



**Torome v IEBC & another (Constitutional Petition E015 of 2023)
[2025] KEHC 1428 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CONSTITUTIONAL PETITION E015 OF 2023
F GIKONYO, J
FEBRUARY 14, 2025**

BETWEEN

JOSPHINE SENEYO TOROME PETITIONER

AND

IEBC 1ST RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF NAROK 2ND RESPONDENT

JUDGMENT

IEBC not properly constituted

1. The Petitioner sought the following orders in her Petition dated 7th December, 2023:
 - a. A declaration that the Petitioner is the next female person that is eligible to be elected as a member of the Assembly of the County of Narok under the said gender-top up category following the nullification of the election of Alice Chepkirui Kering.
 - b. An Order of Mandamusdo issue against the 2nd Respondent to declare position held by Alice Chepkirui Kering as vacant within seven (7) days from the date of Judgement and thereafter proceed within 24 hours of the said declaration to swear in the Petitioner into office as the duly nominated Member of the County Assembly of Narok under the Gender Top Up List representing Jubilee Party.
 - c. An Order that failure of compliance with order 2 above within the stipulated time, the Petitioner be deemed as having been elected and she be at liberty to take her position as the Member of the County Assembly of Narok under the Gender Top Up List representing Jubilee Party.
 - d. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.



- e. Costs of this Petition be awarded to the Petitioner.
2. The petition was supported by the petitioner's affidavit which grounds were also augmented through written submission filed hereto.
3. The Petition is opposed by the 1st Respondent who has filed the Grounds of Opposition dated 18th December, 2023 and Replying Affidavit sworn by Chrispine Owiye on 21st December, 2023.

Background

4. The Petitioner filed the Election Petition, Narok Chief Magistrates' Election Petition No. E003 of 2022 Josephine Seneyio Torome v The Independent Electoral and Boundaries Commission & 5 Others, challenging the election of Alice Chekirui Kering as a Member of the County Assembly of Narok under the category of special 2 seats (Gender Top-up). The Election Trial Court (Hon. Phyllis Shinyanda) delivered its Judgement on 9th March, 2023 and allowed the Petitioner's Petition and thus nullified the election of the said Alice Chepkirui Kering in the following terms:
 - a. That the nomination of the 2nd Respondent, Alice Chekirui Kering, as a Member of the County Assembly of Narok under the category of special seats (Gender Top-up) is null and void.
 - b. That an order is hereby issued quashing and/or invalidating Special Gazette Notice Vol. CXXIV- No. 186 of 9th September, 2022 to the extent that it specifies that the 2nd Respondent is validly nominated and/or elected member of Jubilee Party to the County Assembly of Narok.
 - c. That an order is hereby issued to the 1st Respondent to re-consider and nominate the appropriate gender top-up candidate to the 4th Respondent in accordance to the list of persons submitted to it by the 3rd Respondent in full appreciation that the said person to be so nominated must be a resident and a voter from the County of Narok.
 - d. That since the party lists submitted to the 1st Respondent is required under section 34 (10) of the Elections Act not to be amended during the term of Parliament, I certify and order the 1st Respondent to re-allocate the gender top-up seat to the next female Narok County registered voter in the said list from which the 2nd Respondent was gazette in accordance with the provisions of section 37 of the *Elections Act*.
 - e. That the Petitioner is hereby awarded the costs of the Petition capped at Kshs. 600,000/= payable by the 1st and 2nd Respondents.

Petitioner's submissions

Whether Petitioner is next female person eligible to be elected as a MCA, County of Narok

5. According to the petitioner, in compliance with Regulation 54 of the Elections (General) Regulations, 2012, the 1st Respondent published at page 87 of the issue of the Standard Newspaper of 27th July, 2022 the Jubilee Party List for the Gender Top Up Category with respect to Narok County Assembly in which the following persons are listed as eligible to nomination in the order in which they are listed:



NO	Name	Gender	Status of Nomination/ Election
1.	Maria Kiserian Meriki	Female	Elected and sworn-in
2.	Wilson Siraa Nantama	Male	Not eligible for election
3.	Alice Chepkirui Kering	Female	Election nullified
4.	Micheal Kipkemoi Ng'erechi	Male	Not eligible for election
5.	Daniel Kararon Tsur	Male	Not eligible for election
6.	Linda Katimwa Ntutu	Female	Elected and sworn-in
7.	Tyson Leteipa Masompe	Male	Not eligible for election
8.	Immaculate PISOI Sonkoi	Female	Elected and sworn-in
9.	Philip Lenkume Ndalania	Male	Not eligible for election
10.	Torome Seneyio Josphine	Female	Eligible for election and swearing-in after nullification of the election of Alice Chepkirui Kering
11.	Daniel Olesakarri Lemayian	Male	Not eligible for election
12.	Christine Seeta Kodonyo	Female	
13.	Joy Nentaya Karia	Female	
14.	Dominic Tira Dukirr	Male	Not eligible for election



15.	Florence Motosio Koshal	Female	
16.	Sointa Kuyoo Parkire	Female	
17.	Doris Nairesiae Kurisha	Female	
18.	Chepkorir Ednah	Female	
19.	Namunyak Enole Olololiyo	Female	
20.	Emily Sanoyia	Female	
21.	Alice Kashu	Female	
22.	Mary Njoki Wangai	Female	
23.	Lucy Tiges Kinayia	Female	

6. Following the performance of Jubilee Party in the elections conducted on 9th August, 2022, Jubilee Party became entitled to nominate four (4) women under the Gender Top-Up Category. Therefore, in accordance with the above list, the 1st Respondent vide Gazette Notice Vol CXXIV- No. 186 of 9th September, 2022 notified the public of the election of the following as duly nominated MCAs under the Gender Top-Up Category:
- a. Maria Kiserian Meriki
 - b. Alice Chepkirui Kering
 - c. Linda Katimwa Ntutu
 - d. Immaculate Pisoni Sonkoi
7. To her, therefore, pursuant to section 34 (10) of the Elections Act and the gazetted Party List for Jubilee Party with respect to the Gender-Top Up category, the Petitioner is the next female person that is eligible to be elected as a member of the Assembly of the County of Narok under the said gender-top up category following the nullification of the election of Alice Chepkirui Kering. This position has since been confirmed through the letter dated 21st November, 2023 from Jubilee Party.
8. The petitioner was of the view that the above facts are undisputed. Nowhere in their said Responses has the 1st Respondent discredited the fact that the Petitioner is the next female person that is eligible to be elected as a member of the Assembly of the County of Narok under the said gender-top up category following the nullification of the election of the Interested Party.

