Wanyama & 2 others v Murunga & another (Election Appeal E002, E003, E004 & E005 of 2023 (Consolidated)) [2023] KEHC 19753 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19753 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

ELECTION APPEAL E002, E003, E004 & E005 OF 2023 (CONSOLIDATED)

DK KEMEI, J

JULY 7, 2023

BETWEEN

JOHN KENNEDY WANYAMA ..... 1ST APPELLANT

MILDRED APIYO BARASA ..... 2ND APPELLANT

FORUM FOR RESTORATION OF DEMOCRACY (FORD-KENYA) ..... 3RD APPELLANT

AND

CHRISPINE KIPSANG MURUNGA ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES BOUNDARIES COMMISSION (IIEBC) ..... 2ND RESPONDENT

(Being an appeal from the judgement of the Honourable Adhiambo Principal Magistrate in Kimilili Law Court's Election Petition No. E003 of 2022-Chrispine Kipsang Murunga vs Forum for Restoration of Democracy (Ford-Kenya); Mildred Apiyo Barasa and John Kennedy Wanyama delivered on 27th January 2023.)

JUDGMENT

Background

1. The three (3) appeals herein arise from election petition No. E003 of 2022 in the Magistrate's Court at Kimilili wherein Chrispine Kipsang Murunga was the Petitioner while Forum for Restoration of Democracy (Ford-Kenya); Mildred Apiyo Barasa and John Kennedy Wanyama were the 1st ,3rd and 4th Respondents respectively, while the Independent Electoral and Boundaries Commission (IEBC) was the 2nd Respondent. At the conclusion of the hearing of the election petition, the trial court on 6th March 2018 allowed the petition and ordered as follows; -

i. That the 3rd Appellant's marginalized party list for Bungoma County Assembly published by the 2nd Respondent in the Standard Newspaper of 27th July 2022, was not generated and submitted in compliance with *the Constitution* of Kenya 2010, the *Elections Act*, Elections (General) Regulations 2017, the Requirements for submission of Party Lists published in Gazette Notice No. 6378 dated 3rd June 2022 as well as the 2nd Respondent's Nomination and Election Rules and is therefore null and void.

ii. That "minority" or "entrepreneur" as "special interest categories" and "women" as a "minority category" are not the nature of marginalized special interest groups contemplated in Article 177 (1) (c) and as such, the 1st and 2nd Appellants were not qualified to be nominated under the Marginalized Party list category at the expense of persons with disabilities, youth and minority and marginalized groups as provided in section 36 (3) of the *Elections Act* or any other special interest therein.

iii. That the prayers seeking a declaration that the 2nd Respondent's purported allocation of special seats under Article 177(1) (c) to the 1st and 2nd Appellants using the impugned party list before its rectification as per the judgement and decree of the Political Parties Disputes Tribunal was null and void and of no effect and be and is hereby quashed and that the claim of res judicata is hereby denied.

iv. That the prayer seeking that the Court issues a declaration that the Petitioner is the only qualified candidate for nomination under the marginalized party list to represent minority and marginalized groups and communities in Bungoma, being both a youth and a member of Ogiek/Ndorobo community is res judicata is hereby denied.

v. That orders are issued quashing the 3rd Appellant's marginalized list for Bungoma County Assembly and direct that it be reorganized afresh in strict compliance with *the Constitution* of Kenya 2010, the *Elections Act*, Elections (General) Regulations 2017, the Requirements for submission of Party Lists published in Gazette Notice No. 6378 dated 3rd June 2022 as well as the 2nd Respondent's Nomination and Election Rules.

vi. That the 3rd Appellant and the 2nd Respondent do jointly and severally pay the Petitioner's costs which are capped at Kshs. 500,000/=; the Petitioner to file and serve the bill of costs before 31st January 2023.

The Appeals

2. From the above decision of the trial Court, three (3) appeals No. E002 of 2023; No. E003 of 2023 and No. E004 of 2023 were filed which were consolidated and heard together. In Election Appeal No. E002 of 2023 filed on 3rd February 2023, the Appellant was John Kennedy Wanyama while the Respondents were Chrispine Kipsang Murunga 1st Respondent, Forum for Restoration of Democracy (Ford-kenya) as 2nd Respondent, Independent Electoral and Boundaries Commission as 3rd Respondent, and Mildred Apiyo Barasa as 4th Respondent; with the grounds of appeal being: –

i. The learned magistrate erred in law and fact and misdirected herself in finding that the Appellant is not qualified to be nominated as a member of County Assembly of Bungoma under the category of the marginalized groups.

ii. The learned magistrate erred in law and fact in failing to consider triable issues raised by the Appellant and the submissions thereof against the claims in the Petition.

iii. The learned magistrate erred in law in misinterpreting and misapplying Nairobi Petition No. 33 of 2018 Sammy Ndungu Waity vs Independent Electoral and Boundaries Commission & 3 Others.

iv. The learned magistrate erred in law in failing to appreciate that the main issue in Nairobi Political Parties Dispute Tribunal Complaint No. E016 of 2022 was substantially similar to the main issue in the election petition and thus res judicata.

v. The learned magistrate erred in law in finding that it had jurisdiction to entertain the election petition as presented by the Petitioner.

vi. The learned magistrate wholly erred in law and fact and misdirected herself in failing to analyse evidence adduced by the witnesses and the submissions thereof.

vii. The learned magistrate erred in law and fact in finding that the 1st Respondent's marginalized party list for Bungoma County Assembly published by the 2nd Respondent in the Standard Newspaper of 27th July 2022, was not generated and submitted in compliance with *the Constitution* of Kenya 2010, the *Elections Act*, Elections (General) Regulations 2017, the Requirements for submission of Party Lists published in Gazette Notice No. 6378 dated 3rd June 2022 and 2nd Respondent's Nomination and Election Rules and is therefore null and void.

viii. The learned magistrate erred in law and fact in finding that "minority" or "entrepreneur" as "special interest categories" and "women" as a "minority category" are not the nature of marginalized special interest groups contemplated in Article 177 (1) (c) and as such, the 1st and 2nd Appellants were not qualified to be nominated under the Marginalized Party list category at the expense of persons with disabilities, youth and minority and marginalized groups as provided in section 36 (3) of the *Elections Act* or any other special interest therein.

ix. The learned magistrate erred in law in issuing orders quashing the 1st Respondent's marginalized list for Bungoma County Assembly and directing that it be reorganized afresh.

3. On the above grounds of appeal, the Appellant asked that the appeal be allowed and judgement of the trial court be set aside in its entirety with costs.

4. Appeal No. E003 of 2023 was filed on 6th February 2023, by Mildred Apiyo Barasa and the Respondents were Chrispine Kipsang Murunga 1st Respondent, Forum for Restoration of Democracy (Ford-kenya) as 2nd Respondent, Independent Electoral and Boundaries Commission as 3rd Respondent, and John Kennedy Wanyama as 4th Respondent; with the grounds of appeal being: –

i. The learned magistrate erred in law and fact for holding that she had jurisdiction to hear and determine the Petition before the Court when the same had been determined by a competent Political Parties Dispute Tribunal.

ii. The Learned Magistrate erred in law and fact for upholding the Petition after finding out that the Petition was res judicata having been heard and determined by a competent tribunal.

iii. The Learned Magistrate erred in law and fact when she quashed the 2nd Respondent's marginalized list for Bungoma County Assembly and directed for the same to be reorganized afresh when the Court did not have jurisdiction to make such orders.

iv. The Learned Magistrate erred in law and fact when she declared that the Appellant was not qualified to be nominated under the marginalized party list when the evidence and the law under Section 36(3)of the *Elections Act* qualified her to be nominated.

v. The Learned Magistrate erred in law and fact for ordering the re-organization of the 2nd Respondent's Marginalized list for Bungoma County Assembly when the same was time barred by the provisions of the law.

vi. The Learned Magistrate erred in law and fact for purporting to sit on appeal against the decision of the Political Parties Dispute Tribunal.

vii. The Learned Magistrate erred in law and fact in failing to consider the pleadings and evidence on record leading to miscarriage of justice.

viii. The Learned Magistrate erred in law in failing to follow judicial decisions leading to a miscarriage of justice.

5. On the above grounds of appeal, the Appellant asked that the appeal be allowed and judgement of the trial court be set aside by the Court in its entirety with costs.

6. Appeal No. E004 of 2018 was filed on 10th February 2023, by Mildred Apiyo Barasa and the Respondents were Chrispine Kipsang Murunga 1st Respondent, Independent Electoral and Boundaries Commission as 2nd Respondent, Mildred Apiyo Barasa as the 3rd Respondent and John Kennedy Wanyama as 4th Respondent; with the grounds of appeal being: –

i. That the Honourable Court erred in failing to find that the entire Petition was re judicata and an abuse of Court process.

ii. That the Honourable Court erred in law and in fact by finding that the nomination of the 3rd and 4th Respondents were not lawfully nominated contrary to the evidence and applicable legal instruments that were presented before the Court.

iii. That the Honourable Court erred in law and fact in finding that the Appellant's Marginalized Party List for Bungoma County was not generated and submitted in compliance with the law, a finding which had no basis in the evidence and applicable law to the Petition that was presented and prosecuted before the trial Court.

iv. That the Honourable Court's decision of 27th January 2023 is contrary to the tendered evidence and applicable law, it is a miscarriage of justice and sets a bad precedence unless set aside by this appellate Court.

7. On the above grounds of appeal, the Appellant asked that the appeal be allowed and judgement of the trial court be set aside by the Court in its entirety with costs being borne by the 1st Respondent.

8. Vide Court directions dated 2nd March 2023, the three appeals were consolidated and John Kennedy Wanyama became 1st Appellant while Mildred Apiyo Barasa and Forum for Restoration of Democracy (FORD-KENYA) became 2nd and 3rd Appellants respectively.

9. Before the appeal was heard, counsel for Forum for Restoration of Democracy (FORD-KENYA) (3rd Appellant herein) filed a Notice of Motion dated 8th February 2023 under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 3A and 63(e) of the *Civil Procedure Act* and all other enabling provisions of the Laws of Kenya, under certificate of urgency, and sought that the a stay of execution and/or enforcement of the judgement delivered on 27th January 2023 in the

Kimilili Magistrate Court Election Petition No. E003 of 2022-Chrispine Kipsang Murunga vs Forum for Restoration of Democracy (Ford-Kenya); Mildred Apiyo Barasa and John Kennedy Wanyama be issued pending the hearing and determination of the application; a stay of execution and/or enforcement of the judgement delivered on 27th January 2023 in the Kimilili Magistrate Court Election Petition No. E003 of 2022-Chrispine Kipsang Murunga vs Forum for Restoration of Democracy (Ford-Kenya); Mildred Apiyo Barasa and John Kennedy Wanyama be issued pending the hearing and determination of the appeal and that costs of and incidental to this application be borne by the 1st Respondent.

10. Vide Court directions dated 2nd March 2023, orders of stay of execution pending hearing and determination of the appeal were issued.

11. On 24th March 2023, this Court directed the 2nd and 3rd Appellants to file and serve their respective records of appeals before close of business on 29th March 2023.

12. On 18th May 2023, this Court directed that the consolidated appeals be canvassed vide written submissions. All advocates for the parties filed and served written submissions. The consolidated appeal was thus set down for judgement.

Submissions by the parties' counsels

13. Mr. Maloba appeared for the 1st Appellant and submitted in respect of the preferred grounds of appeal. On grounds 1, 2 and 8 he argued that the trial Magistrate held that the 1st Appellant was not qualified to be nominated as a member of the County Assembly of Bungoma under the category of the Marginalized. He referred to Article 193(1) (a) of *the Constitution* of Kenya 2010 of Kenya 2010 which explicitly lists requirements to be met in order to qualify for election/nomination as Member of County Assembly which are also replicated in Section 25(1) of the *Elections Act* No. 24 of 2011. He submitted that one must be registered as a voter to qualify for nomination by a political party, such a voter must be a member of the particular party, and in compliance with party nomination rules, apply to be considered for nomination. He relied on the Supreme Court case of Moses Mwicigi & 14 others vs Independent Electoral and Boundaries Commission (2015) eKLR which reiterated the centrality of political parties in nomination to the senate, national assembly and county assemblies as follows;

> "Nowhere does the law grant powers to the IEBC to adjudicate upon the nomination processes of a political party: such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant laws and regulations."

14. He submitted that based on the above, it was clear that political parties have a responsibility to prepare and submit to IEBC a party list of all persons who would stand elected if the party were entitled to all the seats. He relied on Sections 34(4), 35 and 36 of the *Elections Act* together with Regulation 54 of the Elections (General) Regulations on the phraseology, "political party submitting" or a "party list submitted by the political party".

15. It was argued that the above provisions place upon the IEBC the duty to ensure that the party lists submitted comply with the relevant provisions of the law. He referred to Article 88(4)(e) of *the Constitution* of Kenya 2010 of Kenya 2010 which mandates the IEBC to intervene and settle disputes relating to, or arising from nominations. However, the IEBC does not have powers to adjudicate upon the nomination processes of a political party as this role has been left entirely to the political parties.

