



Matuli & another v Independent Electoral and Boundaries Commission & 2 others (Election Petition Appeal E001 of 2022) [2024] KEHC 210 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEHC 210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
ELECTION PETITION APPEAL E001 OF 2022
RN NYAKUNDI, J
JANUARY 23, 2024**

BETWEEN

LYDIA MATULI 1ST APPELLANT

AMANI NATIONAL CONGRESS 2ND APPELLANT

AND

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

ESTHER JEMELI MISOI 2ND RESPONDENT

VIOLET ENYIMBA CLEMENT 3RD RESPONDENT

Gazettement of a nominated County Assembly Member by the IEBC CEO without a properly constituted IEBC

The applicant challenged the failure by the Independent Electoral and Boundaries Commission (IEBC) and the Speaker of the County Assembly of Nandi to comply with the orders to gazette and have her sworn as a Member of the Nandi County Assembly citing the absence of the chairperson and commissioners of the IEBC as the reason for the non-compliance. The court held that since the Commission had not been properly constituted, and to give effect of the court's directions, the IEBC's CEO could exercise such an administrative duty of communicating the decision of the court to the Government Printer. The court further found that there was no mandatory provision to the effect that a member of County Assembly could only be sworn in after gazettement.

Reported by Kakai Toili

Electoral Law – elections – nomination of members of county assemblies – gazettement of members nominated to county assemblies - where the Independent Electoral and Boundaries Commission (IEBC) was not properly constituted - whether it was mandatory for a member of county assembly to be gazette before being sworn in - whether IEBC's CEO could gazette a member of a county assembly under the gender top up as ordered by a court where the Commission had not been properly constituted County Government Act (cap 265), section 7A.



Constitutional Law – *fundamental rights and freedoms – right to equality and freedom from discrimination – what was the threshold test to determine a claim of violation of the right to equality where there was no differentiation – Constitution of Kenya, article 27.*

Brief facts

The trial court declared the nomination of the 1st appellant as a member of Nandi County Assembly under the category of special seats (gender top up) as null and void. Consequently, the 1st appellant's gazette was nullified. The 1st respondent, the Independent Electoral and Boundaries Commission (IEBC) was ordered to re-allocate the gender top up seat to the next female Nandi County registered voter in the list. Being aggrieved, the appellants filed the instant appeal, which was consequently dismissed. In dismissing the appeal, the court stated that the declaration made by the trial court in clause 3 of its judgment was take effect forthwith but not later than thirty (30) days from April 26, 2023.

The failure by IEBC and the Speaker of the County Assembly of Nandi to comply with those orders triggered the instant application by the applicant. The applicant sought for among other orders; that the orders issued by the High Court at Eldoret on November 3, 2023 in Eldoret Election Appeal No. E001 of 2023; Anne Bett Jepleting v IEBC & others to apply in the instant case *mutatis mutandis*; and that the court be pleased to make any other appropriate reliefs to ensure protection of the Constitution. The applicant contended that the IEBC and the Speaker of the County Assembly of Nandi had refused to comply with the orders to gazette and have her sworn as a Member of the Nandi County Assembly citing the absence of the chairperson and commissioners of the IEBC as the reason for the non-compliance.

Issues

- i. Whether IEBCs CEO could gazette a member of a county assembly under the gender top up as ordered by a court where the Commission had not been properly constituted.
- ii. Whether it was mandatory for a member of County Assembly to be gazette before being sworn in.
- iii. What was the threshold test to determine a claim of violation of the right to equality where there was no differentiation?

Held

1. The court took judicial notice that in the current state of affairs regarding the constitution of the IEBC, it was not clear when the IEBC would be reconstituted and get back to carrying out its mandate as stipulated under the Constitution and the Independent Electoral and Boundaries Commission Act. Sections 5 and 10(7) of the Independent Electoral and Boundaries Commission Act were authoritative as to the composition of the Commission and the basic role of the chief executive officer (CEO) was to execute the decisions of the Commission and to perform the duties assigned to him/her by the law and the Commission.
2. As a matter of practical reality much of the powers of IEBC legislative activities were intended to be undertaken by an organ prescribed in the name and style of the Commission. That statutory provision conditioned the gazette approval of any member of Parliament or of the county assembly be enabled and validated as duly elected through a gazette notice submitted to the Government Printer be vested with the Commission.
3. The superintendence direction and control of the preparation of the electoral rolls for and the conduct of all elections to Parliament and to the Senate and of elections to the county assembly, and to the offices of President and Deputy President held under the Constitution shall be vested in a commission referred to in brief as IEBC.
4. To gazette a winner out of an election contest was at the tail end of the electoral process. The specified form of dispatching names to the Government Printer was on the basis of administrative law in order to ensure that the conferred jurisdiction on IEBC to declare candidates as duly elected consistent with the Constitution and enabling statues. It was a confirmation procedure which required the Commission to make such an application of validity to the official Kenya Gazette.



