



**Maina & 12 others v The Independent Electoral and Boundaries Commission
& 2 others; Mutai & 2 others (Petitioner) (Election Petition Appeal
E002 of 2023) [2024] KEHC 208 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
ELECTION PETITION APPEAL E002 OF 2023
RN NYAKUNDI, J
JANUARY 23, 2024**

BETWEEN

WACHIRA JAMES MAINA & 12 OTHERS APPELLANT

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

THE UNITED DEMOCRATIC ALLIANCE PARTY 2ND RESPONDENT

THE CLERK UASIN GISHU COUNTY ASSEMBLY 3RD RESPONDENT

AND

CELESTINE CHEPCHIRCHIR MUTAI & 2 OTHERS PETITIONER

RULING

Background

1. In a judgment delivered at the trial court on 15th March 2023, Hon. D. Mikoyan CM, allowed the petitioners' petition. The trial court made a declaration that the Party List for UDA Party Uasin-Gishu County Member of County Assembly (Marginalized) Category published by the Independent Electoral Boundaries Commission vide Gazette Notice No. 10712 Vol. CXXIV-No. 186 dated 9th September, 2022 is illegal null and void. Further that a declaration do issue that the final party list for UDA Party Uasin-Gishu County Member of County Assembly (Marginalized) category published by the Independent Electoral Boundaries Commission on its website and in the standard newspaper on the petitioner appeared as number 3 on the list be adopted as the only valid party list.
2. Being aggrieved by the trial court's judgment, the appellants filed the present appeal, which was consequently dismissed for lack of merit and the learned magistrate's decision affirmed vide this court's



judgment dated 1st September, 2023. Orders were extracted to that effect and served upon the 1st Respondent.

3. The failure by IEBC to comply with the said orders, triggered the present application by the petitioners/applicants. The Applicants filed the application by way of Notice of Motion dated 21st November, 2023 seeking the following orders:
 - a. Spent
 - b. The Commission Secretary/Chief Executive Officer of the 1st Respondent, IEBC, Marjan Hussein Marjan, be and is hereby compelled to, within (7) days hereof, cause to be published in the Kenya Gazette a corrigendum to Gazette Notice 10712 of 2022 (special issued dated 9th September 2022 to the effect That:
 - i. The names of Serem Naomy Chepkemboi, Kemboi Roda Chelagat, Rebecca Jerop, Kiboi Chemtai Nancy, Hassan Saida Chepkoech, Idid Sahra Abdi, Kebenei Magrinah Chebet, Chelimo Juliet and Cheronon Caroline as Members of County Assembly of Uasin-Gishu under the Gender Top up List for the United Democratic Alliance (UDA) party are deleted;
 - ii. The names of Carolyne Jeptanui, Cheronon Caroline, Tirop Everline Chepkoech, Serem Naumi Chepkemboi, Ngetich Pamela Jemutai, Sharon Jewel Kogo, Burgei Veronica Chepkemei, Mutai Celestine Chepchirchir, Rebecca Jerop are included as Members of County Assembly of Uasin Gishu under the Gender Top Up List for the United Democratic Alliance (UDA) Party.
 - iii. The names of Wachira James Maina, Tirop Belinda Chebichii, Waiganjo David Waweru And Tirop Everlyne Chepkoech as Members of County Assembly of Uasin Gishu under special category for the United Democratic Alliance (UDA) party are deleted.
 - iv. The names of Kiplagat Gerard, Wambui Tabitha, Kering Robert Kiptanui And Chumba Reginah Chepkemboi are included as Members of County Assembly of Uasin Gishu under special category for the United Democratic Alliance (UDA) Party.
 - c. In the event of failure to comply with prayer B above, the Deputy Registrar of the High court to, within Seven (7) days, publish in the Kenya Gazette the notification of determination of Election Petition and the Appeal.
 - d. Upon the publication in the Kenya Gazette as per order (B) or (c) above, as the case may be, the Speaker of the County Assembly of Uasin Gishu to, at the immediate next sitting of the County Assembly of Uasin Gishu after such Publication, swears in Carolyne Jeptanui ID No. 25253229, Cheronon Caroline ID No. 24961986, Tirop Everlyne Chepkoech ID No. 29448242, Serem Naumi Chepkemboi ID No. 20416078, Ngetich Pamela Jemutai ID No. 12469734, Sharon Jewel Kogo ID No. 32093567, Burgei Veronica Chepkemei ID No. 201890476, Mutai Celestine Chepchirchir ID No. 22903122, Rebecca Jerop ID No. 12827402 respectively as Members of County Assembly (MCA) in Uasin-Gishu County Assembly and Kiplagat Gerard ID No. 30136976, Wambui Tabitha ID No. 26242156, Kering Robert Kiptanui ID No. 24421312, Chumba Reginah Chepkemboi ID No. 21730036 respectively as Members of County Assembly (MCA) in Uasin-Gishu Assembly.



