then that in its special meeting rearranged the ranking of the 3rd and 5th Nominees by placing the 1st Respondent in the place of the Petitioner and subsequently the list was gazetted.

I will now turn to the Statute provisions and Articles in the Constitution I had mentioned earlier. For the sake of carefully analysing the mandate of IEBC, it is in order to cite sections of the Elections Act and the Constitution that touch on this petition. They are as follows;

Article 88. (1) There is established the Independent Electoral and Boundaries Commission.

(4) The Commission is responsible for conducting or supervising referenda and Elections to any elective body or office established by this Constitution, and any other Elections as prescribed by an Act of Parliament and, in particular, for—

(d) the regulation of the process by which parties nominate candidates for Elections;

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

(5) The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

Article 90. (1) Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.

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

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

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

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

Section 34 of the Elections Act

Subsection (1) The election of members for the National Assembly, Senate and county assemblies for party list seats specified under Articles 97 (1) (c) and 98 (1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(3) A political party which nominates a candidate for election under Article 98 (1) (a) shall submit to the Commission a party list in accordance with Article 98 (1) (b) and (c) of the Constitution.

(5) the party lists under subsection (2), (3) and (4) shall be submitted in order of priority.

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

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

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

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

Section 35. of the Elections Act

A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97 (1) (a) and (b), 98 (1) (a) and 177 (1) (a) of the Constitution.

Section 36. of the Elections Act

(1) (b) A party list submitted by a political party under Article 98 (1) (b) of the Constitution shall include sixteen candidates;

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

(5) The allocation of seats by the Commission under Article 97 (1) (c) of the Constitution will be proportional to the number of seats won by the party under Article 97 (1) (a) and (b) of the Constitution.

(6) The allocation of seats by the Commission under Article 98 (1) (b), (c) and (d) of the Constitution shall be proportional to the number of seats won by the party under Article 98 (1) (a) of the Constitution.

Regulation 54 of the Elections (General) Regulations

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

(2) The party list referred to in sub regulation (1) shall contain the name, address, age, sex, disability and category of disability, phone number, occupation, elective post sought and such other qualifications as are provided under the Constitution and the Act.

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

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

(b) be submitted in hard copy and in electronic form.

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

(5) The Commission may reject a nominee submitted by a political party for any elective post if that

nominee is not qualified to be elected to the office for which the nomination is sought as specified under the Constitution or the Act.

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

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

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

Regulation 55 of the Election (General) Regulations

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

(2) The Commission may reject any party list that does not comply with the requirements of the Constitution, the Act or these Regulations.

(3) The political party whose party list or nominee has been rejected by the Commission under sub regulation (2) shall resubmit the party list or nominee within such period as the Commission may specify.

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

Having set out the above, I recognise that the various provisions that govern the electoral process must therefore be read together in a manner that gives full effect to the purpose of the Constitution. One thing that comes to my mind is that in determining this first issue, I will have to consider the interpretation of the Constitution and the wordings of the Articles mentioned. The principle of constitutional interpretation is that the Constitution has to be construed as a whole so that its various parts work together with other Statutes in such a way that none of them is rendered impractical. In the case of **J. H Mensah v Attorney-General (1996-97) SC GLR 320 at 362** court held that "….. *a better approach to the interpretation of a provision of the 1992 Constitution is to interpret the provision in relation to the other provisions of the Constitution so as to render that interpretation consistent with the other provisions and the overall tenor or spirit of the Constitution. An interpretation based solely on a particular provision without reference to the other provisions is likely to lead to a wrong appreciation of the true meaning and import of that provision. [Emphasis mine]Thus it is important to construe an enactment as a whole since it is easy and this would avoid the taking a particular provision of an Act in isolation, to obtain a wrong impression of its true effect. The dangers of taking passages out of their context are well known in other fields, and they apply just as much to legislation. Even where an Act is properly drawn it still must be read as a whole"*. I could not agree more with this holding which I find relevant as consider issues for determination.