5. As far as standing was concerned the applicant had complied with the provisions of the law necessary as a nominated member of the County Assembly. The applicant had presented enough evidence and arguments that all the procedural requirements of appeal had been fully exhausted and that her fundamental rights were at stake of a violation or infringement. The provisions considered were suggestive that in the interim there was no organ of state in the name and style of IEBC but in essence the secretariat under the CEO was in place to undertake various functions as the case may be to await the establishment of the Commission. The petitioner having shown that she had exhausted all the procedures that may have been available within the hierarchy of courts it was appropriate that she be gazetted in accordance with the rules and regulations as a *bonafide* member of the Nandi County Assembly.
6. It could not be said that special measures had been taken by the Government to ensure the protection or advancement of persons like the applicant who had been disadvantaged by one act on not sending her name for gazette as a member of the County Assembly in Nandi County. There was no sameness of treatment of the applicant with same individuals in the same category. The action by the CEO of IEBC of taking a neutral norm risks neglected the deepest commitment of the Constitution.
7. The principle of equality before the law conferred to any citizen the right to equal protection and benefit of the law. Basically, that meant that there was a preliminary enquiry as to whether the impugned provision or conduct differentiated between people or categories of people. That was a threshold test if there was no differentiation then there could be no question of a violation of any part of article 27 of the Constitution. If a provision of conduct did differentiate, then a two-stage analysis must be applied.
 1. The first stage concerned the right to equal treatment and equality before the law in article 27. It tested whether the law or conduct had a rational basis. If the answer was in the negative, then the impugned law or conduct violated article 27(1) and it failed at the first stage.
 2. If the differentiation was shown to be rational, then the second stage of the enquiry would be whether the differentiation amounted to unfair discrimination on some specified grounds in article 27(4).
8. The applicant had discharged the onus by putting up a plausible explanation that the right to equality in terms of article 27 of the Constitution had been breached for the failure on the part of the Speaker of the County Assembly not to administer the oath by imposing a restriction on the known process of gazette and the CEO of IEBC to justify the limitation of that right by avoidance. It seemed puzzling that the Constitution had allocated to the State and its organs a role as the protectors and the guarantors of the fundamental rights and freedoms and to ensure that they were available to all regardless of their social, economic or political status failed to show any criteria that was reasonable or justified to impair the rights which accrued by the electoral process declaring the petitioner as the winner.
9. None of the drafters of the electoral statutes and regulations were willing to go as far as ordering that in absence of the commissioners as of necessity a gazette notice by a validly elected Member of Parliament or county assembly could be acted upon by the CEO. Civil rights were an essential component of democracy. Therefore, when individuals like the petitioner was being denied an opportunity to participate in political society her civil rights were under threat of being infringed or violated already. Wherefore, it was sometimes possible to act beside the law, namely in a case where the law failed yet the act would not be evil.
10. The CEO was neither an independent entity from the Commission nor an alternative to the Commissioner. It then meant that the CEO was incapable of assuming the role of the Commission in instances when the Commission was not properly constituted or not constituted at all. However, the Constitution of Kenya, 2010 did not envisage the present scenario where strictly speaking, there were no members of the Commission. The Constitution and the Independent Electoral and Boundaries