- e. In the alternative to prayers (B), (C) and (D) above, Gazette Notice 10712 of 2022 (Special Issue) dated 9th September, 2022 be deemed automatically amended by operation of law to the effect that:
- i. The names of Serem Naomy Chepkemboi, Kemboi Roda Chelagat, Rebecca Jerop, Kiboi Chemtai Nancy, Hassan Saida Chepkoech, Idid Sahra Abdi, Kebenei Magrinah Chebet, Chelimo Juliet And Cherono Caroline as Members of County Assembly of Uasin-Gishu under the Gender Top up List for the United Democratic Alliance (UDA) party are Deleted;
 - ii. The names of Carolyne Jeptanui, Cherono Caroline, Tirop Everline Chepkoech, Serem Naumi Chepkembooi, Negtich Pamela Jemutai, Sharon Jewel Kogo, Burgei Veronica Chepkemei, Mutai Celestine Chepchirchir, Rebecca Jerop are Included as Members of County Assembly of Uasin Gishu under the Gender Top Up List for the United Democratic Alliance (UDA) Party.
 - iii. The names of Wachira James Maina, Tirop Belinda Chebichii, Waiganjo David Waweru And Tirop Everlyne Chepkoech as Members of County Assembly of Uasin Gishu under special category for the United Democratic Alliance (UDA) party are Deleted.
 - iv. The names of Kiplagat Gerard, Wambui Tabitha, Kering Robert Kiptanui And Chumba Reginah Chepkemboi are Included as Members of County Assembly of Uasin Gishu under special category for the United Democratic Alliance (UDA) Party.
- f. In the event of grant of prayer (E) above, the Speaker of the County Assembly of Uasin-Gishu to, at the immediate next sitting of the County Assembly of Uasin Gishu after service of this order, swear in Carolyne Jeptanui ID No. 25253229, Cherono Caroline ID No. 24961986, Tirop Evarlyne Chepkoech ID No. 29448242, Serem Naumi Chepkemboi ID No. 20416078, Ngetich Pamela Jemutai ID No. 12469734, Sharon Jewel Kogo ID No. 32093567, Burgei Veronica Chepkemei ID No. 201890476, Mutai Celestine Chepchirchir ID No. 22903122, Rebecca Jerop ID No. 12827402 respectively as Members of County Assembly (MCA) in Uasin-Gishu County Assembly and Kiplagat Gerard ID No. 30136976, Wambui Tabitha ID No. 26242156, Kering Robert Kiptanui ID No. 24421312, CHumba Reginah Chepkemboi ID No. 21730036 respectively as Members of County Assembly (MCA) in Uasin-Gishu Assembly.
4. The application is supported by the Affidavit of one Mutai Celestine Chepchirchir and is premised on the following grounds: -
- a. That in the judgment dated 1st September, 2023 dismissed the appeal hearing upholding the decision of the Chief Magistrates court in nomination of Member of County Assembly for Uasin-Gishu County Assembly under gender top up and special category as provided for under paragraph B (i-iv) herein above.
 - b. That the 1st Respondent, the Independent Electoral and Boundaries Commission (IEBC), has indicated that since the Commission has no Chairperson and Commissioners and this is a matter of judicial notice, the Commission is unable to publish in the Kenya Gazette as ordered by the court.
 - c. That the Commission does not cease to exist due to the absence of the Chairperson or Commissioners.



