



REPUBLIC OF KENYA



**Kering v Torome & 5 others (Election Petition Appeal E002 of 2023)
[2023] KEHC 22368 (KLR) (6 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22368 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
ELECTION PETITION APPEAL E002 OF 2023
F GIKONYO, J
SEPTEMBER 6, 2023**

BETWEEN

ALICE CHEPKIRUI KERING APPELLANT

AND

JOSEPHINE SENEYIO TOROME 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

JUBILEE PARTY 3RD RESPONDENT

COUNTY ASSEMBLY OF NAROK 4TH RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF NAROK 5TH RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 6TH RESPONDENT

*(An appeal from the judgment of Hon. P.L. Shinyada (SRM) in
Narok CMC election petition no. E003 OF 2022 delivered on 9.3.2023)*

JUDGMENT

1. In the judgment of the trial court of 9th March 2023 allowed the 1st respondent 's petition and issued the following orders;
 - i. The nomination of the 2nd respondent, Alice Chepkirui Kering, as a member of the county assembly of Narok under the category of special seats (gender top-up) is null and void.
 - ii. An order is hereby issued quashing and/or invalidating special gazette notice Vol. CXXIV-NO 186 of 9th September, 2022 to the extent that it specifies that the 2nd respondent is validly nominated and/ or elected member of the Jubileeparty to the county assembly of Narok.



- iii. An order is hereby issued to the 1st respondent to reconsider and nominate the appropriate gender top-up candidate to the 4th respondent in accordance to the list of persons submitted to it by the 3rd respondent in full appreciation that the said person to be so nominated must be a resident and a voter from the county of Narok.
 - iv. Since the party list submitted to 1st respondent is required under section 34 (10) of the [Elections Act](#) not to be amended during the term of parliament, I certify and order the 1st respondent to re-allocate the gender top-up seat to the next female Narok county registered voter in the said list from which the 2nd respondent was gazette in accordance with the provisions of section 37 of the [Elections Act](#).
 - v. The petitioner is hereby awarded the costs of this petition capped at Kshs 600, 000 payable equally by the 1st and 2nd respondents
2. Being aggrieved by the trial court judgment and orders appeals on the grounds of law as follows;
1. That the learned court erred in law and fact in shifting the burden of proof from the 1st respondent to the appellant.
 2. That the learned magistrate erred in law and fact in disregarding the appellant's evidence and placing an extremely high burden of proof on the part of the appellant on her membership to the Jubileeparty.
 3. That the learned magistrate erred in law and fact by ignoring the provisions of section 14(1) and (2) of the [Political Parties Act](#), 2012 to the effect that resignation from a political party takes effect upon receipt of a resignation notice by the political party from a member.
 4. That the learned magistrate erred in law and fact in failing to consider adequately or at all the issue of the 1st respondent's failure to lodge a complaint before the political parties disputes tribunal or before the Jubileeparty when the independent electoral and boundaries commission published the appellant's name among the potential nominees to the county assembly of Narok.
 5. That the learned magistrate erred in law and fact in failing to appreciate that the issue of the appellant's membership to the Jubileeparty was a pre-election nomination dispute that ought to have been addressed by the Jubileeparty's internal dispute resolution mechanisms and by the political parties disputes tribunal, not the trial court.
 6. That the learned magistrate erred in law and fact in holding that the appellant is not a resident of Narok County when no evidence was tendered to support the position.
 7. That the learned magistrate erred in law and fact in holding that the appellant was not qualified to be nominated to the county assembly of Narok because she was not a resident and voter of Narok County.
 8. That the learned magistrate erred in law and fact in failing to lay any constitutional statutory and regulatory basis for her finding that the appellant was required to be a resident and a voter of Narok County for her to be nominated to the county assembly of Narok.
 9. That the learned magistrate erred in law in rendering a decision that substantially undermines the institutional independence and power of the Jubileeparty to nominate a person of its choice to the county assembly of Narok.



10. That the learned magistrate erred in law and fact by ignoring the appellant's submissions and evidence hence arriving at an erroneous decision.
3. In the end the appellant urged this court to set aside the judgment of 9/03/2023, declare the appellant was validly nominated to the county assembly of Narok, and that costs of this appeal be borne by the 1st respondent.

Background

4. The appellant was gazetted by the independent electoral and boundaries commission as among the Jubileeparty's four gender top-up nominees to the county assembly of Narok. Her name appeared second in the 3rd respondent's gender-to-up list on page 33 of gazette notice no. 10712 Vol CXXIV – NO. 186 dated 9/9/2022. The appellant was subsequently sworn in as a Narok member of the county assembly on 21/09/2022.
5. The appellant's nomination was challenged through the petition dated 16/09/2022.

Directions of the court.

6. The appeal was canvassed by way of written submissions. The appellant, 1st respondent, and 2nd respondent have filed submissions which are considered in the analysis by the court.

Analysis And Determination

Court's jurisdiction and duty

7. According to Section 75 (1A) of the *Elections Act* an appeal from the decision of the election court (magistrate's court) on as to the validity of the election of a member of a county assembly, shall lie to the High Court on matters of law only.