He relied on the case of National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another [2013] eKLR, where the High Court thus observed;

> " Section 34(6) of the *Elections Act*, 2011 specifically provides that, 'The party lists submitted to the Commission under this section shall be in accordance with *the Constitution* of Kenya 2010 or nomination rules of the political party concerned. This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet Constitution of Kenya 2010al and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under Section 39, Part VI of the *Political Parties Act*, 2011 or to the High Court in appropriate circumstances"

16. He submitted that subject to the foregoing the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution of Kenya 2010, the Political Party Constitution of Kenya 2010, and the nomination rules as prescribed under Regulation 55. He further argued that, a political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the "elections" for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list, and to require a fresh list to be submitted or an amendment to be made on the list submitted.

17. He submitted that the list submitted by the Ford Kenya Party, the 3rd Appellant herein, to the IEBC in respect to nomination of the 1st and 2nd Appellants was found to conform to Constitution of Kenya 2010al and statutory requirements. However, 1st Appellant took issue with the trial Magistrate when she found that the 1stAppellant is not qualified to be nominated as a Member of County Assembly of Bungoma under the category of the Marginalized Groups. The Ford Kenya Party nominated the 1st Appellant into the County Assembly of Bungoma to represent the special category of entrepreneurs. He submitted that it was the trial Court's view that marginalized groups comprise, strictly, minority, youth and people living with disabilities, and that that proposition is not supported by the law and therefore a misdirection as *the Constitution* of Kenya 2010 makes use of the term 'marginalized' and 'special interests' interchangeably to mean the same thing. He relied on Article 177 (1) (c) of *the Constitution* of Kenya 2010 of Kenya 2010 which provides that the membership of the County Assembly includes the number of members of 'marginalized groups' including persons with disabilities and the youth, prescribed by an Act of Parliament. He further relied on Article 97 (1) (c) of *the Constitution* of Kenya 2010 of Kenya 2010 which provides for 'special interest' inclusive of youth, persons with disabilities and workers. It was his argument that, in both provisions, the lists provided are not restrictive but permissive. The provisions differ from Article 98 of *the Constitution* of Kenya 2010 of Kenya 2010 which define the composition of the senate in restrictive manner so as not to leave room to include other categories of special interest groups or marginalized groups. Article 98 is reproduced hereunder;

> " 98
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> (1) The Senate consists of forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency; sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90; two members, being one man and one woman,

representing the youth; two members, being one man and one woman, representing persons with disabilities; and the Speaker, who shall be an ex officio member.

(2) The members referred to in clause (1) (c) and (d) shall be elected in accordance with Article 90.

(3) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a)."

18. According to him, if the drafters of *the Constitution* of Kenya 2010 of Kenya 2010 intended the composition of county assemblies to be as restrictive as it is in the senate, they would have framed Articles 177 (1) (c) and 97 (a)(c) in the same manner they framed Article 98(1) of *the Constitution* of Kenya 2010 of Kenya 2010. In appreciating that different counties may have different needs at different points in time, he further argued that they did not restrict marginalized and special interest groups to ethnic minorities, youths and people living with disabilities.

19. He submitted that the law on composition of county assemblies, therefore, is permissive and gives room to political parties in generating party lists to identify marginalized groups or special interest groups within specific counties to ensure everybody is brought on board in the spirit of inclusivity as espoused in Article 10 of *the Constitution* of Kenya 2010 of Kenya 2010. In expanding this space, he argued that political parties are given the latitude to define what would constitute marginalized/special interests at a particular time and place but must be guided by ejusdem generis rule while performing this function.

20. He relied on the case of Micah Kigen and 2 Others v Attorney General and 2 Others Nairobi Petition No. 268 and 398 of 2012 [2012] eKLR, where the Court considered the definition of special interests under the provisions of Article 97(1)(c) of *the Constitution* of Kenya 2010 of Kenya 2010 and held that, "the nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to time ..... any special interests may emerge in future and which the political party may consider require representation." Therefore, IEBC, in formulating guidelines to political parties in generating party lists, left it to the parties to define the special interests and to indicate in their respective party lists the special kind of interests the person so nominated represented.

21. It was argued that the 3rd Appellant, in generating its list, considered 'entrepreneurs' as special interests group which required representation in the County Assembly of Bungoma. In support of this preposition, Counsel relied on the Court of Appeal case of Aden Noor Ali v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR which allowed nomination of a person nominated by the Jubilee Party under marginalized category termed "Mixed Heritage". The court stated;

> " Article 97 (1) (c) of *the Constitution* of Kenya 2010 provides for "special interest" including the youth, persons with disabilities and workers... Article 100 of *the Constitution* of Kenya 2010 that contemplates enactment of the law to promote representation of marginalized groups, lists women, ethnic and other minorities and marginalized communities as some of the special interest to be included in the contemplated legislation. All these categories are recognized by the law as falling under "special interest" As the law stands today, there is no definition of categories of "special interest" other than the various categories contained in *the Constitution* of Kenya 2010 and the pronouncements of courts. This lack of definition of "special interests" leaves the situation rather fluid leaving the matter with the political parties to define the categories they consider as "special interests" of course within the confines of the law."

What the learned judge meant was that save for *the Constitution* of Kenya 2010 that specified the categories of youth, persons with disabilities and workers as well as women, ethnic and other minorities and marginalized communities, there was no specific legislation that particularized the categories to be included in the party list, and therefore, all the specified categories fell into the definition of special interest groups.

In the case of Lydia Nyaguthi Githendu vs Independent Electoral and Boundaries Commission & 17 others, [2015] eKLR this Court held; "We must express the view that *the Constitution* of Kenya 2010 scheme vests, to some extent an unregulated power to the political parties to regulate and formulate the list of candidates, and a secondary power to the Commission to supervise, with the Court retaining the ultimate and final authority to address and determine instances of violation or infringement of fundamental rights".

In the case of Micah Kigen & 2 others vs Attorney General (supra) the High Court observed that; "Where *the Constitution* of Kenya 2010 has provided for the representation of specific groups or interests it has explicit provisions for these specific groups and interest represented. It would be inconsistent with *the Constitution* of Kenya 2010 to limit the right of any special interests identified by political parties to be represented in the National Assembly."

When the law as it currently stands is considered, it is true that, despite the stipulations of Article 100 of *the Constitution* of Kenya 2010 which specifies that Parliament shall enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities, and marginalized communities, it is appreciated that no such legislation has been enacted to date.

Until legislation is enacted providing a definition of special interest groups, and setting out the various special interest categories as well as the criteria to be adopted to ascertain the nominees of specific special interest group, and further providing guidelines to be followed by political parties during nomination of their members, political parties will remain at liberty to identify and select categories of special interest groups under which to nominate their representatives at will.

In this case, there was nothing prohibiting the Jubilee Party from specifying the minorities mixed heritage (Asian African) as a category of the minorities or marginalized category, and it was entitled so to do. Needless to say, the appellant did not substantiate how the minorities and marginalized Asian African heritage did not amount to a special interest category, or indeed how it differed from his own representative status which only specified him as a representative of 'minorities.' Essentially, we agree with the learned judge when she stated that "...I find that this court cannot fault the 2nd respondent for identifying mixed heritage as a "special interest." The current electoral law gives the political parties that latitude to define "special interests..." So that having only stated that the 3rd respondent was in a special interest group, and by correcting it to specify minorities mixed heritage (Asian African) as a special interest group, the Jubilee Party was merely identifying a special interest group which it was entitled to do under the current electoral nomination dispensation."

22. Counsel submitted that the trial Court in this appeal therefore ran into an error in concluding that the 1st Appellant was not qualified to be nominated as a member of the County Assembly of Bungoma under the marginalized category for reason that the special interests group of the 'entrepreneur' are not in the nature of the marginalized groups contemplated under Article 177(1)(c) of *the Constitution* of Kenya 2010 of Kenya 2010.

23. On grounds No. 2, 3, 4 and 5 of the appeal, Counsel submitted that all these grounds speak to jurisdiction of the trial Court to entertain the election petition. He relied on the Supreme Court case of Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR which established the boundaries between Article 88(4)(e) of *the Constitution* of Kenya 2010 which gives the IEBC jurisdiction to entertain electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results on one hand and Article 105 (1) Constitution of Kenya 2010 as read together with Section 75 of the *Elections Act* which empowers Courts of law to hear and determine questions as to whether a person has been validly elected. In arriving at the delicate balance so as not to render institutions mandated to deal with pre-election disputes inoperable, the Supreme Court pronounced principles to guide the said institutions and Courts in determining the question of jurisdiction. These are as follows;

> "(i) All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.
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> (ii) Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution* of Kenya 2010, such dispute shall not be a ground in a petition to the election Court.
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> (iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution* of Kenya 2010. The High Court shall hear and determine the dispute before the elections and in accordance with *the Constitution* of Kenya 2010 timelines.
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> (iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.
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> (v) The action or inaction in (4) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution* of Kenya 2010, even after the determination of an election petition.
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> (vi) In determining the validity of an election under Article 105 of *the Constitution* of Kenya 2010 or Section 75 (1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election."

24. He submitted that it is common ground that the 2nd Respondent was not happy in the manner the 3rd Appellant generated its gender top-up and the marginalized lists. As per law provided, the 2nd Respondent took the dispute before the Political Parties Disputes Tribunal (PPDT) which heard the

dispute and judgment delivered in his favour. Grounds forming the basis for the 2nd Respondent's complaint before the PPDT were;

> "b. Nature of the Complaint
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> 4. The complainant seeks amendment of the Respondent's Bungoma Gender Top-up and Marginalized Groups by deleting his name under the Gender Top-up and including it in the Marginalized List and prioritized at number 1 for being the most qualified candidate under the said category.
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> c. Grounds on which the Compliant is Presented
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> 5. The Complainant/Applicant applied for nomination in Bungoma County under the Marginalized Category but his name has been included in the Gender Top-up List.
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> 6. The Complainant/Applicant has raised the matter with the Respondent's Internal Disputes Resolution mechanisms who have categorically declined to amend the party lists and or entertain his complaint by deleting his name in the gender top-up and including it in the Marginalized list.
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> 7. That Complainant/Applicant is an Ogiek/Ndorobo which is the only recognized minority and marginalized community in Bungoma County.
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> 8. The Respondent's marginalized list for Bungoma is populated by persons from the Luhya and Kalenjin communities which are neither marginalized nor minority in Bungoma County and therefore not qualified for nomination under the said category.
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> 9. The Respondent accepted the Complainant's/Applicant's application and even asked that he pays Kshs. 15,000 which he did by sending the money to one Stephen Manusyule, the Director of the Respondent's Elections Board."

25. The 2nd Respondent thereafter sought the following reliefs from the PPDT;

> "(a) An order directing the Respondent to amend its Bungoma Gender Top-up and Marginalized Groups by deleting the Complainant's name under the Gender Top-up and including it in the Marginalized List prioritized at number 1 being the most qualified candidate under Marginalized category.
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> (b) In the alternative to (a) above, the Interested Party amends the Respondent's Bungoma Gender Top-up and Marginalized Groups by deleting the Complainant's name under the Gender Top-Up and including it in the Marginalized List prioritized at Number 1 being the most qualified candidate under Marginalized Category."

26. In allowing the 2nd Respondent's Complaint, the PPDT considered the procedure to be followed by political parties in arriving at their party nomination lists and here is an extract of its judgment;

> " 19. The law placed within the political party, the primary jurisdiction of compiling its party nomination list for the various positions. The *Elections Act* (No. 24 of 2011), the Elections (General) Regulations, 2012, the Elections (Party Primaries and Party Lists) Regulations, 2017, submission of party list guide the nomination process in regard to party lists.
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> 20. It is provided, in law, that party lists must generally comply with *the constitution*, 2010, the *Elections Act*, 2011 as amended by the Statute Law (Miscellaneous Amendment) Act, 2012, the Elections (Amendment) Act, 2012, the Elections (Amendment) (No. 2), the *Political Parties Act*, 2011 and any other relevant law as well as the party constitution and the party nomination rules.
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> 21. We note that the IEBC role, is, at the stage of nominations into party lists, limited to requiring parties to submit lists that represent the categories outlined in law. Specifics as to which member should be in which list and at what number they should be in such list, is a political is party affair. IEBC may require, lawfully, that the lists are presented, as much as possible, in 'zebra' form.
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> 22. The relevant law (regulations), as reproduced below, provides the following in respect to the county assembly party nomination list; .....
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> 23. The Respondent has not controverted the complaint's claim that he qualifies for nomination into the marginalized group nor that he applied for consideration to the marginalized list. The Respondent has however averred that the list contains names of persons from other communities that are equally marginalized within Bungoma County. No information is placed before us to show how and why the complainant was not also considered for the marginalized group but preferred for the gender list, which he did not apply."

27. He submitted that in the Petition filed by the 2nd Respondent, the subject matter of this appeal, the 2nd Respondent laid out the history of the dispute repeating the grounds argued in the PPDT and further pleaded;

> " 51. The 1st and 2nd Respondents did not comply with the orders of the Political Parties Disputes Tribunal and neither did they deem it fit to respond to the letter of the Petitioner asking them to comply and are therefore in contempt.
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> 52. The 1st Respondent's marginalized list for Bungoma County Assembly is populated by persons from the Luhya and Kalenjin Communities which are neither marginalized nor minority in Bungoma County and therefore not qualified for nomination under the said category.
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> 53. The Petitioner avers that the 1st Respondent, deliberately or otherwise failed to comply with mandatory provisions of *the constitution*, the *Elections Act*, Elections (General) Regulations, Elections (Party Primaries and Party Lists)

Regulations, Regulations set out by IEB in Gazette Notice No. 6378 of 3rd June 2022 and its own nomination and election rules as set out in the preceding paragraphs in generating/creating its marginalized party list for Bungoma County assembly .....