- d. That further, an order of the Court does not require the approval of the Commission to be effected.
 - e. That among the functions of the Commission Secretary is to be the chief executive officer of the Commission and Responsible for facilitating, coordinating and ensuring execution of the Commission's mandate.
 - f. That the Commission, the IEBC, has the mandate to obey and enforce Court Orders.
 - g. That any delay in swearing in the validly nominated members of the Uasin Gishu county assembly in furthering the violation of their rights.
 - h. That further to the above, underserving individuals continue to occupy seats of nominated members of Uasin Gishu county Assembly drawing illegal salaries and allowances despite the determination of this matter by this honorable court.
 - i. That it is the sacred duty of the judiciary to protect, maintain and uphold constitutionalism, rule of law and democracy thus the honorable court cannot make orders in vain.
 - j. That the public suffer greatly when the court orders are disobeyed with abandon and in the instant case over flimsy reasons.
5. I have perused through the record and I take note that no response was filed by the respondents. Therefore, as it stands the application is unopposed. Counsel acting for the applicants made indications of withdrawing the application but the same was denied by the applicants, who subsequently filed notices to act in person.
 6. The applicants filed affidavits dated 7th December, 2023 in an attempt to clarify the issue of representation between the firm of Nechesa & Company Advocates and Mosioma & Company Advocates. In the said affidavits, the applicants alluded to two other applications that are before the court of appeal but there was nothing filed in this court to confirm the said position. Nonetheless, the court of appeal has consistently held that it has no jurisdiction to entertain second appeals from the High Court regarding question of validity of the election of a member of county assembly.
 7. The applicants filed submissions in support of their application whereas none were filed by the respondents.

Applicants' submissions

8. It was submitted for the applicants that the orders of this court were duly served upon the Respondents and its authenticity confirmed. That the 4th Respondent, IEBC asserted that it was unable to comply with the said orders because there are no commissioners in office.
9. The applicants submitted that the action bestowed upon the 4th Respondent, IEBC is an administrative one which includes placing a notice communicating the decision of this court and such an action does not call for the commission to have a sitting and have deliberations to come up with a decision. That the order in question is a valid one which doesn't need any approval. That the 4th Respondent has only chosen a deliberate path to disobey the order of the honorable court. Counsel relied on the case of Eldoret Election Petition appeal No. 1 of 2023; Bett Anne Jepleting vs Independent Electoral and Boundaries Commission & 3 others.



10. The applicants further submitted that the act of filing a second appeal to the court of appeal is an exercise in futility since the Court of Appeal does not have jurisdiction to hear and/or entertain second appeals involving the election of a Member of County Assembly.
11. Finally, counsel urged the court to rely on the ruling of Justice W.A. Okwany in Nyamira High Court Petition number E005 of 2023 where the learned judge observed that the petitioner be sworn in within 24 hours after the court's ruling.

Analysis and determination.

12. I have carefully considered the application and the submission in support. The main issues I find for determinations are as follows: -
 - a. Whether the Chief Executive Officer, IEBC has the mandate to gazette the applicant.
 - b. Whether Gazettement is such a fundamental step to an election process.

Whether the Chief Executive Officer, IEBC has the mandate to gazette the applicant.

13. The applicants averred and confirmed that indeed the orders of this court were served upon the respondents but the 4th Respondent chose to deliberately disobey the same for reasons that the IEBC is not quorate and as such could not action upon the said orders.
14. It has not been disputed that the orders issued on 16th November, 2023 were served upon the respondents. It is also not in dispute that as at the time this court rendered its judgment on the appeal in 1st September, 2023, all the Commissioners of the 4th Respondent were no longer in office for various including resignation, removal from office and retirement. Without a doubt, in the absence of Commissioners, the 4th Respondent cannot be said to be properly constituted. To that end, I take judicial notice that in the current state of affairs regarding *the constitution* of the Commission, it is not clear when the 4th respondent will be reconstituted and get back to carrying out its mandate as stipulated under *the Constitution* and the IEBC act.

The provisions of Section 5 of the *Independent Electoral and Boundaries Commission Act* are as follows:

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Composition and appointment of the Commission

- (1) The Commission shall consist of a chairperson and eight other members appointed in accordance with Article 250(4) of *the Constitution* and the provisions of this Act.
- (2) Subject to section 35, the chairperson and members of the Commission shall be appointed in accordance with the procedure set out in the First Schedule.
- (3) The procedure set out in the First Schedule shall apply, with the necessary modifications, whenever there is a vacancy in the Commission.
- (4) The chairperson and members of the Commission shall perform their functions as provided in *the Constitution*, and the secretariat shall perform the day-to-day administrative functions of the Commission.