Matters of law only

8. The phrase "matters of law only" as used in section 85A [read also 75(1A) (4)] of the *Elections Act*, 2011 refers to:
 - i. 'the interpretation, or construction of a provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine, in an election petition in the High Court; or
 - ii. the application of a provision of *the Constitution*, an Act of Parliament, subsidiary legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial judge in an election petition; or
 - iii. the conclusions arrived at by the trial judge in an election petition where the appellant claims that such conclusions were based on "no evidence," or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same'. (Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR)
9. Under this jurisdiction, nothing precludes reversal of trial court's conclusions of fact and appraisal of witness accounts that are absurd, irrational or so perverse that no reasonable tribunal would arrive at such.
10. The three components or elements of 'Matters of law' established by the Supreme Court have been referred to as:



Technical element - interpretation of the law and legal principle;

Practical element – application of the law and legal principle to a set of facts or evidence on record;

Evidentiary element – evaluation of the conclusions of the trial court which are based ‘on evidence’ or are ‘so perverse’ or so illegal.

What the appellate court ought not to do

11. Nevertheless, the election appellate court should not entertain: -

‘...a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses...’ (see Frederick Otieno Outa v Jared Odoyo Okello & 4 Others, Supreme Court Petition No. 6 of 2014; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014)

12. This court will therefore, exercise the appellate jurisdiction set out in statutory as well as decisional law above.

Issues for determination

13. Arising from the memorandum of appeal, the submissions of the parties, and the authorities cited in support thereof are the following issues for determination;

- i. Whether the appellant has raised matters of law or facts.
- ii. Whether the trial court misapplied the standard of proof and evidentiary burden.
- iii. Whether the trial court ignored Section 14(1) of the *Political Parties Act*.
- iv. Whether the trial court failed to consider all issues raised by the parties in the petition.
- v. Whether the trial court failed to lay any constitutional statutory and regularity basis for her finding that the appellant was required to be a resident and a voter of Narok County to be nominated.
- vi. Whether the trial court rendered a decision that substantially undermines the institutional independence and power of the Jubileeparty to nominate a person of its choice to the county assembly of Narok.
- vii. Who shall bear the costs?

I. Whether the appellant has raised matters of law or facts.

14. The appellant submitted that this court has jurisdiction to hear and determine the appeal as framed in the memorandum of appeal to the extent that the grounds of appeal outlined are based on law. The appellant relied on section 75(4) of the *Elections Act* and the case of Hon. Samra Ishardali Mohamed Vs IEBC –Nairobi (CA) Election Petition Appeal 22 of 2018.

15. The court has already outlined under ‘Court’s appellate jurisdiction and duty’, the scope of the appellate jurisdiction of the High Court as well as the duty of the court. The court will therefore deal with ‘matters of law only’. See Gatirau Munya Case.

16. The court will nevertheless, not entertain any matters: -



‘...which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses...’ (see Frederick Otieno Outa v Jared Odoyo Okello & 4 Others, Supreme Court Petition No. 6 of 2014; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014)

II. Whether the trial court misapplied the standard of proof and evidentiary burden.

17. The appellant submitted that she proved her membership in the Jubilee Party to the required standards above the balance of probabilities. She argued that she resigned from ODM through the letter dated 16/03/2022, which was duly received by the ODM party on 23/03/2023. That she also produced a letter confirming her membership in the Jubilee Party. Therefore, the learned trial magistrate erred in law in requiring her to provide further evidence of her membership to the Jubilee Party as of 25th June 2022 when the 1st respondent had not provided any evidence to prove that the appellant was not a member as of 25/06/2022. The appellant relied on Section 34(8) of the *Elections Act*, sections 108 and 109 of the *evidence act*, Raila Odinga & Others V Independent Electoral & Boundaries Commission & Others, Petition No. 5 Of 2013 As Cited In Anuar Loitiptip V Independent Electoral & Boundaries Commission & 2 Others [2019] eKLR Petition 18 & 20 Of 2018 (Consolidated).
18. The appellant submitted that the learned magistrate erred in law in shifting the burden of proving the appellant’s membership to the Jubilee Party as of 25/06/2022 from the 1st respondent to the appellant. That the evidential burden of proof remains at all times with the petitioner and it only shifts to the respondent when the petitioner has discharged the evidential burden. That the 1st respondent never provided any evidence that the appellant was not a member of the Jubilee Party as of 25/06/2022. The appellant relied on Raila Amollo Odinga & Another V Independent Electoral And Boundaries Commission & 4 Others & Attorney General & Another, Presidential Petition No. 1 Of 2017 [2017] eKLR As Cited In Mohammed Mahamud Ali V Independent Electoral And Boundaries Commission [2019] eKLR Petition 31 Of 2018, Anuar Loitiptip V Independent Electoral & Boundaries Commission 7 2 Others[2019] eKLR 18 & 20 Of (Consolidated).
19. The 1st respondent submitted the issue of burden of proof was discussed by the trial court in paragraphs 54-64 of the judgment. The election court rightly applied the burden and standard of proof in an election court. The 1st respondent established a prima facie case that showed that the appellant was not a member of the Jubilee Party as of 25/06/2022. The election court insisted that the appellant needed to discount the 1st respondent’s case. But it cannot be said that the trial court shifted the legal burden of proof. That the court shifted the evidential burden of proof to the appellant to show with certainty that she was a member of the Jubilee Party as of 25/06/2022. The appellant did not discharge this burden. The 1st respondent relied on the case of Raila Amolo Odinga & Another V Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR
20. The 2nd respondent submitted that the learned magistrate unfairly shifted the burden of proof to the appellant, arrived at an erroneous conclusion, and unjustly revoked the appellant’s nomination. There was overwhelming evidence that the appellant had resigned from the 6th respondent’s party and joined the 3rd respondent. The same is acknowledged by the trial court in paragraph 58 of the judgment but condemns the appellant for having not demonstrated that the resignation was communicated to the registrar of political parties. The 2nd respondent relied on the supreme court case of John Harun Mwau & 2 Others V IEBC & 2 Others, Supreme Court Presidential Election Petitions 2 & 4 Of 2017, Raila 2013 And 2017.



