



**Mureithi v IEBC & 16 others; Clerk, Nyandarua County Assembly (Interested Party) (Election Petition Appeal E001 of 2023) [2023] KEHC 22301 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
ELECTION PETITION APPEAL E001 OF 2023  
CM KARIUKI, J  
SEPTEMBER 20, 2023**

**IN THE MATTER OF THE CONSTITUTION OF KENYA;  
ARTICLES 1, 2, 3, 6, 10, 12, 20, 21, 22, 23, 24, 25, 26, 27, 28, 47, 48,  
54, 56, 90, 100, 174, 175, 177 AND 259 OF THE CONSTITUTION  
IN THE MATTER OF SECTIONS 34, 35, 36 & 37 OF THE ELECTIONS ACT  
NO. 24 OF 2011 AND THE ELECTIONS (GENERAL) REGULATIONS 2017  
AND THE ELECTIONS (PARTY PRIMARIES AND  
PARTY LIST REGULATIONS 2017) PETITION RULES  
AND  
IN THE MATTER OF ELECTIONS/NOMINATION FOR THE COUNTY ASSEMBLY  
ELECTIONS/ NOMINATIONS FOR NYANDARUA COUNTY ASSEMBLY  
IN THE MATTER OF THE GAZETTE NOTICE NO.  
10712 VOL CXXIV-NO. 186 AT PAGES 7070 AND 7079**

**BETWEEN**

**NANCY NJOKI MUREITHI ..... APPELLANT**

**AND**

**IEBC & 16 OTHERS ..... RESPONDENT**

**AND**

**THE CLERK, NYANDARUA COUNTY ASSEMBLY ..... INTERESTED PARTY**

*(Being an appeal against the Judgment of H O. Barasa, Senior Principal  
Magistrate at Engineer delivered on 1st day of February, 2023.)*



## JUDGMENT

1. The Appellant Nancy Njoki Mureithi aka Nancy Mercy Njoki Mureithi filed the instant Appeal following the trial court judgment, delivered on 1st February 2023. The election petition in the trial court primarily alleged that the 1st Respondent failed to apply the correct Formula for the allocation of special seats as provided for under the Law and that by the 1st Respondent's alleged failure to apply the correct Formula, the 1st Respondent was biased in favour of the United Democratic Alliance and Jubilee parties against her and the Chama Cha Kazi Party.
2. The petition was dismissed thus the Appellant herein, being aggrieved by the entire Judgment of H O. Barasa, Senior Principal Magistrate at Engineer delivered on 1st day of February, 2023 filed this Appeal dated 1st March 2023 against the aforesaid Judgment on the following grounds: -
  - i. That the Learned Trial Magistrate erred in Law and occasioned grave miscarriage of justice by misconceiving and misapplying the same and therefore misapplying principals of Law as set out in the case of Ann Potisho versus Karasar Sialo Natanya Tasui Election Petition Appeal No. 2 of 2018 at the High Court in Narok.
  - ii. The Learned Trial Magistrate erred in Law by making a finding that a party mandatorily required to submit both its party lists under Article 177 of Constitution and Section 34 35 and 36 of the Elections Act to qualify for election under nomination form either of the party lists.
  - iii. The Learned Trial Magistrate fell into grave error of the Law by purporting and making a finding that the Independent Electoral and Boundaries Commission required to first and in priority consider the marginalised party lists before the same or similar consideration was attended to the gender top up lists.
  - iv. The Learned Trial Magistrate erred in Law in finding that the formulae applied by the Independent Electoral and Boundaries Commission in allocating special seats under the category of gender top up complied with the formulae provided for under Regulations 56 (2) of the Elections (General) Regulations, 2012 which formula was adopted and emphasized in the case of Ann Potisho versus Karasar Sialo Natanya Tasui Election Petition Appeal No. 2 of 2018 at the High Court in Narok.
  - v. The Learned Trial Magistrate fell into grave error of the Law by dismissing the Petitioner's fundamental right to nomination into the County Assembly of Nyandarua despite her party Chama Cha Kazi (CCK) having attained above the required decimal five (0.5%) percentage of all seats available in the said Assembly.
  - vi. The Learned Trial Magistrate gravely erred in Law by deciding and making a finding that only twelve (12) seats were available for allocation under the gender top up category without any basis in the Constitution, the statutes and regulations thereof.
  - vii. That the Learned Trial Magistrate erred in Law and caused a grave miscarriage of justice by denying the Appellant her nomination slot into the County Assembly of Nyandarua despite well entrenched Law and traditions of nominations in favour of all political parties that achieve decimal five (0.5%) of the available seats as was demonstrated by the Appellant from the party list nomination for the General Elections held on the 9/8/2022.
  - viii. That the Learned Trial Magistrates erred and occasioned a grave miscarriage of justice by without basis purporting that all the seats available for allocation in the County Assembly of



Nyandarua had been exhausted and therefore departing from the sound principles of Law as laid down in the case of Mariam Abdi Mohamud versus IEBC & another in the Magistrate court at Milimani in Nairobi Election Petition No. 20 of 2017.

- ix. That the Learned Trial Magistrates erred in Law and completely misapprehended the same by failing to appreciate that the Law speaks of "NOT MORE THAN TWO THIRD (2 /3) OF ANY GENDER" and therefore the Law embraces and welcomes the ideal and desired situation of fifty fifty (50-50) gender parity in Governance.
  - x. That the Learned Trial Magistrate erred in Law and occasioned a grave miscarriage of justice by failing to appreciate that the nomination of the Appellant to the County Assembly of Nyandarua was well grounded in Law and was in furtherance of the constitutional and statutory agenda as set out under Article 177 of the Constitution and Section 34, 35 and 36 of the Election Act.
  - xi. That the learned Trial Magistrate erred in Law by finding that the Jubilee Party's party list on gender top up was competent and legitimate when the same never met the threshold of the Law including the primary requirement of publication in two newspapers of national circulation.
  - xii. That the Learned Trial Magistrate without cause justification nor basis ignored the pleadings, submissions and the Law as presented by the Appellant and only and heavily so relied on the pleadings and submissions by the Respondents.
  - xiii. That Learned trial magistrate judgment is light in Law, unjust oppressive and completely adverse to the intentions of Article 177 of the Constitution and Section 34, 35 and 36 of the Election Act.
3. Reasons wherefore The Appellant prays that this Appeal be allowed in the following terms: -
- a) That the Appeal herein be allowed.
  - b) That Engineer Senior Principal Magistrate's Court Election Petition No. E001 of 2022 be allowed.
  - c) A declaration that the Appellant is entitled for nomination into the County Assembly of Nyandarua under both the Constitution and the relevant statutes and an order to issue directing the 1st Respondent and the interested party to immediately effect the same.
  - d) That the costs of this Appeal be provided for.
- 4) Parties were given directions to file submissions to canvass appeal which they did and exchanged.

## **5. Appellant's Submissions**

6. The appellant submitted on the two (2) grounds together as follows; -
- i. That there is no requirement whatsoever either under the Constitution, The Elections Act or the Election (General) Regulations that a party should mandatorily submit both the gender top up and the marginalized list.
  - ii. Submission of either the General top up list or the marginalized list or both lists for that matter are in compliance with the Constitution, The Laws and the Regulations.