Whether this suit is sub-judice

9. At paragraph 2 of the said Grounds of Opposition as well as at paragraphs 9-10 of the Replying Affidavit of Chrispine Owiye, the 1st Respondents argues that this Petition is sub-judice given the alleged pendency of Nakuru Court of Appeal, Election Appeal No. E001 of 2023 Alice Kiplirui Kering



v Josephine Seneyio Torome & Others which is an appeal from this Court’s Judgement in Narok High Court Election Petition Appeal No. E002 of 2023 Alice Chepkirui Kering v Josephine Seneyio Torome & 5 Others. However, the 1st Respondent’s arguments on sub-judice are misplaced for the following reasons:

- a. It is true that following the delivery of Judgement of this Court in Narok High Court Election Petition Appeal No. E002 of 2023, the Interested Party moved to the Court of Appeal and sought to challenge the said decision in Nakuru Court of Appeal, Election Appeal No. E001 of 2023. Additionally, the Interested Party also filed in Nakuru Court of Appeal, Civil Application No. E078 of 2023 Alice Chepkirui Kering v Josephine Seneyio Torome & 5 Others, a Notice of Motion Application dated 20th September, 2023 seeking to stay the execution of this Court’s decision.
- b. Soon after the Petitioner was served with the Appeal pleadings in Nakuru Court of Appeal, Election Appeal No. E001 of 2023 and Nakuru Court of Appeal, Civil Application No. E078 of 2023, she filed a Notice of Preliminary Objection dated 27th September, 2023 and raised the following objections against the said Appeal:
 - i. That as it is trite that a second appeal does not lie from the High Court in its appellate jurisdiction concerning the validity of an election of a Member of County Assembly, the Court of Appeal lacks jurisdiction to hear and determine the instant Application.
 - ii. That consequently, the instant Application as well as the Notice of Appeal dated 11th September, 2023, both filed by the Applicant herein should be struck off with costs to the 1st Respondent.
- c. Parties thereafter filed Submissions on the Petitioner’s said P.O and the Court of Appeal delivered its Ruling on 8th March, 2024 in Nakuru Court of Appeal, Civil Application No. E078 of 2023 and allowed the said P.O with costs to me. Accordingly, Nakuru Court of Appeal, Election Appeal No. E001 of 2023 was terminated and/or struck out.
- d. In the circumstances, following the said Ruling, there is no appeal pending against the decision of this Court Narok High Court Election Petition Appeal No. E002 of 2023 as alleged by the 1st Respondent.

Implementation of the Election Court’s and this Court’s Judgement as well as the Certificate under section 86 of the [Elections Act](#)

10. At paragraph 1 of the said Grounds of Opposition as well as at paragraphs 2-8 of the Replying Affidavit of Chrispine Owiye, the 1st Respondent has stated that it is unable to enforce the Judgement and Decree of this Court issued in Narok High Court Election Petition Appeal No. E002 of 2023 on the supposed reason that it is not properly constituted and/or quorated to publish any Gazette Notices for any election and/or nomination as sought in this Petition.
11. To this end, the 1st Respondent has argued that the Judgements of both the Election Court in Narok Chief Magistrates’ Election Petition No. E003 of 2022 and this Court in Narok High Court Election Petition Appeal No. E002 of 2023 did not declare the petitioner as the appropriate candidate to take over the vacated seat previously occupied by the Interested Party, that is, a Member of the County Assembly of Narok under the category of special seats (Gender Top-up). According to the 1st Respondent, it is yet to conduct a reconsideration and nomination of an appropriate candidate in strict conformity to the law as was ordered by the Election Court and this Court due to lack of Commissioners.



12. The petitioner viewed the 1st Respondent's above arguments as disingenuous as nothing stops either of the Respondents herein from implementing the Election Court's and this Court's Judgement as well as the Certificate under section 86 of the [Elections Act](#).
13. By a letter dated 29th November, 2023, all the above issues were brought to the attention of both Respondents. However, the 2nd Respondent through its Head of Legal Services responded through its letter dated 29th November, 2023 and equivocally stated that it would not accede to the Petitioner's demand until the 1st Respondent gazettes the Petitioner as the rightful elected member of the County Assembly of Narok under the Gender Top-Up Category and/or a Court Order issues directed to it to declare as vacant the seat previously occupied by the Interested Party and proceed to rightfully swear-in the Petitioner.
14. It is a matter of public notoriety by the time Narok High Court Election Petition Appeal No. E002 of 2023 was determined, all the Commissioners of the 1st Respondent were no longer in office for various reasons ranging from retirement, resignation and removal from office. It is also not in doubt that in the absence of the Commissioners, the 1st Respondent cannot be said to be properly constituted. Indeed, as matters currently stand, it is not certain if and when the 1st Respondent will be reconstituted.
15. As is evident from the Court's record, the final determination of the Election Court and which determination was upheld by this Court was that the 1st Respondent was ordered to:
 - i. re-consider and nominate the appropriate gender top-up candidate to the Narok County Assembly in accordance to the list of persons submitted to it by the Jubilee Party in full appreciation that the said person to be so nominated must be a resident and a voter from the County of Narok.
 - ii. since the party lists submitted to the 1st Respondent is required under section 34 (10) of the [Elections Act](#) not to be amended during the term of Parliament, I certify and order the 1st Respondent to re-allocate the gender top-up seat to the next female Narok County registered voter in the said list from which Alice Chepkirui was gazetted in accordance with the provisions of section 37 of the [Elections Act](#).
16. In the view of the petitioner, the matter of who is the next female that the 1st Respondent ought to re-allocate the gender top-up seat vacated by the Interested Party is fairly straightforward which does not require the sitting of the 1st Respondent's commissioner but one in which only requires a look at the Jubilee Party List for the Gender Top Up Category with respect to Narok County Assembly that was published by the 1st Respondent at page 87 of the issue of the Standard Newspaper of 27th July, 2022. Thereafter, the 1st Respondent's CEO will take notice of persons that were nominated as MCA's under the Gender Top-up Category and take into account that following the performance of Jubilee Party in the elections conducted on 9th August, 2022, Jubilee Party became entitled to nominate four (4) women under the Gender Top-Up Category.
17. The petitioner concluded that, by simple analysis, the undisputable conclusion is that the Petitioner is the next female person that is eligible to be elected as a member of the Assembly of the County of Narok under the said gender-top up category following the nullification of the election of the Interested Party.
18. The 1st Respondent's insistence on the issue of gazettelement before the Petitioner can be sworn-in is not only unreasonable but also violates the Petitioner's rights under Article 81 and 82 of [the Constitution](#).
19. This Court sitting in Nyamira (Hon. Lady Justice Winfrida Okwany) delivered a landmark decision on 31st October, 2023 in Nyamira High Court Petition No. E005 of 2023 Michelle Kemuma Omwoyo



v Independent Electoral & Boundaries Commissions and the Speaker, Nyamira County Assembly wherein:

- a. Just as in the present situation, the Petitioner in Nyamira High Court Petition No. E005 of 2023 had successfully challenged the election of the individual who had previously been elected as the Jubilee Party Representative in the Gender Top Up List for Member of County Assembly of Nyamira.
- b. However, and as is also in the instant case, at the time when the appeal process had been exhausted and the 1st Respondent herein was ordered to facilitate the election of the Petitioner in Nyamira High Court Petition No. E005 of 2023 as the duly elected Jubilee Party Representative in the Gender Top Up List for Member of County Assembly of Nyamira, the 1st Respondent was not properly constituted.
- c. The High Court in Nyamira therefore directed the Speaker of the County Assembly of Nyamira to swear in the said Petitioner despite the prevailing non- constitution of the 1st Respondent. The High Court in Nyamira held that there is no requirement for gazette ment before the swearing in of an eligible candidate who had already been duly nominated and part of the requisite Party List.
- d. For avoidance of doubt, the following is the relevant portion of the decision of the High Court in Nyamira:

58. While this Court appreciates the fact that the Constitution and the IEBC Act did not envisage a situation where there are no IEBC Commissioners, thereby holding all its functions in abeyance, the court is also aware of its duty to provide answers or remedies to aggrieved parties. I therefore find that the court cannot ‘fold its hands’, remain helpless and watch the glaring prejudice that has been occasioned to the Applicant/ Petitioner herein who has been unable to assume her office as an MCA despite the existence of a valid court orders merely because she has not been gazzetted. What then is the purpose of gazette ment? Is it a mandatory legal requirement? Is it a mere formality?

59. The answer to the above question can be found in the decision by the Court of Appeal in Nderitu Gachagua vs Dr. Thuo Mathenge & 2 others Civil Appeal No. 14 of 2013 (Nyeri), where the learned judges explained the purpose of a gazette notice and held thus:

“The court observes that the Gazette is an official document of the Government of Kenya in which official matters including official notices by the Government are published. Any notice published in the Gazette is deemed as notice to the general public and one is barred from pleading ignorance of the same.”

60. Section 69 of the *Interpretation and General Provisions Act*, Chapter 2, Laws of Kenya provides that: -

‘69. The production of a copy of the Gazette containing a written law or notice, or of copy of a written law or notice purporting to be printed by the Government printer shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.’

61. Section 85 of the Evidence Act provides thus: - “85. Gazette, etc., to be prima facie evidence.



The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.”

62. The above provisions and cited cases posit that a gazette notice is evidence, at face value, of the existence of a law or a notice that has been duly formulated. This implies that a gazette notice merely brings to the attention of the public, information or a law or a directive. In simple terms, a Gazette notice is an official communication or a formal expression of the existence of the notice or law.
63. In *Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Another* (2012) eKLR Odunga J. (as he then was) considered the import of gazette and held thus: -
“What this implies is that, in absence of proof to the contrary, the Gazette notice becomes a formal expression of the existence of the notice or law in question. The Gazette does not, as it were, constitute the notice or the law itself but rather the official announcement of its existence or coming into force. Such that the validity or otherwise of a law or notice is not resident in the Gazette but the persons or bodies tasked with the responsibility to make such laws or issue such notices in accordance with the law and the Constitution. The Gazette merely confers a seal of authority or officialdom to existence of the notice or the law.” (Emphasis added)
64. The 2nd Respondent argued that since the 1st Respondent is not duly constituted, the office of the Speaker of the County Assembly had not been served with the requisite certificate to enable it declare a vacancy in the seat in contention so as to swear in the Applicant. On its part, 1st Respondent argued that in the absence of the Commissioners, court orders for gazette cannot be complied with until such a time that the Commission will be constituted. My finding is that in the face of the uncontested fact that the 2nd Respondent was on 13th January 2023 served with the Certificate of Election issued by court, the Respondents’ insistence on gazette as a prerequisite to the swearing in is untenable. The Respondents’ argument amounts to an attempt to take advantage of the lacuna created by the absence of the Commissioners from office so as perpetuate an illegality.
65. I have considered the provisions of the County Government Act with respect to the process of assumption of office of Members of County Assembly. Section 7A of the said Act provides as follows: -
- 7A. County Assemblies to be duly constituted at first sitting
1. A county assembly shall not be fully and duly constituted for the first sitting after a general election unless all the members provided for under paragraphs (b) and (c) of Article 177(1) of the Constitution have been duly nominated and their names published in the Gazette.
 2. Sub-section (1) shall not apply where the nomination of a member of a county assembly under paragraphs (b) and (c) of Article 177(1) of the Constitution is the subject of a court order stopping or otherwise pending the nomination of the member.



3. Despite sub-section (1), a county assembly shall be deemed to be fully and duly constituted for first sitting notwithstanding the death, on or before the date of the first sitting of the county assembly, of a member nominated under paragraphs (b) and (c) of Article 177(1) of *the Constitution*.
66. My understanding of the above provision is that once members of the county assembly are nominated and/or elected, the IEBC publishes their names in the Kenya gazette to inform the public of the prospective office holders. I note that there is no mandatory provision to the effect that an MCA can only be sworn in after gazettelement. The gazettelement of the MCAs only serves to inform the public of the successful aspirants thereby marking the close the election process. The Supreme court discussed the subject of Nomination for county Assembly and the role of the IEBC in the of gazettelement of the nominees in the case of Moses Mucigi & 14 Others vs Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR as follows: -
- “[104] Section 36 (7) (8) and (9) of the Act, with regard to nominations for County Assembly, thus provides:
- “(7) For purposes of Article 177 (1) (b) of *the Constitution*, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.
- “(8) For purposes of Article 177(1)(c) of *the Constitution*, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.
- “(9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of *the Constitution*.”
105. It is clear from the foregoing provisions that the allocation of nomination-seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettelement of the nominees’ names by the IEBC, as an integral part of the election process.
106. The Gazette Notice in this case, signifies the completion of the “election through nomination”, and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates the returning officer’s mandate, and shifts any issue as to the validity of results from the IEBC to the Election Court.
- 107 It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and



shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of a County Assembly.” [Emphasis added].