21. Further the 2nd respondent submitted that it acted within the confines of the law in the verification of the 3rd respondent's party list, publication of the compliant list inviting complaints and or objections relating to any of the persons appearing in the nomination list, and the subsequent gazettelement of all the nominated persons for the special seats including the appellant herein.

Of burden of proof

22. The legal burden of proof in Election disputes lies on and remains with the petitioner throughout the case (*Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others*, Supreme Court Petition No. 5 of 2013).
23. The evidential burden of proof in EDR initially lies upon the party bearing the legal burden (i.e. the petitioner). The evidential burden, however, may shift, and often shifts, between the parties as the weight of evidence given by either side during the trial varies. See *Raila 2013*.
24. But, in determining the validity or otherwise of the election, the election court must consider the totality of the evidence adduced before it. (*Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others*, Election Petition (Mombasa) No. 10 of 2013, *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, Civil Appeal (Nyeri) No. 38 of 2013).
25. It was the 1st respondent's case that the name of the appellant was never forwarded for nomination by the 3rd respondent's Narok branch, that the appellant was not and was never a voter registered in Narok county but instead a voter in Nakuru county.
26. The 1st respondent contended that the appellant was a resident and a voter in Nakuru county and a former nominated MCA for the Nakuru county assembly for the 6th respondent between August 2017-august 2022. Further, that she is not a member of the 3rd respondent party but a registered member of the 6th respondent and her membership number is ODM3735606.
27. The 1st respondent contended that the appellant had not tendered any evidence to show that she was a member of the 3rd respondent as at 25th June 2022- the deadline for submission by the parties of their respective party lists to the 2nd respondent.
28. The 2nd respondent stated that the 3rd respondent submitted its list on 25th June 2022 and it was found to be non-compliant and it was advised that the 3rd respondent submits an amended list by 25th July 2022.
29. The appellant contended that she had been a registered member of the 3rd respondent since March 2022. That the 1st respondent did not produce any evidence that she was still a member of the 6th respondent as of June 2022. That she resigned from the 6th respondent's membership through a letter dated 16th March 2022 addressed to the registrar of political parties which letter was received on 23rd March 2022. She later joined the 3rd respondent.

Of membership of Jubilee Party

30. The proper perspective of this issue on membership is whether the appellant was a member of Jubilee Party at the time the party list for nomination to the County Assembly was submitted to the IEBC.
31. The 2nd respondent alleged that the appellant was not a member of Jubilee Party as at 25th June 2022- the deadline for submission of the party list for Jubilee Party's for nomination to the county assembly of Narok. The 2nd respondent also made another allegation; that at the material time, the appellant was a member of the 6th respondent. It appears that the appellant and IEBC have placed absolute focus



on the latter allegation, and in furtherance of their arguments thereto, made a proposition that the 2nd respondent bore the onus of proof that the appellant was a member of the 6th respondent- an approach that made them lose sight of the real issue; whether the appellant was a member of Jubilee Party at the time the party list was submitted to IEBC. It is the view of the court that, at best, the claim that the appellant was a member of the 6th respondent was merely evidence in support of the main issue. Nevertheless, the court will determine alleged resignation of the appellant from the 6th respondent when it shall be discussing the purport of section 14(1) of the [Political Parties Act](#).