As regards the principles applicable in the construction of the Constitution, I have to revert to Article 259(1) of the Constitution which has set out these principles. This Article provides as follows;

259. (1) This Constitution shall be interpreted in a manner that –

a. promotes its purposes, values and principles;

b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. permits the development of the law; and

d. contributes to good governance.

In our own courts, the High Court in the case of **John Harun Mwau & 3 others vs Attorney General and 2 others, Petition No.65 of 2011,** recognized these principles and added that while interpreting the Constitution**,** *the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion adding that the Constitution must be interpreted broadly, liberally and purposively so as to avoid the strictness of formulated legalism and further that the entire Constitution has to be read as an integrated whole and so no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument.* This court also notes that the Constitution should be read in its plain meaning and cannot to be read in isolation from the statutes and legislative enactments but rather the Constitution shall be regarded as the guiding instrument to the other written laws. Therefore in exercise of this court's original jurisdiction, the Constitution as the fundamental law of the land must not be narrowly construed but rather, the Constitution must be given a wide generous and purposive construction in the context of the people's aspirations and hopes and with special reference to the political, social and economic development of the country as was stated by the judges in the case of **National Gender and Equality Commission –vs- IEBC & Another [2013] e KLR**

Having considered that, the question this court asks is what then is the mandate of the 2nd Respondent in regards to elections by way of party lists? Article 88 (1)(4) (d) of the Constitution states that "*the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution and any other elections as prescribed by an Act of Parliament and in particular the regulation of the process by which parties nominate candidates for Elections*". Additionally, under sub article (k) the Commission is mandated in "*the monitoring of compliance with the legislation required by Article 82 (1)(b) relating to nomination of candidates by parties*". It is not in dispute that the 2nd Respondent, in compliance with the above law, executed its mandate as stated.

Article 88 (1) establishes IEBC and under sub article 4 the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other Elections as prescribed by an Act of Parliament .Under Sub Article 4 (d) ***it regulates the process by which parties nominate candidates for Elections and under sub Article (5) the commission in expected to exercise its power and perform its functions in accordance with the Constitution and national legislation***. In conducting and supervising the elections**,** IEBC through Gazette Notice No. 19653 IEBC gave notice in part (d) *that the days for nomination of political parties candidates and independent candidates for senate and National Assembly (Women representatives) Elections will be on 31st January 2013 and 1st February 2013 and nomination papers shall be delivered by candidates to the county returning officers in the respective counties between the hours of eight o'clock in the afternoon and between the hours of two o'clock and four o'clock in the afternoon of the days at the County Election Office. Part (e) of the notice stated that the day for submission of nominees of the party lists under Article 98 (1) (b) (c) and (d) would be held on the 31st January 2013 at IEBC offices. Part (f) states that if the elections are contested, the poll will take place on the 4th March 2013.* In compliance with the said Notice, TNA underwent the process as per their party regulations as stated by the Petitioner and the 1st Respondent and the party officials submitted their party lists on the 30th January 2013 and thus complied with the Gazette Notice No 19653.

TNA was required to comply with sections 34, (1), (3) and (5) of the Elections Act. This petition concerns Women Nominated Senators as provided under Article 98 (1) (b) of the Constitution. Under subsection (1) of the Elections Act, TNA was to comply with provisions of Article 90 of the Constitution. Article 90 (1) states that election for the seats in Parliament provided under 98 (1) (b) (c) and (d) shall be on the basis of proportional representation and by use of party lists. Under Sub article (2) IEBC was responsible for the conduct and supervision of Elections and was to ensure under sub article 2 (b) that except in the case of the seats provided for under Article 98 (1) (b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and under sub article (2) (c) except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

Under Rule 54 (1) each political party was to submit to the Commission a party list of all persons who would stand elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with Article 90 of the Constitution and Sections 34, 35, 36 and 37 of the Elections Act. Under Rule 54 sub rule (2) of the Elections (General) Regulations 2012, the party list was to contain the name, address, age, sex, disability and category of disability, phone number, occupation, elective post sought and such other qualifications as are provided under the Constitution and the Act. In compliance with this section 35 and Rule 55 (1) the Election (General) Regulations and section 73 of the TNA Nomination rules, TNA submitted a list to the 2nd Respondent with a cover letter dated 29th January 2013 with the title "**FINAL PARTY LIST"** which had the following nominees as listed below.