54. The petitioner further avers that the 2nd respondent, deliberately or otherwise failed to discharge its constitutional and statutory duty by ensuring the 1st respondent's marginalized party list for Bungoma County Assembly submitted to them complied with mandatory provisions of *the constitution*, the *Elections Act*, Elections (General) Regulations, Elections (Party Primaries and Party Lists) Regulations, Regulations set out by IEB in Gazette Notice No. 6378 of 3rd June 2022 and 1st respondent's nomination and election rules as set out in the preceding paragraphs.

55. The 2nd Respondent failed to ensure compliance with *the constitution* and clear provisions of legislation even after the petitioner moved the Political Parties Disputes Tribunal challenging the process leading to the 1st Respondent's Marginalized Party List for Bungoma County Assembly and obtaining judgment and decree in his favour which both the 1st and 2nd Respondents are in contempt of.

56. The Petitioner therefore avers that the purported allocation of seats by the 2nd Respondent to the 3rd and 4th Respondents using the impugned party list was null and void and should be sanctioned by this honourable Court.

57. The Petitioner avers that the 3rd and 4th Respondents are not qualified for nomination under the marginalized party list since both hail from the dominant ethnic community in Bungoma County and the impugned party list does not comply with section 36(3).

58. The Petition further avers that the use of the impugned party list to allocate seats to the 3rd and 4th Respondents is untenable following the judgment and decree of the Political Parties Disputes Tribunal in PPDT/E016/2022; Chrispine Kipsang Murunga vs Forum for Restoration of Democracy (Ford-Kenya) and Independent Electoral and Boundaries Commission (IEBC) which the 1st and 2nd Respondents are in contempt of.

59. The Petitioner avers that he hails from the Ogiek community which pursuant to an authoritative report by the National Gender and Equality Commission report titled 'Unmasking Ethnic Minorities and Marginalized Communities in Kenya, who and where?' published in 2017, the Ogiek/Ndorobo are the only community recognized as minority and marginalized in Bungoma County."

28. He submitted that the 1st Appellant contends that the trial Magistrate was wrong to hold that the Court was seized with jurisdiction to determine the dispute for two reasons. Firstly, the issues in the petition the subject of the appeal were substantially similar to the issues presented to the Political Parties Disputes Tribunal (PPDT) and therefore res judicata. Secondly, the 1st Appellant contends that the petition raises pre-election disputes which ought to have been handled by either the IEBC or the PPDT.

29. On whether the Petition is res judicata, Counsel submitted that the 2nd Respondent could not move the election Court and raise the same grounds raised and adjudged in the PPDT. The 2nd Respondent

challenges the party lists prepared by the 3rd Appellant on the basis that he is more qualified for nomination than the 1st and 2nd Appellants. He argues that the 1st and 2nd Appellants hail from the dominant Luhya community while he comes from the minority and marginalized Ogiek/Ndorobo community. It is therefore difficult to divorce the issue of qualification of the 1st and 2nd Appellants and the 2nd Respondent for nomination by the 3rd Appellant party as presented before the PPDT from the dispute presented before the trial Court. Counsel argued that the dispute presented as an election petition by the 2nd Respondent was also presented to the Political Parties Disputes Tribunal in PPDT/E016/2022; Chrispine Kipsang Murunga vs Forum for Restoration of Democracy (FORD-Kenya) and Independent Electoral and Boundaries Commission (IEBC) and adjudged upon.

30. He submitted that the doctrine of res judicata is addressed under Section 7 of the *Civil Procedure Act* which provides:

> " No court shall try any suit or issue in which the mater directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

31. He further argued that the Black's law Dictionary 10th Edition defines "res judicata" as

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..." Emphasis added.

32. There are three grounds which must be established.

    1. There is a former suit in which the same parties in the subsequent suit litigated.
    2. The matter in issue is directly or substantially in issue in the former suit,
    3. Court of competent jurisdiction had heard the matter and finally decided the matter in controversy.

    And this was also stated in case of Maina Kiai and 2 Others -V- Independent Electoral and Boundaries Commission and 2 Others (2017) eKLR;

    "The elements of res judicata are as follows:-

    a. The former judgment or order must be final;
    b. the judgment or order must be on merits;
    c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
    d. there must be between the first and the second action identity of parties, of subject matter and cause of action."

33. He also relied on the case of Okiya Omtatah Okoiti-V- Communications Authority of Kenya & 14 Others (2015) eKLR where the Court held:-

> " For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been previously decided by a competent Court. Secondly, the matter in dispute in the former

suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.....The rationale behind the provisions of Section 7 above entrenching the doctrine of res judicata is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was what was held with approval in Omondi vs National Bank of Kenya Ltd. and Others (2001) EA 177.....

22. Once they have been determined, they come to an end and that is why in E.T. vs Attorney General (supra) the Court stated as follows;

"The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction."

Para 24. The locus classicus of that aspect of res judicata is the judgment of Wigram VC in Henderson v Henderson (1843) Hare 00, 115, where the judge says: Where given matter becomes the subject of litigation in, and of adjudication by, court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case.

The plea of res judicata applies, except in special cases, not only to points which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

34. He submitted that the doctrine was also considered in John Florence Maritime Services Limited & Another -V- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR, Court of Appeal where it was stated:

" The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action

has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."

35. Counsel argued that the issue of 3rd Appellant's compliance with *the constitution*, the *Elections Act*, Elections (General) Regulations, Elections (Party Primaries and Party Lists) Regulations and party nomination rules was determined by the PPDT in this matter and between the 2nd Respondent on one part and 3rd Appellant and 1st Respondent on the other. He argued that the 2nd Respondent is barred from bringing the same issue to the election Court as if a party has litigated on an issue before a Court with competent jurisdiction and a decision has been made, the party should not be allowed to litigate on the same issue with the same parties. It amounts to a waste of precious judicial time and flies on the face of the overriding objectives in the Civil Procedure and even in the *Elections Act* for the expeditious and timely disposal of civil and electoral disputes.

36. He submitted that the matters raised in the election Court were substantially in issue before the PPDT in PPDT/E016/2022 which determined them and for a same party to come before this Court seeking the same orders is an exercise in futility as the matter is res judicata.

37. He submitted that it was not permissible for the learned trial Magistrate to determine part of the dispute as res judicata and proceed to hear the petition. He relied in the case of John Florence Maritime Services Limited (supra), which highlighted the doctrine of res judicata does not permit litigation in piecemeal. Litigants are required to bring their whole case unless fraud or collusion is alleged. No allegation of fraud/collusion was made and considered by the trial Court in seizing jurisdiction to entertain part of the claim presented to her. Counsel argued that it was a misdirection on the part of the trial Court to hold that the issue as to whether or not the 1st and 2nd Appellants belong to the minority and marginalized groups was not an issue for determination at the PPDT and shall be heard by the election Court for two reasons. Firstly, the proposition is not true since it was the 2nd Respondent's case that the party lists for the minority and marginalised category submitted by the 3rd Appellant to the 1st Respondent consisted of people not qualified to be in the list and it was on this basis that he sought to be prioritized as number 1. Secondly, it was upon the 2nd Respondent to bring his entire case before the PPDT and he is estopped from litigating in piecemeal.

38. Counsel placed reliance in the Court of appeal decision of Siri Ram Kaura – Vs – M.J.E. Morgan, CA 71/1960 (1961) EA 462 where the court held as follows;

> "The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...
>
> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

> The point is not whether the Respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

39. On pre-election disputes, Counsel relied on the Supreme Court in Sammy Ndung'u Waity (Supra), which stipulated specific conditions that ought to be met before an election court assumes jurisdiction to entertain a pre-election dispute. The two important guiding principles come into play;

    iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.

    vi) In determining the validity of an election under Article 105 of *the Constitution* or Section 75 (1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election."

40. In the above principles, the Supreme Court held that election Court had no jurisdiction to entertain pre-election disputes which were known to the Petitioner or the Petitioner ought to have known the existence of facts forming the basis of the dispute and chose not to present the same to the IEBC or the PPDT. In addition, the election Court ought to have ascertained itself that the dispute goes to the root of the election. Counsel further submitted that not to render IEBC and PPDT useless, election Courts must ascertain these issues before assuming jurisdiction to entertain pre-election disputes. It is not in doubt that the issues raised in the petition before the trial Court were concerned with the manner in which the 3rd Appellant generated its list of the marginalized category presented for the Bungoma County Assembly and therefore a pre-election matter. The trial Court, before assuming jurisdiction to entertain the dispute, did not ascertain whether these disputes met the principles (iv) and (vi) as set out by the Supreme Court. No evidence or material was produced to suggest, even remotely, that the issues raised in the petition were not within the knowledge of the Petitioner or ought not to have been within his knowledge when he filed PPDT/E016/2022. To the contrary, all indications point to the fact that the 2nd Respondent was aware of the facts forming the dispute brought to the election Court and therefore ought to have been pleaded before the PPDT.

41. It was submitted that the trial learned Magistrate, indicating that she was guided by the principles in Supreme Court in Sammy Ndung'u Waity (Supra) stated, "This court noted that the first time the public got to know about the publication and as to who was nominated was 27/7/2022 but the 2nd Respondent's Director of Legal Services stated that they did not expect the members of the public to raise complain. A complaint has been raised that the 3rd and 4th Respondent do not qualify to be nominated under the marginalized group. It is my finding that after gazettement of the nominees the issues as to the suitability of persons nominated ceases to be a pre-election dispute which should be determined before the party internal dispute resolution panel, or the IEBC or the Political Parties Disputes Tribunal and it becomes an issue to be determined before the election Court."

42. Counsel submitted that the same was a complete departure and misdirection from the principles pronounced by the Supreme Court in Sammy Ndungu Waity (supra). According to the trial magistrate, a dispute becomes an election dispute if it is presented/brought after gazettement of

nominees. By implication this means that the gazettement of nominees changes all disputes from pre-election disputes into election disputes. Consequently, if a person is aggrieved by nomination process of his/her political party and fails to complain to the party's internal dispute resolution mechanism, the IEBC or the Political Parties Disputes Tribunal as provided in statutes, this complaint could later be taken to Court as an election petition. Counsel argued that if this were to be the position in law, then for what use are the party's internal disputes resolution mechanism, the IEBC and the Political Parties Disputes Tribunal in resolving pre-election disputes. Such interpretation of the law would, indeed, render statutory institutions created by law to resolve pre-election disputes inoperable undermining Article 88(4) (e) of *the Constitution* of Kenya 2010. The Supreme Court in Sammy Ndungu Waity (Supra) recommended a twin approach to the issue in the following terms;

> "(69) So what is the interface between Articles 88 (4) (e) and Article 105 (1) of *the Constitution* as read with Section 75 (1) of the *Elections Act*" How should we approach these provisions so as, instead of rendering any of them inoperable, we strengthen the scheme of electoral dispute resolution" The starting point in our view is to recognize the mandate of the IEBC or any other Organ such as the PPDT, of resolving pre-election disputes, including those relating to or arising from nominations, whether such disputes revolve around the qualification of a candidate or otherwise. The next logical step is to ensure that an election court or the judicial process for that matter is not helpless when faced with a critical factor to determine the validity of an election. This twin approach ensures that Article 88 (4) (e) of *the Constitution* is not rendered inoperable while at the same time preserving the efficacy and functionality of an election Court under Article 105 of *the Constitution*. To achieve this noble objective, we think that now is the time to issue certain guiding principles."

43. Counsel submitted that for an election Court to seize jurisdiction to entertain pre-election disputes, reliance must be placed on guiding principles handed down by the Supreme Court. To proceed without these precautionary measures, the learned trial Magistrate misdirected herself in assuming jurisdiction to entertain the petition as presented, overstepping in her mandate. She ought to have declined jurisdiction and downed her tools in view of the binding decision in Sammy Ndung'u Waity (Supra).

44. Counsel urged this Court to allow the appeal, judgment in favour of the 2nd Respondent be set aside and substituted by one in favour of the Appellant and the 1st Appellant be awarded costs of the appeal and in the subordinate Court.

45. Mr. Makokha, Counsel for the 2nd Appellant submitted three issues for determination namely: whether the learned trial Magistrate had jurisdiction to hear and determine the petition; whether the learned trial magistrate erred in law for upholding the petition after finding out that the same was res judicata and who should bear the costs of the appeal.

46. On the first issue, Counsel submitted that the complaint before the trial Court was heard and determined by the PPDT vide PPDT No. E016 of 2022 between Chrispinus Kipsang Murunga vs Ford Kenya and Independent Electoral and Boundaries Commission thus the learned trial Magistrate lacked jurisdiction. Counsel relied on the case of Owners of the Motor Vessel "Lillian S" V. Caltex Oil (Kenya) Ltd (1989) (eKLR).