- Commission Act were however clear on the steps to be taken to replace commissioners in the event of resignation, retirement and removal. Section 5 of the Act was to the effect that the process of replacement process should commence at least six months before the lapse of the commissioners' term.
11. The replacement process was not initiated prior to the lapse of the commissioners' terms in office and the Commission had not been constituted at present. In sum, given the fact that the Commission had not been properly constituted, and to give effect of the court's directions, the IEBC's CEO could exercise such an administrative duty of communicating the decision of the court to the Government Printer. The applicant had exhausted all remedies and it would be an injustice to delay further her swearing in as a Member of the County Assembly of Nandi.
 12. From article 259 the Constitution, the Constitution was to be interpreted in a manner that promoted its purposes values and principles; advanced the rule of law, human rights fundamental freedoms and that permitted the development of law and good governance. In the instant circumstances, IEBC had not been properly constituted.
 13. While the court appreciated the fact that the Constitution of Kenya 2010, did not envisage such a *lacuna* where there were no IEBC commissioners, thereby holding all its functions in abeyance, the court was also aware of its mandate to fashion appropriate remedies to the aggrieved party. The court could not then sit back and watch the applicant suffer a glaring prejudice for reasons that a properly constituted commission did not exist.
 14. From section 69 of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya and section 85 of the Evidence Act, a gazette notice was evidence, at face value, of the existence of a law or a notice that had been duly formulated. It then implied that a gazette notice was an official communication or a formal expression of the existence of the notice or law.
 15. The argument that IEBC was unable to publish a gazette notice for lack of a quorate commission was untenable and an attempt to take advantage of the *lacuna* created by the absence of the commissioners, an issue that was out of control of the applicant.
 16. From section 7A of the County Government Act, once members of the county assembly were nominated and/or elected, it was the IEBC's role to publish their names in the Kenya Gazette to inform the public of the prospective officer holders. There was no mandatory provision to the effect that a member of county assembly could only be sworn in after gazette. Gazette only served as an avenue to formally inform the public of the successful candidates and as such marking the close of the election process.
 17. The substantive process of electing or nominating a member of county assembly was what may be challenged in a court of law and gazette only served as a notification to the public of the outcome of the nomination. The process of gazette was merely an administrative task arising from an already concluded process. That gazette could not vitiate the status of a person who had been duly elected or nominated during an election process.
 18. It would be a travesty of justice to continue barring the applicant from assuming the office that she was validly nominated to serve in on account of the pending reconstitution of the IEBC whose timelines were unknown and/or indefinite. Once the applicant exhausted the available legal remedies, she legitimately expected to be sworn in. The basic premise underlying the protection of legitimate expectations seemed 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.
 19. Nothing stopped the applicant, who had a valid court order and who had been vigilant in seeking legal remedies from being sworn in to office. The provisions of article 177 of the Constitution which limited the term of a member of county assembly to 5 years. Given that the general elections were held in August 2022, it then meant that as at present almost 1 year and 5 months had lapsed from the period



that the applicant was supposed to be serving as a member of county assembly. The court was mandated to ensure that the applicant received appropriate remedies. Her rights could not be delayed further.

Application allowed.

Orders

- i. *The IEBC's Commission Secretary/CEO or any other person occupying that office was compelled to, within 14 days thereof, cause to be published in the Kenya Gazette a corrigendum to Gazette Notice 10712 of 2022 (special issue) dated September 9, 2022 to the effect That: -*
 1. *The name of the 1st appellant as a Member of County Assembly of Nandi County under the gender top up list for the 2nd appellant, Amani National Congress (ANC) party was deleted.*
 2. *The name of the applicant was included as a Member of County Assembly of Nandi County under the gender top up list for ANC party at position 8;*
- ii. *Upon the publication in the Kenya Gazette as per order (i) above, the Speaker of the County Assembly of Nandi County shall, at the immediate next sitting of the of the County Assembly of Nandi after such publication swear in the applicant as a Member of County Assembly of the County Assembly of Nandi County.*
- iii. *In the alternative, in the event the IEBC's Commission Secretary/Chief Executive Officer or any other person occupying that officer failed to gazette the applicant within that period, the Speaker of the County Assembly of Nandi shall immediately declare the position of the ANC in the gender top up list for Member of County Assembly of Nandi vacant.*
- iv. *Upon declaring the position vacant in terms of order (iii) above, the Speaker of the County Assembly of Nandi shall in the immediate next sitting after the lapse of 14 days proceed to swear the applicant into office as a duly nominated Member of the County Assembly of Nandi County, under the gender top up list representing ANC.*
- v. *In the event of failure to comply with the above orders within the stipulated time, the applicant shall be deemed to have been duly nominated and sworn in, in which case, she would be at liberty to take up her position as a Member of Nandi County Assembly representing ANC under the gender top up category.*
- vi. *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 Nandi County and the County Assembly of Nandi County shall forthwith cease to accord the 1st appellant the status, rights, privileges and any other entitlement as a Member of the County Assembly of Nandi County.*
- vii. *The Deputy Registrar of the High Court under the ministerial powers donated by the statute to serve the instant ruling upon the CEO of IEBC and the Speaker of the County Assembly for compliance forthwith.*
- viii. *The IEBC to bear the costs of the application.*