32. Accordingly, the claim by the appellant and IEBC that the trial court shifted the burden of proof to the appellant is based on this stray focus.
33. One of the major constitutional requirements for election by nomination through party list to the county assembly is that, such person must be ‘nominated by a political party’ (article 193(1)(c) (i) of [the Constitution](#)). Throughout [the Constitution](#) and the [Elections Act](#), membership to a political party of such person nominated is central in an election by nomination through party list. According to section 34(8) of the [Elections Act](#): -

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

34. Accordingly, the 2nd respondent made a claim that the appellant was not a member of Jubilee Party as at 25th June, 2022, and rebuttal thereof was required of the appellant who was claiming that she was a member of Jubilee Party at the material time. The trial election court did not therefore shift the legal burden as claimed by IEBC and the appellant. The trial court stalwartly observed and declared in respect of the proposition by IEBC and the appellant that the 2nd respondent ought to prove that the appellant was not a member of Jubilee, thus: -

‘With all due respect to the 2nd respondent I disagree with this argument. While it is true in accordance with section 107 and 109 of the [Evidence Act](#) that he who asserts must prove, it is also trite that one cannot... be expected to prove a negative. The petitioner alleges a negative...that the 2nd respondent was not a member of Jubilee Party before 25th June 2022.

35. And, the trial court gave its reasons in paragraph 62 of the judgment- for taking this view to wit; according to section 12 of the Law of [Evidence Act](#), it behooved upon the appellant as the person with primary knowledge and facts to prove as to when she became a member of Jubilee Party.
36. Amazingly, IEBC claimed it published the names of the nominees in the gazette notice after, among other things, due verification. It also claimed to have the onus on the issue of membership- which is doubtful- yet, it did not produce evidence in court which it used to verify the membership of the appellant in Jubilee Party as at 25th June, 2022.
37. The trial court did not, therefore, illegally shift the legal burden of proof to, nor improperly create upon, and shifted the evidential burden to the appellant to prove her membership in Jubilee Party. The arguments by the appellant and the IEBC fail.
38. As a consequence, the inextricable question is; whether the appellant was a member of the Jubilee Party as at 25th June 2022. This question is determined after the following issue.



III. Whether the trial court ignored Section 14(1) of the *Political Parties Act*.

39. The appellant submitted that her resignation from the ODM party took effect upon receipt of her resignation letter on 23/03/2023. Further, it was not her duty to provide evidence that the said letter was submitted to the registrar of political parties. The appellant relied on section 14 of the *Political Parties Act*, 2012.
40. The 1st respondent submitted that the issue of section 14(1) of the *Political Parties Act* was not an issue before the election court. That paragraphs 56-60 of the judgment dealt with the resignation letter. Therefore, the election court did not ignore section 14(1) of the *Political Parties Act*.
41. The 2nd respondent submitted that it lacks the discretion to interfere with the party lists upon verification and confirmation that the lists were compliant. The 2nd respondent relied on the case of Aden Noor Ali V Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR, Moses Mwiggi & 14 Others Vs Independent Electoral And Boundaries Commission [2015] eKLR.
42. Section 14 (1) of the *Political Parties Act* provides
14. (1) A member of a political party who intends to resign from the political party shall give a written notice prior to his resignation to—
- (a) The political party;
- (b) The Clerk of the relevant House of Parliament, if the member is a member of Parliament; or
- (c) the clerk of a county assembly, if the member is a member of a county assembly.
- (2) The resignation of the member of the political party shall take effect upon receipt of such notice by the political party or clerk of the relevant House or county assembly.
- (3) The political party of which the person is a member, the member, or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within three days of the resignation.
43. The election court acknowledged that the appellant resigned from the 6th respondent but was not persuaded that the resignation was communicated to the registrar of political parties on or before 25th June 2022. The appellant seems to suggest that she bore no obligation in law to notify the Registrar of Political Parties of the resignation. However, a reading of section 14(3) of the *Political Parties Act* reveals that: -
- The political party of which the person is a member, the member, or the clerk of the relevant House of Parliament or of a county assembly of which the person is a member shall notify the Registrar of such resignation within three days of the resignation. [Underlining for emphasis]
44. Contrary to the submissions by the appellant and the 1st respondent, the trial election court was alive to the provisions of section 14(1) of the *Political Parties Act*.
45. The trial court was also clear that even assuming the appellant had duly resigned, the question of her membership in Jubilee Party at the material time remained the predominant issue.



46. Upon interpretation and application of the law on the facts, the trial election court did not err on its findings and conclusions on resignation of the appellant from the 6th respondent.

Appellant's alleged membership in Jubilee Party

47. The election trial court noted that the appellant produced a letter from the registrar of political parties dated 3rd October 2022 in which the registrar acknowledged an inquiry made by the appellant in her letter dated 30th September 2022. The registrar of political parties confirmed that as of 3rd October 2022, the appellant was a registered member of the 3rd respondent. The letter further stated that the appellant was further registered as a member of the 3rd respondent on the 3rd May 2012. The election court noted that the appellant tried to correct in her submissions the date of her alleged registration as a member of Jubilee Party and termed it 'a typographical error' and stated that the correct date ought to have been 3rd May 2022.

48. Membership of the appellant in Jubilee Party on the date of submission of the party list is a critical question of law and fact. According to section 34(8) of the *Elections Act*: -

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

49. Similarly, the application of the law on the facts and conclusions drawn upon those facts by the trial court also becomes matters of law.