The functions of the Chief Executive Officer are provided for under Section 10 (7) of the IEBC Act as follows: -

- (e) responsible for: -



- (i) executing decisions of the Commission;
- (ii) Assignment of duties and supervision of all employees of the Commission;
- (iii) Facilitating, coordinating and ensuring execution of Commission’s mandate;
- (iv) Ensuring staff compliance with public ethics and values; and
- (v) The performance of such other duties as may be assigned by the law and Commission.

15. The foregoing provisions are authoritative as to the composition of the Commission and the basic role of the CEO is to execute the decisions of the Commission and to perform the duties assigned to him/her by the law and Commission. I take note that the applicant relied on the High Court decision in Eldoret Election Petition Appeal No. E001 of 2023. In the said decision, this court presided by Justice Anthony Charo Mrima gave orders directing the CEO, Marjan Hussein Marjan or any other officer occupying the said office to cause to be published in the Kenya Gazette a Corrigendum to Gazette Notice 10712 of 2022. The Court in its ratio decidendi adopted the approach that the action of gazetteing by the CEO is a simple administrative one; placing a notice communicating the decision of the court. That such an action does not call for the commission to sit, deliberate and come up with a decision. I couldn’t agree more.
16. In my considered view, true, the CEO is neither an independent entity from the Commission nor an alternative to the Commissioner. It then means that the CEO is incapable of assuming the role of the commission in instances when the Commission is not properly constituted or not constituted at all. However, *the Constitution* of Kenya 2010 did not envisage the present scenario where strictly speaking, there are no members of the Commission. *The Constitution* and the IEBC Act are however clear on the steps to be taken to replace commissioners in the event of resignation, retirement and removal.
17. Section 5 of the Act is to the effect that the process of replacement process should commence at least six months before the lapse of the Commissioners term. I take note that the replacement process was not initiated prior to the lapse of the Commissioners’ terms in office and the commission has not been constituted at present. In sum, given the fact that the Commission has not been properly constituted, and to give effect of this court’s directions, it is my finding that the 4th Respondent’s CEO can exercise such an administrative duty of Communicating the decision of the court to the Government printer. The Applicants have exhausted all remedies and it will be an injustice to delay further their swearing in as Members of the County Assembly of Uasin Gishu.

Effective Remedies

18. Before I move to the next issue, it is important to briefly highlight that this court is aware of its duty to give effective remedies for purposes of enforcing *the constitution*, human rights and the rule of law. In *Fose v Minister of Safety and Security* [1997] (3) SA 786(CC)1997(7) BCLR 851 Ackermann, J, writing for the Court, stated that;

“Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is



necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.”

Further in *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; Ngcobo, J put the position thus;

“(45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, “we must carefully analyze the nature of the constitutional infringement, and strike effectively at its source”. (emphasis)

19. Guided by the foregoing discussion, this court is called upon to grant a relief that will effectively cure the violation as a way of enforcing *the constitution* and strike a blow to any future incentives for any state organ, state officer or public officer to violate, infringe and or frustrate a legitimate constitutional or legal process.
20. I have taken note of the 4th Respondent has allegedly cited incapacity as a reason for not complying with the court’s order. That the 4th Respondent is not properly constituted and as such it is unable to comply. It then triggers the next issue for determination.

Whether Gazettement is such a fundamental step to an election process.

21. The next issue I shall consider is whether the issue of Gazettement is such a fundamental step in the election process that it can keep an elected or nominated aspirant from assuming office. The Provisions of Article 259 require *the Constitution* to be interpreted in a manner that promotes its purposes values and principles; advances the rule of law, Human Rights Fundamental Freedoms and that permits the development of law and good governance.
22. In the present circumstances, IEBC has not been properly constituted. Any further delays would then mean that the Applicants’ rights will be put on hold until such a time when the commission will be constituted. Will such an approach breathe life into *the Constitution*, being a living document?
23. In my view, when parties suffer a constitutional violation, they quite naturally turn to the courts for relief. The function of the courts then is to assist in fashioning a legal system which is effective and responsive to individual demands for an orderly and expeditious resolution of issues.
24. Therefore, while this court appreciates the fact that *the Constitution* of Kenya 2010, did not envisage such a Lacuna where there are no IEBC Commissioners, thereby holding all its functions in abeyance, the court is also aware of its mandate to fashion appropriate remedies to the aggrieved party. To this end, the court cannot then sit back and watch the applicant suffer a glaring prejudice for reasons that a properly constituted commission doesn’t exist.



