



**Wanyama & another v Ingo & another (Election Petition Appeal  
E006 of 2023) [2023] KEHC 22146 (KLR) (11 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22146 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
ELECTION PETITION APPEAL E006 OF 2023**

**DK KEMEL, J  
SEPTEMBER 11, 2023**

**BETWEEN**

**ALLAN NYONGESA WANYAMA ..... 1<sup>ST</sup> APPELLANT**

**THE DEMOCRATIC ACTION PARTY-KENYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JANE CHEPERENGER INGO ..... 1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

*(Appeal from the Judgment and decree of the Principal Magistrate's  
Court at Bungoma delivered by Hon. Tom Mark Olando on 29<sup>th</sup>  
March 2023 in Bungoma Election Petition No. E004 of 2022)*

**JUDGMENT**

**Introduction**

1. The citizens of Kenya firmly entrenched affirmative action by establishing the positions of nominated members to represent these special interests in our 2010 Constitution in an effort to ensure that the interests of minorities and marginalised communities and groups were adequately represented and protected. Political Parties were given the mandate to prepare and present the requisite party lists.

**Background**

**Petitioner's Case**

2. Jane Cheperenger Ingo, a resident of Mr. Elgon Constituency, Elgon Ward, Bungoma County is a registered life member with the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> March 2022. She was initially interested in vying



for the position of Member of County Assembly for the Mt. Elgon Ward under the 2<sup>nd</sup> Respondent's ticket but due to health challenges, she was unable to proceed with the campaigns prompting her to shelve her ambition. She duly communicated her inability to contest and on further consultation with the 2<sup>nd</sup> Respondent was persuaded to throw her support behind its other preferred candidate to the Mt. Elgon Ward with the understanding that the 2<sup>nd</sup> Respondent will on priority basis list her name in its party nomination list.

3. Vide a letter dated 19<sup>th</sup> May 2022, the 2<sup>nd</sup> Respondent made her application to the 2<sup>nd</sup> Respondent to be listed in party nomination list and the same was received on 25<sup>th</sup> May 2022.
4. On 27<sup>th</sup> July 2022, the 3<sup>rd</sup> Respondent published across the leading dailies the full lists of all the persons whose names had been forwarded by various political parties for nomination to the County Assembly and the Petitioner's name was among the 3 forwarded by the 2<sup>nd</sup> Respondent for publishing but the same was not listed as number one. The Petitioner's name was listed as number two, an issue that she was not agreeable with and intended to take it up with the 2<sup>nd</sup> Respondent so that the list is amended to place her name at the apex of the party list.
5. On conclusion of the general elections, the 2<sup>nd</sup> Respondent was allocated one nomination slot by the 3<sup>rd</sup> Respondent published vide the Gazette Volume CXXIV-No. 186 and there was no entry for the 2<sup>nd</sup> Respondent's marginalized list in the said notice with reason indicated as "not allocated-conflicting IDRM orders..." No communication was preferred to the 1<sup>st</sup> Respondent on the same.
6. On 19<sup>th</sup> September 2022, she formally lodged her complaint with the 2<sup>nd</sup> Respondent vide its Internal Dispute Resolution Committee (IDRC) and the same was duly served and received. She sought the amendment of the 2<sup>nd</sup> Respondent's party list to have her name prioritized at position 1 and upon making such an amendment forward the amended list to the 3<sup>rd</sup> Respondent for consequent Gazettement.
7. The reasons she availed for the said prioritization were as follows:
  - i. Unlike the person listed at position one in the party nomination list, she was an ethnic minority on account of her ethnic group, the Sabaots in Bungoma County.
  - ii. The individual listed at position 1 in the party nomination list was of luhya ethnicity which is not a marginalized community within Bungoma County.
  - iii. Unlike the person listed at position one in the party nomination list, she is a woman who was of the minority gender.
  - iv. Unlike the person listed at position one in the party nomination list, she was a fully paid up life member with the 2<sup>nd</sup> Respondent and had participated in the popularization of its activities such as party membership drives and mobilization, support of party nominees for various positions and financial back up to its nominees.
  - v. In beginning the listing with a nominee of male gender, the 2<sup>nd</sup> Respondent was in flagrant breach of the 3<sup>rd</sup> Respondent's Elections and Party Primaries and Party Lists Regulations, 2017 which mandates that in order to meet the gender requirement the listing must alternate between female and male candidates.
8. The Petitioner lodged a complaint with the 2<sup>nd</sup> Respondent's Internal Dispute Resolution Committee which was never heard nor determined thereon, a fact that was an affront to the Petitioner's constitutional right to fair hearing and Regulation 27 of the 3<sup>rd</sup> Respondent's Election (Party Primaries and Party Lists) Regulations, 2017.



9. On 21<sup>st</sup> September 2022, the 3<sup>rd</sup> Respondent vide Gazette Notice Volume CXXIV -No. 192 published the 1<sup>st</sup> Respondent as the 2<sup>nd</sup> Respondent's duly elected member to Bungoma County Assembly and that action curtailed the Petitioner's right to participate in the political process against express provisions provided under Rule 5(a) of the Code of Conduct for political parties in the [Political Parties Act](#), 2011.
10. According to the Petitioner, the election of the 1<sup>st</sup> Respondent offended the provisions to respect and promote her gender equity and equality as espoused under Rule 5(b) of the Code of Conduct for political parties in the [Political Parties Act](#), 2011, and the transmission of 1<sup>st</sup> Respondent's name from Gazettement by 3<sup>rd</sup> Respondent and consequent election thereon contravened the express proviso of the Election (Party Primaries and Party Lists) Regulations, 2017 with regards to the County Assembly (marginalized group) party list in as far as alternation of the list is concerned.
11. The Petitioner argued that the election of the 1<sup>st</sup> Respondent herein by the 2<sup>nd</sup> Respondent failed the test of marginalization as the said 1<sup>st</sup> Respondent is not marginalized for the reason that he is of the male gender and hails from the Luhya ethnic group which constitutes the majority of the community within Bungoma County.
12. In that petition she sought the following declarations:
  - i. A declaration be and is hereby made that the 2<sup>nd</sup> Respondent's party list containing the name of the 1<sup>st</sup> Respondent in the 1<sup>st</sup> position was not compliant with the Election (Party Primaries and Party Lists) Regulations, 2017.
  - ii. A declaration be and is hereby made that the consequent gazette of the 1<sup>st</sup> Respondent by the 3<sup>rd</sup> Respondent as 2<sup>nd</sup> Respondent's nominee was unlawful and unconstitutional.
  - iii. A declaration be and is hereby made that the election of the 1<sup>st</sup> Respondent to the Bungoma County Assembly was unconstitutional.
  - iv. An order be and is hereby issued quashing the gazette notice number 11259 declaring the 1<sup>st</sup> Respondent as the 2<sup>nd</sup> Respondent's elected member to the Bungoma County Assembly.
  - v. An order compelling 2<sup>nd</sup> Respondent to submit the Petitioner's name in compliance with the Elections (Party Primaries and Party Lists) Regulations, 2017 for onward processing and Gazettement.
  - vi. Respondents be condemned to pay costs for the Petition.