50. The trial court found that the letter from the Registrar of Political Parties tendered by the appellant did not prove that the appellant was a member of Jubilee Party as at 25th June, 2022. It also found that the alleged typographical error on the date when the appellant was registered as a member of Jubilee Party was a substantial matter which required official communication from the Registrar. Ultimately, as no such proof was adduced, the trial court found that there was nothing to show that the appellant was a member of Jubilee Party as at 25th June, 2022.

51. It bears repeating that, in accordance with section 34(8) of the *Elections Act*, 'a person who is nominated by a political party...shall be a person who is a member of the political party on the date of submission of the party list by the political party.' The party list through which the appellant was nominated by Jubilee Party was submitted on 25th June, 2022. This was the relevant date in this petition and required specific proof. The letter by the Registrar did not prove the appellant was a member of Jubilee Party as at 25th June 2022. The date when she was registered as a member of Jubilee Party was obscured by the supposed 'typographical error' which ought to have been duly corrected through official communication by the Registrar and not through submissions by the appellant as she sought to do.

52. On the basis of the evidence adduced, this court also finds there was no proof that the appellant was a member of Jubilee Party- the 3rd respondent- as at 25th June, 2022.

IV. Whether the trial court failed to consider all issues raised by the parties in the petition.

53. The appellant submitted that the appellant raised before the trial court that the 1st respondent failed to lodge any complaint before the political parties dispute tribunal, the IEBC, or before the Jubilee Party despite the IEBC and political parties inviting members of the public and stakeholders through a notice to lodge any complaint against any of the nominees published on 28/07/2022 and 6/8/2022. According to the appellant, the 1st respondent had not exercised her right to utilize the appropriate



dispute resolution mechanism when the opportunity had been provided. The appellant relied on Article 88(4) (e) of *the Constitution*, section 74(1) of the *Elections Act*, 2011, regulation 54 of the Elections (General) Regulations, sections 39 and 40 of the *Political Parties Act*, 2011, Republic V The Independent Electoral And Boundaries Commission Ex Parte Charles Ondari Chebet (Nakuru High Court Judicial Review Application No. 3 Of 2013), Francis Gitau Parsimei & 2 Others V National Alliance Party & 4 Other [2012] eKLR Cited In Republic V The Independent Electoral and Boundaries Commission Ex Parte Charles Ondari Chebet (Nakuru High Court Judicial Review Application No. 3 Of 2013).

54. The 1st respondent submitted that the issue of complaints to PPDT was considered by the trial court at paragraphs 14, and 23 of the judgment. Further, the appellant did not file any preliminary objection to the jurisdiction of the elections court. The appellant and 2nd respondent's written submissions both dated 17/02/2023 do not address the election court on the issue. Therefore, the matter did not form part of the issues for determination. The 1st respondent urged this court not to disturb the election court's judgment. The 1st respondent relied on the case of Moses Mwigigi & 14 Others V IEBC & 5 Others [2016] eKLR, Sections 75 Of The *Elections Act* and National Gender And Equality Commission V IEBC And Hassan Ali Joho And Another V Suleiman Said Shallah Supreme Petition No. 10 Of 2013.
55. The 1st respondent further submitted that it matters not whether a complaint was made regarding the Jubilee Party list to the PPDT. Once a nomination is made pursuant to a party list and there is a contest as to the election of whoever is nominated then that matter can only be challenged by way of an election petition that is filed primarily at the magistrate's court, which is the court of original jurisdiction of such election petition dispute. Thus, according to the 1st respondent, the learned magistrate was right to assume jurisdiction to hear and determine the 1st respondent's petition notwithstanding that the Jubilee Party list was never challenged at the PPDT.

Jurisdiction on party list

56. The trial court's record show that the appellant and IEBC had raised the issue that the 1st respondent ought to have raised complaints on the party list forwarded by the Jubilee Party to IEBC to the internal dispute mechanism then to IEBC and ultimately to PPDT. See their submissions before the trial court and specifically paragraph 14 and 23 of the judgment. However, the election court did not address the issue in its judgment.
57. That notwithstanding, the controversy presented before the trial court and now subject of this appeal is, election of the appellant to Narok County Assembly by nomination through party list. It is appropriate to determine whether such is a matter for the election court or pre-election dispute resolution mechanism so as to resolve any question on jurisdiction?
58. *The Constitution* and the *Political Parties Act* (PPA 2011) confer jurisdiction to settle pre-election disputes to the IEBC, the Political Parties Disputes Tribunal, and the political party internal dispute resolution mechanisms (IDRMs) as first port of call. Article 88(4)(e) of *the Constitution* grants the IEBC the mandate to resolve disputes arising from and relating to nominations, but excluding election petitions and disputes following declaration of results.
59. The concern of the court in this issue is the limitation of the jurisdiction on pre-election disputes in the expression; 'but excluding election petitions and disputes following declaration of results'.
60. Much help in resolving this issue comes from the decision of the Supreme Court in Moses Mwigigi and 14 Others v Independent Electoral and Boundaries Commission and 5 Others (2016) eKLR, which in effect held that the entire process of allocation of the nomination-seats starting from the determination



of the number of seats due to each political party through to designation of the number of nominees required to join the assembly in the publication in the Gazette Notice of the names of the nominees who are persons nominated to the county assembly constitute the election of those persons to the county assembly. The Gazette Notice signifies the completion of the ‘election through nomination’ and finalized the process of constituting the county assembly in question. The mandate of IEBC ends there. Therefore, all the steps or incidents provided in the law are essential or integral part of the election process, thus, any question thereof is an election dispute to be determined by the election court. Matters complained of here must be decided in an election petition by the election court.