Why Gazette? Is it a mandatory legal requirement?

25. While I appreciate the importance of Gazettement in the election process, I insist on realizing the Applicants' constitutional rights who equally have a legitimate expectation to be sworn in as a Members of County Assembly having exhausted the available avenues in pursuing their cause.
26. In explaining the purpose of a Gazette notice, the Court of Appeal in *Nderitu Gachagua vs Dr. Thuo Mathenge & 2 others Civil Appeal No. 14 of 2013 (Nyeri)* held as follows: -
- “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.”
27. Section 69 of the *Interpretation and General Provisions Act*, Chapter 2, Laws of Kenya provides: -
- “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.’
28. Section 85 of the *Evidence Act* provides as follows: -
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.
29. From the foregoing cited provisions, it is safe to conclude that a gazette notice is evidence, at face value, of the existence of a law or a notice that has been duly formulated. It then implies that a Gazette notice is an official communication or a formal expression of the existence of the notice or law.
30. In *Director of Public Prosecutions vs Samuel Kimuchu Gichuru & Another (2012) eKLR Odunga J.* (as he then was) considered the import of Gazettement 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 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”
31. The 4th respondent's reasons as put forth by the applicants that it is unable to comply with the court's orders for lack of a quorate commission, is therefore untenable and an attempt to take advantage of the lacuna created by the absence of the Commissioners, an issue that is out of control of the Applicant.
32. I shall then proceed and consider the process of assumption of office of Members of the County Assembly. Section 7A of the County Government Act provides as follows: -



7. County Assemblies to be duly constituted at first sitting

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- (1) 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*.

33. My reading and understanding of the above provision is that once members of the County Assembly are nominated and/or elected, it is the IEBC's role to publish their names in the Kenya Gazette to inform the public of the prospective officer holders. It is noteworthy that there is no mandatory provision to the effect that an MCA can only be sworn in after Gazettement. Gazettement only serves as an avenue to formally inform the public of the successful candidates and as such closing the election process.

34. The Supreme court considered the issue of Nomination for county Assembly and the duty of the IEBC in the Gazettement of nominees in the case of Moses Mucigi & 14 other vs Independent Electoral and Boundaries Commission & 5 other (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 gazette 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.

35. The Supreme court in the above decision reasoned that the substantive process of electing or nominating an MCA is what may be challenged in a court of law and gazette only serves as a notification to the public of the outcome of the nomination. I agree with the court’s reasoning in total and that of the High court in Nyamira Constitutional Petition No. E005 of 2023; Michelle Kemuma Omwoyo versus IEBC & Another, that the process of gazette is merely an administrative task arising from an already concluded process. That gazette cannot vitiate the status of a person who has been duly elected or nominated during an election process. It was the position adopted by Odunga J. (as he was then) 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 gazette, the gazette is merely directive and the failure to gazette the appointment does not necessarily the appointment.”

36. In making its finding, the learned judge in the above cited case made reference 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 the statutory provisions section 7(1) of the Customs Tarriff 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.”

37. Having considered the above cited provisions of the law, I agree with my sister Hon. W.A. Okwany in Nyamira Constitutional Petition No. E005 of 2023; Michelle Kemuma Omwoyo versus IEBC & Another that it would be a travesty of justice to continue barring the applicants from assuming the office that they were validly nominated to serve in on account of the pending reconstitution of the IEBC whose timelines are currently unknown and/or indefinite.



The doctrine of legitimate expectation.