NO.	NAME OF NOMINEE	CATEGORY	ETHNICITY OF NOMINEE
1	Beth Mugo	N/A	Kikuyu
2	Emma Mbura Getrude	N/A	Mijikenda
3	Lydia Mathia	Youth	Kikuyu
4.	Joy Adhiambo Gwendo	Youth	Luo
5.	Naisula Lesuuda	Youth	Samburu
6.	Suleka Hulbale Harun	Youth	Somali
7.	Joyce Kemunto Mongari	N/A	Kisii
8.	Saadia Abdi Kontoma	Ethnic Minority	Ajuran Somali
9.	Rose Kisama	N/A	Masaai
10.	Hubbie Hussein Al Haji	N/A	Somali
11.	Rose Maritim	N/A	Kalenjin
12.	Wanyoike Irene Njeri	N/A	Kikuyu
13.	Sera Shiloo Tipis	N/A	Masaai
14.	Lucy Mugwere	N/A	Kikuyu

Rule 55 (2) states that the Commission may reject any party list that does not comply with the requirements of the Constitution, the Act or the Regulations. Sub rule (3) states that the political party whose list or nominee has been rejected by the Commission under sub regulation (2) shall resubmit the party list or nominee within the period as the Commission may specify. From the sequence of events which I gather from the affidavits and the evidence of the parties, TNA submitted the above list to IEBC on the 30th January 2013 through its letter dated 29th January 2013.On the 22nd February 2013 (the letter referred to is at page 97 of the Petitioners exhibits) TNA responded to a clarification sought by the IEBC .I note that the letter IEBC wrote to TNA was not exhibited by any of the parties. I find it necessary to reproduce the said letter at this stage.

*"**We would like to seek your indulgence on the application of some rules set out by the IEBC on the Parliamentary Party lists as submitted to yourselves for the purpose of the March 4th General Election.** [*emphasis is mine*]According to the rules released by the IEBC with respect to the Senate and National Assembly lists no more than one person should be registered in the same county.*

In as much as we agree with the commission on the aspiration to have regional and ethnic diversity, we feel that this requirement does not meet its own objective. As you are aware many Kenyans opted to register as voters at their places of work due to the fact that they could not travel to their home counties during the voter registration period. As a result many registered in Nairobi and other major cities.

We feel that this requirement possess a great disadvantage to those who chose to register as voters especially in Nairobi County.

Despite having more than one of our nominees registered in the same county, they indeed represent ethnic and regional diversity in addition to representing special interest .In our Party List for the National Assembly, the first nominee, Hon Amina Abdalla is classified as a worker and an ethnic minority (Kenyan Arab) with her home county being Garissa. This is despite her being registered as a voter in Nairobi County. The second nominee, Mr Sakaja Johnson represent in Nairobi due the fact that as the National Chairman of the party, he was deeply engaged in party affairs. Nominee No 5 Linda Muriuki is a registered voter in Nairobi but Home County in Meru.

In the case of Senate Party List Nominee 1,5, and 8 represent different regions and ethnicities as nominees no 1 is a Kikuyu while No 5 is a Luo. Nominee 8 and 6 despite both having registered in Wajir County, represent different clans of the Somali Community whereby No.8 is a minority Ajuran.

In essence, the county where one is registered may not be a good measure of regional diversity .We therefore would urge your good office to consider other factors such as county of origin as a better measure of regional diversity in the case of these lists"

Then there is the letter dated 16th March 2013 that was addressed to the 2nd Respondent by TNA party.