- iii. That Article 177 (1) (b) and (c) does not require that each political party submits both lists does not also provide for any sanctions in the event that only (1) list is submitted as in the present case.
  - iv. The plain reading of the provisions of Sections 34,35 and 36 of the Elections Act does not in any way compel a political party to submit both lists as Gender top up and marginalized groups. Indeed Section 35 provides as follows; -
  - v. "A political party shall submit its party list to the Commission at least Forty-Five (45) days before the date of the General election".
  - vi. Section 34(6) of the Elections Act provides
  - vii. "The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.
  - viii. Section 34(6A) provides that; -
    - i) "Upon receipt of the party list from a political party under Commission shall review the list to ensure compliance and— Issue the political /party with a certificate of compliance; or Require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list
7. It was averred that by the 1st Respondent allowing the Chama Cha Kazi (CCK), Gender top-up list, it must have confirmed that the same was in compliance with the Constitution and the Nomination Rules of the Party.
  8. The 1st Respondent never requested the Chama Cha Kazi (CCK) (hereinafter referred to as CCK) to amend its list or rejected the submitted list on gender top up all together. The 1st Respondent admitted that the CCK Party list on gender top up and issued it with a "Certificate of Compliance".
  9. That under Section 34(7) of the Elections Act, the party list submitted by CCK Party is valid for the term of the Parliament (Assembly).
  10. The section reads as follows; -
 

"The Party lists submitted to the Commission shall be valid for the term of Parliament."
  11. It was argued that the learned Magistrate misconceived and misapprehended the Law and precedents in purporting that the CCK Party required to submit both lists under the gender top-up and the marginalized group for it to be admissible or eligible for a nomination slot. Indeed Articles 90 and 177 of the Constitution, Sections 34,35 and 36 of the Elections Act Elections (Party Primaries and Party Lists) Regulations, 2017 have no such requirements.
  12. Reliance was placed on Regulation 26, 56 (2) and paragraph 25 of the Ann Potisho case [supra]
  13. It was averred that there was therefore no plausible reason, grounds nor justification for the learned trial magistrate to determine that the CCK Party and the Appellant in particular was not entitled to a nomination slot in the Nyandarua County Assembly. Indeed, the party's list on gender top-up was accepted by the 1st Respondent unconditionally and it will subsist and remain in force of the term of the County Assembly of Nyandarua.
  14. In concluding the submissions on these two grounds, it was submitted that the compliance legitimacy and constitutionality of the party list by the CCK Party was never an issue in the hearing and the petition. The learned trial magistrate therefore occasioned a grave miscarriage of justice by making the



- same an issue and introducing the issue and thereon misapprehending the Law and precedents on the same.
15. Grounds 3, 4 and 5 the grounds of Appeal are canvassed as follows;
  16. That the Trial magistrate failed to appreciate the import of Articles 90 and 177 of the Constitution, Sections 34,35 and 36 of the Elections Act, Regulation 56 of the Elections (General) Regulations 2012 and Regulation 26 of the Election (Party Primaries and Party Lists) Regulation ,2017.
  17. That the 1st Respondent erred in its supervisory jurisdiction by not considering the party lists submitted by political parties with representation at the Nyandarua County Assembly under the gender top up and marginalized groups independently.
  18. That the 1st Respondent purported to factor in the woman nominated under the marginalized group in allocating the seats under the gender top up which was erroneous and without any basis in Law. They learned magistrate also fell into the same error by embracing that unlawful direction taken by the 1st Respondent.
  19. That Regulation 56(2) is plain in its reading and provides a basic formula for allocation of seats under the Law as stated herein below. It is not a law or Formula to be belaboured. The bottom line is that once a party achieves a percentage of elective seats above zero decimal five (0.5%) that party is entitled to a seat in the respective House of Parliament/Assembly.
  20. In the case of Ann Potisho Kapasar [Supra], the KANU Party was merely denied a seat purely because it did not reach the threshold of Decimal Zero Percentage (0.5%) of elected members in the Narok County Assembly.
  21. The Maendeleo Chap Chap Party only missed a seat in the same County Assembly under the Gender Top up because it had not submitted a party list under that category.
  22. In the instant case, CCK Party achieved the required threshold and the Appellant was the first and in priority in the gender top up list.
  23. On grounds 6,7,8,9 and 10 of the Appellant's grounds of Appeal, it was submitted on the said grounds as follows: -
  24. That the 1st Respondent in denying the Appellant the nomination into the County Assembly of Nyandarua ignored its own modus operandi as applied in other counties where parties that had one(1) elected member were awarded a nomination slot as was those other parties that did not even meet the threshold of decimal zero five percentage (0.5%). This is well captured in the analysis from the general elections held on the 9/8/2023 and the nominations that followed as shown at pages 179 to 185 of the record of Appeal.
  25. There is no reason, justification nor basis in Law why the CCK Party and the Appellant could not be allocated a seat at the Nyandarua County Assembly despite the clear provisions of the Constitution, the Law and the Regulations and the precedents cited and in particular the case of Ann Potisho Kapasar [supra].
  26. That the 1st Respondent never demonstrated or at all the basis of allocating twelve (12) seats under the gender top up to the Nyandarua County Assembly and therefore the same was baseless without the force of the Law.



27. That the Respondent was clearly in breach of the Law in pegging the number of nominations under the gender top up to the nominations under the marginalized group. The two (2) lists are sovereign and independent and exists without regard to the other.
28. That in Election Petition No. 20 of 2017 at Milimani Chief Magistrates Court Mariam Abdi Muhammad Vs IEBC & Another, In this matter which is heavy in Law and therefore persuasive to, the Court found that the Petitioner was entitled to a nomination in the Wajir County Assembly. The 1st Respondent just like in this case had purported that the seats under the gender top up had been exhausted and that therefore there was no seat available for allocation to the Petitioner. This notion was disabused by the Court and the Petitioner was allocated a seat.
29. At page 6 the Court had this to say; -
- i. "Jubilee party won 4 seats and was allocated (3) special seats, PDR won 6 elective seats and was allocated (3) special seats, NARC -K won 3 elective seats and was allocated (2) special/ seats, WDM-K won 3 elective seats and was allocated (2) special seats, ODM won 3 elective seats and was allocated (2) special seats, KANU and ANC each won 2 elective seats and each was allocated (1) special seat. PNU the interested party where the Petitioner is a party won 3 elective seats and was not allocated any special seat."
30. At page 7 the Court continued thus;
1. "Based on the above facts it is apparent that a// the political parties that won elective seats in Wajir County based on the two Gazette Notices sated above were allocated special seats including the political/ parties like KANU and ANC which won fewer seats compared to the interested patty still got special seats while the interested party was not allocated any special seat, on this issue I find as such and further find that even the name of the interested party did not even feature in the Gazette Notice of 28h August,2017 declaring those nomination dots."
31. The Court further at page 10 stated that; -
- i. "As such I find that the Respondent violated the proviso of Article 90(3) and 177 (1)(b) with respect to the rights of the interested party and by extension the interested party's membership including the Petitioner by failing to allocate to the interested party the party lists in proportion of the number of seats that the interested party had won on the 8th August,2017 to which the interested party won 3 seats and was not located any special seats, further the Respondent violated Article 177(1)(b) of the Constitution by failing to allocate special seats to the interested patty, as a consequence, the Petitioner's name which was in position 1 on the interested party's gender top up list was omitted in violation of the constitutional requirement that no more than two thirds of the membership of the Assembly are of the same Gender and the violation of the Constitution the respondents acts are retrogressive and they do not promote the purpose of the Constitution which is to protect the rights of women, in the supreme Court in Advisory opinion No.2 of 2012 in the matter of the principle of Gender Representation in the National Assembly and the senate.
  - ii. The Court on its advisory opinion held that it is the duty of the state to progressively implement the two-thirds gender rules as a way of protecting the right of women to access elective office. "
32. It was argued that the Court found that the 1st Respondent was retrogressive, discriminative and partisan in allocation of seats. This is exemplified by the conduct of the 1st Respondent in allocating nomination slots to County Assemblies across the country.