Citations

Cases

Kenya

1. *Director of Public Prosecutions v Samuel Kimuchu Gichuru & another* (Criminal Revision 926 of 2011; [2012] KEHC 5422 (KLR) — (Followed)
2. *Gachagua, Nderitu v Thuo Mathenge & 2 others* (Civil Appeal No. 14 of 2013; [2013] KECA 84 (KLR) — Explained
3. *Jepleting, Anne Bett v Independent Electoral and Boundaries Commission & others* Election Appeal No E001 of 2023 – (Distinguished)
4. *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* (Petition 1 of 2015; [2016] KESC 2 (KLR) — (Followed)
5. *Omwoyo v Independent Electoral & Boundaries Commission & another* (Petition E005 of 2023; [2024] KEHC 8315 (KLR) — (Followed)

Regional Court



Catholic Diocese of Moshi v Attorney General [2000] 1 EA 25 — (Followed)

South Africa

1. Fose v Minister of Safety and Security [1997] (3) SA 786 1997(7) BCLR 851 — (Explained)
2. Hoffmann v South African Airways [2000] ZACC 17 — (Followed)
3. National Director of Public Prosecutions v Philips [2020] ZAGPJHC 99) — (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 27, 27(4); 82(1)(b); 157(12); 177; 250(1); 259 — (Interpreted)
2. County Governments Act (cap 265) section 7A — (Interpreted)
3. Elections Act (cap 7) sections 37, 85 — (Interpreted)
4. Evidence Act (cap 80) section 85 — (Interpreted)
5. Independent Electoral and Boundaries Commission Act (cap 7C) sections 5, 10 (7); 11(A) (a) – (Interpreted)
6. Interpretation and General Provisions Act (cap 2) sections 69, 85 — (Interpreted)

Texts

Forsyth, CF., (Ed) (1988), *The Provenance and Protection of Legitimate Expectations* Camb LJ 238, pp 242-244)

Advocates

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RULING

Background

1. In a judgment delivered at the trial court on November 2, 2022, Hon DA Ocharo PM, allowed the petitioners' petition. The trial court declared the nomination of the 1st appellant as a member of Nandi County Assembly under the Category of Special Seats (Gender Top Up) as null and void. Consequently, the 1st appellant's Gazettement was nullified. The 1st respondent was ordered to re-allocate the gender top up seat to the next female Nandi County Registered voter in the list in accordance with section 37 of the [Elections Act](#).
2. Being aggrieved by the trial court's judgment, the appellants filed the present appeal, which was consequently dismissed for lack of merit *vide* this court's judgment dated April 26, 2023. In the said judgment this court in dismissing the appeal stated that the declaration made by the trial court in clause 3 of its judgment take effect forthwith but not later than thirty (30) days from April 26, 2023.
3. The failure by IEBC and the Speaker of the County Assembly of Nandi to comply with the said orders, triggered the present application by the 2nd respondent/applicant. The 2nd respondent/ applicant filed the application by way of Notice of Motion dated November 9, 2023 seeking the following orders: -
 - i. Spent
 - ii. The orders issued by the High court at Eldoret (Hon Antony Mrima LJ) on November 3, 2023 in Eldoret Election Appeal No E001 of 2023; *Anne Bett Jepleting versus the IEBC & others* to apply in this case *Mutatis Mutandis*.