38. Once the Applicants exhausted the available legal remedies, they legitimately expected to be sworn in. The requirements for the existence of such an expectation were restated in *National Director of Public Prosecutions v Philips*. These include: -
- i. That there must be a representation which is “clear, unambiguous and devoid of relevant qualification,”
 - ii. That the expectation must be reasonable in the sense that a reasonable person would act upon it,
 - iii. That the expectation must have been induced by the decision-maker and
 - iv. That it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it.
39. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty. Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law. Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows: - (See C.F. Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 *CAMB. L.J.* 238, 242-244 (1988).)
40. Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public’s fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices.”
41. In the exercise of discretion, the rule of law dictates that like cases are treated alike. In the sense there should be a degree of predictability and certainty that such individuals in the position of petitioners can benefit from the application of the law and remedies provided therein to plan their lives in reference to a particular legitimate administrative decision. From a more practical point of view holding back the gazetteement of the petitioners denies their constituency right of representation in the County Assembly. Therefore, the argument being advanced by the petitioners is a valid one particular circumstances change in the composition of IEBC should be prohibited for that change impairs their civil and political rights. The failure to generate the necessary instruments leading to them taking oath of office as members of the County Assembly is unjust and causes unfairness. A case in point is where the statutory frame work is crystal clear as to the procedure to be adopted. Here the appropriate test is for the chief executive officer to find ways and means to give this matter the weight it deserves and the implications of not fulfilling the letter and spirit of the law. There is an overriding public interest which transcends the individual rights in this litigation. The principle of proportionality, was delved into by the supreme court of India in *Kumar Vs Union of India* (2001) 2 SCC 386 in which the court explained By proportionality, we mean the question whether while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order as the case maybe.
42. Under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties of interest of persons keeping in mind the purpose which they were intended to serve.



43. From the facts of this petition the measures adopted by the state organ of not processing the procedural legal instruments in favour of the petitioners largely infringes their fundamental rights and freedoms and the objective which was intended to be achieved by their nomination as occasioned severe prejudice and injustice to the communities/groups designated to be represented by them in the County Assembly I may unhesitatingly remark that this limitation on the petitioners enjoyment of their rights is of a nature beyond their individual interest and rights. This is about the interests of the public. This action in a democratic society fails to meet the objectives of the legitimate expectation.
44. In my final analysis and in considering the peculiar nature of the present circumstances, nothing stops the applicants, who have a valid court order and who have been vigilant in seeking legal remedies from being sworn in to office. I take note of the provisions of Article 177 of *the Constitution* which limit the term of an MCA to 5 years. Given that the general elections were held in August 2022, it then means that as at present almost 1 year and 5 months have lapsed from the period that the applicant is supposed to be serving as an MCA. The court is mandated to ensure that the applicant receives appropriate remedies. Their rights cannot be delayed further.
45. Lastly the emerging scope of this petition cannot escape an illumination on the remedies available under Art. 23 (3) (f) of *the Constitution* on judicial review. This is meant to redress any threats to or actual violation of any right or freedom including by private persons. In Art. 47 (1) of *the Constitution* it guarantees a right to fair administrative action that does not violate or threaten to infringe any fundamental rights or freedoms. In this unprecedented petition due to the lack of establishment and operationalization of IEBC as a critical organ of the state in matters to do with election management I invoke the writ of mandamus to compel the chief executive officer to execute the tasks in favour of the petitioners within the limitations of the law. While it may seem difficult for the speaker of the County Assembly to assemble the petitioners for purposes of administering the oath of office it is too clear that the petitioner's rights ripened upon nomination and on the strength of the doctrine of exhaustion of all the pending litigations within our legal system. The jurisdiction of the speaker of the County Assembly in the premises therefore, is not questioned. There will be no ground of attack in the manner of the exercise of that jurisdiction. Citizens who suffer loss as a result of unfair administrative action feels and express often in a colourful language a very strong sense of injustice in our legal system over the difficulty and frequently the inability to obtain appropriate remedies for the loss, cause of action, claim, tort, in contract and infringement or violations of their fundamental rights and freedoms. The bitterness is more so compounded on being told there is a lacuna in the law in connection with the remedy being sought in realization of their rights. For months the petitioners have been searching for an answer on the potential direct route to be sworn as members of the County Assembly. It is the premise for making the following declarations.
46. In the upshot, the applicants' application dated 21st November, 2023 is merited and is hereby allowed in the following terms: -
- a. The Independent Electoral and Boundaries Commission (IEBC)'s Commission Secretary/ Chief Executive Officer, Marjan Hussein Marjan, or any other person occupying the said officer, be and is hereby compelled to, within 14 days hereof, cause to be published in the Kenya Gazette a corrigendum to Gazette Notice 10712 of 2022 (special issue) dated 9th September 2022 to the effect that: -
 - i. The names of Serem Naomy Chepkemboi, Kemboi Roda Chelagat, Rebecca Jerop, Kiboi Chemtai Nancy, Hassan Saida Chepkoech, Idid Sahra Abdi, Kebenei Magrinah Chebet, Chelimo Juliet And Cheronon Caroline as Members of County Assembly