33. The Constitution and the laws of the land dictate that the lower threshold to ensure that the "not more than two thirds gender rule" is adhered to is not less than "one third". There would be no breach of the Constitution or the Law if the lower threshold exceeds one third (1/3) of the other Gender. By nominating the Appellant to the County Assembly of Nyandarua.
34. Under ground 10 of the Appeal, they submitted as follows; -
1. That the Appellant was duly nominated by the CCK Party in strict compliance with Article 90 and 177 of the Constitution, Sections 34,35 and 36 of the Elections (Party Primaries and Party Lists), Regulations,2017.
  2. That CCK Party garnered more than Decimal Five percentage of all the elected members of Nyandarua County Assembly. Indeed, CCK Party got decimal five four five percent (0.545%) of all the elective seats.
  3. That the Appellant was ranked first and in priority by the CCK Party for nomination into the County Assembly of Nyandarua under the gender top up.
  4. That the CCK Party list under the gender top up with the Appellant appearing first and in priority was submitted to the 1st Respondent on time, was accepted unconditionally by the 1st Respondent and was placed in the standard newspaper of 27/2/2022 and in the 1st Respondent's public website.
  5. That under the formulae provided under Regulation 56(2) of the Elections (General) Regulations,2012 the 1st Respondent was obligated and compelled by the Law to allocate CCK Party a slot and nominate the Appellant to the Nyandarua County Assembly.
  6. That the formulae under Regulation56(2) aforesaid is a straight jacket and the formulae purported and introduced by the 1st Respondent in this instance is unknown in Law, is alien and has no application in our Jurisprudence. Reliance was placed on Election Petition No. 25 of 2017 Harold Kimugo Kipchumba Vs IEBC & Another
35. it was stated that the 1st Respondent other than citing regulations 56 does not indicate or pronounce any other guidelines or otherwise that allowed it to go outside Regulation 56 in allocating seats to the Nyandarua County Assembly.
36. h) In the case of Harold Kimuge Kipchumba [Supra], the 1st Respondent had to be practical, applied common sense, be objective and at the same time be innovative to avoid being in conflict with Article 98(1)(d) of the Constitution.
37. In the present case, the 1st Respondent in nominating the Appellant to the Nyandarua County Assembly would have been compliant with the Law, dynamic, progressive and liberal in Interpretation of Article 90 and 177 of the Constitution and Section 34 and 35 of the Elections Act.
38. That unlike in the case of Harold Kimuge Kipchumba, nomination of the Appellant would not have been in breach of the Law but in the promotion of the same. And this comes to the light in the Supreme Court in Advisory opinion No.2 of 2012 in the matters of gender representation in the National Assembly and the Senate where the import was that "it was the duty of the state to progressively implement the two third gender rule as a way of protecting the rights of women to access elective office."
39. That in this matter the 1st Respondent did not act the way it did, which was outside the laid down regulations and in particular Regulations 56(2) at least to comply with the Law and its actions were to say the least retrogressive, inconsiderate, discriminatory and lacking in any merit in Law.



40. On ground 11, 12 and 13 of the grounds of the Appeal they submitted as follows: -
41. On ground 11, they reiterated their submissions as found in page 235 and 236 that the list of nominations by the Jubilee party and by United Democratic Alliance were not in compliance with the Law and therefore unconstitutional.
42. In short is that either the lists or some names in the lists were not subjected to requisite publications to allow for thorough vetting and public participation or the said lists were interfered with by the 1st Respondent and therefore the Kenya Gazette Notice of 9/9/2022 did not reflect the list as appeared in the Standard newspaper of 27/7/2022 nor the 1st Respondent's website.
43. That the learned trial magistrate was overly inclined to the pleadings and submissions by the 1st Respondent in particular and treated the same as the enunciation of already settled principles of the Law which was not the case and the Appellant could therefore not be served justice by the said Court.
44. That the trial magistrate clearly misapprehended the Law on nominations, the formulae as provided for in the regulations to ensure proportionality and gender parity and even the jurisprudence created by the few precedents in this particular area of the Law.
45. That the overall reliance on the pleadings and submissions by the 1st Respondent was unfair, unjust and unwarranted particularly for the reason that the same was self-preservation and purely intended to justify its unjust and unlawful allocation of seats within the Nyandarua County Assembly.
46. That the Supreme court in Civil Appeal No. 224 of 2013 Lydia Nyaguthii Githendu vs IEBC and 17 Others clearly demonstrated the prejudices that are inbuilt within the operations of the 1st Respondent its conduct in Court which was found not be helpful in the administration of justice nor in the advancement of the principle of gender equity.
47. In the overall, the Appellant prayed that this Appeal and the Petition thereof be allowed as prayed.
48. On costs, they noted that this a new frontier that is being opened in the area of "the formula for allocation of seats and in particular in County Assemblies" and also on" the question of party lists" and therefore thus are legal issues of most public importance and the jurisprudence to be built thereon is for the benefit of the entire country and posterity and wish to leave the same to the wisdom and discretion of the honourable Court.

### **1<sup>st</sup> Respondent's Submissions**

49. ....
50. The 1<sup>st</sup> Respondent stated that it published its Regulations in Kenya Gazette Special Issue No. 101, dated 3rd June 2022. The Regulations therein expressly Stipulated nomination procedures for party lists with respect to marginalized group and for the gender top up list (see 153 of record of Appeal on County Assembly (marginalized group) party list and County Assembly (Gender) party list)
51. That in the said Gazette Notice; it was expressly stated that the party lists as submitted by political parties must meet the requirements and procedures laid out therein. A political party would not be considered for allocation of special seats where it fails to submit its party list (page 143, paragraph 20 of record of Appeal).
52. That in the said Gazette Notice; the 1<sup>st</sup> Respondent further expressly informed political parties and candidates of the Formula that would be applied by the Commission in computation of allocation of



special seats to a particular party. This Formula was stipulated in the said Gazette Notice Special Issue No. 101, dated 3<sup>rd</sup> June 2022 (page 143, paragraph 20(a) & (b) & page 153 of record of Appeal).

53. The 1<sup>st</sup> Respondent deponed in its sworn Replying Affidavit that the Formula for the special group under gender top up category considers the number of men and women who have already been allocated seats across the entire County Assembly. This is in order to ascertain, which Gender is disadvantaged in representation so as to top-up with the opposite Gender in compliance with the two-thirds gender principle under Article 177(I)(b) of the Constitution (page 145, paragraph 23(a) of the record of Appeal).
54. The 1<sup>st</sup> Respondent's role in conducting and supervising elections involves accepting party lists and ensuring the lists are in compliance with constitutional and statutory provisions of Articles 82(1) 90, 177 of the Constitution and Section 36 of the Elections Act of 2011. Article 90(2) of the Constitution, stipulates that that the IEBC shall be responsible for the conduct and supervision of elections for seats (which includes those under Article 177(I)(b) &(c). The Article further provides that each political party that participates in a general election ought to nominate and submit a list of all the persons who would stand elected if the party were to be entitled to all the seats for provided under sub-Article(I).
55. In order to comply with the Constitution and enforce its statutory mandate; the 1<sup>st</sup> Respondent is empowered under Articles 88(4)(d), (k) and 88(5) of the Constitution and Section 109(1)(c) and (d) Elections Act of 2011 to regulate the process of nomination of candidates, allocation and re-allocation of special seats. The 1<sup>st</sup> Respondent is duty bound to enforce these legal requirements pursuant to Section 36(7) of the Elections Act of 2011.
56. They submitted that the duty and authority to regulate means that the 1<sup>st</sup> Respondent is authorized to publish Regulations that inform political parties and the public on, inter alia the process of nomination of candidates, allocation and re-allocation of special seats. The 1<sup>st</sup> Respondent dutifully performed this mandate by putting together a formula and process, which it published in Regulation 56(2) of the Elections (General) Regulations, 2012 and in the Kenya Gazette Special Issue No. 101, dated 3<sup>rd</sup> June 2022. It is instructive to note that Regulation 56 of the Elections (General) Regulations (2012), expressly mandates the 1<sup>st</sup> Respondent to publish a formula for allocation of seats.
57. The above position was held by the Court of Appeal in Aden Noor Ali v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR. The superior Court held that "the IEBC is therefore required to ensure that the party list complies with all the stipulated prerequisites including the appropriate number of qualified candidates; alternate listing of male and female nominees in order of priority... where there is compliance, the political party will be issued with a certificate of compliance, and where there is no compliance, the IEBC can reject the party list".
58. The 1<sup>st</sup> Respondent submitted that the honourable trial court correctly interpreted and applied the principles in the cited case of Ann Potisho case [supra]. In the above cited case the High Court, in paragraph 28, page 6/9, held that "IEBC is also bound to take into account the total number of seats won by each party ...in its responsibility of allocating seats to each political party.
59. Article 90(2) of the Constitution provides that each political party that participates in a general election ought to nominate and submit a list all the persons who would stand elected if the party were to be entitled to all the seats for provided under sub-Article(I). That from the above, it is evident that the words total number of seats would refer to nominees under both the gender top-up list pursuant to Article 177(I)(b) and marginalized category pursuant to Article 177(1) of the Constitution.
60. In view all the regulations, the averments by the 1<sup>st</sup> Respondent and the constitutional provisions; it is evident that for a candidate to be considered for nomination under the special seats category the



candidate's political party was required to submit party lists for both categories of marginalized group and gender top-up list