67. The reasoning by the Supreme Court was that the substantive process of electing or nominating an MCA is what may be challenged in a court of law and that gazettment only serves the purposes of notifying the public of the outcome of the nomination. It is my view that the process of gazettment is merely an administrative task arising from an already concluded legal process. I find that gazettment cannot vitiate the status of a person who has been duly elected or nominated during an election process. This is the position that was adopted by Odunga J. (as he then was) in *Director of Public Prosecutions vs. Samuel Kimuchu Gichuru & Another* (supra), when he held thus: -
- “...In my view, unless the instrument in question expressly provides that an appointment thereunder is effective on gazettment, the gazettment is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment.”
68. In the said *Samuel Kimuchu Gichuru & Another* case (supra), the learned Judge referred to the decision by the Court of Appeal of Tanzania in *Catholic Diocese of Moshi vs. Attorney General* (2000) 1 EA 25 (CAT), where it was held that: -
- “The requirement that administration and remission orders made by the Minister under to statutory provisions (section 7(1) of the Customs Tariff Act of 1976 (Act 12 1976), and section 28(1) of the Sales Tax Act of 1976 (*Act 13 of 1976*), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation.”
69. Flowing from the above provisions and legal precedents, and considering the particulars of constitutional breaches outlined by the Applicant in the Petition, it is my considered view that it would be a travesty of justice to continue barring her from assuming the office that she was validly nominated to serve in on account of the pending the reconstitution of the IEBC whose timelines is currently unknown and/or indefinite.
70. _____
- have, in the same vein, considered the fact that as a court of equity, this Court should consider the peculiarity of the circumstances that the parties find themselves in where, for some unexplained reason, there is no properly constituted IEBC, and draw reference from the equity maxim which states that; “Equity sees as done that which ought to have been done”. The Respondents herein have not disputed that the Applicant would have been gazetted if the 1st Respondent was properly constituted. Indeed, the Applicant would have been gazetted immediately upon the determination of the suit in the Chief Magistrate’s Court on 11th January 2023 in which the nomination of Dolphine Nyang’ara was nullified. The lower court’s decision was upheld on appeal. I therefore find that there is no impediment or barrier to the Applicant’s swearing in and assumption of office. This Court takes the view that, in



the interest of justice and in circumstances of this case, the issue of gazettelement, which is not a legal prerequisite but an administrative formality/directive, may be by-passed or be deemed to have been done. I find that nothing should further stand in the way of the Applicant, who has been vigilant in pursuing her cause, from assuming her rightful place in office as an MCA. My finding is bolstered by the provisions of Article 177 of *the Constitution* which limits the term of an MCA to 5 years. The section provides that: -

177. Membership of county assembly

(4) A county assembly is elected for a term of five years.

71. I note that elections were held in August 2022 and this means that as at the time of delivering this ruling, more than 1 year has lapsed from the 5-year period that the Applicant is supposed to serving as an MCA. I find that it will be an affront to the rule of law and indeed a recipe for chaos/anarchy for a litigant to obtain a court order only for the order to be rendered superfluous on account of inability to secure publicity in the Kenya Gazette which, I have already found, is no more than directory. I am further guided by the maxim “Equity will not suffer a wrong to be without remedy”. My view is that, in the peculiar circumstances of this case, the issue of gazettelement should not be invoked so as to create a hurdle that ultimately prevents the Applicant from taking up her rightful position as an MCA of Nyamira County. I reiterate that gazettelement is merely a formality that serves as a notice to the general public of the Applicant’s nomination. In this case, one can say that the existence of court orders upholding the Applicant’s nomination is itself sufficient notice to the public of such nomination. It is trite that court orders are not issued in vain. I further find that in the circumstances of this case, the gazettelement of the Applicant is not necessary.

72. Having regard to the observations and findings that I have made in this ruling, I find that the application dated 29th June, 2023 is merited and I therefore allow it in the following terms: -

- a. An order is hereby issued directing the 2nd Respondent to immediately declare the position of Jubilee Party Representative in the Gender Top Up List for Member of County Assembly of Nyamira vacant.
- b. Upon declaring the position vacant in terms of the order in (a) hereinabove, the 2nd Respondent shall within 24 hours from the time of the delivery of this ruling proceed to swear the Applicant into office as a duly nominated Member of the County Assembly of Nyamira County, under the Gender Top Up list representing Jubilee Party.
- c. That in the event of failure to comply with order (a & b) above within the stipulated time, the Petitioner shall be deemed to have been duly elected and sworn in, in which case, she will be at liberty to take up her position as a Member of Nyamira County Assembly representing Jubilee Party under the Gender Top Up Category.
- d. The costs of this application shall abide the outcome of the Petition.”

20. Flowing from the decision above, it is clear that gazettelement does not, as it were, constitute the notice or the law itself on my election but rather the official announcement of its existence or coming into force.