- iii. Leave be granted for the firm of GSLAW LLP Advocates to come on record for the 2nd respondent/Applicant, Esther Jemeli Misoi.
 - iv. The court be pleased to make any other appropriate reliefs to ensure protection of the Constitution.
 - v. Costs be in the cause.
4. The application is supported by the applicant's affidavit and is premised on the following grounds: -
- a. That the IEBC and the Speaker of the County Assembly of Nandi have refused to comply with the orders to Gazette and have her sworn as a Member of the Nandi County Assembly citing the absence of the Chairperson and Commissioners of the IEBC as the reason for the non-compliance.
 - b. That the refusal is further violation of her Constitutional rights as the orders of the court are not subject to a resolution of commissioners of the Chairperson of IEBC.
 - c. That the High Court at Eldoret in Election Petition Appeal No E001 has ordered the IEBC CEO, Marjan Hussein Marjan or any person acting in the office to Publish a corrigendum and include Anne Bett Jepleting as a Member of the County Assembly of Nandi and the Speaker to swear her in within 14 days from November 3, 2023.
 - d. That the circumstances of the two cases are similar as they involve the same Gazette Notice and the same County Assembly.
 - e. That it is imperative in the interest of justice that the corrigendum to include the orders of this court.
 - f. That the application is thus in the interest of justice and constitutionalism in our democratic polity.
5. In response to the application, the 1st respondent, the Independent Electoral and Boundaries Commission, also referred to as 'IEBC' through its Director of Legal Services one Chrispine Owiye admitted to have received the court's orders dated November 28, 2022, by the chief Magistrate's court at Kapsabet and stated that the commission is well aware that the matter was referred to appeal and an order or certificate pursuant to the decision of the appellate court has not been supplied to the commission. He further averred that the high court, having delivered a decision on the appeal, the magistrate's court is now *functus officio*.
6. In further response, the 1st respondent stated that the commission is currently unable to act on any order which requires publication of a Gazette Notice, because of the following reasons: -
- a. The process of publication of a Gazette Notice by the Commission is policy based thus requires the presence of the Commission Chairperson and Commissioners pursuant to section 11(A)(a) of the IEBC Act 2011. The principal role of the Commission (Chairperson and Commissioners) is to provide oversight, policy direction and strategy on all matters related to the election management.
 - b. The Offices of the Chairperson and Members of the Commission are vacant and are yet to be filled, therefore posing a challenge to the Commission in carrying out certain activities including publication of election related Gazette Notices such as the ones required pursuant to the court decision.



- c. The Commission is ultimately responsible and accountable to Kenyans for the proper discharge of the Commission's Constitutional and statutory mandate. It thus follows that, in absence of a quorate Commission, IEBC is unable to execute and publish a Gazette Notice to delete the names of those whose elections were nullified with their resultant replacements as the same would lack sanction of the Commission thereby violating the provisions of article 250(1) of the Constitution.
 - d. Finally, the 1st respondent argued that it is not true that the Secretary/Chief Executive Officer of the Commission has refused to act on the said orders, but is unable to do so due to circumstances which are not of his making. That the commission has been unable to act on several other orders related to party List Elections on account of the aforesaid reasons.
7. The matter came for hearing of the application on December 18, 2023 and the parties sought to rely on their respective pleadings save for the other respondents who elected not to file any response for reasons that the orders issued by the court concerned the 1st respondent.

Analysis and Determination.

8. I have carefully considered the pleadings filed and the respective parties' depositions therein. 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.

9. The 1st respondent argued that in absence of a quorate Commission, IEBC is unable to execute and publish a Gazette Notice to delete the names of those whose elections were nullified with their resultant replacements as the same would lack sanction of the Commission thereby violating the provisions of article 250(1) of the Constitution.
10. The applicant on the other hand in her pleadings averred that the High Court in Eldoret Election Petition Appeal No E001 of 2023 ordered the IEBC CEO, Marjan Hussein Marjan or any other person acting in the office to publish a Corrigendum and include the appellant therein as a Member of the County Assembly of Nandi and the Speaker to swear her within 14 days. To this end, the applicant urged the court to adopt similar orders in the present matter *mutatis mutandis*.
11. It is not in dispute that the trial court declared the nomination of the 1st appellant as a member of Nandi County Assembly under the Category of Special Seats (Gender Top Up) as null and void through its decision of November 2, 2022. The said court directed the 1st respondent to re-allocate the gender top up seat to the next female Nandi County Registered voter in the list in accordance with section 37 of the Elections Act.
12. It is also not in dispute that as at the time this court rendered its judgment on the appeal in April 26, 2023, all the Commissioners of the 1st respondent were no longer in office for various including resignation, removal from office and retirement. Without a doubt, in the absence of the Commissioners, the 1st 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 1st respondent will be reconstituted and get back to carrying out its mandate as stipulated under the Constitution and the IEBC act.