61. It was averred that the effect of Sections 36(1), (7), (8) and (9) is that a political party is required under mandatory statutory provisions to submit lists for both categories — under marginalized and Gender top-up categories. This is to enable the 1<sup>st</sup> Respondent to first allocate seats under marginalized category and then determine which Gender is disadvantaged in representation and then top-up from the submitted top-up list.
62. That the above interpretation and application of the statutory provisions was approved in the above cited case of *Ann Potisho vs Sialo Natanya Tasur & 11 others* [2018] eKLR in paragraphs 27 & 28.
63. From the above constitutional and statutory provisions; they submitted that the CCK Party had a responsibility to submit its party list that bore names of all its nominees if the party was to be entitled to all the seats under Article 177 (b) and (c). This interpretation was adopted by the Supreme Court in the case of *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR in paragraph 92.
64. It is a fact that the Appellant was a member of the Chama Cha Kazi (CCK) political party and applied for nomination under the party's ticket. Consequently, the said party submitted the Appellant's name as its nominee under the category of gender top-up list for Nyandarua County National Assembly (page 18 and 20 of record of Appeal). The CCK party submitted the Appellant's name to the 1<sup>st</sup> Respondent but the submission was only done for the category of gender top-up. In other words, the political party only participated by sending the Appellant's name under the said category (page 18 and 20 of record of Appeal).
65. The 1<sup>st</sup> Respondent asserted that the trial court correctly held that although the Appellant was first in the list of gender top-up category as per list submitted nevertheless her party failed to follow clear instructions as given by the Respondent (see page 420, lines 8 to 16 of record of Appeal).
66. In view of the above analysis, the Petitioner has purported to mislead this Honourable Court by reading Article 177(1)(b) in isolation to the exclusion of all the other Constitutional provisions on elections and electoral laws as articulated above. That It is significant to note that the 1<sup>st</sup> Respondent is a constitutional body, pursuant to Article 88 of the Constitution. Further, sub-articles 88(4)(d) and 88(5) of the Constitution; the 1<sup>st</sup> Respondent is obliged to regulate the process of nomination of candidates for elections, exercise its powers and perform its functions in accordance with the Constitution and legislation.
67. Further to the above; the 1<sup>st</sup> Respondent is empowered and obligated under Section 109(1)(c) and (d) of the Elections Act to provide for the regulations of the process by which parties nominate candidates for elections and to provide for the manner of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes arising out of such nominations, allocation and re-allocation -respectively.
68. The express provisions of Article 90(2) of the Constitution mandate the IEBC to conduct and supervise elections. This mandate stretches to formulating regulations for the conduct and supervision of elections including those of special seats under Article 177(1) &(c). The Article further provides that each political party that participates in a general election ought to nominate and submit a list of all the persons who would stand elected if the party were to be entitled to all the seats for provided under sub-Article(1).



69. The regulatory mandate of the IEBC was restated in the case of Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [20161 eKLR in paragraph 93, page 18/24 (annexed and highlighted herein). The Supreme Court held that "IEBC is expressly designated as the regulatory body to ensure compliance with the law".
70. The above means that the 1<sup>st</sup> Respondent is empowered by statute to create subsidiary legislation. Such subsidiary legislation was created by way of The Elections (General) Regulations of 2012 and the Gazette Notice Special Issue No. 101 of 3<sup>rd</sup> June 2022, for the implementation of its statutory obligations under the Act. It is in the said Regulations the 1<sup>st</sup> Respondent published the Formula for allocation of special seats in order to comply with Article 1 77(l)(b) and (c) of the Constitution to achieve proportionality.
71. The 1<sup>st</sup> Respondent averred and relied upon the Regulation 56(2) of the Elections (General) Regulations, 2()12 in its Replying Affidavit. The 1<sup>st</sup> Respondent is obliged under the said Regulations to allocate seats in proportion 10 the number of seats won by a political party (see paragraph 20(a), page 143 of record of Appeal). In exercising its powers, it was submitted that the 1<sup>st</sup> Respondent correctly formulated the process of nomination, allocation and re-allocation of special seats and mechanisms for resolving disputes that arose out of the said nomination and allocation processes. Such Formula was set in two stages so as to give comprehensive effect to the provisions of Sections 36(1) (f); (7), (8), (9) of the Elections Act and Article and (c) of the Constitution.
72. The 1<sup>st</sup> Respondent submitted that following receipt of its party list from the CCK party for the gender top up category; the 1<sup>st</sup> Respondent published the list in the Standard Newspaper of 27<sup>th</sup> July 2022, wherein the Appellant was listed as first female in the said list (see page 20 and 143, paragraph 16 of the record of Appeal). The actions by the 1<sup>st</sup> Respondent clearly demonstrated the strict observance of its statutory obligations, contrary to the allegations by the Appellant.
73. They relied on the Supreme Court judgement in Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [20161 eKLR (annexed and highlighted herein). The apex court, in paragraph IOS, page 20/24 held, inter alia, that the allocation of nomination of seats by the IEBC is a time bound process and the Constitution and the electoral laws envisage the entire process of nomination for the special seats by the IEBC as an integral part of the election process. The above statutory obligation of the 1<sup>st</sup> Respondent was aptly captured in the trial court's judgement (see page 416, lines 6 to 9 of record of Appeal).
74. The trial court further considered that the holding in Ann Potisho vs Karasar Sialo Natanya Tasui, Election Petition Appeal No. 2 of 2018 at the High Court in Narok; "aptly captures the formula to be used by IEBC in allocating seats to parties". The Formula that was restated in the above authority is the same Formula that was adopted by the 1<sup>st</sup> Respondent in allocation of special seats and which is found in Regulation 56 of the Elections (General) Regulations and was published in the Gazette Notice, Special Issue No. 101 of 3<sup>rd</sup> June 2022.
75. That the trial court correctly interpreted the Law -in its judgement and restated that the 1st Respondent is obliged to allocate special seats in accordance with the Formula set out under Regulation 56 of the Elections (General) Regulations (see page 416, lines 6 to 14 of record of Appeal).
76. The trial court further held that it had carefully considered the Formula as stipulated in Regulation 56 of the Elections (General) Regulations and compared the said Formula to the one set out in the 1<sup>st</sup> Respondent's Replying Affidavit; The trial court further stated that the Formula as relied upon by



- the 1<sup>st</sup> Respondent did not deviate from the one found in Regulation 56 of the Elections (General) Regulations of 2012 (see page 419, lines 1 to 13 of record of Appeal).
77. That the learned trial magistrate was, therefore correct in holding that the 1<sup>st</sup> Respondent in implementing the said Formula in allocation of special seats for the County Assembly of Nyandarua did not deviate in any way from the Formula found in the said Regulations. The 1<sup>st</sup> Respondent averred that it published the said Formula in the Gazette Notice, Special Issue No. 101 of 3<sup>rd</sup> June 2022 (see paragraph 20(b), page 143 and page 153 of record of Appeal).
78. It was contended that the trial court correctly made a finding that the Formula applied by the 1<sup>st</sup> Respondent complied with the Formula under Regulations 56(2) of the Elections (General) Regulations, 2012.
79. That The trial court considered the evidence adduced by the 1<sup>st</sup> Respondent — that it followed the Formula provided under the Law in allocating special seats to the parties (see page 416, lines 10 to 14 and paragraph 20(a) to 20 (p) at page 143; paragraph 23(a) to 23(w) and page 153 of record of Appeal).
80. The trial court further held it considered that the 1<sup>st</sup> Respondent had published a Gazette Notice that clearly stipulated that a party which doesn't submit its party list for marginalized groups will not be considered for allocation of special seats and that the Gazette Notice was not challenged (see page 420, lines 5 to 8 of record of Appeal).
81. The Formula in Regulation 56 of the Elections (General) Regulations of 2012 serves to give effect to Section 36(7), (8), and (9) of the Elections Act and the Regulations cannot be read in isolation of the statutory provisions, which form the primary legislature.
82. The 1<sup>st</sup> Respondent deponed that the Formula for allocation of seats under the gender top up category is applied after consideration is made of the number of men and women who have already been allocated seats across the entire county assembly. The Formula ascertains which Gender is disadvantaged in representation across the entire county assembly in order to give effect to Article 177 (1)(b) of the Constitution (see paragraph 23(a), page 145 and paragraphs 25 and 26, page 345 of the record of Appeal).
83. It is necessary, therefore, that allocation is therefore first made under the marginalized group (Article 177(l)(c) of the Constitution) and, subsequently, allocation is made under gender top-up category — after identifying which Gender is disadvantaged in representation with a view to topping up with the opposite Gender in compliance with Article 177(l)(b) of the Constitution.
84. They further submit that Section 36(7) of the Elections Act (the 'Act') stipulates that the 1<sup>st</sup> Respondent is obliged to consider the list of candidates in the order submitted by political parties to ensure that no more than two-thirds of the membership of the county assembly are of the same Gender. The Act further provides — in mandatory terms — under Section 36(8) that the 1<sup>st</sup> Respondent shall draw four (4) candidates — from the list given by political party in order to give effect to Article 177 (c) of the Constitution. Section 36(9) of the Act provides in mandatory terms that the allocation of seats ... under Article 177(l)(b) and (c) of the Constitution shall be proportional to the number of seats won by the party...'
85. The 1<sup>st</sup> Respondent also averred that it is authorized by Regulation 54(5) of the Elections (General) Regulations of 2012 to reject a nominee whose name has been submitted if that nominee is not qualified to be elected to the office for which the nomination is sought (see paragraph 26, page 148 of record of Appeal).
86. The trial court considered the 1<sup>st</sup> Respondent's evidence on: -