47. It was argued that the dispute before the lower Court related to the nomination of candidates to the County Assembly of Bungoma and more specifically nomination of candidates on the marginalized

party list of FORD-Kenya Party. He relied on Article 88 (4) of *the Constitution* of Kenya 2010, Section 74 (1) of the Election Act and Section 39 of the *Political Parties Act*.

48. Counsel argued that the jurisdiction of the election Court as constituted in the lower Court petition did not extend to hearing and determining disputes arising from party nominations or lists. He submitted that under Section 40 (1) (b) of the Political Parties (amendment) Act the Tribunal is clothed with jurisdiction to determine disputes between a member of a political party and a political party, dispute between members of a political party, disputes between political parties, independent candidate and political party, between coalition partners, disputes arising from party primaries and from decisions of the Registrar of political parties. He relied of the cases of Billy Elias Nyonje vs The National Alliance Party of Kenya & 2 Others (Nairobi Judicial Review No. 61 of 2013); Anthony Salau & Another vs Independent Electoral Boundaries Commission & 2 Others and Republic vs Independent Electoral Boundaries Commission (Nairobi Judicial Review No. 223 of 2013).

49. On whether the learned trial magistrate erred in law for upholding the petition after finding out that the same was res judicata, Counsel submitted that there was no dispute that the 1st Respondent herein did file a complaint before the PPDT and that the same was registered as complaint No. E016 OF 2022 (KK). He challenged the 3rd Appellant's Party List as published on 27th July, 2022 on the marginalized category. The PPDT rendered its judgement in favour of the 1st Respondent and the 3rd Appellant was directed to include him in the marginalized party list category. Aggrieved by the decision, the 3rd Appellant preferred an appeal at the High Court sitting in Nairobi (Nairobi High Court Civil Appeal No. E034 of 2022) which was dismissed. This prompted the 3rd Appellant to comply with the decision of the PPDT and proceeded to amend the Bungoma County Party List to include the 1st Respondent herein in the marginalized category list.

50. Counsel argued that a perusal of the lower Court election petition as filed by the 1st Respondent, raised the same subject matter being the marginalized category of the party list for Bungoma County Assembly published on 27th July 2022. Thus, the trial Court erred in holding that the 1st and 2nd Appellant were not parties in the previous suit hence the election petition was not res judicata and that the same lacked any form of legal foundation as no law was relied on by the trial Court with regard to the same argument.

51. On the aspect of costs, Counsel submitted that costs as to the appeal be granted to the 2nd Appellant.

52. Mr. Muthomi, Counsel for the 3rd Appellant submitted on the following issues for determination, namely: whether the Honourable trial Magistrate had jurisdiction to preside over and determine the election petition filed by the 1st Respondent in the Lower Court; whether the 1st Respondent herein was estopped from challenging the validity of the 3rd Appellant's Party List; whether the 3rd Appellant's Marginalized Party List for Bungoma County was generated and submitted in compliance with the law; whether the nomination of the 1st and 2nd Appellant was contrary to the evidence and applicable legal instruments that were presented before the Court and who should bear costs of the Appeal.

53. On the first issue, Counsel submitted that, jurisdiction is everything and without which a Court cannot proceed to determine a matter. He relied on the Supreme Court's advisory opinion In The Matter Of The Interim Independent Electoral Commission [2011] eKLR, the Supreme Court delivered itself in Paragraphs 29 and 30 thus:-

> "(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by Statute Law, and by Principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners

of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."

54. Counsel submitted that the learned trial magistrate lacked jurisdiction to preside over the election petition as filed in the lower Court on two principal grounds, being that;

    i. The subject matter of the Petition was a pre-election dispute, and

    ii. The entire petition was Res Judicata and an abuse of the Court process.

55. On the 1st principle of pre-election dispute, Counsel argued that firstly, the election trial Court lacked jurisdiction to entertain a pre-election dispute and Secondly, that the election trial Court committed a fundamental error in entertaining a resolved or ought to have been resolved pre-election dispute as a ground in an election petition.

56. It was submitted that the 1st Respondent's complaint as was lodged before the trial Magistrate's Court had everything to do with the 3rd Appellant's published Party List and in particular, as relates the Marginalized Persons Category. The 1st Respondent pleaded that the 3rd Appellant's Party List as generated and published in the newspapers on 27th July, 2022 by the 2nd Respondent was null and void and prayed that it be quashed for reasons that it was not generated and submitted in compliance with *the Constitution* of Kenya, the Election Act, the Elections Regulations, the Gazette Notice No. 6378 of 3rd June, 2022 and the 3rd Appellant's Nomination Rules. The 3rd Appellant was of a view contrary to that of the 1st Respondent on matters generation and publication of its impugned Party List. The opposing positions between the 1st Respondent and the 3rd Appellant created a dispute which required a resolution.

57. It was further submitted that the dispute between the 1st Respondent and the 3rd Appellant relating to the impugned Party List arose prior to the General Elections voting exercise held on 9th August, 2022 and subsequent declarations of results. It was therefore, in the legal parlance, a pre-election dispute. Counsel is of the humble view that such Pre-election dispute could only be in the first instance submitted for resolution before either the Independent Electoral and Boundaries Commission Disputes Resolutions Committee or the Political Parties Disputes Tribunal and on Appeal, to the High Court.

58. Counsel submitted that by the time the dispute arose on 27th July, 2022 when the Party List was published, the Election of 9th August, 2022 had not been conducted. No Election Court, as prescribed by laws, had been decreed and or designated under Section 75 (1A) of the Election Act. The only legal organs established to handle electoral related disputes was therefore the IEBC, DRC or the PPDT. The

Magistrate's Court, then having not been gazetted as an Election Court, would have no jurisdiction to entertain such a pre-election dispute. Counsel further submitted that, "Election" of nominated members in the Party List is an election through nomination which is signified by the publication in the Gazette Notice, in this case a Gazette Notice published on 9th September, 2022.

59. Counsel argued that Article 90(2) of *the Constitution* of Kenya, 2010 vests the responsibility for the conduct and supervision of elections under the Party Lists to the IEBC while Regulation 99(1) & (2) of The Elections (General) Regulations, 2012 vests the mandate of resolving pre-election disputes to the IEBC dispute resolution committee. The Public Notice issued by the 2nd Respondent and PPDT on 27th July, 2022 all would be aggrieved parties, including the 1st Respondent herein, by the Party Lists, were informed of the dispute resolution forums, as the IEBC, DRC and PPDT. For emphasis, Counsel proceeded to reproduce the said statutory Notice relevant parts, which read, thus;

> "JOINT PUBLIC NOTICE
>
> .....
>
> Following publication of the final Party Lists as governed under Regulation 54(8) of the Elections (General) Regulations, 2012, aggrieved persons seeking to lodge complaints are HEREBY notified THAT:
>
> The IEBC Dispute Resolution Committee (DRC) and the Political Parties Disputes Tribunal (PPDT) shall be hearing disputes arising from persons aggrieved from 28th July, 2022 to 6th August, 2022....."

60. Counsel submitted that the 1st Respondent, in appreciation of the above governing law relating to pre-election disputes, proceeded, rightly so, to lodge his dispute against the 3rd Appellant's Party List before the PPDT, which dispute was registered as Complaint No. E016 of 2022, [Chrispine Kipsang Murunga Versus Ford K & IEBC]

61. Counsel argued that Courts are consistent, that matters generation and or preparation of Party Lists, and the disputes arising therefrom, are a preserve of the IEBC DRC or PPDT for resolution. The election Court would only be invited upon Gazettement of the nominated members and on disputes subsequent to the Gazettement. The Supreme Court, in the case of Moses Mwicigi & 14 Others -Vs- Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR, it was held, of relevance, thus;

> "[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....."

62. Counsel further relied on the High Court case, in which it similarly appreciated that matters Party Lists disputes are pre-election disputes, had no difficulties in holding that dissatisfied parties' recourse would lie to the IEBC dispute resolution committee when in the National Gender and Equality Commission -Vs- Independent Electoral and Boundaries Commission & Another [2013] eKLR, a High Court bench held, thus;

" 83. We shall therefore order IEBC to publish as required by regulation 54(8) of the General Regulations the party lists of those parties which have qualified under Article 90(3). Thereafter, any person dissatisfied with the list shall be at liberty to file a complaint with the IEBC in accordance with Article 88(4)(e) as read with section 74 of the *Elections Act*, 2011. ....."

63. He further placed reliance on the Supreme Court case of Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR which held, in relevant parts, thus;

" (56) In resolving this question, the starting point must always be *the Constitution*; to wit, Article 88 (4) (e), which provides that: The Independent Electoral and Boundaries Commission is inter alia responsible for:

> "the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results."

(57) Section 74 (1) of the *Elections Act* provides:

> "Pursuant to Article 88 (4) (e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(58) Needless to state, the foregoing Section is a replica, nay, a derivative, of Article 88 (4)(e) of *the Constitution*. Together, these provisions constitute the normative architecture for the resolution of pre-election disputes including those arising from nominations. This framework for dispute resolution came into existence after the promulgation of the 2010 Constitution. Prior to this, the jurisdiction to determine pre-election disputes, lay with the High Court sitting as an Election Court.

(59) It is clear to us that *the Constitution* of 2010 and the resultant electoral law, deliberately set out, to delimit the institutional competencies for the settlement of all electoral disputes. In this regard, it donated jurisdictional authority to different judicial and quasi- judicial organs. The Supreme Court was vested with original and exclusive jurisdiction to determine petitions

relating to the election of a President. The Court of Appeal has jurisdiction to determine appeals from the High Court on points of law, the High Court has original jurisdiction to determine petitions relating to the election of Governor, Senator, Member of Parliament, and Women Representative. The Resident Magistrates Court has jurisdiction to determine petitions relating to the election of Member of County Assembly with appeals there from to the High Court on points of law only.

[60] Coming to pre-election disputes, including disputes relating to, or arising from nominations, *the Constitution* is clear. These are to be resolved by the IEBC (through its Committee on Dispute Resolution as provided for by Section 12 of the enabling Act) or where applicable, by the Political Parties Disputes Tribunal. Where *the Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.

.....

(69) ..... To achieve this noble objective, we think that now is the time to issue certain guiding principles.

i. All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance."

64. Counsel placed further reliance on the case of Margaret Wanjiru Ireri & 2 Others versus Monica Gathoni & 4 Others (2018) eKLR where the high Court held;

"The other issue that is for consideration is whether the trial Court had jurisdiction to determine this matter or in other words, was the dispute before the Court a nomination dispute and if so which body should have heard the dispute. This issue was raised and argued as a Preliminary Objection before the trial magistrate. After hearing the parties, the court made its ruling and dismissed the Preliminary Objection and proceeded with the hearing of the petition.

I have seen the judgment of the Court where the Court revisited the issue of jurisdiction and held that it had the jurisdiction to entertain the election petition because it had been appointed by the Hon. The Chief Justice, gazetted as an election Court and that once nominations had been gazetted, the only forum to challenge the decision was through a petition. Mr. Njiri, counsel for the 1st and 2nd Respondent also argued that the Appellants failed to appeal against the ruling and could not do so at this stage.

In reply to the above contention that the Appellants have failed to appeal, I agree with Appellants' counsel that in election petitions, there can be no appeals on interlocutory rulings because of the strict time lines within which petitions have to be heard and determined. The ruling on jurisdiction can only be dealt with at this stage.

In the case of The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd (1989) KLR (1) the Court stated as follows on the question of jurisdiction:

> "Jurisdiction is everything. Without it, a Court has no power to make one step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a Court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

Also see Macharia and another v KCB Ltd & 2 others C.A.2/2011 (Supreme Court).

In this case the Appellants have argued that the Petition is incompetent in view of Articles 87(2), 88(4) of *the Constitution*, Section 74(2) of the *Elections Act*, Regulations 2012, and Section 40 of the *Political Parties Act*. Article 87(2) provides for the filing of an election petition, other than that relating to presidential elections, within 28 days of declaration of results by IEBC. Article 88(4)(e) of *the Constitution* provides for creation and functions of IEBC. It states as follows:

"88

(4) the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and in particular for (a)..... (d).

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

(f) .....

(k) ...."

Clearly, the above Constitutional provision confers resolution of nomination disputes on the IEBC, not the court.

Section 74 of the *Elections Act* 2011 provides that:

"74

(1) Pursuant to Article 88(4) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission."

The *Political Parties Act* establishes a tribunal under Section 39(1) of the said Act and its jurisdiction is provided for under Section 40 of the said Act. It reads as follows:

"Section 40, The tribunal shall determine:

(a) Disputes between the members of a political party;

(b) Disputes between a member of a political party and a political party;

(c) Disputes between political parties;

(d) Disputes between an independent candidate and a political party;

(e) Disputes between candidate partners; and

(f) Appeals from decisions of the Registrar under this Act.

Notwithstanding subsection (1) the Tribunal shall not hear or determine a dispute under paragraph (a) (b) (c) or (e) when the dispute has been heard and determined by the internal political party dispute resolution mechanisms."