13. The provisions of section 5 of the [Independent Electoral and Boundaries Commission Act](#) are as follows:

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.

14. 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 herein urged the court to adopt the orders issued the High Court 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 gazetting 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. As a matter of practical reality much of the powers of IEBC legislative activities were intended to be undertaken by an organ prescribed in the name and style of the commission. That statutory provision conditioned the gazetting approval of any member of parliament or of the County Assembly be enabled and validated as duly elected through a gazette notice submitted to the government printer be vested with the commission. It is also true that the superintendence direction and control of the preparation of the electoral rolls for and the conduct of all elections to parliament and to the senate and of elections the county Assembly, and to the offices of president and vice president held under this



constitution shall be vested in a commission referred to in brief as IEBC. In [independent electoral and boundaries commission Act 9 of 2011](#) the following functions are assigned to the commission;

- a. The continuous registration of citizens as voters.
 - b. The regular revision of the voters rolls;
 - c. The delimitation of constituencies and wards in accordance with the [Constitution](#).
 - d. The regulation of the process by which parties nominate candidates for elections.
 - e. The settlement of electoral disputes, including relation to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results.
 - f. The registration of candidates for election.
 - g. Voter education.
 - h. The facilitation of the observation, monitoring and evaluation of elections.
 - i. The regulations of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election.
 - j. The development and enforcement of a code of conduct for candidates and parties contesting elections.
 - k. The monitoring of compliance with the legislation required by article 82(1)(b) of the [Constitution](#) relating to nomination of candidates by parties.
 - l. The investigation and prosecution of electoral offences by candidates, political parties or their agents pursuant to article 157(12) of the [Constitution](#).
 - m. The use of appropriate technology and approaches in the performance of its functions and
 - n. Such other functions as are provided for by the [Constitution](#) or any other written law.
17. In terms of the mandate under these provisions to gazette a winner out of an election contest is at the tail end of the electoral process. The specified form of dispatching names to the government printer is on the basis of administrative law in order to ensure that the conferred jurisdiction on IEBC to declare candidates as duly elected consistent with the [Constitution](#) and enabling statutes. It is a confirmation procedure which requires the commission to make such an application of validity to the official Kenya Gazette.
18. As far as standing is concerned the petitioner has complied with the provisions of the law necessary as a nominated member of the county Assembly. This a matter in which the public has a sufficient interest in a remedy which raises substantial questions as to whether the failure to have the petitioner duly gazetted followed with an Act of taking oath of office before the speaker of the County Assembly it does genuinely occasion prejudice. It is important to note that the petitioner has presented enough evidence and arguments that all the procedural requirements of appeal have been fully exhausted and that her fundamental rights are at stake of a violation or infringement. The provisions I have considered in this ruling are suggestive that in the interim there is no organ of state in the name and style of IEBC but in essence the secretariat under the chief executive officer is in place to undertake various functions as the case may be to await the establishment of the commission. The petitioner having shown that she has exhausted all the procedures that may have been available within the hierarchy of courts it is appropriate that she be gazetted in accordance with the rules and regulations as a bonafide member of the Nandi County Assembly.