87. Communication on the Formula it would adopt in allocation of special seats (see paragraph 20(a), page 143, page 153; page 412, lines 20 to 23 of record of Appeal).
88. Communication that a political party that failed to submit its party list would not be considered for the allocation of special seats was contained in the Gazette Notice, Special Issue of 3<sup>rd</sup> June 2022 and that the Gazette Notice was not challenged (see paragraph 20, page 143, Page 153; page 420, lines 5 to 8 of record of Appeal).
89. The Formula for allocation of special seats is done in two (2) phases and also restated how the two (2) phases are applied (see paragraph 20(n), page 145; paragraph 23(u), page 147 and page 419 lines 11 to 16 of record of Appeal).
90. The 1<sup>st</sup> Respondent argued that it is evident that the Appellant's political party (CCK) obtained 0.54545 (1/22 \*12) as explained by the 1<sup>st</sup> Respondent in paragraph 23(g), 23(h), 23(s), 23(t), pages 146, 147, respectively of record of Appeal. But it is also evident that there were only twelve (12) seats available for allocation under special category of gender top-up category (see paragraph 23(d) to 23(g); page 146 of record of Appeal). Ten (10) seats were allocated to UDA and Jubilee in the first round under the statutory Formula stated above and approved in the case of Ann Potisho (supra).
91. That Only two (2) seats were available for allocation in the second round. UDA and Jubilee parties were allocated the two (2) remaining seats in the second round (see paragraph 23(u), 23(v), 23(w), page 147 of record of Appeal). CCK with 0.54545 had the lowest score and since all seats had been allocated it did not qualify any seat (see paragraphs 25 & 26, page 148 of record of Appeal).
92. In this regard, notwithstanding that the Appellant's political party (CCK) obtained 0.54545 it did not qualify to be awarded any seat under the gender top up category. The above was considered by the trial court in its judgement (see page 417, lines 1 to 16 of the record of Appeal).
93. They stated that it is, therefore, untrue and misleading for the Appellant to aver that trial court erred and dismissed her petition notwithstanding her party attained the threshold of seats available for allocation.
94. The 1<sup>st</sup> Respondent averred as follows in its Replying Affidavit (see paragraphs 20(d) to (f) page 144; paragraphs 23(a) to 23(f) page 145 to 146 (g) of record of Appeal):-
95. The 1<sup>st</sup> Respondent demonstrated to minute detail how it arrived at the number twelve (12) seats that were available for allocation under gender top up category.
96. The 1<sup>st</sup> Respondent averred the number of seats that were available for allocation in the Nyandarua County Assembly was twenty (22)
97. The 1<sup>st</sup> Respondent further averred that fourteen (14) females were required to be allocated seats in the Nyandarua County Assembly — under gender top up category in order to comply with the two-thirds (2/3rds) gender rule principle under Section 36(7) of Elections Act and Article 177(1) (b) of the Constitution.
98. This is because the women were disadvantaged in number. This was 2/3 multiplied by 22 seats to give 14 seats for allocation under the gender top up category.
99. There were already two (2) women the County Assembly (one nominated and one elected) compared to twenty-seven (27) men.
100. Therefore, only twelve (12) seats were necessary and available for allocation in compliance with Section 36(7) of Elections Act and Article 177(1)(b) of the Constitution.



101. They submitted that the finding of twelve (12) seats available for allocation by the trial court was made upon the Court's consideration of the above mathematical Formula as averred by the 1<sup>st</sup> Respondent. The trial court correctly held that the 1<sup>st</sup> Respondent could not create more seats (see page 418, lines 1 to 5; page 419, lines 16 to 18 of record of Appeal).
102. They relied on the facts in the case of *Mariam Abdi Mohamud vs IEBC & Another* in the Chief Magistrate Court at Milimani in Nairobi Election Petition No. 20 of 2017, is to be distinguished from the facts of the Appellant's Petition.
103. This is because of the following:
  - a. Whereas in the case of *Mariam Abdi Mohammad* the IEBC confirmed the Petitioner's party list therein was submitted in compliance with tile law; however, in the instance appeal the 1<sup>st</sup> Respondent denied the Petitioner's party (CCK) complied with the Law in submission of its party list (see paragraphs 16, 17, 20(g), pages 143 & 144 of record of Appeal).
  - b. The trial court, in the petition, which is subject of Appeal herein, correctly held that the fact that the Appellant's party failed to submit its list for marginalized group was not disputed (see page 420, lines 1 to 4 of record of Appeal).
  - c. In *Mariam Abdi Mohammad*; the Court held that the IEBC did not give reasons for excluding the Petitioner's name from the Gazetted list. In the petition to which the instant Appeal refers; the 1<sup>st</sup> Respondent extensively explained the Formula it applied in allocation of special seats (see paragraphs 20(a) to 20(p) of page 144 -145; paragraphs 23(a) to 23(w) of page 145 - 146 of record of Appeal). Additionally, the trial court herein held that the 1<sup>st</sup> Respondent had explained the Formula it applied in allocation of special seats (see page 417, lines 11 to 16 of record of Appeal).
  - d. The above case of *Mariam Abdi Mohammad* dealt majorly with the contention that the Petitioner's political party submitted its party list within the prescribed statutory period. However, the dispute in Appellant's petition is due to the Appellant's party's failure to comply with the instructions of the 1<sup>st</sup> Respondent by failing to submit both lists for marginalized and gender top up groups.
104. In view of the above they submitted that the judicial outcome in above cited case — as relied upon by the Appellant - is not applicable herein.
105. The 1<sup>st</sup> Respondent argued that this Honourable Court does not have jurisdiction to entertain this ground of the Appeal and the same ought to be struck out. At appeal level, on matters of election the jurisdiction of the High Court is limited to considering issues only of Law. The above ground is an issue of fact that was not litigated in the trial court. It is unjust and an abuse of the process of the Court for the Appellant to raise fresh and new issues at appellate level.
106. That Section 75(4) of the Elections Act No. 24 of 201 1 expressly states that an appeal as to the validity of the election of a member of county assembly shall lie in the High Court on matters of Law only.
107. Reliance was placed on the authority of *Odongo Victor Robert v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR. In that case, in paragraph 17, page 4/12; the High Court held that Section 75(4) of Elections Act, deals with appeals on election disputes from magistrate's courts to High Court on matters of Law only.
108. They submitted that the allegations by the Appellant are unfounded and contrary to the contents of the judgement of the trial court.