"Kindly note that owing to the legal requirements for regional, ethnic and gender balance expected while compiling the party list and the need for a representative balancing within the jubilee Coalition the party has since re-arranged its party list .This is executed to enable the party achieve this Constitutional requirement as well as to offer representation for areas not covered by the coalition partners. [Emphasis is mine]

In this regard please do find enclosed herein our comprehensive party list for your attention and prompt action; this list is to be read together with the earlier list as relate to youth and persons with disability .Kindly treat this as the final list"

What I can infer from these two letters and the list as a whole is that TNA as a party did not adhere to the provisions of the Constitution and Elections Act Section 34 (3). I make this conclusion because in these letters TNA is seeking indulgence on the application of some rules set out by the IEBC on the Parliamentary Party lists as submitted by themselves for the purpose of the March 4th General Election and is also asking IEBC to consider other factors such as county of origin as a better measure of regional diversity in the case of their lists. In the letter dated 16th March 2013 TNA sought to substitute the earlier list that had been presented to the 2nd Respondent that complied with the directions of IEBC. The Petitioner's argument is that the list as submitted was valid and therefore IEBC ought to have acted on it. On the other hand IEBC's argument is that the list did not comply with the provisions of Article 90 (2) (c) of the Constitution in that it did not reflect the regional and ethnic diversity of the people and that they had the mandate as provided under Article 90 coupled with the provisions of section 36 (4) of the Elections Act 2011 to designate from the qualifying list the party representatives on the basis of proportional representation. Article 90 (2) (c) states that each party list was to reflect the regional and ethnic diversity of the people of Kenya.

When I look at the list submitted by TNA I note the following; that the category column was incomplete and on ethnicity column, there are ethnic communities that had more than one candidate Kikuyu-4, Somali -3, Maasai-2, Kalenjin-2, Samburu-1, Mijikenda-1, and Kisii-1. Rule 83 of the TNA Nomination Rules states that "*The senate women party list names shall be listed in the alternate between a woman youth and woman who is not a youth in order of priority*" and Rule 84 states that "*the senate women party list shall reflect the ethnic diversity of Kenyans"* .The party list as show in the table above fails to comply with the party rules.

In seeking clarification from TNA in February 2013, IEBC as an administrative body was complying with the requirements imposed on them by law even though I note that this was done after the 31st January 2013.My understanding of Rules 55 (2) and (3) is that IEBC should have rejected the list and asked TNA to resubmit another list in compliance with the requirements that IEBC had sought from TNA. Article 90 (2) (c)bestows upon IEBC the responsibility of ensuring that the party lists met certain criteria set out in the Constitution and legislation .The political parties themselves just as any other person or state organ are bound to observe all provisions of the Elections Act and the Constitution. In the case of **Commissioner for Implementation of the Constitution vs.-AG & Another [2013]e KLR,** the Court of Appeal held that**,** "*The legal framework for the nomination of candidates to the Senate ,National Assembly and County Assembly was intended to inject equity ,rationality, objectivity and inclusivity into the nomination process……As concerns nomination of members of the National Assembly, Senate and County Assembly the exercise of discretion by political parties was required to promote gender equity and also regional diversity in accordance with the provisions of Article 90 of the Constitution of Kenya .The requirement for the lists to reflect the regional and ethnic diversity of the people of Kenya meant that to ensure that no ethnic group or region of the country dominates the list provided by the parties"*. Further, in the case of **National Gender & Equality Commission –vs. Independent Electoral and Boundaries Commission & Anor [2013] e KLR** the court held that, "*IEBC is obliged in accepting the party lists to ensure that the provisions of the statute are adhered to Regulation 55 (2) of the General Regulation which empowers IEBC to ensure that the party lists comply with the requirements of the Constitution, the Elections Act 2011 and the regulations.*"