19. The Constitution requires me to grapple with this difficult issue on the idea of equality in terms of art 27 the provisions tell us the type of society that was created in 2010 is one based on equality, dignity and freedom. This comprises a guarantee that the law will protect and benefit people equally under prohibition on unfair discrimination. To this end it cannot be said that special measures have been taken by the government to ensure the protection or advancement of persons like the petitioner who have been disadvantaged by one Act on not sending her name for gazetement as a member of the County Assembly in Nandi County. To her constituency these are deep scars of systematic discriminations since her nomination and the exhaustion of the right of appeal. There is no sameness of treatment with of the petitioner with same individuals in the same category. It is clear to me purely the action by the chief executive of IEBC of taking a neutral norm risks neglecting the deepest commitment of the Constitution.
20. The principle of equality before the law confers to any citizen the right to equal protection and benefit of the law. Basically, this means that there is a preliminary enquiry as to whether the impugned provision or conduct differentiate between people or categories of people. This is a threshold test if there is no differentiation then there can be no question of a violation of any part of art 27. If a provision of conduct does differentiate then a two-stage analysis must be applied. The first stage (a) above concerns the right to equal treatment and equality before the law in art 27. It tests whether the law or conduct has a rational basis is there a rational connection between the differentiation in question and a legitimate government purpose that it is designed to further or achieve? If the answer to this is no, then the impugned law or conduct violated art 27(1) and it fails at the first stage. If, however, the differentiation is shown to be rational, then the second stage of the enquiry would be whether does the differentiation amount to unfair discrimination on some specified grounds in art 27(4) of the Constitution. I am satisfied that the petitioner has discharged the onus by putting up a plausible explanation that the right to equality in terms of art 27 of the Constitution has been breached for the failure on the part of the speaker of the County Assembly not to administer the oath by imposing a restriction on the known process of gazetement and the chief executive officer of IEBC to justify the limitation of that right by avoidance. It seems puzzling that the Constitution has allocated to the state and its organs a role as the protectors and the guarantors of the fundamental rights and freedoms and to ensure that they are available to all regardless of their social, economic or political status fails to show any criteria that is reasonable or justified to impair the rights which accrued by the electoral process declaring the petitioner as the winner.
21. I am defending an interpretive approach to law that seeks to show and to make sense of our law, locating answers to legal and Constitutional questions that would otherwise elude us. It is also important in assessing the factual matrix of this case none of the drafters of the Electoral Statutes and Regulations were willing to go as far as ordering that in absence of the commissioners as of necessity a gazette notice by a validly elected member of parliament or county Assembly can be acted upon by the chief executive officer. A good deal of concerns about the petitioner seems to stem from the way the existence of the secretariat of IEBC declined to engage with the petitioner in a legitimate manner to intervene to protect democracy. With an eye to the broader context of constitutionalism it is worthy adding here in parentheses that the court would make decisive orders on this cause of action in to afford a remedy to the petitioner within the existing legal infrastructure. For present purposes what is of particular interest is that when the case first reached the court it was ruled in favour of the petitioner. It is also significant that the litigation traversed to the appeals court and the legal points squarely raised were heard and conclusively determined. A major theme of this petition is specially to tackle the uncertainties on procedural protocols demanded of the law in the context of gazetement and administering oath of office by the speaker of the County Assembly. It is that lack of formal process which has paused a special problem on the distinctive facts of this case. Civil rights are an essential component of democracy.



Therefore, when individuals like the petitioner is being denied an opportunity to participate in political society her civil rights are under threat of being infringed or violated already. Wherefore, it is sometimes possible to act beside the law, namely in a case where the law fails yet the act will not be evil.

22. Hence in terms of this perspective the chief executive officer of IEBC need not depart from the positive law discourse by dispatching a memo to the government printer unless however, the violation of it is of such an intolerable degree that the rule becomes in effect lawless for its failure to meet the minimum standard of justice. A typical question which arises in this inquiry is how unjust a specific rule of law before it forfeits its claim to be law in terms of the ideal standards of the said law. The IEBC by the spirit of the law is deemed to be specifically an effective institution capable not only abiding by the constitutional dictates but more particular also capable of meticulously enforcing the law in each instance regardless of the justness of such a law or in spite of the fact that such a law might arguably be gravely unjust. To what extent the actual behavior in question corresponds with the legal norm formulation is a matter which in this petition occurs by exception and it is effectively remedy by measures of exercising discretion to undo the transgression in the case of legal uncertainty. I am therefore justified in taking the position that the necessity of a well-functioning legal order placed reliance on the government machinery as a means for carrying out the mandates of law to avoid a malfunctioning of a legal system, its validity and efficacy. In a scenario of this kind it should be clear a realistic assessment of the law that is actually prevailing requires the validity of the petitioner as a member of the County Assembly duly acknowledged in obedience of the law remains valid and nothing bars her name to be forwarded to the government printer for a gazette notice to issue by its officials. Here one has to be alive to the fact reliably so from the other statutory instrument accompanying the petition prima facie indications of what electoral law entails there is no dispute as to the petitioner's legal order as a member of the Nandi County Assembly.
23. 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.
24. 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 1st respondent's CEO can exercise such an administrative duty of Communicating the decision of the court to the Government printer. The Applicant has exhausted all remedies and it will be an injustice to delay further her swearing in as a Member of the County Assembly of Nandi.