109. In view of all the above, it was their assertion that the Petitioner does not qualify to be declared as nominated member of County Assembly of Nyandarua and the trial court was correct in dismissing the Petition. that the Appeal lacks merit and ought be dismissed with costs to the 1st Respondent.
110. In seeking costs, 1st Respondent wishes to highlight the provisions of Section 84 of the Elections Act, which provides that
- i. "An election court shall award the costs of and incidental to a petition and such costs shall. Follow the cause."
111. In Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission [2019] eKLR (annexed herein); the Supreme Court, in paragraphs 59 and 61, held that Section 84 of the Elections Act provided that costs follow the event and are awardable at the discretion of the Court.
112. In dismissing the Appeal, the 1<sup>st</sup> Respondent urged this Honourable Court to make a finding that the circumstances herein merit an award of costs to the 1<sup>st</sup> Respondent.

### **2nd-17th Respondents' submissions;**

113. ....

### **Issues For Determination**

114.

1. Whether the Appeal has merit?
2. Whether costs should issue?

### **Grounds 1, 2, 3 & 11**

115. ....

116. Reliance was placed on Article 90 of the Constitution

117. It was asserted that the provisions of Section 35 of the Elections Act, 2011, are coached in mandatory terms and should be read as a whole. They require all political parties to submit their party lists to IEBC 45 days before the general elections. The Appellant agrees that Chama-cha Kazi submitted her name under the gender top-up category but did not submit her name under the marginalized category.

118. The 1st Respondent issued a Gazette notice dated 3rd June 2022, where it informed political parties that a political Party would not be considered for allocation of special seats if it failed to submit its party lists. Thus,it became mandatory for parties to submit their lists for all categories, failure to which they would not be considered. Thus the 1st Respondent allocated the 4 seats to the Parties that submitted their lists, and CCK got 0 as it did not submit a party list for this category. The Appellant was unsuccessful and failed to be included in the final list due to the fact that Chama cha Kazi failed to submit a party list for the marginalized category.

119. It is important to note that the party list for Gender top-up can only be considered after all the seats have been allocated in Parliament. It is a misapprehension by the Appellant that the gender top-up list should have been considered first and not the marginalized category. The gender top up category is utilized to ensure that the two-third gender rule is followed and as such can only be considered last after all other available seats have been allocated and there is a gender imbalance that needs to be corrected.



120. Reliance was placed on *Lynnet Mbula Mutula & 2 Others v Independent Electoral & Boundaries Commission & 7 Others* [2018] eKLR
121. That being said Jubilee party had the responsibility of deciding how the party list would be ranked, and it was not up to the IEBC to make changes to the said list. However, the IEBC has the mandate to reject lists and order the parties to review and recompile. Jubilee Party was tasked with the same and managed to file their amended lists in time as stipulated by the guidelines, while the Appellants Party didn't file a party list, to begin with.
122. It was contended that this Appeal is pegged on a misconception with respect to the Formula applicable to acquire a seat under the gender-top-up category. The affidavit by IEBC dated 5th October 2022 has clearly illustrated the Formula used as mandated by Section 34 (4) and (6) of the Elections Act to give effect to Article 177 (l)(b) of the Constitution.
123. Reliance was placed on the *Ann Potisho Kapasar Case* [Supra] on the role of IEBC.
124. Contrary to the Appellant's averments, IEBC has clearly illustrated the following used and the reasoning behind it thus; The Formula for special groups under the top-up category considers the number of men and women who have already been allocated seats across the entire Assembly. This is in order to ascertain which Gender is disadvantaged in representation so as to top up;
- i) In the general election of 9th August 2022, 24 men and 1 woman were elected as MCAs at Nyandarua County Assembly;
  - ii) In the marginalized group category, 3 men and 1 woman were nominated;
  - iii) In this regard the County Assembly has 27 men and 2 women;
  - iv) In this regard there is unfair gender representation in the County Assembly and clear violation of the two-thirds gender rule principle;
  - v) Thus, 14 women are required to be allocated seats in the County Assembly;
  - vi) There are already women in Assembly and consequently, and available for allocation;
  - vii) Thus, the allocation under gender top up list was as follows, pursuant to Regulation 56 of the Elections (General) Regulations, 2012 and Section 36 of the Elections Act No. 24 of 2011, to wit,
    - b. -UDA — 18 seats won x 12 (as seats available for allocation under
    - c. 22 as the total no of seats Gender top-up Category
    - d. For allocation in the C. A
    - e. -Jubilee — 3 seats won x 12 (as seats available for allocation under
    - f. 22 as the total no of seats Gender top-up category
125. For allocation in the C. A
- a. -CCK — 1 seat won x 12 (as seats available for allocation under
  - b. 22 as the total no of seats Gender top-up category
  - c. For allocation in the C.A
126. UDA, therefore, got 9.81818;



127. Jubilee got 1.63636 and
128. CCK got 0.54545
129. According to the Formula, the allocation is conducted in two (2) rounds. The first round considers the party with the largest to the lowest first-round whole number obtained, and the second phase considers the largest to the lowest remainder of the the-decimal number obtained by the political parties.
130. In view of the above results, therefore; -
131. The round of the whole number; UDA got nine (9) seats; Jubilee got one (1), and CCK got zero (0) seats. The total number allocated in the first round of whole number is ten (10) seats;
132. The second round of largest remainder, UDA had the largest remainder of 0.81818 and, therefore, was allocated one (1) seat, Jubilee had the second largest remainder of 0.63636 and was allocated one (1) seat. CCK had the third lowest remainder of 0.54545. Total number allocated in the second round of remainder is two (2) seats.
133. Therefore, the total number of seats allocated in both rounds was twelve (12) seats. This number is also the number that was available under gender top-up.
134. It was argued that it is clear that the IEBC did use the correct Formula in allocating seats as had been set out in Ann Potisho Kapasar's case and was correct in finding that only 12 seats were available for allocation.

### **Grounds 7,10 & 13**

135. ....
136. The 2nd -17th Respondents are nominated members of the County Assembly of Nyandarua. The 2nd -13th Respondents were nominated under the Gender top-up category whilst 14-17 were nominated under the marginalized group category. The nominated members hail from different parties, i.e., UDA and Jubilee Party. The Appellant is a member of Chama Cha Kazi Party with no affiliations to UDA and/or Jubilee Party.
137. Essentially, a scrutiny of the Appeal reveals that the Petitioner seeks the intervention of this Court to compel IEBC to nominate her to the County Assembly of Nyandarua under the Chama Cha Kazi ticket. The Appellant does not challenge the nomination and/or election of the 2nd -17th Respondents but simply seeks to be nominated into the County Assembly of Nyandarua.
138. The Supreme Court made it clear that once IEBC gazettes names of the nominated members it marks the end of its mandate and any other dispute thereafter is for the election court.
139. The duty of the Election Court starts after that of the IEBC mandate is over. Their main duty is to resolve any election disputes that arise after the Elections. Section 75 (3) of the Elections Act narrows down the jurisdiction of the Court and provides as follows: -
  - 75 (3) In any proceeding brought under this section, a court may grant appropriate relief, including—
    - i) a declaration of whether or not the candidate whose election is questioned was elected;
    - ii) a declaration of which candidate was validly elected; or
    - iii) an order as-to whether afresh election will be held or not.



140. It is not the duty of the Court to order the allocation of more seats or to create a seat to pacify an aggrieved appellant. Doing so would be in contravention of both the rules set down by the Constitution and the Elections act. The Formula that has been laid down by both the Constitution and numerous jurisprudences shows that the Appellant could not be allocated a seat both by party's negligence in failure to provide a party list and secondly by applying a wrong formula.
141. It was stated that the Formula suggested and relied on by the Appellant would be in contravention of Regulation 56 of the Elections General Regulations, 2012 and Section 36 of the Election Act.
142. It was the respondents' submission that the IEBC already did its mandate and allocated seats according to the standard Formula and came up with 12 seats all of which were allocated accordingly. The Declaration being sought by the Appellant would be ultra vires to this Court and in excess of the jurisdiction mandated to it by the Constitution.
143. Lastly, the respondents stated that costs follow the event. Upon dismissing the present Appeal, this Court is implored to award the 2nd -17th Respondents the costs for defending the present Appeal.

### **Issues, Analysis And Determination**

144. ....
145. After going through the pleadings, submissions filed, and the counsels' submissions, I find the issues are:

Whether the Appeal has merit? And Whether costs should be awarded to the successful party(ies)?