## **Responses to the Petition**

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent**

13. In response to the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a joint response dated 23<sup>rd</sup> November 2022, contending the allegations in the Petition in exception to the description of the parties.
14. They averred that the decision to place the Petitioner on number 2 was based on the important parameters as guided by law and that the on conclusion of the general elections the 3<sup>rd</sup> Respondent allocated the 2<sup>nd</sup> Respondent four (4) slots; three(3) to be filled by women from the gender top-up list to achieve the two third threshold and one(1) to be filled by a male nominee from the marginalized list.
15. They averred that with the representation of the Saboat community in Bungoma County with the Deputy Governor and 9 members of the County Assembly, the Saboat community was therefore



not marginalized and the 1<sup>st</sup> Respondent was nominated to represent the youth and not the Luhya community, and thus the list forwarded was lawful.

16. They averred that the Petitioner failed to lodge her complaint with the 2<sup>nd</sup> Respondent's Internal Dispute Resolution Committee when she allegedly lodged her complaint on 21<sup>st</sup> September 2022 out of time and after the 2<sup>nd</sup> Respondent had submitted the party nomination amended list to the 3<sup>rd</sup> Respondent and the proposed names duly gazetted.

### **3<sup>rd</sup> Respondent's Replying Affidavit**

17. Vide a Replying Affidavit sworn on 9<sup>th</sup> December 2022, the 3<sup>rd</sup> Respondent in opposition to the Petition argued that in respect to political party list nominees it was limited to reviewing and ascertaining that the party list as submitted was in compliance with the law thus did not violate any law in the process leading to the election of the 1<sup>st</sup> Respondent.
18. It contended that on 3<sup>rd</sup> June 2022, the Chairman of the 3<sup>rd</sup> Respondent vide gazette notice no. 637B published in the Kenya Gazette a notice on requirements for submissions of party lists. On or about 25<sup>th</sup> June 2022 pursuant to Section 35 of the [Elections Act](#) all the political parties forwarded to the same to the 3<sup>rd</sup> Respondent and on review for compliance pursuant to Article 90 of [the Constitution](#) as read together with Section 34 of the Election Act, Regulations 54 and 55 of the Elections (General) Regulations, 2012 and Regulations 21 of the Election (Party Primaries and Party Lists) Regulations, 2017 the 3<sup>rd</sup> Respondent found all the list non-compliant.
19. On 15<sup>th</sup> July 2022, the 3<sup>rd</sup> Respondent pursuant to Regulation 55 of the Elections (General) Regulations, 2012 wrote to all the political parties highlighting the areas of non-compliance.
20. On 25<sup>th</sup> July 2022 the 2<sup>nd</sup> Respondent resubmitted an amended list and the Petitioner herein was listed as number 2 in the marginalized group list for Bungoma County Assembly. On 27<sup>th</sup> July 2022, the 3<sup>rd</sup> Respondent proceeded to publish the same in the Standard and the Star Newspaper all the party lists as submitted by the Political Parties. A presser was jointly issued with the Political Parties Dispute Tribunal informing the members of the public, political parties, and institutions who were aggrieved to lodge their disputes.
21. On 31<sup>st</sup> August 2022, the 2<sup>nd</sup> Respondent vide its chairman wrote to the 3<sup>rd</sup> Respondent forwarding a list of different names for gazettelement and on 7<sup>th</sup> September 2022 through its secretary general forwarded to the 3<sup>rd</sup> Respondent a conflicting set of proposed names for gazettelement.
22. On conclusion of the general elections and pursuant to the established constitutional, statutory and regulatory framework the 2<sup>nd</sup> Respondent was allocated 1 seat for the marginalized group for the Bungoma County Assembly.
23. On 9<sup>th</sup> September 2022 the 3<sup>rd</sup> Respondent gazetted the names if all the nominated members of the County Assembly but in view of conflicting communication, the 3<sup>rd</sup> Respondent could not gazette the name of the 2<sup>nd</sup> Respondent's marginalized group candidate for Bungoma County Assembly.
24. On 19<sup>th</sup> September 2022, the 2<sup>nd</sup> Respondent vide its secretary general wrote to the 3<sup>rd</sup> Respondent affirming that the issue in conflict was duly resolved by IDRM and the letter indicated the names agreed by the party. The decision was never challenged by the Petitioner.
25. On 21<sup>st</sup> September 2022, the 3<sup>rd</sup> Respondent through its chairman proceeded to issue an addendum notice vide Gazette Notice NO. 11259 and gazetted the 1<sup>st</sup> Respondent as the nominated Member of County Assembly for Bungoma County representing the marginalized group.



## **Trial Court judgement**

26. On the 29<sup>th</sup> March 2023, the learned magistrate allowed the petition and held that the nomination of the 1<sup>st</sup> Respondent was illegal, null and void, and the 3<sup>rd</sup> Respondent was ordered to pay costs.

## **Appeal**

27. Aggrieved by the above findings the Appellants filed an appeal on the following grounds:

- i. The learned trial Magistrate erred in law and in fact by exceeding the scope of his jurisdiction as an election Court and delved into matters that are within the jurisdiction of the Political Parties Internal Dispute Resolution mechanism and Political Parties Dispute Tribunal.
- ii. The learned trial Magistrate erred in law and in fact by delving into extraneous matters that were neither pleaded nor argued by the parties thereby arriving at a wrong decision.
- iii. The learned trial Magistrate erred in law and in fact by failing to find that the Court had no jurisdiction to entertain the Petition as the complaint filed by the 1<sup>st</sup> Respondent was statute barred having been made after the election of the 1<sup>st</sup> Appellant.
- iv. The trial Magistrate erred in law when it exceeded its jurisdiction usurping the powers of the 2<sup>nd</sup> Appellant and delving into exclusive domain of the 2<sup>nd</sup> Appellant by issuing an order nominating the 2<sup>nd</sup> Respondent as the duly nominated member of the County Assembly of Bungoma despite being position two in the 2<sup>nd</sup> Appellant's list of nomination for the marginalized category.
- v. The trial Magistrate erred in law by failing to consider and appreciate the 1<sup>st</sup> and 2<sup>nd</sup> Appellants pleadings, witness affidavits, testimonies and submissions thereby arriving at a wrong decision.
- vi. The learned trial Magistrate erred in law and in fact by failing to make a determination on the issues raised in the Petition.
- vii. The learned trial Magistrate erred in law by finding the 1<sup>st</sup> Appellant was not nominated in accordance with the law without first analyzing the process giving rise to the impugned nomination.
- viii. The trial Magistrate erred in law by setting aside the decision of the internal dispute resolution mechanism of the 2<sup>nd</sup> Appellant in nominating the 1<sup>st</sup> Appellant despite failure by the 2<sup>nd</sup> Respondent to lodge an appeal against the decision in the Political Parties Disputes Tribunal which had jurisdiction to hear the appeal before the matter is brought to Court.
- ix. The learned trial Magistrate erred in law by failing to find the Petition brought by the 2<sup>nd</sup> Respondent was an appeal against the decision of the 2<sup>nd</sup> Respondent's internal dispute resolution mechanism disguised as an Election Petition and that the Court was not right forum for lodging the appeal but the Political Parties Disputes Tribunal.
- x. The learned trial Magistrate erred in law by directing the 1<sup>st</sup> Respondent to gazette the Petitioner who was ranked second in priority as the duly nominated member of County Assembly representing the 2<sup>nd</sup> Appellant yet other nominees namely the 1<sup>st</sup> Appellant ranked 1<sup>st</sup> in priority in the 2<sup>nd</sup> Appellant's party list as submitted to the 2<sup>nd</sup> Respondent.