21. Even more appalling, the petitioner submitted, is that while the 1st Respondent would want this Court to believe it is handicapped from giving effect to the Judgements of the Election Court and this Court on account of lack of Commissioners, it has in other similar cases such as the instant one gazetted other eligible persons in other Counties following successful Election Petitions against various nominations.
 - a. Through Gazette Notice No. 798 of 26th January, 2024, the 1st Respondent's CEO gazetted the re-allocation of special seats for two (2) nominated MCAs to the County Assembly of Nandi in implementation of the Ruling of the High Court at Kapsabet delivered on 23rd January, 2024 in Election Petition Appeal No. E001 of 2022; Lydia Matuli & Amani National Congress v IEBC, Esther Jemeli Misoi & Violet Enyimba Clement.
 - b. Through Gazette Notice No. 799 of 26th January, 2024, the 1st Respondent's CEO gazetted the re-allocation of special seats for thirteen (13) nominated MCAs to the County Assembly of Uasin Gishu in implementation of the Ruling of the High Court at Eldoret delivered on 23rd January, 2024 in Election Petition Appeal No. E002 of 2023; Wachira James Maina & 12 Others v Celestine Chepchirchir Mutai, IEBC & Others.
 - c. Through Gazette Notice No. 12898 of 4th October, 2023, the 1st Respondent's CEO gazetted the re-allocation of special seat for or Ms. Janet Lenaimalda to the County Assembly of Samburu in implementation of the Judgement of the High Court at Maralal delivered on 25th September, 2024 in Constitutional Petition No. E1 of 2024; Janet Lenaimalda v Abdi IEBC, IEBC Commission Secretary/CEO and Speaker, County Assembly of Samburu.
22. The petitioner urged the Court should also take judicial Notice that in the much-publicized proceedings before the three (3) bench of Judges in the case of Nairobi High Court Constitutional Petition No. E522 of 2024 as consolidated with Petition No. E506 of 2024, Petition No. E509 of 2024, Petition No. E525 of 2024, Petition No. E528 of 2024, Petition No. E537 of 2024 and Petition No. E541 of 2024 Rigathi Gachagua & 11 Others v The Speaker, National Assembly of Kenya & 7 Others; William Samoei Ruto & 4 Others (Interested Parties), it has been noted that through the Presidential Memorandum of Nomination of Candidate for Confirmation as Deputy President issued on 18th October, 2024, the President of Kenya sought for and received confirmation from the 1st Respondent that his nominee for Deputy President, Hon. Prof. Kithure Kindiki, is qualified to vie for election as Member of Parliament in accordance with Article 137 (1) of *the Constitution*. The President therefore annexed a Confirmation of Compliance from the 1st Respondent.
23. The petitioner quipped; if the 1st Respondent can accomplish all of the above actions and tasks, what stops it from implementing the decision of this Court as sought in the instant Petition?
24. The totality of the above is that the Respondents have violated the Petitioner's rights as guaranteed under Article 38 (3) (c) of the Constitution by preventing her from holding office even though she next female person that is eligible to be elected as a member of the Assembly of the County of Narok under the said gender-top up category following the nullification of the election of the Interested Party.
25. The Respondents have violated Articles 81 and 82 of the Constitution through their insistence on the issue of gazettement before the Petitioner can be sworn-in.
26. The 2nd Respondent has violated Articles 90, 100 and 177 of *the Constitution* as well as section 36 of the *Elections Act* by failing to designate, from the Jubilee Party list, the Petitioner as the Jubilee party representatives, on the basis of proportional representation.
27. According to the petitioner, taken as a whole, the acts and omissions of Respondents' in failing to facilitate the taking of office by the Petitioner as a duly elected Member of the County Assembly of



Narok under the Gender Top Up category does not only offend the rules of natural justice, but also be tainted with illegality, irrationality and procedural impropriety.

28. On the basis of the Respondents derelict in acting on the two (2) Judgements mentioned above as well as the Certificate under section 86 of the Elections Act and flowing from the 2nd Respondent's letter dated 29th November, 2023, there is need for an express order that the Petitioner be deemed as having been elected and she be at liberty to take her position as a Member of the County Assembly of Narok under the Gender Top Up category.
29. It would be a serious abdication of jurisdiction and the powers of this Honourable Court if it were to shy away from issuing orders against the Respondents herein who have acted in blatant disregard with the provisions of the Constitution of Kenya.

1st respondent's submissions

30. The 1st Respondent submits that the main issue that arises for the Court's determination is whether the 1st Respondent in particular has violated the Petitioner's Constitutional rights and has blatantly declined to enforce the judgment and decree.
31. The 1st Respondent submits that the Petition has been brought about because the judgement declaring the nomination of Alice Chepkirui Kering as null and void was not enforced, which actions have allegedly violated the Petitioner's Constitutional rights.
32. The 1st Respondent submits that this can only be far from the truth. The 1st Respondent submits that the judgement of the High Court in particular ordered that;

“An order is hereby issued to the IEBC, the 27^d Respondent to consider and nominate the appropriate gender top-up candidate to the County Assembly of Narok in accordance with the list of persons submitted to it by Jubilee Party, the 3rd Respondent, in full appreciation that the said person to be so nominated must be a resident and a voter of the County of Narok.

As under section 34(10) of the *Elections Act*, the party list (the gender top-up seat) submitted to the 2nd Respondent is not to be amended during the term of parliament, the 27^d Respondent is ordered to nominate from the list in which the appellant was gazetted in accordance with the provisions of section 37 of the *Elections Act*, the next female person who is registered as a voter in Narok County as a member of the Assembly of the County of Narok.”

33. The 1st Respondent submits that a look at the said order required the 1st Respondent to consider and nominate from the list in which the Interested Party in this case was gazetted, the next suitable female person who is a registered voter in Narok County in due compliance with the law and the judgment of the Court.
34. The 1st Respondent thus submits that firstly, nowhere in the said order did the Court require the 1st Respondent to specifically nominate the Petitioner as the Candidate in place of Alice Chepkirui Kering. The order required the Commission to have a look at the already gazetted list and nominate whoever is the appropriate person from the said list in accordance with the law, relevant regulations and the judgment of the Court.
35. That notwithstanding, the 1st Respondent further submits that in order to comply with the High Court's Order, the Pt Respondent had to be properly constituted to exercise its mandate of reviewing