- of Uasin-Gishu under the Gender Top up List for the United Democratic Alliance (UDA) party are deleted;
- ii. The names of Carolyne Jeptanui, Cherono Caroline, Tirop Everline Chepkoech, Serem Naumi Chepkembooi, Negtich Pamela Jemutai, Sharon Jewel Kogo, Burgei Veronica Chepkemei, Mutai Celestine Chepchirchir, Rebecca Jerop are included as Members of County Assembly of Uasin Gishu under the Gender Top Up List for the United Democratic Alliance (UDA) Party.
 - iii. The names of Wachira James Maina, Tirop Belinda Chebichii, Waiganjo David Waweru And Tirop Everlyne Chepkoech as Members of County Assembly of Uasin Gishu under special category for the United Democratic Alliance (UDA) party are deleted.
 - iv. The names of Kiplagat Gerard, Wambui Tabitha, Kering Robert Kiptanui And Chumba Reginah Chepkemboi are included as Members of County Assembly of Uasin Gishu under special category for the United Democratic Alliance (UDA) Party.
- b. Upon the publication in the Kenya Gazette as per Order (b) above, the Speaker of the County Assembly of Uasin Gishu County shall, at the immediate next sitting of the of the County Assembly of Uasin Gishu after such publication swear in Carolyne Jeptanui, Cherono Caroline, Tirop Everline Chepkoech, Serem Naumi Chepkembooi, Negtich Pamela Jemutai, Sharon Jewel Kogo, Burgei Veronica Chepkemei, Mutai Celestine Chepchirchir, Rebecca Jerop as a Members of County Assembly (MCA) of the County Assembly of Uasin Gishu County.
 - c. In the alternative, in the event the Independent Electoral and Boundaries Commission (IEBC)'s Commission Secretary/Chief Executive Officer, Marjan Hussein Marjan, or any other person occupying the said officer fails to gazette the applicant within the said period, the Speaker of the County Assembly of Uasin Gishu shall immediately declare the positions of the United Democratic Alliance in the Gender Top Up List for Member of County Assembly of Uasin Gishu Vacant.
 - d. Upon declaring the positions vacant in terms of order (c) herein above, the Speaker of the County Assembly of Uasin Gishu shall in the immediate next sitting after the lapse of 14 days proceed to swear the applicants into office as a duly nominated Members of the County Assembly of Uasin Gishu County, under the Gender Top Up list representing United Democratic Alliance Party.
 - e. That in the event of failure to comply with the above orders within the stipulated time, the applicants shall be deemed to have been duly nominated and sworn in, in which case, they will be at liberty to take up their positions as a Members of Uasin Gishu County Assembly Representing United Democratic Alliance under the Gender Top Up Category.
 - f. For purposes of further protecting the dignity of administration of justice and the rule of law and pending compliance as ordered above, the Speaker of the County Assembly of Uasin Gishu County and the County Assembly of Uasin Gishu County shall forthwith cease to accord the said Serem Naomy Chepkemboi, Kemboi Roda Chelagat, Rebecca Jerop, Kiboi Chemtai Nancy, Hassan Saida Chepkoech, Idid Sahara Abdi, Kebenei Magrinah Chebet, Chelimo Juliet And Cherono Caroline the status, rights, privileges and any other entitlement as a Members of the County Assembly of Uasin Gishu County.



- g. The Deputy Registrar of the high court under the ministerial powers donated by the statute serves this ruling upon the chief executive officer of IEBC and the speaker of the County Assembly for compliance forthwith.
- h. The 4th Respondent shall bear the costs of the application.

It is so ordered.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 23RD DAY OF JANUARY 2024.

R. NYAKUNDI-

JUDGE

In the presence of the;

The petitioners