Flowing from the above provisions, *the Constitution* and legislature set out to enact various laws on resolution of disputes relating to electoral matters and it is incumbent upon the political parties and their members to adhere to those procedures. There is now a host of authorities that have held that when *the Constitution* or legislature prescribes the manner in which a dispute should be resolved, that procedure should be adhered to. In Speaker of National Assembly v Hon. James Njenga Karume C.A 92/1992 (2008) I KLR 425, the court held "where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of parliament, that procedure should be strictly followed."

The above case was relied upon in Kimani Wanyoike v Electoral Commission and Act (1995) KLR.

The case of Diana Kethi Kilonzo v IEBC and 2 others also underscored the above position when the court said:

"We note that *the Constitution* allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by *the Constitution*. So long as they comply with *the Constitution* and National Legislation. Those bodies and institutions should be allowed to grow. The people of Kenya, in passing *the Constitution* found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

In this case, Jubilee Party passed their lists to IEBC which published the list in the Nation Newspaper on 23/7/2017. The 1st Respondent saw it but 2nd Respondent denied having seen it. At the end of the list, which was shown to the trial Court,

any party that was aggrieved by the list was invited to lodge an objection or complaint with IEBC within 7 days. Both the 1st and 2nd Respondent did not lodge any complaint which resulted in the names being gazette on 28/8/2017. The 1st and 2nd Respondent denied having been aware that they should complain. However, ignorance of the law is no defence in Kenya.

I do agree with the Appellants,3rd, 4th and 5th Respondents that the cause of action herein arose on 23/7/2017 upon the list being published. It was a nomination dispute and it was the duty of the 1st and 2nd Respondent to lodge their objection or dispute with IEBC within 7 days in accordance with Article 88(4)(e) and Section 74(1) of *Elections Act*. By failing to file any complaint with the IEBC, the 1st and 2nd Respondents forfeited their right to complain once the notices were gazetted. They could only approach this Court, after the IEBC had carried out its mandate.

The Court of Appeal in considering Article 88(4)(e) and Section 74 of the *Elections Act* in Kennedy Moki's Case (Supra), cited in Republic v IEBC ex parte Charles Onderi Chebet Nakuru JR.3/2013 where the Court said:

> "Therefore, my understanding of Article 88(4)(e) of *the Constitution* and Section 74 of the *Elections Act* is that any dispute relating to nominations to any electoral positions are required to be determined within a prescribed time; and those relating to nomination of candidates should be determined before the date of nomination or election whichever is applicable. Clearly, because of the limited time spans for determination of nomination disputes, political party nominations needed to be done well before the nomination dates to the Returning Officer Electoral bodies. As this did not happen, the aggrieved candidate must live with the choices of their political mandarins.

In summary therefore, I find and hold that where there is a clear Constitutional and statutory provision for resolution of disputes including qualification and nomination disputes, this Court's jurisdiction is precluded. This Court's jurisdiction would only arise after due exercise by the mandated bodies, the Returning Officer and the Commission of their statutory mandate."

In the circumstances of this case, I am guided by the above decisions that this being a nomination dispute, the election Court is precluded from hearing and determining it. In affirming

the above position, Justice Lenaola in the case of Isaiah Gichu Ndirangu (Supra) said at paragraph 57:

> "I have deliberately set out the above decision with a view to highlighting the approach the Courts have taken, which I believe is the correct one, in addressing disputes in regard to nominations pertaining to election matters. In the above cited decisions, I note that the parties alleged violation (5) of *the Constitution* and various electoral laws in regard to the nominations and in that regard, their first port of call was the Commission's Dispute Resolution Committee. Being dissatisfied with the decision of the Committee, they thereafter approach the Courts...."

In my view and guided by the various decisions, I have referred to the 1st and 2nd Respondents failure or ignorance to exercise their rights by complaining to the IEBC Dispute Resolution Committee, forfeited their right to be heard and cannot be heard complaining before an election Court.

In the case of Moses Mwangi v IEBC (Supra), the Supreme Court underscored the seriousness with which parties and the Court should respect the procedure set up in *the Constitution* and other statutes because adherence thereto helps to strengthen the institutions. The Court held: (Paragraph 121)

"One of the objectives of our Constitution is the establishment of firm institutions that have a pivotal role in its implementation. Our electoral dispute – resolution regime has a continuum of institutions that require strengthening, through the judicial system: Namely; the Political Parties; the Political Parties Disputes Tribunal; and the IEBC. These have to comply with *the Constitution*, and the electoral laws and regulations. Participation of the people under Article 10 of *the Constitution*, in the affairs of the political parties, is not only a Constitutional duty on the part of the citizens, but also a vital pillar in the growth of parties, as democratic institutions under *the Constitution*. That political parties may evolve into stable institutions, requires the full participation of members in their affairs, particularly those that pertain to elections."

I find that the Lower Court misdirected itself when it found that it had jurisdiction to hear a nomination dispute thus usurped the mandate of the IEBC Dispute Resolution Committee.

Flowing from the above finding, it follows that the court had no jurisdiction to order the Jubilee Party to come up with a fresh list to include the 1st and 2nd respondents in priority. Even if the Court had jurisdiction to hear the matter, yet it would not have arrogated itself power which was purely in the hands of the

political party to make party lists. In the case of Linet Kemunto (Supra) the court said:

> "....it follows that it is the responsibility of the parties to choose their preferred candidate and rank them in order of preference. The seats won by each party are filled by candidates in the order they appear on the party's respective list. The definition of 'party list' under Section 2 of the *Elections Act* suggests ownership of the list by the political party that has prepared it."

In National Gender case (Supra), the court held that the Court had no role in directing the manner in which lists are prepared as that is the preserve of the political parties. I find that the Court fell into error in directing how the party list should be prepared.

In the end, I allow the Appeal the Court not having had jurisdiction to entertain the petition and further find that the petition was not proved to the required standards which is below beyond reasonable doubt but above balance of probability. I hereby dismiss Petition 1 of 2017."

65. It was argued that the entire Petition of the 1st Respondent is awash with grievances relating to the generation and or preparation of the Party List as published on 27th July, 2022. The entire prayers as sought in the Petition targeted the published Party List of 27th July, 2022. He noted that these are all pre-election disputes which fell for determination before either the IEBC, DRC or the PPDT. The trial Court, sitting as an election Court therefore had no jurisdiction to preside over and or determine the pre-election dispute presented as an electoral petition by the 1st Respondent. Counsel humbly urged this Court to so hold and proceed to allow the appeal on that ground alone.

66. It was submitted that the learned trial magistrate did appreciate that a resolved pre-election dispute should not be a ground in a Petition to an election Court. However, the learned Magistrate found that the pre-election dispute in the election petition only related to two prayers in the petition, which the Court proceeded to dismiss, being:

    i. Prayer (C) of the election Petition which had sought that the allocation of special lists by the 2nd Respondent using the impugned Party List before rectification pursuant to the judgement of PPDT be invalidated.

    ii. Prayer (D) of the election petition which had sought that the 1st Respondent be declared as the only qualified candidate for nomination under the marginalized Party List to represent Minority and Marginalized Group and Communities in Bungoma County.

67. Counsel proceeded to argue that the learned trial Magistrate proceeded in the impugned judgement to consider the other prayers of the Election Petition as to whether they were pre-election disputes. And this is where the trial Court started misunderstanding the principle of pre-election disputes in that the trial Court was bent on, in determining whether or not the issue(s) was a Pre-election dispute, assessing the prayers of the suits as opposed to the subject matter of the suits. This is an issue the 3rd Appellant termed as qualified doctrine of Res Judicata.

68. He further submitted that the learned magistrate, at Paragraph 4 of the Judgement at Page 63, posed, thus,

> " Back to the other prayers sought by the Petitioner; the 1st, 2nd, 3rd and 4th Respondents argument is that the aforesaid prayers and the entire petition is res judicata and further that this Court has no jurisdiction to determine the issues raised"

69. It was argued that in declining to hold that the Court lacked jurisdiction over the other prayers of the Petition, the learned magistrate rendered three (3) reasons which she proceeded to analyze sequentially and separately in demonstrating, why the trial Court made an error in so holding.

70. On the argument that that the 1st and 2nd Appellants were not an issue for determination in the PPDT as preferred by the trial Magistrate, Counsel submitted that at Page 63 of the Judgement, the 6th Paragraph, the learned trial Magistrate posed, thus,

> " It is my view that the issue as to whether or not the 3rd and 4th Respondent belong to the Minority and Marginalized Groups was not an issue for determination in the complaint the Petitioner raised before the Internal Dispute Resolution Panel or even before the Political Parties Dispute Tribunal."

71. It was the Counsel's argument that he completely disagrees with the trial Magistrate's reasoning because;

i. The published Party List of 27th July, 2022 had the names of the 1st and 2nd Appellants as nominees in the Marginalized List. As at the time, the 1st Respondent was instituting his Complaint before the PPDT on 2nd August, 2022, he was very much aware that the 1st and 2nd Appellants had been listed as such nominees.

ii. The 1st Respondent had every opportunity, if he was aggrieved with the listing of the 1st and 2nd Appellants as nominees in the marginalized list, to complain against them. If the 1st Respondent did not complain against them as a pre-election dispute, then he is forever bound not to so complain in any other forum, let alone the Election Court. This is because the 1st Respondent was aware of the would be pre-election dispute of listing the 1st and 2nd Appellants prior to election and therefore barred to raise it later as an election dispute. This was the holding in the said celebrated Supreme Court decision of Sammy Ndung'u Waity (supra), wherein the Supreme Court posed, thus;

> " (69) ..... To achieve this noble objective, we think that now is the time to issue certain guiding principles.
>
> i. .....
>
> ii. .....
>
> iii. .....
>
> (iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.

iv. .....

(vi) In determining the validity of an election under Article 105 of *the Constitution* or Section 75 (1) of the *Elections Act*, an Election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the Petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election."

72. It was the Counsel's argument that the learned magistrate ought to have addressed her mind on whether, the 1st Respondent was aware or could have been aware of the facts forming the basis of the dispute before the election, in this case, the listing of the 1st and 2nd Appellants in the Marginalized List Category. If the learned Magistrate would have focused on the same, then the answer would have been the same, being that the 1st Respondent was aware that the 1st and 2nd Appellants had been listed in the Marginalized Category on 27th July, 2022 and if so wished would have raised it as a Pre-election dispute. The mere fact that the 1st Respondent did not present it as an issue for determination in the PPDT as a Pre-election dispute, cannot be, as the trial Court suggested, a reason for exclusion of the issue of Listing of the 1st and 2nd Appellants from the realm of a Pre-election dispute. The 1st Respondent knew of the said Listing on 27th July, 2022 prior to the Election, deliberately opted not to challenge it before the PPDT and cannot take advantage of that own deliberate omission to remove the issue from the ambit of a Pre-election dispute.

73. It was submitted that the trial court, with respect, committed a grave error with its finding suggesting that although an issue could be a Pre-election dispute, once however there is a Gazettement, such an issue(s) ceases to be a Pre-election dispute and converts itself to a Post – Election issue (s) for determination by an Election Court. The trial Court therefore concluded that although the Complaint on the nomination of the 1st and 2nd Appellants was a Pre-election dispute, it so ceased upon Gazettement. He proceeded to highlight the many errors that the trial Court's impugned finding manifests;

i. The trial Court appears not to differentiate between publication of a Party List and Gazettement of nominees from the published Party List. The Party List, which was subject of attack both in the PPDT and before the Election Court, by the 1st Respondent was the Party List as published in the Newspaper by the 2nd Respondent on 27th July, 2022. The Gazettement of the "elected" nominees was published on 9th September, 2022 vide a Gazette Notice of the same date (See Pages 370 to 381 for the Newspaper Advertisement of 27th July, 2022 of the Record and the Gazette Notice dated 9th September, 2022 at Pages 231 to 252 of the Record).

ii. The trial Court in the impugned finding appears not to draw a distinction between a published Party List in the Newspaper and a Gazette Notice of Nominees by referring only to the date of publication being the 27th July, 2022 as the date the public became aware of the listed persons and that therefore after the "gazettement" the dispute ceased to be a pre-election dispute. The correct position is that the "publication" as done on the 27th July, 2022 is not a "gazettement" and that the pre-election dispute did not cease to exist on 27th July, 2022 upon publication. Indeed, it is the act of publication that gave the public an opportunity to scrutinize the published names and raise a pre-election dispute if aggrieved. The joint Notice issued by the IEBC and PPDT on 27th July, 2022 and appearing at Pages 382 of the Record of Appeal was

express on inviting would be Aggrieved Parties to raise and lodge Complaint(s) commencing 28th July, 2022 to 8th August, 2022.

iii. The mere fact that a gazettement of nominees has been done by the IEBC does not by that mere fact of gazettement change the character of a Pre-election dispute. A Pre-election dispute remains as such prior, during and after the gazettement. It is in recognition that a Pre-election dispute does not mutate to a different dispute post gazettement that the Supreme Court did hold at Paragraph 69 (iv) of its judgement in the aforesaid case of Sammy Ndung'u Waity (supra) that an Election Court may only consider a Pre-election dispute (Meaning one that could have been presented and determined in the prescribed Pre-election dispute forums i.e. IEBC, DRC and PPDT) if the Pre-election dispute goes to the root of the Election and that "the Petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the Election". The doctrine of a Pre-election dispute ceasing to be such a Pre-election dispute upon Gazettement of a Party List Nominee(s) therefore as enunciated by the learned trial Magistrate is not anchored in any law and is for setting aside.

iv. The trial learned Magistrate also appears to have completely misunderstood the holding in the Supreme Court decision in Moses Mwicigi (supra) on the essence of publication of a Gazette Notice. The Trial Court quoted the relevant Paragraph of the said decision at Page 64 of the Judgement, 2nd Paragraph thereof, thus;

> "In Moses Mwicigi & 14 Others vs Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR at paragraph 107 the court stated,
>
> "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."