- and or considering the list and nominating the appropriate candidate. This is a preserve of a duly constituted Commission through the plenary and not the Chief Executive Officer (the CEO).
36. The fact that the 1st Respondent is not properly constituted is a matter of public notoriety as even elections are yet to be conducted for vacant parliamentary positions as the CEO and the secretariat in the absence of Commissioners lack the requisite legal mandate to undertake the same. The Petitioner at paragraphs 38 and 39 of her Petition, admits that in the absence of the Commissioners, the 1st Respondent cannot be said to be properly constituted. The Petitioner further admits that the Pt Respondent is therefore handicapped in enforcing the orders of the High Court.
 37. The 1st Respondent thus submits that it cannot be deemed to have violated the rights of the Petitioner in not enforcing the High Court's judgement because it did not have the capacity to enforce the said judgement, as rightly pointed by the Petitioner herself. It is equally undeniable that there is no order declaring the Petitioner as the most suitable candidate as the judgment and decree mandated the Pt Respondent to consider and nominate a suitable candidate on the list and not necessarily the Petitioner.
 38. Notably, being on top of the list to be considered does not necessarily mean that one is the most suitable or qualified as this needs to be ascertained by a duly constituted Commission and in strict regard to the law, regulations and parameters set in the judgment and decree of the Court. Indeed, the Interested Party's election despite being on top of the list was invalidated on account of certain legal requirement having not been met as observed by the Court. It is thus only after a lawful and proper consideration of the suitability of the candidates and arriving at the most appropriate candidate guided by the judgment and decree of the Court that a quorate Commission can arrive at a decision and declare a candidate duly nominated and or elected.
 39. In fact, as advised by the 2nd Respondent in its letter dated 29th November, 2023, the Petitioner had to seek the Court's further express orders that would then be tenable and enforceable by the Commission as currently constituted without breaching the law and it would seem that the Petitioner heeded to this advice and filed the Petition herein.
 40. Additionally, in the case of Nyamira High Court Petition No. E005 of 2023; Michelle Kemuma Omwoyo v Independent Electoral and Boundaries Commission and the Speaker, Nyamira County Assembly in which judgement was delivered on 31st October, 2023, the Court acknowledged that the lack of Commissioners rendered the Commission's functions to be in abeyance and it is for this reason that the Court directed the Speaker of Nyamira County Assembly to declare the position of Jubilee Party Representative in the gender top-up list for MCA of Nyamira Vacant and swear the Applicant into office.
 41. The 1st Respondent submits that without the above express order of the Nyamira High Court, the orders issued in the Election Appeal could still have not been enforceable as the Commission as currently constituted and or the CEO would have acted ultra-vires.
 42. Similarly, the 1st Respondent submits that borrowing from the decision in Nyamira High Court Petition No. E005 of 2023 (supra), the 1st Respondent did not and does not have the capacity to enforce the Judgement of the High Court in the Election Appeal.
 43. The 1st Respondent further submits that the Petitioner has not sought further orders in this petition against the 1st Respondent, but rather the orders sought are directed to the 2nd Respondent. The 1st Respondent submits that this is a clear acknowledgement by the Petitioner that the 1st Respondent is incapacitated and could therefore not have willingly violated her constitutional rights as alleged.



44. The 1st Respondent notes that the Petitioner has averred that it is pretentious for the 1st Respondent to aver that it is handicapped from giving effect to the High Court's judgement because it has in other similar cases gazetted other eligible persons.
45. The 1st Respondent submits that in the cases quoted by the Petitioner, case in point being *Maina & 12 others v The Independent Electoral and Boundaries Commission & 2 others*, *Mutai & 2 others (Petitioner) (Election Petition Appeal E00292.)*, 3 120241 KEHC 208 (KLR) (23 January 2024) (Ruling), the Applicants in that case had specifically prayed for orders inter alia compelling the CEO of the 1st Respondent to gazette the rightful nominees. The Court in directing the CEO of the 1st Respondent to Gazette the said names, acknowledged that the Constitution of Kenya 2010 did not envisage the present scenario where strictly speaking, there are no members of the Commission. The Court further recognized that the CEO is incapable of assuming the role of the Commission in instances where the Commission is not properly constituted or not constituted at all.
46. The 1st Respondent thus submits that in the quoted case, the CEO of the Commission did not gazette the said names because it had powers to do so but rather did so pursuant to a specific Court order that was tenable and enforceable. The Petitioner can therefore not purport to fault the 1st Respondent for being unable to enforce the High Court's judgement which was technically unenforceable in the absence of a properly constituted Commission, and further that if the 1st Respondent was properly constituted, nothing would have been easier than to enforce the said orders as required by law. Its hands were and are still evidently tied.
47. This peculiar situation that the parties thus find themselves in is therefore a situation that strictly speaking needed the Court's interpretation and issuance of a specific order that is enforceable. The 1st Respondent can therefore not be faulted for not being able to enforce orders that Courts have acknowledged it did not have powers or ability to enforce.
48. The Nairobi High Court (Odunga J, as he then was) while holding that the Commission in the absence of the Commissioners could not lawfully execute a contract through the Accounting Officer in case of *Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others* 120171 eKLR observed thus:
- “ 189. It was however contended that since there was an accounting officer, the entry into the contract the subject of these proceedings was lawful. In *Eng. Michael Kamau and Others vs. Ethics and Anti-Corruption Commission and Others Nairobi (Milimani) High Court Petition No 230 of 2015* the Court expressed itself inter alia as follows: "...it is clear to us that under the Constitution and the legislation, the foundation of the powers of the Secretariat is the existence of the Commission. The Secretary and the Secretariat can only carry out the powers vested in their offices when the Commission is in place exercising its powers since they implement what the Commission has resolved upon. Whereas we appreciate that the staff may, based on their areas of specialization, perform the duties for which they are appointed, to contend that they have a free hand to make binding recommendations arising from their duties without reference to the Commission, in our view would be absurd. The outcome of the tasks undertaken by the Commission's staff must be ratified by the Commissioners if they are to be deemed as the decisions of the Commission". ”
49. We urge the Court in determining this petition to be guided by the Court of Appeal decision in *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others* 12017]



eKLR which affirmed the High Court decision in Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others supra and in which it was held thus:

“ 84. I therefore find that the Commission was not properly constituted as at 30th November, 2016 when the procurement contract in issue was executed by the Commission's secretary and accounting officer. The contract was therefore void in law. In the absence of the Chairperson and the Commissioners, the secretary acted ultra vires and the decision of the IEBC was therefore properly quashed. "Emphasis ours

50. The 1st Respondent submits that the Petition as against it is not merited as the Petitioner has not established a case against it. The 1st Respondent thus submits and urges that the Petition against it in particular should be dismissed with costs.

THE INTERESTED PARTY'S WRITTEN SUBMISSIONS.

51. The Petitioner herein, vide the instant Petition seeks to be declared the next eligible person to be the nominated member of the County Assembly of Narok and as such, seeks orders of mandamus against the 2nd Respondent in the manner and terms well expressed on the face thereof.

52. The Interested Party opposed the instant petition and thus seeks reliance on the 1st Respondent's Replying Affidavit sworn on the 21st December, 2023, grounds of opposition dated 18th December, 2023 as well as submissions dated 22nd November, 2024.