- xi. The learned trial Magistrate erred in law and in fact in holding that the 2<sup>nd</sup> Respondent directed the 2<sup>nd</sup> Appellant to submit name of one male person strictly for nomination in the category of the marginalized group without considering the totality of the evidence presented.
28. The Appellants prayed for:
- i. A declaration that the 1<sup>st</sup> Appellant is the duly nominated Member of the County Assembly of Bungoma representing the youth under marginalized group for the 2<sup>nd</sup> Appellant.
  - ii. A declaration that the decision of the 2<sup>nd</sup> Appellant's internal dispute resolution mechanism that led to the nomination of the 1<sup>st</sup> Appellant is valid having not been appeal against in the Political Parties Dispute Tribunal.
  - iii. A declaration that the trial Court did not have jurisdiction to hear and determine the Petition as presented.
  - iv. A declaration that the Petition was time barred as the Petitioner's complaints on the nomination process was brought after gazettelement of the 1<sup>st</sup> Appellant as the Member of the County Assembly long after the lapse of the statutory timelines for lodging such complaints.
  - v. A declaration that the position for nomination of marginalized groups is not a gender top up seat and it is not a must that women must be number one in the list on a priority basis provided that the list has both men and women on a zebra format, number one in the list can be either a male or a female depending in the decision of the party.
  - vi. A declaration that the honourable learned trial magistrate interfered with the internal nomination process of the 2<sup>nd</sup> Appellant when it ordered the 2<sup>nd</sup> Appellant to submit the 2<sup>nd</sup> Respondent's name for onward processing and gazettelement.
29. In response to the Appeal, the 1<sup>st</sup> Respondent filed a response dated 12<sup>th</sup> June 2023, arguing that the trial Court evaluated the whole body of evidence placed before it and upon application of *the Constitution* and relevant law arrived at a definite conclusion that the election of the 1<sup>st</sup> Appellant was not within the dints of the law thus a nullification of the same should suffice.
30. Vide Court directions dated 18<sup>th</sup> May 2023, this Court directed that the appeal shall be canvassed by way of written submissions. All the parties complied by filing and exchanging their respective submissions.

### **1<sup>st</sup> and 2<sup>nd</sup> Appellants submissions**

31. Mr. Maloba, Counsel for the Appellants in a nutshell submitted on the preferred grounds of appeal. According to him, the trial Court delved into matters that are within the jurisdiction of the political party's dispute resolution tribunal as the issue for determination of the Petition related to the nomination of candidates by political parties and any issue arising therefrom falls within the Political parties internal dispute resolution mechanism and in case of unsatisfaction by the aggrieved party then they can lodge a complaint to the Political Dispute Tribunal herein.
32. Counsel argued that the 1<sup>st</sup> Respondent never lodged a complaint with the Political parties internal dispute resolution mechanism of the 2<sup>nd</sup> Appellant or the Political Dispute Tribunal and it was only after the 1<sup>st</sup> Appellant had been nominated, gazetted and sworn in as a nominated member of the County Assembly of Bungoma that she raised her complaints.



33. Counsel submitted that during her evidence the 1<sup>st</sup> Respondent admitted that she was aware of the party list that was sent to the 2<sup>nd</sup> Respondent and she did not complain at all until after the election of the 1<sup>st</sup> Appellant on 21<sup>st</sup> September 2022 vide a letter dated 19<sup>th</sup> September 2022, after the nomination and gazettelement of the 1<sup>st</sup> Appellant. Counsel argued that this rendered her complaint incompetent and time-barred as the same was made after the gazettelement of the 1<sup>st</sup> Appellant, making the 2<sup>nd</sup> Appellant IDRMM lack jurisdiction to hear her complaint or make any changes to the names already submitted. Counsel relied on the Supreme Court decision of Sammy Ndung'u Waity vs Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR and Article 88(4) of *the Constitution* as read together with Section 40 of the *Political Parties Act* and Section 74 of the *Elections Act*. Counsel argued that the delay by the 1<sup>st</sup> Respondent was a squander of her chance to have a pre-election dispute determined in the right forum as provided by law.
34. Counsel submitted that the trial Court lacked jurisdiction to hear the Petition as, first of all, the issues for determination were complaints arising from Political Parties nomination and second, the time for determining such disputes lapsed when the election was conducted. The 1<sup>st</sup> Respondent lodged her complaint to the IDRMM on 21<sup>st</sup> September 2022, one and a half after the conduct of the general elections which were held on 9<sup>th</sup> August 2022. Counsel placed further reliance to the case of Sammy Ndung'u Waity vs Independent Electoral & Boundaries Commission & 3 Others (2019) eKLR arguing that the case before the trial Court did not fall under the exceptional circumstances as envisaged in the case which denotes jurisdiction to an election Court only on matters that a party was not aware of and could not be aware of before the election. Counsel argued that in this case the 1<sup>st</sup> Respondent on cross-examination, paragraph 13 of her Petition and paragraph 10 to 20 of the affidavit in support of the Petition envisaged that she was about of her gazettelement as number 2 in the party nomination list and did not complain way until after the elections and no reasons were advanced to the Court why she did not lodge her complaint before the elections despite being aware of the facts.
35. Counsel further argued that the 1<sup>st</sup> Respondent was well aware of the public notice published jointly by the IEBC dispute Resolution Committee and the Political Parties Dispute Resolution Tribunal on 3<sup>rd</sup> June 2022, that the disputes arising out of party nominations were to be heard and determined by the PPDT and IDRMM and that all complaints arising from nominations fell under the jurisdiction of PPDT. Counsel relied on the case of Lisamula Anami & Another vs Independent Electoral and Boundaries Commission and 2 Others Kakamega Election Petition No. 1 of 2017 (2018) eKLR.
36. Counsel submits that the 1<sup>st</sup> Respondent ought to have moved the internal dispute resolution mechanisms of the 2<sup>nd</sup> Appellant at the earliest opportunity including exhausting all channels of appeal through the PPDT before coming to Court. She was not to wait until after the nomination and final election if the 1<sup>st</sup> Appellant before starting the process in Court. He urged this Court to render the decision of the trial Court null and void as it lacked jurisdiction. Counsel relied on the case of Owners of the Motor Vessel "Lilian S vs Caltex Oil (Kenya) Ltd (1989) eKLR.
37. Counsel submitted that, even if the trial Court found that the 2<sup>nd</sup> Appellant did not act in accordance with then law, the Court ought to have referred the matter back to the 2<sup>nd</sup> Respondent to hear the complaints of the 1<sup>st</sup> Respondent and allow the 2<sup>nd</sup> Appellant to make a decision and nominate a candidate of its choice. According to him, it was not within the arena of the trial Court to venture into the issues of nomination and direct the 2<sup>nd</sup> Appellant on who its preferred candidate for nomination should be and failure to render reasons why it specifically ordered that the 1<sup>st</sup> Respondent should be nomination having found that the position was not a gender top up seat, neither was it a position that was limited only to persons from a minority tribe. Counsel relied on Section 13(1) of the *Elections Act* and the case of Lydia Mathia vs Naisula Lesuuda & Another (2013) eKLR. Counsel submitted that