With these two cases in mind, I find as follows; IEBC as an administrative body should act fairly reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or tribunal. The elections by way of party lists commenced when different political parties presented their party lists and concluded upon gazettement of the nominees who had met the requirements of Article 90 (2) (c).Section 36(4) of the Election Act states that, "*Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation*". What this court deduces from section 36(4) of the Elections Act is that the lists that had been presented to the 2nd Respondent were valid and that it was incumbent upon the 2nd Respondent to designate the representatives on the basis of proportional representation. It is not the Petitioner's contention that the list was not valid. This section does not state that it had to be in **order of priority** in the party list rather the words used were **qualifying lists**. Article 90 (2) (b) of the Constitution states that except Article 98 (1) (b) (which refers to women members nominated to the Senate) the party list shall comprise the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed. The plain meaning of this sub article is that with the women nominated to the Senate IEBC had the mandate to designate, bearing in mind regional and ethnic diversity of the nominees and not necessarily looking at the order of priority in which nominees were listed.

Looking back at Rule 54 (1) (5) which states that, "The *Commission may reject a nominee submitted by a political party for any elective post if that nominee is not qualified to be elected to the office for which the nomination is sought as specified under the Constitution or the Act*", and further, under sub rule 6 clarifies that, "*The rejection by the Commission of a nominee under this regulation shall not invalidate the entire party list submitted by the political party*." It is not in dispute that the 1st and 3rd Nominees from the TNA party list are from the same ethnic group. The slots available for TNA were only four and given that there were other nominees in the list presented by TNA it was incumbent upon the 2nd Respondent to look at the list and designate the nominees in line with the provisions of the Constitution

under Article 90. It is also not in dispute that TNA as a party in letters dated 22nd February 2013 and 16th March 2013 respectively acknowledged that it did not follow the 2nd Respondents rules and regulations and sought to be indulged. This, in essence gave the 2nd Respondent the mandate to ensure that the nominees who were eventually going to be designated were in tandem with Article 90 (2)(c) of the Constitution. The 2nd Respondent supported their decision by stating that in a bid to ensure that ethnic balance was maintained it replaced the Petitioner a Kikuyu with the 1st Respondent a Samburu who was the next person on the nominee's list being Number 5. This court also notes that both the Petitioner and the 1st Respondent were both listed under the category of youth. Therefore the realisation of Article 90 (2) (c) did not matter the category but the region and the ethnicity. The court also notes that the TNA party list did not pay much attention to the category of its nominees but on ethnicity.

In the **Raila Odinga &Others –vs The Independent Electoral and Boundaries Commission &Others [2013]e KLR case** it was held that, "*When interpreting legislation relating to Elections one may reasonably conclude the primary purpose is to ensure that there are free open and properly conducted democratic Elections. A Petitioner is not only required to establish that there were irregularities which were committed during the Elections but must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. Apart from that, the Petitioner is required to establish that the errors and irregularities were either occasioned by outright, negligence or a deliberate action on the part of the 2nd Respondent…..Courts will strive to preserve an election as being in accordance with the law, even where there have been noteworthy breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. This is because where possible, the Courts seek to give effect to the will of the people*". This Supreme Court decision guides and binds this court in its decision making when considering IEBC's role in supervising, conducting and regulating elections as provided under the Elections Act and the Constitution.