Effective Remedies

25. 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)
26. 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.
27. I have taken note of the 1st respondent’s argument that the commission is unable to act on any other which requires publication of a Gazette Notice for reasons that there is no quorate commission, which is ultimately responsible and accountable to Kenyans for the Proper discharge of the of its constitutional and statutory mandate. That IEBC is therefore unable to execute and publish a Gazette Notice to delete the names of those whose elections were nullified with their resultant replacements. It then triggers the next issue for determination.

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

28. 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 a one from assuming office. The Provisions of article 259 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.
29. In the present circumstances, IEBC has not been properly constituted. The 1st respondent through its Legal director appears to urge the court to put on hold the applicant’s rights until such a time when the commission will be constituted. Will such an approach breathe life into the Constitution, being a living document?
30. 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.
31. 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?

32. While I appreciate the importance of Gazettement in the election process, I insist on realizing the applicant's constitutional rights who equally has a legitimate expectation to be sworn in as a Member of County Assembly having exhausted the available avenues in pursuing her cause.

33. In explaining the purpose of a Gazette notice, the Court of Appeal in *Nderitu Gachagua v 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.”

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.’

34. 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.

35. 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.

36. In *Director of Public Prosecutions v 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”

37. The 1st respondent argument that IEBC is unable to publish a Gazette Notice 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.

38. 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: -



- 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.
39. 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 marking the close of the election process.
40. 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 gazettement 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.

41. 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 gazettelement 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 v IEBC & another*, that the process of gazettelement is merely an administrative task arising from an already concluded process. That gazettelement 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 v 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 gazettelement, the gazettelement is merely directive and the failure to gazette the appointment does not necessarily the appointment.”

42. 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 v 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.”

44. Having considered the above cited provisions of the law, I agree with my sister Hon WA Okwany in Nyamira Constitutional Petition No E005 of 2023; *Michelle Kemuma Omwoyo v IEBC & another* that it would be a travesty of justice to continue barring the applicant from assuming the office that she was 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.

45. Once the applicant exhausted the available legal remedies, she 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.
46. 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 CF Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 Camb LJ 238, 242-244 (1988).)
- 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.”
47. In my final analysis and in considering the peculiar nature of the present circumstances, nothing stops the applicant, who has a valid court order and who has 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. Her rights cannot be delayed further.
48. In the upshot, the applicant’s application dated November 9, 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 September 9, 2022 to the effect That: -
 - i. The name of Lydia Matuli as a Member of County Assembly of Nandi County under the Gender Top up List for Amani National Congress (ANC) party is Deleted.
 - ii. The name of Esther Jemeli Misoi is Included as a Member of County Assembly of Nandi County under the Gender Top Up List for Amani National Congress (ANC) party at position 8;
 - b. Upon the publication in the Kenya Gazette as per Order (b) above, the Speaker of the County Assembly of Nandi County shall, at the immediate next sitting of the of the County Assembly of Nandi after such publication swear in Esther Jemeli Misoi of Identity card Number 5277844 as a Member of County Assembly (MCA) of the County Assembly of Nandi 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 Nandi shall immediately declare the position of the Amani National Congress in the Gender Top Up List for Member of County Assembly of Nandi Vacant.
- d. Upon declaring the position vacant in terms of order (c) herein above, the Speaker of the County Assembly of Nandi shall in the immediate next sitting after the lapse of 14 days proceed to swear the applicant into office as a duly nominated Member of the County Assembly of Nandi County, under the Gender Top Up list representing Amani National Congress Party.
- e. That in the event of failure to comply with the above orders within the stipulated time, the applicant shall be deemed to have been duly nominated and sworn in, in which case, she will be at liberty to take up her position as a Member of Nandi County Assembly Representing Amani National Congress 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 Nandi County and the County Assembly of Nandi County shall forthwith cease to accord the said Lydia Matuli the status, rights, privileges and any other entitlement as a Member of the County Assembly of Nandi 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 1st 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;

Mugun state counsel

GS Law Advocates LLP

Humphrey & Company. Advocates

B. J. Sawe & Company. Advocates