53. It is apparent that the main issue for determination is whether the Petitioner is entitled to the orders sought. We wish to submit as hereunder:-

(a) Whether the Petitioner is entitled to the orders sought.

WHETHER THE PETITIONER IS ENTITLED TO ORDERS SOUGHT.

54. The interested party submitted; in the negative.

55. First, it is settled under Section 107 of the Evidence Act that:-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

56. The court of Appeal ANNE WAMBUI NDIRITU -VS- JOSEPH KIPRONO ROPKOI & ANOTHER [2005] 1 EA 334, held that: -

“As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party, the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”



57. The interested party wholly shares in the finding and determination of the court in the above cited authority and urge this court to be guided therewith. In the instant case, the Petitioner seeks enforcement of this of this court’s judgment in Narok High Court Election Petition Appeal No.E002 of 2023; Alice Chepkirui Kering Vs Joseph Seneiyo Torome & 5 Others in which the court, in upholding the trial court decision, ordered inter-alia:-

“An order is hereby issued to the IEBC, the 2nd Respondent to consider and nominate the appropriate gender top-up candidate to the County Assembly of Narok in accordance with the list of persons submitted to it by jubilee party, the 3rd Respondent, in full appreciation that the said person that the said person to be so nominated must be a resident and a voter of the County of Narok.

As under section 34(10) of the Election Act, the Party list (the gender top-up seat) submitted to the second Respondent is not to be amended during the term of parliament, the 2nd Respondent is ordered to nominate from the list in which the Appellant was gazetted in accordance with the provisions of section 37 of the Election Act, the next female person who is registered as a voter in Narok County as member of the Assembly of the County of Narok”

58. It was therefore incumbent upon the Petitioner to prove to the required legal threshold that she is deserving of the orders sought, which burden she has failed to discharge.

59. In the case of Trust Bank Limited -vs- Paramount Universal Bank Ltd & 2 Others{2009} eKLR the court held as follows:-

“...where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings”

60. We share in the sentiments of the court in the above cited authority and urge this court to be persuaded therewith The Petitioner failed to demonstrate that from the list submitted by Jubilee Party, she was the next most qualified person to be nominated should the nomination of the Interested Party be nullified like in the instant case. Further, she failed to demonstrate that the orders of the court directed the Respondents herein to specifically nominate her to replace the Interested Party herein.

61. In view therefore, the Petitioner’s prayer that she ought to be declared and gazetted as the nominated member of County Assembly of Narok is a mere statement of unsubstantiated facts and must be treated as such. For avoidance of doubt, the Petitioner is, by way of this Petition, seeking enforcement of non-existent orders.

62. The upshot of our submissions is that the Petitioner’s instant petition is unmerited, bad in law, incompetent, frivolous, an abuse of the court process and the orders sought cannot legally issue. We urge this court to find and hold as much.

WHO SHOULD BEAR THE COSTS OF THIS PETITION?

63. according to the interested party, it is trite law that award of cost is discretionary and follow event pursuant to the provisions of Section 27 of the Civil Procedure Act. We pray that the cost of this Petition be awarded to the Interested Party.



Analysis And Determination

Issues

64. Upon consideration of the pleadings, the rival submissions of the parties, evidence adduced and the law, the following issues emerge for determination: -
- i. Whether the petitioner is the next eligible person for nomination as the member for County Assembly of Narok County on the Gender top-up category.
 - ii. Whether the petitioner should be nominated as the member for County Assembly of Narok County on the Gender top-up category.
 - iii. Who pays costs?

Orders of the election court

65. The basis of this petition is orders made by the election court in a petition filed by the petitioner herein challenging the election of the Interested party.
66. The Election Trial Court (Hon. Phyllis Shinyanda) delivered its Judgement on 9th March, 2023 and allowed the Petitioner's Petition and thus nullified the election of the said Alice Chepkirui Kering in the following terms:
- a. That the nomination of the 2nd Respondent, Alice Chekirui Kering, as a Member of the County Assembly of Narok under the category of special seats (Gender Top-up) is null and void.
 - b. That an order is hereby issued quashing and/or invalidating Special Gazette Notice Vol. CXXIV- No. 186 of 9th September, 2022 to the extent that it specifies that the 2nd Respondent is validly nominated and/or elected member of Jubilee Party to the County Assembly of Narok.
 - c. That an order is hereby issued to the 1st Respondent to re-consider and nominate the appropriate gender top-up candidate to the 4th Respondent in accordance to the list of persons submitted to it by the 3rd Respondent in full appreciation that the said person to be so nominated must be a resident and a voter from the County of Narok.
 - d. That since the party lists submitted to the 1st Respondent is required under section 34 (10) of the Elections Act not to be amended during the term of Parliament, I certify and order the 1st Respondent to re-allocate the gender top-up seat to the next female Narok County registered voter in the said list from which the 2nd Respondent was gazette in accordance with the provisions of section 37 of the *Elections Act*.
 - e. That the Petitioner is hereby awarded the costs of the Petition capped at Kshs. 600,000/= payable by the 1st and 2nd Respondents.

Erroneous interpretation of order

67. The 1st Respondent in an attempt to interpret the order of the court, submitted: -

‘...that firstly, nowhere in the said order did the Court require the 1st Respondent to specifically nominate the Petitioner as the Candidate in place of Alice Chepkirui Kering. The order required the Commission to have a look at the already gazetted list and nominate



whoever is the appropriate person from the said list in accordance with the law, relevant regulations and the judgment of the Court.

68. Examination of the orders of the court will support or deny the above submission.

69. Inter alia, the court made the following specific order: -

That since the party lists submitted to the 1st Respondent is required under section 34 (10) of the [Elections Act](#) not to be amended during the term of Parliament, I certify and order the 1st Respondent to re-allocate the gender top-up seat to the next female Narok County registered voter in the said list from which the 2nd Respondent was gazette in accordance with the provisions of section 37 of the [Elections Act](#).

70. Of specific relevance; is; ‘...order the 1st Respondent to re-allocate the gender top-up seat to the next female Narok County registered voter in the said list from which the 2nd Respondent was gazette in accordance with the provisions of section 37 of the [Elections Act](#)’.