- the trial Court had no jurisdiction to render IEBC publication unconstitutional then proceed to open the door for fresh nominations and quickly in the same judgement allow only one contestant to pass through that door and close it again locking out other contestants.
38. Counsel submitted that the trial Court lacked the jurisdiction to proceed to nominate a candidate and order her gazettment as that is the responsibility of political parties to determine which of its members are to be included in the party list and order of priority subject to compliance with the requisite legal requirements. He relied on the case of Peninah Nandako Kiliswa vs IEBC & 2 Others, Nairobi Civil Appeal no. 201 of 2013.
  39. Counsel submitted that the election Court had no jurisdiction to re-open an already concluded cause of action as after the 2<sup>nd</sup> Appellant had submitted their party list to the 2<sup>nd</sup> Respondent on 27<sup>th</sup> July 2022, where the name of one Leornard Lugaliki was number 1, the 1<sup>st</sup> Respondent number 2 and the 1<sup>st</sup> Appellant number 3. The 1<sup>st</sup> Appellant aggrieved with his position on the list lodged a complaint on 28<sup>th</sup> July 2022 to the party seeking to be placed at number 1, pursuant to a letter dated 18<sup>th</sup> September 2022. The complaint was heard by the party's internal dispute resolution committee and a ruling was rendered on 2<sup>nd</sup> August 2022 in his favour. Despite the ruling the party's secretary general was not aware that his party chairman had already sent a letter to the IEBC purporting to communicate a decision of the internal dispute resolution committee and seeking an amendment to the 2<sup>nd</sup> Respondent's party list published on 27<sup>th</sup> July 2022. The chairman's letter had requested on Kevin Muchele to be nominated in the marginalized list as number 1 instead of Leonard Lugaliki who had been nominated in the 1<sup>st</sup> instance by the party as per the minutes of the 2<sup>nd</sup> Appellant dated 19<sup>th</sup> September 2022.
  40. Counsel further submitted that the same prompted the 2<sup>nd</sup> Respondent herein reject the party list submitted on 27<sup>th</sup> July 2020 for Bungoma County nominations for the marginalized group vide gazette notice published on 9<sup>th</sup> September 2022. The nomination was referred to IDRМ due to the conflicting names for position number one. Counsel argued that at that point the 1<sup>st</sup> Respondent had not complained to the 2<sup>nd</sup> Appellant and the most logical presumption by the party was that she was content with being number 2 in the party list. The conflict did not affect the 1<sup>st</sup> Respondent's nomination as number 2 in the party list and she did not lodge a complaint about wishing to be number 1 on the party list thus her name was never forwarded to IEBC as position number 1.
  41. Counsel submitted that the law does not allow the 1<sup>st</sup> Respondent to undo a process that was conducted within the confines of *the Constitution* and the law. Counsel argued that the 1<sup>st</sup> Respondent slept on her rights and cannot unsettle what was already done based on her capricious whim. Counsel relied on the decisions of Chris Munga N. Bichage vs Richard Nyagaka Tong'i & 2 Others Sup. Ct. Petition No. 17 of 2014; IEBC vs Jane Cheperenger & 2 Others, SC Petition No. 5 of 2016 and Kennedy Moki vs Racheal Kaki Nyamai & 2 Others (2018) eKLR.
  42. Counsel submitted that the 1<sup>st</sup> Respondent did not raise any complaint in the Petition and supporting affidavit concerning the issue as to whether the IEBC had acted unconstitutionally by indicating in the gazette notice that the position was for a male person, the Court in its judgement delved into an area that was not pleaded by the 1<sup>st</sup> Respondent nor defended by the Appellants thus lacked jurisdiction to dispense itself on this issue. Counsel relied on the case of IEBC & another vs Stephen Mutinda Mule & 3 others.
  43. Counsel submitted that the 2<sup>nd</sup> Respondent demonstrated that it acted within the dints of *the Constitution* by receiving the list as prepared by the 2<sup>nd</sup> Appellant, reviewed it for compliance and required it to deal with the dispute for position 1 which had three different names submitted. The same was referred back due to the differing party IDRМ orders for resolution and submission of one name



for position 1. There was no conflict with regards to position 2 as the same was not contested. The issuance of position number 1 to a male member was pursuant to IEBC gazette notice of 9/9/2022 thus the list forwarded was in compliance with the same. After receiving the list and been satisfied that the conflicting IDRMs had been resolved and that the reconstituted list complied with the law. There being no complaints lodged with the PPDT challenging the reconstituted list the 2<sup>nd</sup> Respondent proceeded to publish the name of the 1<sup>st</sup> Appellant as the duly nominated candidate in the Kenya Gazette for 21<sup>st</sup> September 2022. Counsel relied on Article 90(1); Article 82 (b) & Article 100 of *the Constitution* of Kenya, 2010; Section 34 of the *Elections Act* and Regulations 20 (1) & (2) of the Elections (Party Primaries and Party Lists) Regulations, 2017.

44. Counsel submitted that the argument by the 1<sup>st</sup> Respondent that she is more deserving of the position number 1 than the 1<sup>st</sup> Appellant because she is a woman and from a minority tribe from the County was not supported by evidence or law. The 2<sup>nd</sup> Appellant demonstrated that out of the granted 4 slots the party nominated 3 women and that her ethnic group was well represented in the County Assembly. Counsel relied on Regulation 21 (1) & (2) and Regulations 56 of the Elections (General) Regulations, 2012; Section 34 of the Election Acts Act and Article 88 (4)(k) of *the Constitution*, 2010
45. Counsel submitted that the publication made by the 2<sup>nd</sup> Respondent on 9<sup>th</sup> September 2022 was informed by the Party lists submitted to it by the 2<sup>nd</sup> Appellant and it met the requirement of zebra gender nominations where the position number 1 was male and position number 2 was female and what was referred to as the party's IDRMs was to determine the conflicting forwarded 3 male names for position number 1 by the 2<sup>nd</sup> Appellant.
46. Counsel submitted that the complaint lodged by the 1<sup>st</sup> Respondent dated 19<sup>th</sup> September 2022 and filed on 21<sup>st</sup> September 2022, thus it is trite law that once a person has been gazetted as nominated, any dispute arising therefrom can only be determined by the Court. Counsel referred to Section 40 of the *Political Parties Act* that mandates the IDRMs of a party to hear disputes before a person is gazetted as nominated and upon gazettment IDRMs lack jurisdiction to hear the case. Counsel submitted on the release of the initial list where the 1<sup>st</sup> Respondent's name was number 2 in the party list, the same was only challenged by the 1<sup>st</sup> Appellant and on the orders of the 2<sup>nd</sup> Appellant's IDRMs another list was re-submitted on 19<sup>th</sup> September 2022 where the 1<sup>st</sup> Appellant was at the apex representing the youth. The 1<sup>st</sup> Respondent failed to challenge the decision of the 2<sup>nd</sup> Appellant's IDRMs hearing held on 19<sup>th</sup> September 2022 either before the 2<sup>nd</sup> Appellant or the PPDT or even before this Court making the decision rendered unchallenged to this date. According to him, if the decision that led to the nomination of the 1<sup>st</sup> Appellant was properly challenged by way of either an appeal to the PPDT or Judicial review in the High Court. He argued that the trial Court lacked jurisdiction to move suo motto and challenge an election that was valid. Counsel relied on the case of *Fredrick Odhiambo Oyugi vs ODM & 2 others Nairobi Civil Appeal No. 199 of 2017*.
47. Counsel argued that the trial Court had no original jurisdiction to hear matters arising from nomination of candidates by political parties unless the same fell under the exceptional circumstances where a party is challenging the eligibility of a candidate who has been nominated and the grievance goes to the root of that nomination which was not the case with this Petition. According to him, the 1<sup>st</sup> Appellant was duly nominated and no complaint was lodged by anyone on 19<sup>th</sup> September 2022 and that the only complaint lodged by the 1<sup>st</sup> Respondent was with regards to the party list that was submitted to the IEBC on 7<sup>th</sup> July 2019 that was filed on 21<sup>st</sup> September 2019 and the said party list was already rejected by IEBC vide gazette notice published on 9<sup>th</sup> September 2022. Counsel urged this Court to set aside the holding of the trial Court and proceed to dismiss the 1<sup>st</sup> Respondent's Petition.