I have already stated that IEBC had the mandate to designate the party lists. To designate means, as per the **Blacks Law Dictionary 6th Edition** to mean "*To indicate, select, appoint, nominate or set apart for a purpose or duty as to designate an officer for a command. To mark out, to make it known, to point out, to name"*. Another definition of designate is from **Oxford Advanced Learners Dictionary of Current English AS Hornby, 1974** which defines designate as "*appoint to position of office"*. **Concise Oxford English Dictionary 11th Edition, Revised** defines designate to mean, give a specified name, position, status, appointed to an office or position but not yet installed. What IEBC did in this case was to nominate or appoint to position of office the 1st Respondent. IEBC did not rearrange the party list of TNA nor did it amend the list. It dealt with the qualifying list. Although IEBC did not specifically state in its minutes that they were using the mandate under Article 90 of the Constitution to designate and appoint the 1st Respondent in place of the Petitioner, goes without saying that the application of the principle required of the 2nd Respondent affected the Petitioner which cannot be equated to a breach on the part of the 2nd Respondent. The court noted that the 2nd Respondent overlooked some of the requirements expected of them when it comes to replacement of a nominee as required of it under Rule 54 (7) of The Elections (General) Regulations 2012, but they are insulated by Section 83 of the Elections Act which provides thus: "*No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.*". In reaching my findings on the IEBC's mandate, I am guided by the Court of Appeal decision in the case of **National Gender & Equity Commission –vs- IEBC [2013] e KLR where** the court held that, "……..*we think that laying down definitions of the various terms that govern allocation of seats would be limiting the authority of IEBC to do what it is required to do under the Constitution*". Further, In the case of **Mokotso v H M King Moshoeshoe II (1989) LRC 24** Cullinan C.J, sitting in the Lesotho High Court stated that "*The Courts will endeavour to construe Acts of Parliament so as to avoid a preposterous result; but if a statute clearly evinces an intention to achieve the preposterous, the courts, are under an obligation to give effect to its plain words*." I agree with the 2nd Respondents submissions that the principle of hierarchy of laws means that Statute must be interpreted in such a way that it does not conflict with the Constitution and likewise subsidiary legislation like regulations must be interpreted in such a way that they do not conflict with statutory provisions. In the Ghanaian case of **Medhurst v Lough Casquet [1901] 17 LTR 210**, Kennedy J said that, "*An election*

ought not to be held void by reason of transgression of the law committed <u>without any corrupt motive</u> by the returning officer or his subordinate in the conduct of the election where the court is satisfied that the election was, notwithstanding those transgressions…..". I note that there was no corrupt motive on the part of IEBC in the decision that they made and that they endeavoured to comply with the existing election Laws as provided under the Elections Act and the Constitution. Further in the Canadian case of **Ted Opitz (Appellant) v Borys Wrzesnewskyj 2012 SCC 55,** the Supreme Court of Canada held in an election petition that, *"The practical realities of election administration are such that imperfections in the conduct of Elections are inevitable".* Lastly within our jurisdiction in the case of **National Gender & Equity Commission –vs- IEBC [2013] e KLR** the court held that, *"we think that laying down definitions of the various terms that govern allocation of seats would be limiting the authority of IEBC to do what it is required to do under the Constitution".*

In my view, by holding that the 2nd Respondent could not designate as it did in this case, this Court would be limiting the 2nd Respondent from doing what it was required to do under the Constitution thus, defending the Constitution as required under Article 3 (1) of the Constitution. Political Parties are guided by the Elections Act on how to nominate their members by considering the regional and ethnic diversity and in doing so, comply with the provisions of Article 10 on national values and governance. If a political party fails to do so then it is only appropriate for IEBC, which has the mandate to conduct, supervise and regulate elections, to step in and ensure compliance in accordance with the provisions of the Constitution and election laws. I agree with the 2nd Respondents submissions, that the Petitioner is now estopped from asserting or claiming that the 2nd Respondent lacks that same mandate to ensure ethnic and regional diversity.

I conclude by saying that the Petitioner has failed to prove that the 2nd Respondent did not have the mandate or discretion, pursuant to the provisions of the Constitution and Elections Act 2011, to substitute the names of the Petitioner with that of the 1st Respondent in the list of women members nominated to the Senate by The National Alliance [TNA] imposed by the Constitution.