61. Unlike in its submissions in the trial court, IEBC has this time made submission on this issue which are on point. It matters not whether a complaint was made regarding the Jubilee Party list to the PPDT. Once a nomination is made pursuant to a party list, any contest as to the election of whoever is nominated becomes a matter which can only be challenged by way of an election petition. Thus, the learned magistrate was right to assume jurisdiction to hear and determine the petition by the 1st respondent notwithstanding that the Jubilee Party list was never challenged at the PPDT.
62. Although the trial court may not have specifically determined whether matters forming the petition are pre-election disputes, it rightly assumed and exercised jurisdiction in determining the petition. Nothing therefore turns on this ground.

V. Whether the trial court failed to lay any constitutional statutory and regularity basis for her finding that the appellant was required to be a resident and a voter of Narok County to be nominated.

63. The appellant submitted that the learned magistrate ignored clear provisions of the law on the requirements that one must fulfill in order to qualify for nomination to the county assembly and instead espoused a condition that is unknown to the law. That there is no legal requirement that one has to be a resident or a registered voter in the county where they are nominated to a county assembly. The appellant relied on articles 177, 193 of *the Constitution*, section 25 of the *Elections Act*, Esther Chelimo & 2 Others V Independent Electoral and Boundaries Committee & 12 Others [2018] eKLR Election Petition 1 Of 2017, Esther Okenyuri Anyieni V Mokumi Edmond Anthony & 3 Others [2018] eKLR, Election Petition Appeal 1 Of 2018.
64. According to the 1st Respondent’s petition, the Appellant was not a registered voter in Narok and thus not eligible to be nominated as a Member of the County Assembly for Narok County by the 3rd respondent.
65. The appellant has fastened a quarrel on this claim by the 1st respondent; he calls it foreign requirement to, as the law only requires a person to be registered voter. See article 193(1) of *the Constitution*.
66. Courts have encountered the question whether a person is eligible for nomination to a county assembly only if the person is a registered voter in that county.
67. For instance, in the case of Matuli & 2 Others vs. IEBC & 2 Others [2023] KEHC 3580 (KLR) where Nyakundi J was confronted with this very question resorted to painstaking analysis of the role of purposive interpretation of *the Constitution* especially of articles which present some ‘practical dilemmas’ such as article 193(1) of *the Constitution* and concluded that: -

From the foregoing, it is apparent that a purpose interpretation of Article 193(1) of *the Constitution* on the eligibility for election as a member of the County Assembly would favour a position that would require a candidate to be a registered voter in that county.



68. The judge stated categorically the basis of the approach taken that: -

The Supreme Court of Kenya in the Speaker of the Senate & Another v Attorney-General & 4 Others, Sup Ct. Advisory Opinion No 2 of 2013; [2013] eKLR urges courts, this court included, to resolve constitution-making contradictions; clarify draftsmanship-gaps; and settle constitutional disputes that may have arisen from constitution-making compromises that often attend *the Constitution*-making process. In doing so, this court is to adopt a purposive approach which promotes the dreams and aspirations of the Kenyan people.

69. Dulu J in Victoria Cheruto & Hamid Ahmed vs IEBC NCIC provided some of the justifications of the interpretation adopted by Nyakundi J. The judge opined thus: -

-40. It can be easily discerned from the above provisions of *the Constitution* that the operative words are the Ward, the County, the election, the voters in the Wards, and the seats received in the County. It is also important to note that under Article 90 (2) (c) of *the Constitution*, the party lists for County Assembly seats are not required to reflect the regional and ethnic diversity of the people of Kenya, unlike in the case of the National Assembly and Senate.

41. In Kenya also voters are registered to vote in only one polling station, which will of course be in one Ward and one County. Under regulation 38 of the Elections (Registration of Voters) Regulations 2012, Kenyan citizens residing outside Kenya are only allowed to vote in Presidential Elections or Referendum. Under Regulation 39 E, the same conditions apply to prisoners. As such, my constitutional interpretation is that only those who were registered to vote in Wards in Garissa County could qualify for nomination by the party to the County Assembly of Garissa. In my view therefore, Victoria Cheruto Limo being a registered voter of Uasin Gishu County was not qualified and not validly nominated to fill the gender top-up position in the Garissa County Assembly.