## 1<sup>st</sup> Respondent's submissions

48. Mr. Juma, Counsel for the 1<sup>st</sup> Respondent in a nutshell argued that the question of jurisdiction was never raised during the trial Court proceedings and that upon the gazette of the nominated members the election was deemed over thus any contest as to the same election after publication of the gazette notice by IEBC of the names of the nominees means the nomination process comes to an end thus they stand elected and challenge to an election by nomination is only entertained by way of an election petition. Counsel relied on the decision of the Supreme Court in *Moses Mwicigi & 14 Others vs IEBC & 5 others* (2016) eKLR. Counsel submitted that vide gazette notice volume CXXIV number 193 published on 21<sup>st</sup> September 2022 saw the election of the 1<sup>st</sup> Appellant and the trial Court by dint under *the Constitution*, Election Act and Regulations indicated that the trial Court had the requisite jurisdiction to entertain the Petition. Counsel further relied on Section 75 of the *Elections Act*.
49. Counsel submitted that the 1<sup>st</sup> Respondent was not aware of the alleged 1<sup>st</sup> Appellants issues with the initial list and she was not privy to the same prompting her to inquire into the same vide a complaint dated 19<sup>th</sup> September 2022 and filed on 21<sup>st</sup> September 2022. Counsel relied on the decision of *Sammy Ndung'u Waity vs IEBC & 3 Others* (2019) eKLR. Counsel submitted that it was the name of Lugaliki that was number 1 and hers was number 2 and that she was not involved in the dispute resolution thus the 1<sup>st</sup> Respondent felt blind-sided. Counsel urged this Court to uphold the decision of the trial Court and dismiss the appeal herein.

## 2<sup>nd</sup> Respondent's submissions

50. Mr. Ndetto, Counsel for the 2<sup>nd</sup> Respondent argued that the trial Court erred in law by proceeding to determine that it had the requisite jurisdiction to handle the Petition. According to him, the evidence before the Court was that on 3<sup>rd</sup> June 2022 the chairman of the 2<sup>nd</sup> Respondent vide a gazette notice no. 6378 published in the Kenya gazette a notice on requirements for submission of party lists. On 25<sup>th</sup> June 2022 pursuant to Section 35 of the *Elections Act* all the political parties including the 2<sup>nd</sup> Appellant forwarded to the 2<sup>nd</sup> Respondent their respective party lists. On 15<sup>th</sup> July 2022, the 2<sup>nd</sup> Respondent pursuant to Regulations 21 and 26 of the Elections (Party Primaries and Part lists) Regulations, 2017 wrote to all parties highlighting to them the areas of non-compliance and demanded compliance thereof. On 25<sup>th</sup> July 2022 or thereabout the 2<sup>nd</sup> Appellant together with the other non-complying political parties resubmitted their amended lists. Counsel submitted that the 1<sup>st</sup> Respondent was listed as number 2 in the 2<sup>nd</sup> Appellant's party list for the marginalized group for Bungoma County Assembly. According to him, jurisdiction of the PPDT is anchored in Section 40(1) (2) of the *Political Parties Act* and the same ought to be adhered to strictly. He further relied on the case of *Speaker of National Assembly vs James Njenga Karume* (Civil Application no. 92 of 1992) Nai. 40 of 92 (U.R).
51. Counsel submitted that the proper channel of grievance was from the political Party IDRM to the PPDT then Judicial Review High Court. He noted that the trial Court failed to properly and fairly evaluate the evidence on record. He urged this Court to set aside the judgement of the lower Court.

## Issue for determination

52. I have keenly read and understood the substance of these consolidated appeals. I have perused the Petition and all the responses and their accompanying affidavits, the proceedings, submissions and the judgment of the trial Court as well as the Record of Appeal and the parties' submissions before this Court. A number of issues were crafted by each of the Parties hereto, but the most fundamental and critical issue that this Court must first address before all else is that of jurisdiction.



53. In the context of jurisdiction, Nyarangi J in *The Owners of Motor Vessel "Lillian S" Vs Caltex Oil Kenya Ltd* [1989] KLR 1 a constant and resounding reminder to every court is aptly summed up as follow: -

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

54. In *The Matter Of The Interim Independent Electoral Commission* [2011] eKLR, the Supreme Court delivered itself in Paragraphs 29 and 30 thus:-

“(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by Statute Law, and by Principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

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

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

55. Further, in the case of *Macharia and another vs Kenya Commercial Bank Ltd and 2 Others* Civil Application No. 2 Of 2011 the Supreme Court further stated thus:

“A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”

## Determination

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

“75 An appeal under subsection (1A) shall lie to the High Court on matters of law  
(4) only and shall be;-



- (a) filed within thirty days of the decision of the magistrate’s court; and
- (b) heard and determined within six months from the date of filing of the appeal.”

57. The most essential of all the issues raised is that of the jurisdiction of the trial Court to determine the Petition. The Appellants and the 2<sup>nd</sup> Respondent have submitted that in the Petition filed in the lower Court, the Court had no jurisdiction to grant the Petitioner the orders sought because the issues raised by the Petitioner (1<sup>st</sup> Respondent herein) are within the jurisdiction of the Political Party Internal Dispute Resolution Mechanism. According to the Appellants, the issues for determination in the Petition related to nomination of candidates by political Parties, and the 1<sup>st</sup> Respondent ought to have lodged a complaint with the Political Party Internal Dispute Resolution Mechanism and if not satisfied with the decision of IDRDM she was to lodge the complaint to the Political Parties Disputes Tribunal (PPDT).