The Appellant filed the instant Appeal following the trial court judgment, delivered on 1st February 2023. The election petition in the trial court primarily alleged that the 1st Respondent failed to apply the correct Formula for the allocation of special seats as provided for under the Law and that by the 1st Respondent's alleged failure to apply the correct Formula, the 1st Respondent was biased in favour of the United Democratic Alliance and Jubilee parties against her and the Chama Cha Kazi Party.

147. The Petitioner's main contention is that the Learned Trial Magistrate erred in Law in finding that the formulae applied by the Independent Electoral and Boundaries Commission in allocating special seats under the category of gender top-up complied with the formulae provided for under Regulations 56 (2) of the Elections (General) Regulations, 2012 which formula was adopted and emphasized in the case of Ann Potisho versus Kapasar Sialo Natanya Tasui Election Petition Appeal No. 2 of 2018.
148. The matter narrows down to the main issue for determination:

whether the 1<sup>st</sup> Respondent applied the correct Formula to allocate special seats as provided for under the Law and, consequently, whether the Petitioner was unlawfully left out from the nomination.

149. The legal framework for the nomination of Members to the County Assemblies (and to Parliament) and Party Lists has its origin in the Constitution. Article 177 of the Constitution mandates political parties to nominate members to the County Assembly. The purpose of the said provision is to guarantee that no more than two-thirds of the memberships of any Assembly are comprised of the same Gender and to safeguard further and ensure the representation of marginalized groups, including persons with disabilities and the youth. Under Article 177(1)(b) and (c), the conduct of nominations is to be proportionally matched to the number of seats in a County by each Political Party. Those



members can only be 'drawn' from a list prepared by a political party and presented to IEBC, which is eventually published in the Kenya Gazette by IEBC. That list is what is referred to as 'a party list'.

150. Article 177 of the Constitution on membership of a county assembly provides as follows: -

a.

- (1) A county assembly consists of
  - i. members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
  - ii. the number of special seat members necessary to ensure that no more than two-thirds of the membership of the Assembly are of the same Gender;
  - iii. the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
  - iv. the Speaker, who is an ex officio member.
- (2) The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.
- (3) The filling of special seats under clause (1) (b) shall be determined after Declaration of elected members from each ward.
- (4) A county assembly is elected for a term of five years.

151. Article 90 of the Constitution on the allocation of party lists seats provides for party lists seats in the following manner: -

- i. Elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.
- ii. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that
  - b. each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation.
  - c. except in the case of the seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and
  - d. except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.
- iii. The seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number of seats won by political party candidates at the general election.

152. The 1<sup>st</sup> Respondent is further guided by Sections 34, 35 and 36 of the Election Act in the conduct and supervision of elections for seats for nomination purposes. Primarily, the above sections state thus: -



- a. Section 34;
- b(6) The party lists submitted to the Commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned.
- c(6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and -
  - i. issue the political party with a certificate of compliance; or
  - ii. require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.
- d(6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.
- e(7) The party lists submitted to the Commission shall be valid for the term of Parliament.
- f(8) 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.
- g(9) The party list shall not contain a name of a candidate nominated for an election.
- h(10) A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the County Assembly, as the case may be, for which the candidates are elected.
- i. Section 35;
- j. A political party shall submit its party list to the Commission at least forty-five days before the date of the general election.
- k. Section 36;
  - i. A party list submitted by a political party under-
  - ii. (e) Article 177 (1) (b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county;
  - iii. (f) Article 177 (1) (c) of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group
- l(2) A party list submitted under subsection (1) (a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.
- m(3) The party list referred to under subsection (1) (f) shall prioritize a person with disability, the youth, and any other candidate representing a marginalized group.
- n(4) Within thirty days after the Declaration of the election results, the Commission shall designate, from each qualifying list, the party representatives based on proportional representation.
- o(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.



- p(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.
- q(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.
- r. Section 37;
- i. If a representative from a political party list dies, withdraws from the party list, changes parties resigns, or is expelled from their party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same Gender on the respective political party list.
  - ii. Notwithstanding the provision of Section 34 (10), if no more candidates are on the same party's list, the Commission shall require the concerned political party to nominate another candidate within twenty days.
  - iii. A vacancy in Commission shall not allocate the seat for the remainder of the term of Parliament or the County Assembly. Any seat in a political party list shall not be filled three months immediately before a general election.
  - iv. Where a political party fails to comply with subsection (2) provisions, the
153. Furthermore, Part X of The Elections (General Regulations) Act, 2012, particularly Regulations 54 to 56B, draws attention to the fact that party lists must be per the Constitution, The Elections Act, and all the attendant regulations, including The Election (Party Primaries and Party Lists) Regulations, 2017.
154. The Court in *Umul Ker Kassim & 3 Others v Independent Electoral and Boundaries Commission (IEBC) & Another* [2018] eKLR, the Court succinctly outlined some of the provisions that ought to be complied with in a valid election by nomination of a member of four county assembly, as follows: -
- "constitutionArt. 90. Allocation of party list seatsArt.100. Promotion of representation of marginalized groups.Art. 177. Membership of county assemblyArt. 193. Qualifications for election as a member of county assembly.Election ActSection 25. Qualifications for nomination as a member of the county assemblySection 28. Submission of Party Membership ListsSection 34. Nomination of party lists membersSection 35. Submission of party listsSection 36. Allocation of special seatsElection (General Regulations) Act 2012Section 54. Submission of political party list for allocation of special seatsSection 55. Party-list to be prepared in accordance with party rulesSection56. Commission to publish Formula for allocation of seatsElection (Party Primaries And Party Lists) Regulations, 2017Reg.4. Guiding PrinciplesReg.6. Political party nomination rules and procedureReg.14. FeesReg.15. Application for nominationReg. 20. Party lists."
155. The Appellant asserted that the 1<sup>st</sup> Respondent did not discharge its mandate under all the above mentioned provisions. Consequently, the Chama Cha Kazi Party, which won one elective seat in the Nyandarua County Assembly, was unfairly denied its entitlement to one nomination slot.
156. The Appellant insisted that the trial court's Judgment defied the findings of *Ann Potisho Kapasar v Sialo Natanya Tasur & 11 others* [2018] eKLR. In that case, the Court stated thus: -
- a. "The constitutional provisions in articles 90 and 177 and section 36 (9) of the of seats to the respective political parties from the party list shall be the number of seats won by a political



party divided by the total number of seats multiplied by available seats for allocation in the respective House.

- b. I agree with Mr. Mutua that IEBC must comply with the principle of proportionality in terms of the total seats garnered by each party in allocating seats to the parties. Furthermore, I find IEBC is also bound to take into account the total number of seats won by each party in the county Elections Act, read together with Regulation 56 (2) of the Elections (General) Regulations, 2012, which require the Commission to allocate seats in proportion to the number of seats won by the party. Regulation 56 (2) of the Elections (General) Regulations, 2012 categorically provides as follows: "The Formula for allocation assembly in its responsibility of allocating seats to each political party. In other words, it is bound to follow the Formula in Regulation 56 (2) of the Elections (General) Regulations, 2012. The argument by IEBC that it was necessary to exclude the three seats held by independent candidates in the allocation of seats is proper. The reason is that IEBC can only nominate members to the county assembly from the party lists that political parties submit. The independent candidates are excluded. It seems that the legislature formula of allocation of seats favours political parties and not independent candidates."
157. The foregoing encapsulated the Formula to be followed by IEBC in allocating seats to the political parties.
158. Further, Regulation 56 (6) of The Elections (General) Regulations contains the Formula that IEBC should follow.
159. The 1<sup>st</sup> Respondent asserted that it published its Regulations in Kenya Gazette Special Issue No. 101, dated 3<sup>rd</sup> June 2022. The Regulations expressly stipulated nomination procedures for party lists concerning marginalized groups and the gender top-up list. It was expressly stated that the party lists submitted by political parties must meet the requirements and procedures laid out therein. A political party would not be considered for allocation of special seats if it fails to submit its party list. The 1<sup>st</sup> Respondent further expressly informed the political parties and candidates of the Formula that would be applied by the Commission in the computation of allocation of special seats to a particular party. This Formula was stipulated in the Gazette Notice Special Issue No. 101, dated 3<sup>rd</sup> June 2022.
160. In *Aden Noor Ali v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, the Court held that: -
- the IEBC is therefore required to ensure that the party list complies with all the stipulated prerequisites including the appropriate number of qualified candidates; alternate listing of male and female nominees in order of priority... where there is compliance, the political party will be issued with a certificate of compliance, and where there is no compliance, the IEBC can reject the party list."
161. The 1<sup>st</sup> Respondent reiterated that it used the Formula provided under the Law to allocate special seats in the Nyandarua County Assembly.
162. Accordingly, in the general elections held on 8<sup>th</sup> August 2022, 24 men and one woman were elected as Members of the County Assembly (MCAs) in Nyandarua. Three more men and one more woman were nominated, making that a total of 27 men and two women in the said County Assembly. It was, therefore, necessary to top up the female gender representation per Article 177 (1) (b) of the Constitution. To comply with the 2/3<sup>rd</sup> gender rule, there needed to be 14 women allocated seats as MCAs; thus, 12 seats were available for allocation under the special category of gender top-up.