70. This court only wishes to add that, there is absolute sense that the principle of representation in the county political aspirations and goals should be understood and given meaning within the objects of devolution and principles of devolved government in order to build a robust constitutional philosophy around this subject.

71. Quite eminent arguments have been proffered that, the ‘practical dilemma’ arising from superficial application of article 193(1)(a) of *the Constitution* in relation to representation in the county assembly, has manifested itself in the many questions courts have started to ask especially of representation in the county assembly, and which may justify a shift of focus to try and understand whether *the Constitution* established an electoral system that has neglected the importance, the specific objects of devolution and principles of devolved governments entrenched in *the Constitution*. A polity with a constitutional framework that has engendered devolution, will underscore the importance of effective representation thereto should draw substantially upon the objects of devolution (article 174), and principles of devolved government (article 175 of *the Constitution*). Thus, it is not a rogue thought to propose that, the content of the principle of representation in the county assembly should widely assume and be determined on the basis of those constitutional principles and objects. Courts and across multi-disciplines have started the survey of these provisions of *the Constitution* which provide a subtle premise and opportunity to give the electoral system a general as well as specific constitutional, political and social goals in some comparative manner- national and county legislatures. The effort is aimed at providing meaning and content of the principle of representation- in so far as it concerns devolution- within the principles of devolved government and objects of devolution. In this sense, it may be argued that, the constitutional entrenchment of the electoral system, and devolution as a



unit of governance and representation, makes the electoral system permeable to special factors that govern or attend to or promote devolution. This school of thought consider the said constitutional entrenchment to have a context-dependent effect on specific provisions on election to county assembly but which must lead to greater interface between the electoral system and the overall objectives of representation and devolution.

72. Those would perhaps address the concerns whether *the Constitution* was blind to or gave political parties the license to ignore, representation of actual interests of the residents of the particular county as a basis for elections by nomination through party list. The party list is prepared by the political party in accordance with its nomination rules and must comply with *the Constitution*, *Elections Act* and Regulations made thereunder (Regulation 55 of the Elections (General) Regulations).
73. Back to the main. The Appellant does not dispute that she is not a registered voter or a resident of Narok County. Even if she had been nominated earlier to county assembly of Nakuru, the appellant avoided so much the question as to where she is registered as a voter until finally there was no evidence to show she is a registered voter. And on the basis of Article 193(1) (a) of *the Constitution* and Section 25(1)(a) of the Election Act it is mandatory that anyone offering himself or herself to be elected or nominated as a Member of the County Assembly must be a registered voter.
74. In addition, the trial court appreciated that the evidence placed before the court by the 1st Respondent was sufficient to prove that indeed the Appellant was not a registered voter or resident of Nark county. The reasons given by the trial court in paragraph 71 of the judgment reflect the ‘practical dilemma’ on representation in county assembly of Narok as a consequence of application of article 193(1)(a) of *the Constitution* without reference to the actual interest, needs and aspirations of the residents of the particular county.
75. In light thereof, the trial election court did not err in finding that the appellant was not validly nominated to be a member of Narok County Assembly.

Whether the trial court rendered a decision that substantially undermines the institutional independence and power of the Jubilee party to nominate a person of its choice to the county assembly of Narok.

76. The appellant submitted that the learned magistrate’s decision amounts to unlawful interference with the decision of the Jubilee Party to nominate a person of its choice to the county assembly of Narok. That the petitioner did not demonstrate that either the Jubilee party’s constitution or the nomination rules were violated in any way. Therefore, the trial court’s decision to nullify the appellant’s election through the Jubilee party was erroneous as it substantially undermined the institutional independence and power of the Jubilee Party to nominate a person of its choice to the county assembly of Narok. The appellant relied on section 13(1) of the *elections act*, 2011.
77. The 1st respondent submitted that the judgment of the election court speaks for itself regarding and completely obliterates the appellant’s arguments on this front as observed in paragraphs 66-75 of the judgment. That the election court took into account the requirements under Article 90 of *the constitution*, and past precedents of both the High Court and Court of Appeal on the subject before it.
78. The election Court under Section 75 of *Elections Act*, shall interrogate the process and outcome of the nomination process to confirm validity of the nomination of the appellant.
79. This Court has fully interrogated the Record of Appeal, and the Responses to Petition by the Appellant, the process and outcome of the nomination of the Appellant as a member of the County Assembly of Narok.



80. And on the basis of the analysis of all the issues presented by the parties, this court does not find any error in the interpretation or application of any law or legal principle in the decision by the trial election court to nullify the election by nomination of the appellant through party list. The election was nullified on sound legal basis.
81. In the upshot, the court finds that the election court did not substantially undermine the institutional independence and power of the Jubilee party to nominate a person of its choice to the county assembly of Narok.
82. The appeal lacks merit and is dismissed with costs to the 1st Respondent.