74. According to Counsel, with respect to the trial Court, the Supreme Court in the quoted holding never held that a Pre-election dispute ceases to be as such upon Gazettement. The Supreme Court simply stated that upon Gazettement of a Nomination List, any consequential dispute is shifted to the Election Court. The key phrase in the decision is "any consequential dispute", which means that a fresh dispute that might arise upon Gazettement. The "consequential dispute" does not refer to a Pre-election dispute being converted to a "consequential dispute" upon Gazettement. To suggest as the trial learned Magistrate did, that a "pre-election dispute" ceases to be so and becomes a "consequential dispute" upon Gazettement capable of being entertained by an Election Court was an unforgivable error on the part of the trial Court which is for setting aside by this Honourable Appellate Court.

75. It was submitted that the entire Petition before the trial learned Magistrate was premised on Pre-election disputes. The Election Court did not have jurisdiction to entertain the same. Counsel humbly beseeched this Court to allow this appeal and entire Election Petition be dismissed.

76. On the issue of res judicata, Counsel submitted that there is no dispute that the 1st Respondent herein did file a suit termed as a Complaint before the PPDT. This was registered as Complaint No. E016 of 2022 [KK]. The parties sued were the 3rd Appellant herein and the 2nd Respondent. The 3rd Appellant opposed the same and filed a response thereto. In the said suit, the 1st Respondent herein challenged the 3rd Appellant's Party List as published on 27th July, 2022 and more specifically as relates the Marginalized Category List. It was the 1st Respondent's contention that he applied for nomination under the Marginalized Category but his name was listed in the Gender Top-up List,

that he is an Ogiek/Ndorobo which is the only recognized Minority and Marginalized Community in Bungoma County and that the 3rd Appellant's Marginalized List for Bungoma County was populated by persons from the Luhya and Kalenjin Communities which are neither Marginalized nor Minority in Bungoma County and therefore unqualified for nomination under the Marginalized List. With that foundation of facts, the 1st Respondent sought a prayer of amendment of the Marginalized List and his inclusion on priority as Number 1 in the Marginalized Category List. The 3rd Appellant opposed the previous suit. In summary, it was the 3rd Appellant's case that the Party List was properly generated and that the persons listed in the Party List and of relevance the Marginalized Category List were proper and fit to be so placed in that Category, that the 1st Respondent had not exhausted the internal dispute resolution mechanism and that his suit should be dismissed. The suit proceeded to full trial by way of submissions. The 1st Respondent while urging his case, submitted through submissions a report by the National Gender and Equality Commission (NGEC) titled "unmasking Ethnic Minorities and marginalized communities in Kenya, who and where" published in 2017. Placing reliance on the NGEC report, the 1st Respondent urged that the Luhya and the Kalenjin Communities are neither minorities nor marginalized communities in Bungoma Counties. The 1st Respondent further urged that there was no notice given in the preparation of the Party List, that the 1st Respondent only came to know of the Party List upon publication on 27th July, 2022, that the Election Laws were breached in preparing and submission of the Party List and that his constitutional rights were violated. The 3rd Appellant did it was argued, of relevance, that the Party List was lawfully generated and submitted for publication, that the names contained in the Party List and more so the Marginalized Category were proper and in compliance with Sections 36 of the *Elections Act*, Articles 90, 177 and 260 of *the Constitution*. In buttressing the argument that the special interest in the Marginalized category of a Party List in a County Assembly Allocation does not refer to a community, reliance was placed in the authorities of Margaret Wanjiru Ireri & 2 Others [2018] eKLR, Micah Kigen and 2 Others -Vs- Attorney General & 2 Others [2012] eKLR as well as Article 90 (2) (c) of *the Constitution*.

77. The Tribunal rendered its judgement in favour of the 1st Respondent on 5th August, 2022. The Tribunal, in finding for the 1st Respondent, held that it is a common fact that the Ogiek comprise a marginalized community in Kenya as buttressed by the NGEC report and that the 1st Respondent was qualified to be in the list which he had applied for, being the marginalized List, and the 3rd Appellant was so directed to place him. The Tribunal however declined to place the 1st Respondent on priority as No. 1 in the Marginalized List Category as he had sought.

78. The 3rd Appellant, aggrieved by the decision of the Tribunal, preferred an Appeal to the High Court sitting in Nairobi, and registered as Nairobi High Court Civil Appeal No. E034 of 2022 (hereinafter "the Appeal"). The Appeal was canvassed by way of Submissions and in a judgement delivered on 18th October, 2022 the High Court dismissed the Appeal.

79. Upon dismissal of the said Appeal, the 3rd Appellant herein complied with the decision of the Tribunal in the previous case and proceeded to amend the Bungoma County Party List by inclusion of the 1st Respondent herein in the Marginalized Category.

80. From the above analysis, it is clear that the subject matter in the previous suit was the 3rd Appellant's Party List of Bungoma County Assembly Nominees, and specifically, the Marginalized Category. That was the bone of contention, in other words, the issue in dispute in the previous suit and the parties had their fair share of opportunity to raise all their grievances in respect of the subject matter and judicial time was employed in providing a resolution.

81. It was the 3rd Appellant's legitimate expectation that issues relating to the Bungoma County Assembly Party List and more so the marginalized category had been interrogated in the previous suit and that no

new proceeding could emerge thereafter. To its surprise, the 3rd Appellant was slapped with the Court papers in respect of the election petition filed by the 1st Respondent, being Kimilili Magistrate Court Election Petition No. E003 of 2022 whose judgement is subject of this appeal.

82. A perusal of the Election Petition as presented by the 1st Respondent revolved around the same subject matter being the Party List for Bungoma County Assembly as Generated/Prepared by the 3rd Appellant, submitted to the 2nd Respondent and published on 27th July, 2022. The same Category of the said Party List is targeted for challenge, same being the Marginalized Category. The same or similar grounds were raised in support of the 1st Respondent's Election Petition as compared to the previous suit.

83. As relates reliefs in the Election Petition, the 1st Respondent expanded the scope and number of the reliefs sought as compared to the previous suit. Of importance to note, whereas the 1st Respondent had sought in the previous suit that the Party List be amended, which relief he was granted, the 1st Respondent changed course in the election petition and, without blinking an eye, sought that the same Party List that had been amended in his favour vide a Tribunal order be nullified in entirety.

84. The 3rd Appellant opposed the Election Petition. Besides other grounds, the 3rd Appellant protested that the 1st Respondent was vexing it with endless litigation over the same subject matter and that the entire Petition is for dismissal under the doctrine of Res Judicata.

85. The learned trial Magistrate, in her judgement delivered on 27th January, 2023, subject of this appeal, partly upheld the 3rd Appellant's objection on Res Judicata. In the trial Court's view, only two (2) prayers of the election Petition are Res Judicata, being;

    a. The Prayer (c) of the election Petition which had sought that the allocation of seats in the Party List be nullified for failure to comply with the judgement and decree of the Tribunal in the previous case.

    b. Prayer (d) of the election Petition which had sought a declaration that the 1st Respondent is the only person qualified for nomination in the Marginalized Category List.

    c. In sustaining the other portion of the election and or prayers thereof as not being Res Judicata, the learned trial Magistrate gave three principal reasons, which are the subject of this appeal.

86. To contextualize the same, Counsel submitted that, he wishes to refer to Paragraph 4 at page 63 of the judgement, where the trial Court in seeking to dissect and have part of the election Petition survive the chop of Res Judicata posed, thus;

> "Back to the other prayers sought by the Petitioner; the 1st, 2nd, 3rd and 4th Respondents argument is that the aforesaid prayers and the entire petition is res judicata and further that this Court has no jurisdiction to determine the issues raised"
>
> Thereafter, the learned trial magistrate proceeded to lay three grounds which she invoked to sustain the remainder portion of the election petition, which are that the issue of whether the 1st and 2nd Appellants belong to the minority and marginalized groups grounds did not arise for determination in the previous suit, that the 1st and 2nd Appellants were not parties in the previous suit and that upon gazettement of the nominees, the pre-election dispute ceased to be such a pre-election dispute. Counsel submitted that trial Court committed an error meriting reversal on appeal sequentially on each of the trial Court's impugned reasons in the judgement.

87. At Paragraph 6, page 63 of the judgement, the learned trial Magistrate posed thus;

> " It is my view that the issue as to whether or not the 3rd and 4th Respondent belong to the Minority and Marginalized Groups was not an issue for determination in the complaint the Petitioner raised before the Internal Dispute Resolution Panel or even before the Political Parties Dispute Tribunal."

88. In the trial Court's view therefore, if an issue is not raised for determination in the previous suit, and in a subsequent proceeding such an issue is raised, then the subsequent suit cannot be defeated by Res Judicata defence. This was erroneous reasoning on the part of the trial Court for a number of reasons.

89. The law on Res Judicata in Kenya is now settled. It is statutorily anchored in Section 7 of the *Civil Procedure Act*. The Courts have spent sufficient ink in the definition and application of Res Judicata doctrine. The ingredients of Res Judicata are now well settled as well, and as listed in the case of Mburu Mucheru Vs Samuel Chege Muchunu & Another [2018] eKLR, thus;

> " 28. In order to decide the question whether a subsequent proceeding is barred by res judicata it is necessary to examine the question in reference to;
>
> a. Matters directly and substantially in issue in the former suit.
>
> b. Whether the parties are the same or parties under whom they are or any of them claim.
>
> c. Litigating under the same title.
>
> d. Competence of the Court.
>
> e. Matter has been heard and finally decided."

90. Res Judicata bars a Court from presiding over a matter which has substantially been in issue in the former suit. The term "matter" as used in the definition of Res judicata, refers to the "subject matter" or "cause of action" in the suit. While referring to the term "matter" in the comparative definition of sub judice, the Court in the Republic Vs – Paul Kihara Kariuki, Attorney General & 2 Others Ex-parte Law Society of Kenya [2020] eKLR, posed, thus;

> " 30. The second ground upon which Mr. Ochiel's argument collapses is that the principle of sub judice does not talk about the "prayers sought" but rather "the matter in issue." The matters in issue in the two suits are substantially the same, hence, my finding that res judicata would apply if one suit is determined. In Re the Matter of The Interim Independent Electoral Commission [14] the Supreme Court cited with approval an Australian decision which held: -[15]
>
> > "...we do not think that the word 'matter'...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court..."

91. Counsel reiterated that the subject matter and or cause of action in the previous suit at the Tribunal was a challenge against the generation, submission and publication on 27th July, 2022 of the 3rd Appellant's Party List in respect of Bungoma County Assembly and in particular reference to the marginalized

Category. This was the same subject matter and or cause of action that was presented before the election Court for determination.

92. The 3rd Appellant's first complaint against the trial Court is that in determining whether the subject matter and or cause of action was the same, the learned Trial Magistrate appears to have equated "a subject matter" to "a framed issue(s)" for determination by the Court. In a subject matter presented before Court for determination, there may be many issue(s) that may be framed for determination. The many such framed issue(s) does not multiply the subject matter and or cause of action to be of the same number as the framed issues for determination.

93. Counsel submitted that there was no way the trial Court would have resolved the objection of Res Judicata correctly unless she would have first applied her mind to the question of the cause of action and or the subject matter in the two suits. Res Judicata is concerned with the subject matter between suits and which must be established first, absence of which a Court handling such an objection would fall in an error, as did the trial Court.

94. It was therefore an error on the part of the trial Court to hold that since the issue of whether the 1st and 2nd Appellants had not been raised and or framed for determination in the previous suit, then the election suit petition was not res judicata. Counsel reiterated that Res judicata is not concerned with the framed or raised issue(s) for determination but the subject matter in issue between the previous and current suit.

95. He further argued that, it is not correct, as the learned Magistrate decided that the issue of whether the 1st and 2nd Appellants belonged to minority and marginalized was not an issue for determination in the complaint raised before the Tribunal. Indeed, the Trial learned Magistrate was bound to commit this error as at no point did she attempt to establish what Complaint(s) was before the Tribunal.

96. The challenge before the Tribunal by the 1st Respondent was against the Party List as had been generated, submitted and published on 27th July, 2022, more so the marginalized Category. Listed as among the nominees in the Marginalized Category were the 1st and 2nd Appellants. It was the 1st Respondent's complaint that the Marginalized List Category, which included the 1st and 2nd Appellants, was comprised of the majority Luhya and Kalenjin Communities as opposed to the Ogiek/ Ndorobo, where the 1st Respondent falls, who are the minority and marginalized Community. The 3rd Appellant opposed the 1st Respondent's said complaint on the grounds, among others, that the Marginalized Category Membership is not to be designated based on ethnic background only. The Tribunal agreed with the 1st Respondent and ordered that he be included in the List of the Marginalized Category. The issue therefore of Marginalized and Minority Groups and the listed persons thereat, which included the 1st and 2nd Appellants, squarely fell for determination before the Tribunal. In holding otherwise, the trial Court, with respect, was clearly in error and the error is for correction by this Honourable Court.