58. In this instant appeal, on 3<sup>rd</sup> June 2022, the 2<sup>nd</sup> Respondent vide Gazette Notice No. 6378 issued a notice on requirements for submissions of Party Nomination lists. All Political parties were required to submit their party lists to the 2<sup>nd</sup> Respondent on or before 25<sup>th</sup> June 2022. (A Kenya gazette notice of 3<sup>rd</sup> June 2022 was annexed to the Affidavit of David Eseli Simiyu at Page 164 of the Record of Appeal). On 27<sup>th</sup> June 2022, the 2<sup>nd</sup> Respondent in a media release confirmed that by midnight of 25<sup>th</sup> June 2022 it had received Party Nomination Lists from 81 political parties out of the 83 political parties cleared to participate in the General Elections and that the 2<sup>nd</sup> Appellant was amongst the parties that had submitted their party list. The 2<sup>nd</sup> Appellant’s Party List was of candidates for nomination in all positions including to the County Assembly of Bungoma to represent marginalized groups and the names of the candidates representing marginalized groups were as follows in order of priority:

Number	Gender	Name
1.	M	Leornard M. Lugaliki
2.	F	Jane Cheperenger Ingo
3.	M	Allan Nyongesa Wanyama

(The 2<sup>nd</sup> Appellant’s party nomination list at page 167 to 168 of the Record of Appeal annexed to the Affidavit of David Eseli Simiyu)

59. After the 2<sup>nd</sup> Appellant had submitted their party list to the 2<sup>nd</sup> Respondent on 27<sup>th</sup> July 2022, the 1<sup>st</sup> Appellant aggrieved with his position on the list lodged a complaint on 28<sup>th</sup> July 2022 to the party seeking to be placed at number 1, pursuant to a letter dated 18<sup>th</sup> September 2022. The complaint was heard by the party’s internal dispute resolution committee and a ruling was rendered on 2<sup>nd</sup> August 2022 in his favour. Despite the ruling, the party’s secretary general was not aware that his party chairman had already sent a letter to the IEBC purporting to communicate a decision of the internal dispute resolution committee and seeking an amendment to the 2<sup>nd</sup> Respondent’s party list published on 27<sup>th</sup> July 2022. The chairman’s letter had requested one Kevin Muchele to be nominated in the marginalized list as number 1 instead of Leonard Lugaliki who had been nominated in the 1<sup>st</sup> instance by the party as per the minutes of the 2<sup>nd</sup> Appellant dated 19<sup>th</sup> September 2022.



60. Counsel argued that the same prompted the 2<sup>nd</sup> Respondent herein to reject the party nomination list submitted on 27<sup>th</sup> July 2020 for Bungoma County for the marginalized group vide gazette notice published on 9<sup>th</sup> September 2022. The nomination was referred to IDRМ due to the conflicting names for position number one.
61. Counsel argued that, at that juncture the 1<sup>st</sup> Respondent had not lodged any complaint to the 2<sup>nd</sup> Appellant and the most logical presumption by the party was that she was content with being number 2 in the party list. The conflict did not affect the 1<sup>st</sup> Respondent's nomination as number 2 in the party list and she did not lodge a complaint about wishing to be number 1 on the party list thus her name was never forwarded to IEBC as position number 1. After receiving the list and been satisfied that the conflicting IDRМ orders had been resolved and that the reconstituted list complied with the law. There being no complaints lodged with the PPDT challenging the reconstituted list the 2<sup>nd</sup> Respondent proceeded to publish the name of the 1<sup>st</sup> Appellant as the duly nominated candidate in the Kenya Gazette for 21<sup>st</sup> September 2022. Counsel submitted that the 1<sup>st</sup> Respondent only lodged a complaint dated 19<sup>th</sup> September 2022 on 21<sup>st</sup> September 2022.
62. According to him, on the release of the initial list where the 1<sup>st</sup> Respondent's name was number 2, the same was only challenged by the 1<sup>st</sup> Appellant and on the orders of the 2<sup>nd</sup> Appellant's IDRМ another list was re-submitted on 19<sup>th</sup> September 2022 where the 1<sup>st</sup> Appellant was at the apex representing the youth. The 1<sup>st</sup> Respondent failed to challenge the decision of the 2<sup>nd</sup> Appellant's IDRМ hearing held on 19<sup>th</sup> September 2022 either before the 2<sup>nd</sup> Appellant or the PPDT or even before this Court making the decision rendered unchallenged to this date.
63. The 1<sup>st</sup> Respondent argued that she was not aware of the alleged 1<sup>st</sup> Appellants issues with the initial list and she was not privy to the same prompting her to inquire into the same vide a complaint dated 19<sup>th</sup> September 2022 and filed on 21<sup>st</sup> September 2022. According to her, it was the name of Lugaliki that was number 1 and hers was number 2 and that she was not involved in the dispute resolution thus the 1<sup>st</sup> Respondent felt blind-sided.
64. The Appellants in rebuttal argued that the 1<sup>st</sup> Respondent admitted during cross-examination that she was aware of the 2<sup>nd</sup> Appellant's party list as forwarded to the 2<sup>nd</sup> Respondent and that she did not complain as at 9<sup>th</sup> September 2022 until after the election of the 1<sup>st</sup> Appellant on 21<sup>st</sup> September 2022. Counsel further argued that in reference to her Affidavit in support of the Petition she was well aware of the list forwarded to the 2<sup>nd</sup> Respondent herein and was not content with her name been listed as number 2 instead on number 1.
65. The election process in Kenya is usually a long one and issues do arise with regard to its validity. As a result, the law created various stages for dispute resolution mechanisms. In this regard, there are various entities such as the Political Party Internal Dispute Resolution Mechanism, IEBC Dispute Resolution Committee, Political Parties Dispute Tribunal (PPDT) and the election Court which have been established by both *the Constitution* and relevant statutes as dispute resolution forums. Each of these entities has been tasked with its own mandate with regard to the nature of the dispute to entertain and the particular stage so as to avoid interference with each other's jurisdiction.
66. In her evidence, the 1<sup>st</sup> Respondent alleged that she lodged a complaint dated 19<sup>th</sup> September 2022 which was received on 21<sup>st</sup> September 2022 on the list published on 27<sup>th</sup> July 2022. It is critical for this Court to note that the genesis of issues with regards to the 2<sup>nd</sup> Appellant party nomination lists started way before the reconstituted list that was finally published on 27<sup>th</sup> July 2022.



67. From the foregoing, I have been able to establish that indeed no complaint was rendered by the 1<sup>st</sup> Respondent with regards to the initial list, which according to her evidence she was aware of and knew it bore the name of Leonard M. Lugaliki as Number 1 and hers was number 2. The 1<sup>st</sup> Respondent been aware that she was listed as a number 2 ought to have immediately filed a complaint with the 2<sup>nd</sup> Appellant’s IDRDM as the 1<sup>st</sup> Appellant did but no action was taken.

68. The 1<sup>st</sup> Respondent had every opportunity, if she was aggrieved with the listing of the 1<sup>st</sup> Appellants as nominees in the marginalized list as number 1, to complain against the same. If the 1<sup>st</sup> Respondent did not complain against the 1<sup>st</sup> Appellant as pre-election dispute, then she is forever bound not to so complain in any other forum, let alone the Election Court. This is because the 1<sup>st</sup> Respondent was aware of the would be pre-election dispute of listing the 1<sup>st</sup> Appellants prior to election and therefore barred to raise it later as an election dispute. This was the holding in the celebrated Supreme Court decision of Sammy Ndung’u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR, wherein the Supreme Court posed, thus;

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

- i. ....
- ii. ....
- iii. ....
- (iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.
- iv. ....
- (vi) In determining the validity of an election under Article 105 of *the Constitution* or Section 75 (1) of the *Elections Act*, an Election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the Petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.”