VI. Who shall bear the costs?

83. The appellant urged this court to be guided by the principles in the following cases in exercising its discretionary power on costs; section 84 of the *Elections Act*, rule 30(2) of the Election (Parliamentary And County Election) Petition Rules 2017, and Election Petition No. 2 Of 2017, Martha Wangari Karua V Independent Electoral & Boundaries Commission & 3 Others (Cited In Esther Okenyuri Anyieni V Mokumi Edmond Anthony & 3 Others [2018] eKLR
84. The 2nd respondent urged this court to find and hold that the decision of the trial court in allowing the petition and condemning the 2nd respondent to pay costs without a demonstrated cause of action or violation of the law pertaining to its mandate was unfair and unjust and stands set aside.
85. The 1st respondent submitted that the 2nd respondent has raised an issue on costs which is not an issue captured in the memorandum of appeal. According to her, the 2nd respondent did not file a cross-appeal. The 1st respondent argued that the award of costs is a matter of judicial discretion and follows an event. To her, the learned magistrate did not make any mistake by awarding costs which she rightly capped at 600,000 and ordered that both the appellant and 2nd respondent equally contribute towards payment of the said sum. Therefore, this court should not interfere unless satisfied that the election court misdirected itself and arrived at a wrong decision. The 1st respondent relied *Jasbir Singh Rai & Others V Tarlocha / Ensingh Rai Estate & Others*, Supreme Court Petition No. 4 Of 2012, section 84 of the *Elections Act* 2011, rule 30 of the Elections (Parliamentary And County Elections) Petitions Rules, 2017, *Evans O. Kidero & Others V Ferdinard N. Waititu & Others* Supreme Court Petition No. 18 Of 2014, *Karanja Kabage V Joseph Kiuna & Others* Nairobi Civil Appeal No. 301 Of 2013, article 48 of *the Constitution*, *Mbogo And Anor V Shah* (1968) EA 93 cited with approval in *Peter Gichuki King'ara V IEBC And 2 Others*, Nyeri Civil Appeal No. 31 Of 2013 (court of appeal (visram, koome & odek , JJA)
86. The court has the power to order costs, and may also inter alia, cap the costs of and incidental to an election petition (s. 84 of the *Elections Act*, 2011; Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017; *George Mike Wanjohi v Steven Kariuki*, Supreme Court Petition No. 2A of 2014).
87. Further, an election court may direct that the whole or part of any moneys deposited as security be applied in the payment of taxed costs (Rule 31 (3) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017).
88. Once an election court caps the costs of and incidental to an election petition, the actual amount payable is determined through taxation. The Registrar taxes the costs of a parliamentary or county election petition in the same manner as costs are taxed in civil proceedings in accordance with the *Advocates Act* (Rule 31 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017).



89. Generally, the costs of and incidental to an election petition follow the cause (s. 84 of the *Elections Act*, 2011; *Godfrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others*, High Court (Nairobi) Petitions Nos. 102 and 145 of 2015; *Joseph Amisi Omukanda v Independent Electoral & Boundaries Commission (IEBC) & 2 Others*, Civil Appeal (Kisumu) No. 45 of 2013).
90. The 1st respondent is the successful party in the petition as well as this appeal. She is entitled to costs. Therefore, the trial court exercised discretion judicially.
100. In the upshot, this court finds the appeal to be without merit and is dismissed with costs to the 1st respondent. Accordingly, the Trial Court's decision is upheld and more specifically that: -
- i. The nomination of the appellant, Alice Chepkirui Kering, as a member of the county assembly of Narok under the category of special seats (gender top-up) is null and void.
 - ii. An order is hereby issued quashing and/or invalidating special gazette notice Vol. CXXIV-NO 186 of 9th September, 2022 to the extent that it specifies that the appellant is validly nominated and/ or elected member of the Jubilee Party to the County Assembly of Narok.
 - iii. An order is hereby issued to the IEBC, the 2nd respondent to consider and nominate the appropriate gender top-up candidate to the County Assembly of Narok in accordance with the list of persons submitted to it by the Jubilee Party, the 3rd respondent, in full appreciation that the person to be so nominated must be a resident and a voter in the County of Narok.
 - iv. As under section 34 (10) of the *Elections Act*, the party list (the gender top-up seat) submitted to the 2nd respondent is not to be amended during the term of parliament, the 2nd respondent is ordered to nominate from the list in which the appellant was gazetted in accordance with the provisions of section 37 of the *Elections Act*, the next female person who is registered as a voter in Narok County as a member of the Assembly of the County of Narok.
 - v. Costs of the lower court case remain as ordered and capped by the trial court.
 - vi. The petitioner is hereby awarded the costs of this appeal capped at Kshs 600, 000 payable equally by the appellant and the 2nd respondents
 - vii. Certificate under section 86 of the *Elections Act* of the result of the appeal be issued to Speaker, County Assembly of Narok, and IEBC.
 - viii. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 6TH DAY OF SEPTEMBER, 2023

F. GIKONYO M

JUDGE

In the presence of: -

1. Mrs. Rotich for the appellant
2. Kere and Kamwaro for 1st respondent
3. Odunga for 2nd respondent
4. Muraguri C/A