71. Therefore, the 1st respondent’s submission to the effect that; ‘The order required the Commission to have a look at the already gazetted list and nominate whoever is the appropriate person from the said list...’ is not correct.

72. Evidence presented is that, in compliance with Regulation 54 of the Elections (General) Regulations, 2012, the 1st Respondent published at page 87 of the issue of the Standard Newspaper of 27th July, 2022 the Jubilee Party List for the Gender Top Up Category with respect to Narok County Assembly in which the following persons are listed as eligible to nomination in the order in which they are listed:



	Name	Gender	Status of Nomination/ Election
1.	Maria Kiserian Meriki	Female	Elected and sworn-in
2.	Wilson Siraa Nantama	Male	Not eligible for election
3.	Alice Chepkirui Kering	Female	Election nullified
4.	Micheal Kipkemoi Ng'erechi	Male	Not eligible for election
5.	Daniel Kararon Tsur	Male	Not eligible for election
6.	Linda Katimwa Ntutu	Female	Elected and sworn-in
7.	Tyson Leteipa Masompe	Male	Not eligible for election
8.	Immaculate PISOI Sonkoi	Female	Elected and sworn-in
9.	Philip Lenkume Ndalania	Male	Not eligible for election
10.	Torome Seneyio Josphine	Female	Eligible for election and swearing-in after nullification of the election of Alice Chepkirui Kering
11.	Daniel Olesakarri Lemayian	Male	Not eligible for election
12.	Christine Seeta Kodonyo	Female	
13.	Joy Nentaya Karia	Female	
14.	Dominic Tira Dukirr	Male	Not eligible for election



15.	Florence Motosio Koshal	Female	
16.	Sointa Kuyoo Parkire	Female	
17.	Doris Nairesiae Kurisha	Female	
18.	Chepkorir Ednah	Female	
19.	Namunyak Enole Olololiyo	Female	
20.	Emily Sanoyia	Female	
21.	Alice Kashu	Female	
22.	Mary Njoki Wangai	Female	
23.	Lucy Tiges Kinayia	Female	

73. It was ordered ‘the 1st respondent to re-allocate the gender top-up seat to the next female Narok County registered voter in the said list’.
74. It appears the 1st respondent is bent at refusing to enforce the order of the election court by entertaining thoughts like the court asked the 1st respondent ‘to have a look at the already gazetted list’ and nominate any person in the list. This belittles the purport of the court order. These arguments are merely feigned ignorance as the 1st respondent has the technical as well as legal knowledge on re-allocation of the seat of the representative which falls vacant during the term. Unless there is a specific order of the court, the seat of the representative which has become vacant during the term shall be allocated to the next candidate of the same gender on the respective political party list.
75. The 1st respondent is also taking cover under the quite unsatisfactory state of affairs that it is not properly constituted. All these machinations are aimed at defeating the orders of the court and justice.
76. The saving grace, however, on the IEBC situation, is in their submission that: -
- This peculiar situation that the parties thus find themselves in is therefore a situation that strictly speaking needed the Court’s interpretation and issuance of a specific order that is enforceable.
77. The interested party supports the view taken by the 1st respondent and adds that the petitioner has not proved its case to the required standard of proof. They cited section 107 of the *Evidence Act*.
78. Evidence presented to the court proves that the 1st respondent has failed to act in accordance with the orders of this court. The petitioner is in the list and there is nothing that shows that she is not ‘the next female Narok County registered voter in the said list’ to whom the 1st respondent was ordered ‘to re-allocate the gender top-up seat’. Her rights to enjoy the fruits of her judgment have been violated by the 1st respondent.



79. The law never leaves a person entitled to, without a remedy. The petitioner is entitled to remedy by way of declaration; she is entitled to enjoy the fruits of her judgment which falls within article 27 rights; of equal protection and benefit of the law. Appropriate orders to give the said judgment effect shall be issued.

Gazettement

80. It appears the respondents placed gazette notice in the Kenya Gazette as a pre-requisite for election by nomination through party lists and eventual swearing in of the person nominated as member of the County Assembly.
81. A Gazette Notice does not confer or invalidate an election or nomination of a person to the County Assembly. A Gazette Notice conveys the election or nomination duly conducted in accordance with the law. If that be the purpose of gazettement, unless it is specifically provided for, it cannot be a pre-requisite for election or nomination of a person to the County Assembly under the law. Accordingly, there is no requirement that a person must be gazetted before election or nomination or sworn-in as member of the County Assembly.
82. There is therefore, no requirement that a person duly elected or nominated must be gazetted first before taking office.

Oath of office

83. Other than ushering into and committing a person to the office, the oath of office also makes the person competent to undertake and discharge the functions of the said office. The 1st respondent is obligated in law to administer the oath as prescribed in law.
84. Accordingly, I find that the petition has merit, and is hereby allowed in the following specific and appropriate orders and terms fashioned in accordance with article 23 of *the Constitution*: - -
- a. A declaration is hereby issued that the 1st respondent has violated the right of the petitioner to enjoy the fruits of her judgment; thus denying her protection and benefit of law under article 27(1) of *the Constitution*.
 - b. Given the dilemmas arising from the current unsatisfactory status of IEBC, a declaration is hereby issued that the Petitioner is the next female person that is eligible to be elected as a member of the Assembly of the County of Narok under the said gender-top up category following the nullification of the election of Alice Chepkirui Kering.
 - c. An Order of mandamus is hereby issued against the 2nd Respondent to declare position held by Alice Chepkirui Kering as vacant within seven (7) days from the date of this Judgement.
 - d. Upon declaration in order (c) above, the 2nd Respondent, within 24 hours of the said declaration, to swear in the Petitioner into office as the duly nominated Member of the County Assembly of Narok under the Gender Top Up List representing Jubilee Party.
 - e. Should the 2nd respondent default in (c) & (d) above, the Petitioner shall be deemed to have been elected and sworn in, and she is at liberty to take her position as the Member of the County Assembly of Narok under the Gender Top Up List representing Jubilee Party.
 - f. Despite the dilemma of the IEBC, the 1st respondent did not conduct itself in a manner which would vindicate them from mala fides. Nevertheless, each party shall bear own costs.



DATED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 14TH DAY OF FEBRUARY, 2025

F. GIKONYO M

JUDGE

In the presence of: -

1. Kamwaro for Petitioner
2. Ndegwa for Odunga for IEBC
3. Kinyua C/A