97. Counsel relied on the case of George W M Omondi & another v National Bank of Kenya Ltd & 2 Others [2001] eKLR where the Court stated as follows;

> " The doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction, but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined."

98. It was submitted that by entertaining the Election Petition and granting some orders on the same, the learned trial Magistrate created a total confusion on matters Party List of Bungoma County Assembly. This confusion is so because on one hand, there is a binding Tribunal Order which directs the 3rd Appellant to amend the Party List. Yet on the other hand, at the instance of the same litigant, there is an election Court Order that directs the nullification of the same Party List and generate a fresh one thus a debate on which Order takes precedence over the other. Counsel argued that the 3rd Appellant is in a quagmire on which Order it is expected to comply with and which is to be ignored and therefore violated. He argued that this Honourable Court has a duty to intervene and humbly beseeched this Court to intervenes by upholding the 3rd Appellant's defence that the election petition was Res judicata and an abuse of Court process thus proceed to dismiss it with Costs.

99. According to the Counsel, on whether the 1st Respondent herein was estopped from challenging the validity of the 3rd Appellant's Party List, it was argued that all along during the lodging, hearing and determination of the previous suit, the 1st Respondent never complained that the 3rd Appellant's Party List was invalid and or ought to be nullified. Counsel submitted that it should be clear that the 1st Respondent recognized the 3rd Appellant's list as being valid and all he wanted was to be included as No. 1 priority in the would be amended Marginalized Category.

100. Further, the Tribunal while agreeing with the 1st Respondent that the party List was valid save for inclusion of his name in the marginalized category, proceeded to grant him the prayer for inclusion earning the 3rd Appellant a benefit of doubt through a judicial process in respect of the impugned Party List.

101. Counsel argued that the 1st Respondent, in both the previous suit and the election petition admitted that he presented his application papers to the 3rd Appellant's head office at Nairobi. The 1st Respondent was enlisted as a nominee in the Party List based on the documents he presented at the said office in Nairobi. Based on his said enlistment, although he agitates that initially it was in the wrong category of Gender Top up, the 1st Respondent acquired a cause of action where he approached the Tribunal and was granted an amendment order of the Party List in his favour. Yet in his pleadings, especially in the election petition, the 1st Respondent does a somersault and agitates that the same method of enlisting Nominees in the Party List, which he was a beneficiary, was invalid, null and void as it was not, in his view, generated by a Ward Executive Committee.

102. Counsel reiterated that the 3rd Appellant had considered the 1st and 2nd Appellants as marginalized in the special interest groups of Entrepreneur and Luo community respectively. Such determination of who fits where and for what reason is at the exclusive discretion and province of the 3rd Appellant and the trial learned Magistrate had no mandate to upset such an exercised discretion as vested on the 3rd Appellant. The 1st and 2nd Appellants evidence of being an entrepreneur and a Luo community was not impeached and therefore aligned with the stated category in their Marginalized List Category nomination. It was not open to the trial learned Magistrate to hold as she did that the 1st and 2nd Appellants are not marginalized since that was not within the jurisdiction of the Court. And even if it were that the learned trial Magistrate had jurisdiction to determine the suitability of the 1st and 2nd Appellants as Marginalized groups, there was no valid and binding legal and evidentiary material that was placed before the learned Magistrate that was capable of displacing the 1st and 2nd Appellants evidence that they were Marginalized in their stated respective capacities. The mere contention by the 1st Respondent that the 1st and 2nd Appellants are not marginalized, by itself without more, does not remove the 1st and 2nd Appellants from the category of Marginalized persons as designated by the 3rd Appellant. Indeed, that the 1st Appellant as an entrepreneur was a marginalized special interest category

was a position that no contrary evidence was placed before the trial Court and there was no valid legal basis for the trial Court to hold that an entrepreneur is not Marginalized on matters politics. Similarly, the NGEC report that was relied on by the trial Court did not state anywhere that a Luo community is not a Minority in Bungoma County and there was also no basis for the trial Court to hold that the 2nd Appellant as a Luo was not marginalized because she was not a Minority. The subject holding of the learned trial Magistrate was clearly in error on this score and he beseeched the Honourable Court to set it aside.

103. He relied on the case where the High Court in holding that a single mother, a Boda Boda and an elderly person are also marginalized, held in the case of Margaret Wanjiru Ireri (supra) thus;

> " From the above definition, it is the party that determines who will be included in the special interest groups. The court also meant that special interest is not a term that can be limited but may change with circumstances and time.
>
> The 1st and 2nd Respondents challenged the nomination of the appellants and 5th Respondents as MCAs."
>
> .....
>
> "In so far as the list contained female and male in the alternative, the 3rd respondent complied with the law as per Article 90 and Section 36(2) of *Elections Act*."
>
> .....
>
> "In the instant case, the 1st and 2nd respondents complain that they should have been listed in priority to the others but a reading of the above decisions clearly support the proposition that it was the Jubilee Party's prerogative to decide how to rank the nominees and neither IEBC nor the court can have a role in it. It follows that the court erred when it directed that the 3rd and 4th Respondents come up with lists including 1st and 2nd Respondents in priority.
>
> The other complaint by the 1st and 2nd Respondent is that the party list did not cover the special categories of marginalized groups because the nominations were gazette under marginalized ethnicity yet all the people are from the Kikuyu Community which is the dominant Community in Nyandarua and hence were not a minority."
>
> .....
>
> "The 1st Respondent admitted that the 1st Appellant is a single mother and hence marginalized; that the 2nd Appellant is a woman and a youth while the 3rd Appellant is a youth and Boda Boda operator and both are marginalized people. She also admitted that the 5th respondent who is 79 years old applied under the category of the elderly and is a marginalized person."

104. On costs, Counsel submitted that the learned trial Magistrate having erroneously arrogated herself jurisdiction in the matter before the Kimilili Magistrate's Court and erred in failing to find that the entire petition was res judicata and an abuse of the Court process and the 3rd Appellant having demonstrated to having complied with the provisions of the law on nomination of the 1st and 2nd Appellants under the Marginalized Party List and being that the 1st Respondent had not been satisfied with the Tribunal's decision yet he ought to have moved to the High Court as opposed to filing the election Petition, he beseeched this Court to award to the 3rd Appellant, who has been painstakingly invited to and participation in these vexatious proceedings.

105. Learned counsel for the 1st respondent, vide submissions dated 3/7/2023, raised three issues for determination namely; whether all the issues raised for determination in the petition before the trial court were res judicata or pre- election dispute and therefore the trial court lacked jurisdiction to entertain the same; whether the generation of party lists being an internal party matter authorizes them to flout the law including their own nomination and election rules; what is the role of IEBC when receiving party lists from political parties ?

106. As regards the first issue, it was submitted that the pre-election dispute ceased to be one as soon as the 1st and 2nd appellants were gazetted by the IEBC since the 1st respondent was ambushed by the 3rd appellant who kept the generation of the party lists secret thereby denying members an opportunity to raise complaints. It was the contention of counsel that once names are gazetted by IEBC, then any disputes must be filed in the election court. Reliance was placed in the case of Moses Mwicigi & 14 Others V IEBC & 5 Others [2016] Eklr and Sammy Waity Vs IEBC & 3Others [2019] eKLR. Learned counsel agreed with the trial court for declining to determine issues that had been dealt with by the PPDT and the High Court and only dealt with new issues which the petitioner could not have possibly raised in her pre-election complaint before the PPDT.

107. As regards the second issue, it was submitted that the process of developing the party lists must bear the hallmarks of a democratic, transparent and participatory process and that political parties must not conduct their activities in secrecy and flout the rules and then hide behind the claim that it is an internal party affair. It was further argued that the PPDT had ordered the 3rd appellant to amend their party lists in compliance with the law and that the said 3rd appellant placed the 1st respondent last in the list of marginalized group without any explanation whatsoever.

108. As regards the third issue, it was submitted that the IEBC was under obligation of satisfying itself that the party lists had been generated in compliance with the law. It was submitted that it was wrong for IEBC to canvass directly with the party over compliance with the PPDT judgement to the exclusion of the 1st respondent who had filed the complaint in the first place. It was the contention of the 1st respondent that the IEBC failed in its responsibility to ensure the amended list complied with the requirements of *the constitution*, the *Elections Act*, 2011 and the General Regulations. It was finally submitted that the role of IEBC should not be one of ''wait and see'' especially in this case where it ought to act lawfully after publication of the requirements for submission of party lists published in Gazette Notice No. 6378 and that it should have satisfied itself that the lists were generated in compliance with all legal requirements. Learned counsel finally urged this court to dismiss the appeals herein as they have no merit and proceed to uphold the judgement of the trial court in its entirety.

109. Mrs Kimitei for the 2nd Respondent vide submissions dated 29/5/2023 that the trial court had no jurisdiction to entertain the petition in the first place since the dispute was a pre-election dispute which ought to be dealt with by the IEBC dispute resolution committee and the Political Parties Dispute Tribunal. She also pointed out that the matter was res judicata since the IEBC and PPDT had already determined the petitioner's complaint. Learned counsel placed reliance in several case namely; Sammy Waity V IEBC & 3 Others [2019] Eklr, Moses Mwicigi & 14 Others V IEBC & 5 Others Supreme Court Petition No. 1 of 2015 and petition No. 17 of 2013 National Gender and Equality Commission V IEBC and Another [2013] Eklr. Learned counsel submitted that guided by the above case law and section 36 (3) of the *Elections Act* the list submitted to the 2nd respondent met the current standard required of nomination lists and thus the 2nd respondent cannot be faulted for a political party's decision on the internal definition of a marginalized group and further for a political party's decision to prioritize one special interest group over another. It was thus submitted that the trial court erred in failing to recognize the limitation placed in the role of the 2nd respondent in regard to regulating a

political party's nomination list. Learned counsel urged this court to set aside the judgement of the trial court dated 27th January 2023 and dismiss the 1st Respondent's case.

Analysis and determination

110. I have keenly read and understood the substance of these consolidated appeals. I have perused the Petition and all the responses and their accompanying affidavits, the proceedings, submissions and the judgment of the trial court as well as the Record of Appeal and the parties' submissions before this Court. Having considered the entire record and the submissions of learned Counsels. I find the main issue for determination herein is whether the trial Court had jurisdiction to determine the petition before it.

111. As the first appellate Court, i have to start by reminding myself that this being an appeal from the magistrate's election Court, the jurisdiction of this court is limited to matters of law only as provided under Section 75 (4) of the *Elections Act* which states as follows; -

> "75
>
> (4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be;-
>
> (a) filed within thirty days of the decision of the magistrate's court; and
>
> (b) heard and determined within six months from the date of filing of the appeal."

112. The first thing any Court has to establish in any dispute before it, is whether it has jurisdiction to entertain a matter before it. If a Court has no jurisdiction, it ought to down its tools as it has no power or mandate to further entertain the matter further. In Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court observed: -

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

113. The petition before the trial Court was with regard to the nomination of the 1st and 2nd Appellants to the County Assembly of Bungoma as representatives of the minorities and marginalized groups. The same was challenged by the 1st Respondent before the PPDT. It was the 1st Respondent's complaint that the Marginalized List Category, which included the 1st and 2nd Appellants, was comprised of the majority Luhya and Kalenjin Communities as opposed to the Ogiek/Ndorobo, where the 1st Respondent falls, who are the minority and marginalized Community. The two, together with the 1st Respondent are said to be from the same political party. However, the Appellants were at the top of the party list under the marginalized in the special interest groups of Entrepreneur and Luo community respectively whilst the 1st Respondent was listed under the Gender Top up category list which he opposed.

114. The election process in Kenya is usually a long one and issues do arise with regard to its validity. As a result, the law created various stages for dispute resolution mechanisms. In this regard, there are various entities such as the IEBC Dispute Resolution Committee, Political Parties Dispute Tribunal (PPDT) and the election Court which have been established by both *the Constitution* and relevant statutes as dispute resolution forums. Each of these entities has been tasked with its own mandate with regard

to the nature of the dispute to entertain and the particular stage so as to avoid interference with each other's jurisdiction.

115. When it comes to the PPDT, Section 40 of the *Political Parties Act* No.11 of 2011 stipulates the jurisdiction of the tribunal as follows: -

> "(1) The Tribunal shall determine—
>
> (a) disputes between the members of a political party;
>
> (b) disputes between a member of a political party and a political party;
>
> (c) disputes between political parties;
>
> (d) disputes between an independent candidate and a political party;
>
> (e) disputes between coalition partners; and
>
> (f) appeals from decisions of the Registrar under this Act;
>
> (g) disputes arising out of party primaries.
>
> (2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms."

116. It is clear therefore that the disputes to be resolved by the PPDT relate to disagreements within political parties. In the present case, the 1st Respondent had a problem with the list that was presented to IEBC by his party. He brought the dispute before the tribunal, PPDT/E016/2022, which rendered its judgement in favour of the 1st Respondent on 5th August, 2022. The Tribunal, in finding for the 1st Respondent, held that it is a common fact that the Ogiek comprise a marginalized community in Kenya as buttressed by the NGEC report and that the 1st Respondent was qualified to be in the list which he had applied for, being the marginalized List, and the 3rd Appellant was so directed to place him. The Tribunal however declined to place the 1st Respondent on priority as No. 1 in the Marginalized List Category as he had sought.