69. It is my humble view that the learned trial magistrate ought to have addressed his mind on whether, the 1<sup>st</sup> Respondent was aware or could have been aware of the facts forming the basis of the dispute before the election Court, in this case, the listing of the 1<sup>st</sup> Appellant in the Marginalized List Category. If the learned trial Magistrate would have focused on the same, then the answer would have been the same, being that the 1<sup>st</sup> Respondent was aware that the 1<sup>st</sup> Appellant had been listed in the Marginalized Category submitted to the 2<sup>nd</sup> Respondent on 25<sup>th</sup> June, 2022 but as number 3 and she was listed as number 2. If so she would have raised it as a Pre-election dispute. The mere fact that the 1<sup>st</sup> Respondent did not present it as an issue for determination before PPDT as a Pre-election dispute. The 1<sup>st</sup> Respondent knew of the said Listing on 27<sup>th</sup> July, 2022 prior to the Election, deliberately opted not to challenge it before the PPDT and cannot take advantage of that own deliberate omission to remove the issue from the ambit of a Pre-election dispute.

70. On the allegations that the 1<sup>st</sup> Appellant’s complaint dated 28<sup>th</sup> July 2022 against the list published on 27<sup>th</sup> July 2022 and respective hearing and orders issued to that effect vide a ruling dated 2<sup>nd</sup> August 2022, was all conducted in a secretive manner was to put it plainly none of her business. I believe all the individuals as listed in the party’s nomination list marginalized category were all fighting for their individual priority of nomination stand on the list and none of them nor the Party owed her any briefing towards the same hearing as she never contested her being listed as number 2 on the list.
71. It is evident that the 1<sup>st</sup> Respondent only proceeded to lodge her complaint against the party nomination list after it was published on 9<sup>th</sup> September 2022. The same complaint was lodged with the 2<sup>nd</sup> Appellant’s IDRM. It is imperative to note that even from a layman’s perspective there is nothing the 2<sup>nd</sup> Appellant would have done with regards to the complaint.
72. Article 88 (4) (e) of *the Constitution* of Kenya, 2010 provides: -
- “
- “(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—
- ...
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- ...”
73. Section 74 of the Election Act provides: -
- “(1) Pursuant to Article 88(4)(e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
- (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.
- (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable. [Emphasis added]
74. On the other hand, Section 4 of the *Independent Electoral and Boundaries Commission Act* replicates the provisions of Article 88 (4) of *the Constitution*. In this regard, the dispute resolution mechanism provided for IEBC has to do with disputes that arise before the date of election or nomination.



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

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

76. It is elaborate that the 1<sup>st</sup> Respondent did not exhaust all available legal mechanisms and avenues that were available for her to lodge her complaint with regards to the list that was submitted to the 2<sup>nd</sup> Respondent on 27<sup>th</sup> July 2022. She ought to have filed her claim with the Political Parties Disputes Tribunal (PPDT), the IEBC (2<sup>nd</sup> Respondent’s) Elections Disputes Committee established under Section 40 of the [Elections Act](#) 2011 and/or the Democratic Action Party-Kenya Internal Disputes Resolution Committee. Depending on the outcome therefrom, the Petitioner would then appeal to the High Court and, as such, a subordinate Court has no jurisdiction to handle disputes arising from Party Nomination Lists as the Petitioner did not utilize the statutory remedies.

77. The 1<sup>st</sup> Respondent was of a contrary view that upon the gazettment of the nominated members the election was deemed over thus any contest as to the same election after publication of the gazette notice by IEBC of the names of the nominees means the nomination process comes to an end thus they stand elected and challenge to an election by nomination is only entertained by way of an election petition. Counsel relied on the case of *Moses Mwicigi & 14 Others vs IEBC & 5 others* (2016) eKLR. Counsel further argued that vide gazette notice volume CXXIV number 193 published on 21<sup>st</sup> September 2022 saw the election of the 1<sup>st</sup> Appellant and the trial Court by dint under [the Constitution](#), Election Act and Regulations indicated that the trial Court had the requisite jurisdiction to entertain the Petition. Counsel further relied on Section 75 of the [Elections Act](#).

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

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

“The effect is that, the process of preparation of the party list is an internal affair of the Political Party, which ought to proceed in accordance with the national Constitution, the Political Party Constitution, and the nomination rules as prescribed under Regulation 55.

A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the “elections” for these special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh party list or by amending the list already submitted.

In the instant case, the IEBC after receiving the party list, and in conformity with the High Court decision in the National Gender and Equality Commission Case, proceeded to publish it on 15<sup>th</sup> and 16<sup>th</sup> May, 2013. Thereafter, on 17<sup>th</sup> July, 2013, IEBC gazetted the appellants, by Gazette Notice No. 9794, Volume XCV 105, as the TNA list for Nyandarua County.



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

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

Section 36 (7) (8) and (9) of the Act, with regard to nominations for County Assembly, thus provides:

- (7) For purposes of Article 177 (1) (b) of *the Constitution*, the Commission shall draw from the list under subsection (1)(e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender.
- (8) For purposes of Article 177(1)(c) of *the Constitution*, the Commission shall draw from the list under subsection (1)(f) four special seat members in the order given by the party.
- (9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of *the Constitution* shall be proportional to the number of seats won by the party under Article 177 (1) (a) of *the Constitution*”.

It is clear from the foregoing provisions that the allocation of nomination- seats by the IEBC is a time bound process, that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then ‘designates’, or ‘draws from’ the allocated list the number of nominees required to join the County Assembly. To ‘designate’ or ‘draw from’ entails the act of selecting from the list provided by the political party. It is plain to us that *the Constitution* and the electoral law envisage the entire process of nomination for the special seats, including the act of gazetting of the nominees’ names by the IEBC, as an integral part of the election process.

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

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

80. It is clear from the foregoing that once an election has been undertaken, everything else strictly shifts to the Election Court. In the present case, the IEBC published on 27<sup>th</sup> July, 2022 a list of nominees as submitted by the 2<sup>nd</sup> Appellant and gave the public an opportunity to scrutinize the published names and raise a pre-election dispute if aggrieved within the prescribed timelines. In the aforesaid case of *Moses Mwigigi & 14 Others V IEBC & 5 Others* (supra), the Court held that in the event of a



- dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse must be had by the aggrieved party member to the Political Parties Dispute Tribunal established under section 39, Part IV of the *Political Parties Act*, 2011 or to the High Court sitting as a judicial review court in appropriate circumstances.
81. In the instant appeal, the 2<sup>nd</sup> Respondent on lodged her complaint with the 2<sup>nd</sup> Appellant's IDRМ vide a complaint dated 19<sup>th</sup> September 2022 which was received by the 2<sup>nd</sup> Appellant on 21<sup>st</sup> September 2022. It is imperative I note that the genesis of the list contended by the 1<sup>st</sup> Respondent began with the list submitted by the 2<sup>nd</sup> Appellant to the 2<sup>nd</sup> Respondent on 25<sup>th</sup> June 2022. The 2<sup>nd</sup> Respondent within its authority as per the *Elections Act* found the list non-compliant and the 2<sup>nd</sup> Appellant was directed to amend the same and re-submit it by 23<sup>rd</sup> July 2023. The 2<sup>nd</sup> Appellant proceeded to re-submit the compliant party list to the 2<sup>nd</sup> Respondent on 27<sup>th</sup> July 2022 with the name of one Leonard Lugaliki as number 1, Jane Cheperenger Ingo as number 2 and Allan Nyongesa Wanyama as number 3. Aggrieved by the list, the 1<sup>st</sup> Appellant, listed as number 3 on the list, lodged a complaint on 28<sup>th</sup> July 2022 (within the time frame as provided by the 2<sup>nd</sup> Respondent 28<sup>th</sup> July 2022 to 6<sup>th</sup> August 2022) highlighting why he was better placed to be number 1 on the part list. Vide a ruling delivered on 2<sup>nd</sup> August 2022, the 2<sup>nd</sup> Appellant's IDRМ ordered the rectification of the party list to have the 1<sup>st</sup> Appellant's name be indicated under the Marginalized Party list under youth.
  82. I humbly note that the 1<sup>st</sup> Respondent never lodged a complaint against the list placing her on number 2.
  83. Despite the ruling as delivered on 2<sup>nd</sup> August 2022, the secretary general of the 2<sup>nd</sup> Appellant not being aware that his party chairman forwarded a correspondence dated 10<sup>th</sup> August 2022 to the 2<sup>nd</sup> Respondent fronting a different name, one Kevin Muchele, to be nominated in the marginalized list as number 1 in replacement of Leonard Lugaliki, prompted the 2<sup>nd</sup> Respondent to reject the party list submitted on 27<sup>th</sup> July 2022 vide a gazette notice published on 9<sup>th</sup> September 2022 and the nomination was referred to IDRМ due to the conflicting names for position one.
  84. All this while, the 1<sup>st</sup> Respondent did not take any action with regards to the party list and further gave the illusion that she was duly satisfied with her number 2 posting on the list. The elections were already conducted and the 2<sup>nd</sup> Respondent had concluded that the 2<sup>nd</sup> Appellant could only nominate 3 women as gender top-up and 1 candidate for the marginalized category.
  85. The 2<sup>nd</sup> Appellant on a consensus fronted the name of the 1<sup>st</sup> Appellant as the nominee by the party representing youth for the position of marginalized groups to the 2<sup>nd</sup> Respondent and he was duly sworn in.
  86. The Supreme Court in the case of *Sammy Waity V IEBC & 3 Others* [2019] eKLR pointed out that there are two schools of thought when it comes to the determination of the question whether an election Court has jurisdiction to determine pre- election disputes. It went ahead to state that the first school of thought holds it that the establishment of other organs by *the Constitution* of Kenya, 2010 was to address pre- election disputes including those relating to nomination, divests an election Court of jurisdiction to determine the same. The other school of thought has it that an election being a process and not an event, implies that the same continues until the declaration of results in which case, the election Court has to satisfy itself that the election was at all times conducted in accordance with the tenets of *the Constitution* of Kenya, 2010 by virtue of having a jurisdictional residuum to determine whether a person ought to have been nominated in the first place. The Court went ahead to issue certain guiding principles as follows;



1. All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.
  2. Where a pre- election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the constitution*, such dispute shall not be a ground in a petition to the election court.
  3. Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the constitution*, the High Court shall hear the dispute before the election in accordance with the constitutional timelines.
  4. Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election court.
  5. The action or inaction in (4) above, shall not prevent a person from presenting the dispute for resolution to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of *the constitution*, even after the determination of an election petition.
87. Being guided by the above authority, I find that all pre-election disputes should be resolved by the IEBC or PPDT or the Political Party's IDRM since they are the ones to determine the eligibility of the persons so nominated as representative of the marginalized in the County Assembly of Bungoma as well as the qualifications of the 1<sup>st</sup> Appellant to be nominated as a member of the County Assembly of Bungoma under Article 177(1) of *the Constitution* of Kenya, 2010 and Section 36 (3) of the *Elections Act*, 2011 and should have been raised and addressed in the noted established organs and/or thereafter approach the High Court sitting as a judicial review Court for further redress. It was thus improper for the 1<sup>st</sup> Respondent to raise the issue before the election Court yet she did not exhaust all the available avenues for redress the specified timelines of 28<sup>th</sup> July 2022 to 6<sup>th</sup> August 2022 as per the joint IEBC and Office of the Registrar of Political Parties. The 1<sup>st</sup> Respondent's failure to keep herself abreast with the business of the nominee party list of a party she is a life member to baffles. She was listed as number 2 on the party list but her failure to do something about the same was her undoing since she knew that the dispute then was a pre- election one and that the 2<sup>nd</sup> Appellant's IDRM was the forum for determination.
88. The 1<sup>st</sup> Respondent should not have shelved the issue and reserve it for determination by the election Court. It is instructive that the trial Court in its judgement pointed out that indeed the claim was a pre-election dispute and that it had jurisdiction to delve into. The complaint raised by the 1<sup>st</sup> Respondent was that:
- a. Unlike the person listed at position one in the party nomination list, she was an ethnic minority on account of her ethnic group, the Sabaots in Bungoma County.
  - b. The individual listed at position 1 in the party nomination list was of luhya ethnicity which is not a marginalized community within Bungoma County.
  - c. Unlike the person listed at position one in the party nomination list, she is a woman who was of the minority gender.



- vi. Unlike the person listed at position one in the party nomination list, she was a fully paid up life member with the 2<sup>nd</sup> Respondent and had participated in the popularization of its activities such as party membership drives and mobilization, support of party nominees for various positions and financial back up to its nominees.
  - vii. In beginning the listing with a nominee of male gender, the 2<sup>nd</sup> Respondent was in flagrant breach of the 3<sup>rd</sup> Respondent's Elections and Party Primaries and Party Lists Regulations, 2017 which mandates that in order to meet the gender requirement the listing must alternate between women and men candidates.
89. From the foregoing, the trial Court's view that it had jurisdiction to determine the election Petition was in error. The learned trial magistrate had no jurisdiction to inquire into the nomination dispute of the 1<sup>st</sup> Respondent as this was a matter that was to be dispensed with by the Political Parties Tribunal, and/or her Political Party IDRM. In any case, the 1st Respondent did not even pursue her dispute to conclusion before resorting to the election court.
90. Having answered the question of jurisdiction in the negative, I am inclined agree with the arguments of the Appellants and the 2<sup>nd</sup> Respondent that the trial Court had not jurisdiction to delve into the issues raised in the Petition.
91. Accordingly, I allow the appeal by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and hereby set aside the judgment of the trial court delivered on 29<sup>th</sup> March 2023 and substitute it with an order dismissing the 1<sup>st</sup> Respondent's petition in its entirety. In view of the nature of the appeal, I order that each party will bear their respective costs of this appeal and in the trial Court.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF SEPTEMBER 2023**

**D. KEMEI**

**JUDGE**

**In the presence of:**

Maloba for 1<sup>st</sup> and 2<sup>nd</sup> Appellants

No appearance for Ndetto for 1<sup>st</sup> Respondent

No appearance for Juma for 2<sup>nd</sup> Respondent

Kizito Court Assistant