<u>ISSUE NO. 2 Whether the 1st Respondent herein was validly elected /nominated as a member of the senate.</u>

There is an issue that the Petitioner raised of the 1st Respondent not being a registered member of TNA party and the 1st Respondent continuously defended herself during the hearing and in her pleadings too. Although this issue was raised by the Petitioner, she did not plead the same in her petition. A party is bound by their pleadings. This has been expounded by a petition court in the case of **Mahamud Muhumed Sirat V Ali Hassan Abdirahman And 2 Others Nairobi Petition No. 15 OF 2008 [2010] eKLR** where Kimaru J, in asking parties to conform to their pleadings stated that, "*It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the Petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the Petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition*." This court wholly associates itself with the sentiments of the learned judge and also agrees with the submissions of the 1st Respondent that a party is not allowed to introduce new matters and ambush the respondents unless the matter can be said to be founded on the existing pleadings. Be that as it may, had this issue been pleaded by the Petitioner, this court would have dismissed the same on the grounds that this should have been dealt with at the pre-nomination stage. Further, Sections 2 and 73 of TNA Nomination Rules must have been adhered to by the National Oversight Committee and the fact that the 1st Respondent had been shortlisted by TNA in the nomination list; it is presumed that she is a registered member of the party. The 1st Respondent testified that she registered at the TNA offices in her County in Samburu. Section 17 (1)(a) of the Political Parties Act states that, *"A political party shall maintain at its head office and at each of its county office in the prescribed form an accurate and authentic record of a register of its members in a form prescribed in the second schedule*. Further Section 18 (1) of the Political Parties Act state that the Registrar may issue a written notice in the prescribed form to the chairperson or secretary general of a political party to furnish

for inspection by the Registrar the records required to be maintained under section 17 or such information as is reasonably required by the Registrar to ensure compliance with the provisions of this Act. This confirms that each political party was a custodian of the registers of their members. The Petitioner admitted that the list that contained the 1st Respondent was valid; it therefore begs the question why she would not have an issue with the validity of the list but still claim that the 1st Respondent was not a member of TNA party. This court notes that on 29th July 2013 Mr Wanyaga holding brief Mr Kibe Mungai sought from this court to issue summons to the Registrar of the Political Parties so that she could come produce the document **"LM1"** in accordance with Section 35 of the Evidence Act .The Petitioner during the hearing declined to allow the witness to produce the document on the 1st Respondents membership; therefore, she is estopped from making the claim that the 1st Respondent is not a registered member of TNA party. A keen reading of the TNA Constitution, specifically Article 4 on membership, is evident that the 1st Respondent was cleared by the National Oversight Board to apply for nomination and subsequently shortlisting her for the position of the women nominated to Senate.

Having reached the above conclusion, the question this court will have to deal with is whether the 1st Respondent was validly nominated. The process of nomination was finalised at the time the 2nd Respondent exercised its mandate under Article 90 of the Constitution which issue I have dealt with in the first issue. I therefore find that the 1st Respondent was validly elected and nominated as a member of Senate in compliance with Article 88 (4) (d),90 and 98 (1) (b) of the Constitution.

Who pays the costs?

Costs usually follow event. Pursuant to Rule 34(1) (a) of The Elections (Parliamentary and County Elections) Petition Rules 2012, this court is granted power to specify the total amount of costs that shall be paid in a petition. This court recognises the participation, in terms of time, research, preparation of pleadings and the time spent in court during the actual hearing of the case and submissions. This court also recognises that the Petitioner and 1st Respondents are still both TNA members who have a duty to support their party in cohesion and governance of not only their party but the country as a whole. The Petitioner has lost in this Petition while the 1st Respondent has maintained her nomination of women nominated as Senator. The 2nd Respondent exercised its mandate bestowed upon it by the Constitution of Kenya which this court has upheld its decision. With this in mind in exercising my discretion, I order that each party bears their own costs. In that regard, the sum that was deposited in court shall be refunded to the Petitioner forthwith.

Orders accordingly.

I wish to thank Counsels for their preparations, arguments and submissions.

Dated, signed and delivered in Court this 27th day of September 2013

R.E OUGO

JUDGE

In the presence of:-

Mr Kibe Mungai ……..……for the Petitioner

Mr.Charles Kanjama ……..for the 1st Respondent

Mr Waweru Gatonye/Mrs Imende…… for the 2nd Respondent

Mary Kamau……..Court Clerk