163. The IEBC proceeded to allocate the seats as follows: UDA 10 seats, Jubilee Party 2 seats, and CCK Party 0 seats based on the fact that UDA won 18 elective seats, Jubilee won 3 seats, and CCK won 1 seat.
164. The 1<sup>st</sup> Respondent clarified that according to the Formula mentioned above, the allocation is conducted in two phases. The first considered the party with the largest to the lowest first-round whole number obtained, and the second considers the largest to the lowest remainder of the decimal number obtained by the political parties.
165. The 1<sup>st</sup> Respondent submitted that by applying the Formula in Regulation 56 (6) of the Regulations, CCK had 0.545% of all the members elected on party tickets in Nyandarua county and was, therefore, entitled to one special seat. But in their submissions, they also asserted that the Formula for allocation of seats under the gender top-up category is applied after consideration of the number of men and women who have already been allocated seats across the entire county assembly. The Formula ascertains which Gender is disadvantaged in representation across the entire county assembly to give effect to Article 177 (1)(b) of the Constitution.
166. Further, it is necessary, therefore, that allocation is first made under the marginalized group (Article 177(l)(c) of the Constitution) and, subsequently, allocation is made under the gender top-up category after identifying which Gender is disadvantaged in representation to top up with the opposite Gender in compliance with Article 177(l)(b) of the Constitution.
167. In my view, the 1<sup>st</sup> Respondent applied the correct formal for allocation of seats. However, CCK appears to have been denied the one seat they had been allocated because they failed to submit their list for marginalized groups alongside the gender top-up list as per the 1<sup>st</sup> Respondent's gazette notice.
168. I reiterate that Article 90 vests the responsibility of conducting and supervising elections for seats on the basis of proportional representation by use of party lists, and therefore, they had the mandate to determine the procedure and timelines of the submissions of lists and, thereafter, the allocation of seats as per the Law which they did vide the gazette notice they issued. Sections 34, 35, 36 & 37 of the Elections Act 2011 provide for submissions of Party Lists within defined time lines.
169. The 1<sup>st</sup> Respondent, IEBC, filed a response to the Election Petition on 11<sup>th</sup> October 2017 and deponed that by virtue of Article 90 of the Constitution, it was/is vested with the responsibility of conducting and supervising elections for seats on the basis of proportional representation by use of party lists.
170. The Appellant did not deny the fact the CCK party did not submit the marginalized groups list alongside its gender top-up list as per the 1<sup>st</sup> Respondent's requirements. However, the Appellant averred that by the 1st Respondent allowing the Chama Cha Kazi (CCK) Gender top-up list, it must have confirmed that the same was in compliance with the Constitution and the Party's Nomination Rules. The 1st Respondent never requested the Chama Cha Kazi (CCK) (hereinafter referred to as CCK) to amend its list or reject the submitted list on gender top up altogether. The 1st Respondent admitted that the CCK Party list on gender top-up and issued it with a "Certificate of Compliance".
171. In *Moses Mwicigi & 14 Others vs. IEBC & 5 Others* [2016] eKLR, the Supreme Court stated as follows while expounding on Section 36(7), 8, 9 of the Elections Act with regard to nomination for County Assembly, for purposes of Article 177 of the Constitution: -
- a. "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 selecting from the list provided by the political party. It is plain to us that the



Constitution and the electoral Law envisage the entire nomination process for the special seats, including the Act of gazette ment of the nominees' named by the IEBC, as an integral part of the Electoral process.

- b. The gazette notice, in this case, signifies the completion of the election through nomination and finalizes the process of constituting the Assembly in question. Conversely, an "election by registered voters," as was held in the Joho case I sin principle, completed by the issuance of form 38, terminates the returning officer's mandate and shifts any issue as the validity of results from the IEBC to the election court.
  - c. 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's 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."
172. It is noteworthy that the allocation of seats in the marginalized category is done prior to that of the allocation in the gender top-up category. Therefore, because of the 2/3 gender rule, and in particular, in Nyandarua county, the Gender of the nominees in both the party lists had a bearing in the calculation of the number of seats to be allocated, which was determined as 12 to ensure that not more than two-thirds of the membership of the Assembly is of the same Gender given that only one woman was elected vide the general election.
173. Evidently, CCK was aware of the requirements and timelines set by the 1<sup>st</sup> Respondent, and therefore, they cannot feign ignorance. Both party lists were required by IEBC in order for them to execute their mandate of allocating the seats proportionately. I agree with the 1<sup>st</sup> Respondent's submission that the effect of Sections 36(1), (7), (8), and (9) is that a political party is required under mandatory statutory provisions to submit lists for both categories under marginalized and gender top-up categories. This enables the 1<sup>st</sup> Responden<sup>t</sup> to allocate seats under marginalized categories and determine which Gender is disadvantaged in representation and then top-up from the submitted top-up list.
174. Therefore, after IEBC completed the first phase of allocation under the marginalized group category in which CCK did not submit a list, only 12 seats were remaining under gender top-up, and CCK was found to have qualified for 0 seats after applying the Formula set out in the case of Ann Potisho [Supra]. CCK party had an obligation to submit BOTH party lists that bore the names of all its party nominees to be entitled to seats under all the categories under Article 177. It was not upon the party to pick and choose which list to submit but to follow the rules as enforced by IEBC. By submitting one list under gender top-up, CCK was, in turn, dictating to IEBC on how they should carry out their mandate. The Appellant herein underpinned her Appeal on Article 177 (1) (b) of the Constitution, excluding all other constitutional provisions on elections and electoral laws as articulated above.
175. I agree with IEBC's position that they required both lists to be submitted as per the timelines set to first allocate seats in the marginalized category and then in the gender top-up category, which essentially means that the Gender of the nominees in the marginalized group category had a bearing on the calculation of the number of seats needed to ensure that not more than two-thirds of the membership of the Assembly are of the same Gender. Still, CCK failed to fulfill its legal obligation to that end. Therefore, this Court is unable to come to the Appellant's aid.



176. In conclusion, I agree with the trial magistrate's findings as contained in the Judgment dated 1<sup>st</sup> February 2023 (pg. 28 of 31) that: -

"..... The 1<sup>st</sup> Respondent explained that the Petitioner herein did not qualify to be nominated as a member of the county assembly of Nyandarua since her party, Chama Cha Kazi, failed to submit its list for marginalized groups. The fact was not disputed.

Indeed, special seats. That gazette notice was not challenged. Yes, the Petitioner was first in the list of Gender submitted to the 1<sup>st</sup> Respondent, but her party failed to follow clear instructions given by the 1<sup>st</sup> Respondent. Therefore, she did not qualify to be selected by the 1<sup>st</sup> Respondent. In that respect, this case is distinguishable from the case of Mariam Abdi Mohammad vs. IEBC & Another and the case of Ann Potisho Kapasar vs. Sialo Natanya Tasur & Another, which were extensively quoted and relied on by the parties herein. The 1<sup>st</sup> Respondent issued a gazette notice that stipulated that a party that does not submit its party list for marginalized groups will not be considered for allocation."

177. Considering the evidence and submissions of counsels on behalf of their respective parties and the trial magistrate's Judgment, I am satisfied that the instant Appeal lacks merit. Thus, the Court makes the orders that;

I. The Appeal is dismissed with no orders as to costs as it leans towards the public interest category in its content and form.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**CHARLES KARIUKI**

**JUDGE**