117. Under Section 41(2) of the *Political Parties Act* any party who is dissatisfied with the decision of that tribunal is required to appeal to the High Court. In the present case, the 1st Respondent did not appeal the tribunal's judgment to the High Court by way of a judicial review. In fact it was the 3rd appellant which lodged a judicial review before the High Court in Nairobi but which was subsequently dismissed.

118. Article 88 (4) (e) of *the Constitution* of Kenya, 2010 provides: -

> "(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
>
> ...
>
> (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

..."

119. Section 74 of the Election Act provides: -

> "(1) Pursuant to Article 88(4)(e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
>
> (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.
>
> (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable. [Emphasis added]

120. On the other hand, Section 4 of the *Independent Electoral and Boundaries Commission Act* replicates the provisions of Article 88 (4) of *the Constitution*. In this regard, the dispute resolution mechanism provided for IEBC has to do with disputes that arise before the date of election or nomination.

121. Again, Section 75 (1A) of the *Elections Act* grants the Resident Magistrate's Court power to determine any question with regard to validity of an election of a member of a County Assembly. The section provides: -

> "(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice."

122. Having established the various entities, forums and the nature of disputes they are mandated to determine, at what stage does the Court's jurisdiction commence in the determination of disputes relating to nomination of members of a County Assembly?

123. This arose in the case of Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR wherein the Supreme Court of Kenya rendered itself as follows: -

> "The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55.
>
> A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the "elections" for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.
>
> In the instant case, the IEBC after receiving the party list, and in conformity with the High Court decision in the National Gender and Equality Commission Case, proceeded to publish it on 15th and 16th May, 2013. Thereafter, on 17th July, 2013, IEBC gazetted the appellants, by Gazette Notice No. 9794, Volume XCV 105, as the TNA list for Nyandarua County.

Article 90(2) of *the Constitution* provides that the IEBC shall be responsible for the conduct and supervision of elections, in respect of seats provided for under clause (1). Seats in this category include the special seats provided for under Article 177 (1) (b) and (c) of *the Constitution*. And these seats, by Article 90(3), "shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election".

Section 36(4) of the *Elections Act* provides that "within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives on the basis of proportional representation"

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*".

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.

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

It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been "elected" to serve as nominated members of a County Assembly."

124. It is clear from the foregoing that once an election has been undertaken, everything else shifts to the Election Court. In the present case, the IEBC published on 27th July, 2022 a list of nominees as submitted by the 3rd Appellant and gave the public an opportunity to scrutinize the published names and raise a pre-election dispute if aggrieved. In the aforesaid case of Moses Mwicigi & 14 Others V IEBC & 5 Others (supra), the court held that in the event of a dispute in the manner in which the

parties conduct themselves in conducting their internal elections then recourse must be had by the aggrieved party member to the Political Parties Dispute Tribunal established under section 39, Part IV of the *Political Parties Act*, 2011 or to the High Court sitting as a judicial review court in appropriate circumstances.

125. It is noted that the 1st Respondent was aggrieved by the decision of the 2nd Respondent and lodged Complaint No. 016 of 2022 before the PPDT which was duly considered. If the 1st Respondent was not satisfied by the decision of the PPDT, then he ought to have moved the High Court by way of judicial review but not to wait for the 2nd respondent to gazette the 1st and 2nd appellants and then purport to mount an election petition. Under the doctrine of exhaustion, parties are required to pursue all available administrative or lower-level remedies before seeking relief from a higher court. This was stated by the Supreme Court in the case of Sammy Waity V IEBC & 3 Others [2019] Eklr as follows:

> ''Where *the constitution* or the law consciously confers jurisdiction to resolve a dispute, an organ other than a court of law, it is imperative that such dispute resolution mechanism be exhausted before approaching the later. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing up a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice.''

126. The Supreme Court in the aforesaid case went further to point out that there are two schools of thought when it comes to the determination of the question whether an election court has jurisdiction to determine pre- election disputes. It went ahead to state that the first school of thought holds it that the establishment of other organs by the 2010 constitution to address pre- election disputes including those relating to nomination, divests an election court of jurisdiction to determine the same. The other school of thought has it that an election being a process and not an event, implies that the same continues until the declaration of results in which case, the election court has to satisfy itself that the election was at all times conducted in accordance with the tenets of *the constitution* by virtue of having a jurisdictional residuum to determine whether a person ought to have been nominated in the first place. The court went ahead to issue certain guiding principles as follows;

1. All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.

2. Where a pre- election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the constitution*, such dispute shall not be a ground in a petition to the election court.

3. Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the constitution*, the High Court shall hear the dispute before the election in accordance with the constitutional timelines.

4. Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election court.

5. The action or inaction in (4) above, shall not prevent a person from presenting the dispute for resolution to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the constitution*, even after the determination of an election petition.

127. Being guided by the above authority, I find that all pre-election disputes should be resolved by the IEBC or PPDT since they are the ones to determine the eligibility of the persons so nominated as representative of the marginalized in the County Assembly of Bungoma as well as the qualifications of the 1st and 2nd appellants to be nominated as members of the County Assembly of Bungoma under article 177(1) of *the constitution* and section 36 (3) of the *Elections Act* and should have been raised and addressed in the PPDT complaint No. 16 of 2022 or thereafter approach the High Court sitting as a judicial review court for further redress. It was thus improper for the 1st respondent to again raise the same issue before the election court. Indeed, the 1st respondent at the time he lodged his complaint before the PPDT, was aware of the manner in which the 1st and 2nd appellants had been nominated and thus he had the opportunity to challenge their nomination at that stage. The 1st respondent's failure to do so was his undoing since he knew that the dispute then was a pre- election one and that was the proper forum for determination. Hence, the 1st respondent should not have shelved the issue and reserve it for determination by the election court. It is instructive that the trial court in its judgement pointed out that indeed the claim was a pre-election dispute and that it had no jurisdiction to delve into.

128. The complaint raised by the 1st respondent was that he is from the Ogiek/Ndorobo, the only marginalized community in Bungoma County unlike the Luhya and Kalenjin who are predominant and that the 3rd appellant should have removed his name from the list of Gender Top Up category and insert it in the Marginalized category and he pitched camp and maintained that he was the most suitable candidate for the job. It is noted that the PPDT agreed with him and ordered the 3rd appellant and the 2nd respondent herein to go and amend the list accordingly but declined to place the 1st respondent as number one on the list as this was the preserve of the political party (3rd Appellant). The issue of the eligibility of the 1st and 2nd apellants as well as the 1st respondent to be nominated as the representatives of the marginalized in the County Assembly of Bungoma under Article 177 (1) of *the constitution* and section 36 (3) of the *Elections Act* was dealt with by the PPDT in Complaint No.16 of 2022. This fact was confirmed by the learned trial magistrate. However, the said learned trial magistrate held that the court had jurisdictional residuum and could deal with pre-election disputes and relied on the Supreme Court decision in Sammy Waity Vs IEBC & 3 Others (supra). However, that could only be applicable if the trial court had not indicated that it did not have jurisdiction in a large portion of the dispute. The 1st respondent had the opportunity to challenge the selection and qualification of the 1st and 2nd appellants at the PPDT since their names had already been listed in the relevant nomination list by the 3rd appellant vide the gazette notice to the public on 27th July, 2022 but sat on his laurels and then sprung it up via the election petition yet fully aware that it was still a pre-election dispute.

129. The 1st respondent has vociferously blamed the 2nd respondent for sitting on the job and failing to ensure that the 3rd appellant complied with *the constitution*, statute and regulation in nominating candidates. In fact, the 1st respondent seems to say that the 2nd respondent colluded with the 3rd appellant in the exercise of nomination and kept him in the dark. Indeed, the2nd respondent has its role well cut out under article 88(4) of *the constitution* and section 4 of the IEBC Act namely to regulate the process in which political parties nominate candidates. The learned trial magistrate in her judgement castigated the 2nd respondent herein for failing to supervise the election and ensure that the 3rd appellant herein complied with *the constitution* and party nomination rules which in the end became a sham. The 2nd respondent presented its evidence of the preparation it conducted leading to the final party lists on the 27/7/20022. Learned counsel for the 2nd respondent submitted that currently there is no law that defines special interest groups or sets out various special interest categories and the criteria to be adopted to ascertain the nominees of specific interest groups. This lacuna allows political parties the leeway to select categories of special interest groups under which to nominate their representatives as they wish. This then makes it difficult for the IEBC to control the order or manner

in which nominations are ranked and listed. In the case of Moses Mwicigi & 14 Others Vs IEBC & 5 Others (Supra) the Supreme Court held as follows:

> ''.... Nowhere does the law grant powers to the IEBC to adjudicate upon processes of a political party; such a role has been left entirely to the political parties. The IEBC only ensures that the party list, as tendered, complies with the relevant law and regulations...
>
> ...The party lists submitted to the Commission under this section shall be in accordance with *the constitution* or nomination rules of the political parties concerned. This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria...
>
> ..We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alai, to the Political Parties Dispute Tribunal established under section 39, Part V1 of the *Political Parties Act*, 2011 or to the High Court in appropriate circumstances..''

From the foregoing, it follows that the 2nd respondent could not be faulted for the political parties' decision to prioritize one special interest group over another. To that extent therefore, I find that it was erroneous for the trial court to find fault on the 2nd respondent herein yet its role in regulating a political party's nomination list was limited. Further, it is noted that parliament is yet to enact legislation pursuant to the dictates of article 100 of *the constitution* so as to define special interest groups and their categories plus the criteria to be adopted as well as guidelines to be adopted by political parties during nomination of their members. (See Adan Noor Ali Vs IEBC & 2 Others [2018] Eklr)

130. A perusal of the lower Court record indicates that there was Gazettement of the Party Lists as on 27th July, 2022. The 1st Respondent registered his complaints on the same list and he was heard in PPDTC/E016/2022 where he was granted some of the orders sought. The 3rd appellant lodged a judicial review before the High Court in Nairobi which was subsequently dismissed. The judgement of the PPDT was to the effect that the Party list be amended so as to ensure that the 1st respondent is included in the marginalized group. Even though the 1st respondent wanted to be included as number one on the list, the PPDT declined to grant the request for obvious reasons being that the same was at the discretion of the party. Indeed, the 1st respondent has bitterly complained that the 3rd appellant ought to have placed his name as number one in the list but he ought to content with the judgement of the PPDT. The 1st respondent's grouse is that the 3rd appellant did not place his name as number one in the Gazette and further that the 1st and 2nd appellants did not qualify to be nominated by the 3rd appellant in the marginalized interest group and hence the election petition. The learned trial magistrate in her judgement did confirm that the court did not have jurisdiction on some of the claims. I have set out, verbatim, the words of the trial Magistrate:

> "......If the Petitioner was aggrieved with the decision of the aforesaid PPDT's failure to prioritize as number one in the marginalized list and failing to find that he was the most qualified in the marginalized group, he ought to have appealed against the decision but again he slept on his rights and did not appeal. The issue as to whether the Petitioner should be included in the marginalized group list of the 1st Respondent and prioritized as number one was an issue that fell under the category of pre-election disputes and was dealt with and that all the Petitioner ought to have done was to appeal if aggrieved or to seek orders compelling the 3rd Appellant and the 2nd Respondent to comply with the orders of the PPDT..."

131. The trial Court, correctly in my view, found that it had no jurisdiction to inquire into the nomination dispute of the 1st Respondent as this was a matter that was already dispensed with by the Political Parties Tribunal and judgement issued in his favour. The 1st Respondent however, opted not to appeal against the decision of the PPDT to the High Court by way of judicial review. The learned trial magistrate, having correctly found that the 1st Respondent ought to move as foretasted, fell into error when she went ahead to find that it had jurisdiction to determine some of the prayers sought by the 1st Respondent. Once the learned trial magistrate established that she had no jurisdiction in the first place, she ought to have downed her tools at that juncture and not venture into the substantive issues of the petition that were raised by the parties. It was an error on the part of the trial magistrate to split the dispute into two parts and proceed to find that she had no jurisdiction on one part but had jurisdiction on the other part. Such kind of state of affairs does not augur well with established principles that once a court finds that it lacks jurisdiction, it should down its tools at that juncture. As the learned trial magistrate did not do so, then the resultant determination was in error and must be interfered with. There was clearly an error of principle.

132. Accordingly, I allow the appeals by the three appellants and hereby set aside the judgment of the trial court delivered on 27th January 2023 and substitute it with an order dismissing the 1st respondent's petition in its entirety. In view of the nature of the appeal, I order that each party will bear their respective costs of this appeal and in the trial court.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 7TH DAY OF JULY, 2023

D. Kemei

Judge

In the presence of:

Maloba for 1st Appellant

Wekesa for Mkokha for 2nd Appellant

Miss Bett for 3rd Appellant

Mbithi for 1st Respondent

Mrs Kimutei for 2nd Respondent

Kizito Court Assistant