



**Kisochi v Independent Electoral Boundaries Commission & 2 others (Constitutional Petition 13 of 2017) [2018] KEHC 8292 (KLR) (6 March 2018) (Judgment)**

*Rosina Mghoi Kisochi v Independent Electoral Boundaries Commission & 2 others [2018] eKLR*

Neutral citation: [2018] KEHC 8292 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CONSTITUTIONAL PETITION 13 OF 2017**

**JN KAMAU, J**

**MARCH 6, 2018**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 22, 27, 54,90, 97(1)(C), 100, 177  
(1) (C) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: IN THE MATTER OF SECTIONS  
34 AND 36 OF THE ELECTIONS ACT (NO 24 OF 2011)**

**IN THE MATTER OF: THE ELECTIONS (GENERAL)  
REGULATIONS (L.N. 128 OF 2012 AND L.N. 72 OF 2012)**

**IN THE MATTER OF: THE ELECTIONS (PARTY PRIMARIES  
AND PARTY LISTS) REGULATIONS, 2017 (L.N. 69 OF 2017)**

**AND**

**IN THE MATTER OF: NOMINATED MEMBERS OF THE COUNTY ASSEMBLY**

**BETWEEN**

**ROSINA MGHOI KISOCHI ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**COUNTY ASSEMBLY OF TAITA TAVETA ..... 2<sup>ND</sup> RESPONDENT**

**AND**



**PERSONS WITH DISABILITY -TAITA TAVETA (LIST ANNEXED) ..... INTERESTED PARTY**

**Procedure for nominating representatives of persons with disabilities into county assemblies.**

*The main issue was whether the failure of the Independent Electoral Boundaries Commission to gazette the nomination of at least one person to represent persons with discriminatory and illegal. The High Court held that the Independent Electoral Boundaries Commission's role in relation to the nomination of representatives of persons with disability in county assemblies was merely supervisory as it was bound by the party list provided by the political parties.*

Reported by Byron Mati, Vincent Mbaluka, and John Ribia

**Constitutional Law** - fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to equality and freedom from discrimination – nomination of PWDs - procedure – whether the allocation of special seats to persons with disabilities (PWDs) by the IEBC, based on the ranking of PWD nominees in the party lists submitted by political parties and proportional to the seats won by the respective parties, infringed upon the rights of PWDs against discrimination – Constitution of Kenya, articles 27(4), 36(3), 38(3), 54, 81(b), (c), 90, 97(1)(c), 98(1)(b), (c), 100, 165, and 177(1)(c).

**Electoral Law** – nominated members of county assembly – nominated seats reserved for persons with disabilities – role of political parties – role of IEBC - whether political parties fulfilled their responsibility to ensure adequate representation of persons with disabilities (PWDs) in the County Assemblies, National Assembly, and Senate by submitting party lists with PWD nominees ranked high enough to secure special seats allocated proportionally by the IEBC - Elections Act, (Cap 7) section 34, 35, 36, and 75; Election (Party Primaries and Party Lists ) Regulations, 2017 (Act No 24 of 2011) part II; regulation 27 (1); Persons With Disabilities Act (Cap. 133) section 29; Political Parties Act (Cap 7D) sections 39, and 40.

**Jurisdiction** – jurisdiction of the High Court – jurisdiction of the High Court vis-à-vis the jurisdiction of the Resident Magistrate Court – jurisdiction to determine disputes on nomination to county assemblies - whether the High Court had jurisdiction to hear and determine a dispute on the nomination of members of county assembly that was usually heard by the Resident Magistrate's Court designated by the Chief Justice - whether the Constitution of Kenya and the relevant laws mandated the representation of two persons with disability in the County Assemblies – Constitution of Kenya, article 165.

**Constitutional Law** – constitutional petitions – locus standi to institute constitutional petitions -whether the petitioner had locus standi to institute the proceedings alleging a contravention of the fundamental rights of persons with disabilities – Constitution of Kenya, article 22  
**Constitutional Law** - fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to equality and freedom from discrimination – nomination of PWDs - procedure – whether the allocation of special seats to persons with disabilities (PWDs) by the IEBC, based on the ranking of PWD nominees in the party lists submitted by political parties and proportional to the seats won by the respective parties, infringed upon the rights of PWDs against discrimination – Constitution of Kenya, articles 27(4), 36(3), 38(3), 54, 81(b), (c), 90, 97(1)(c), 98(1)(b), (c), 100, 165, and 177(1)(c).

**Electoral Law** – nominated members of county assembly – nominated seats reserved for persons with disabilities – role of political parties – role of IEBC - whether political parties fulfilled their responsibility to ensure adequate representation of persons with disabilities (PWDs) in the County Assemblies, National Assembly, and Senate by submitting party lists with PWD nominees ranked high enough to secure special seats allocated proportionally by the IEBC - Elections Act, (Cap 7) section 34, 35, 36, and 75; Election (Party Primaries and Party Lists ) Regulations, 2017 (Act No 24 of 2011) part II; regulation 27 (1); Persons With Disabilities Act (Cap. 133) section 29; Political Parties Act (Cap 7D) sections 39, and 40.



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**Constitutional Law** – *constitutional petitions – locus standi to institute constitutional petitions -whether the petitioner had locus standi to institute the proceedings alleging a contravention of the fundamental rights of persons with disabilities – Constitution of Kenya, article 22.*

### **Brief facts**

In 2017, the petitioner filed a notice of motion seeking a mandatory injunction against the County Assembly of Taita Taveta under order 40 rule 4(1) and order 51 rules (1), (3) and (13) of the Civil Procedure Rules to cease conducting any house business pending the hearing and determination of the petition.

It was the petitioner’s case that the 1<sup>st</sup> respondent violated its rights when it published Gazette Notice 8380 on August 28, 2017, and failed to nominate one (1) male and one (1) female person with disability as representatives for persons with disabilities in the 2<sup>nd</sup> respondent, the County Assembly of Taita Taveta. She claimed that the action by the 1<sup>st</sup> respondent was discriminatory and in contravention of article 27(4), 54, 90, 97(1)(c), 98(1)(b)(c), 100 and 177 of the Constitution of Kenya, 2010.

The 1<sup>st</sup> respondent denied breaching any rights of the petitioner stating that its role concerning article 177(1) (c) of the Constitution of Kenya was merely supervisory as the nomination of members in the party list was done by the political parties themselves. The 2<sup>nd</sup> respondent on the other hand contested the jurisdiction of the court to hear and determine the matter and averred that this was an electoral dispute that ought to have been heard by a Magistrate Court. It also contended that being an electoral dispute, it was filed outside the statutory period rendering it defective.

### **Issues**

- i. Whether the petitioner had *locus standi* to institute the proceedings alleging a contravention of the fundamental rights of persons with disabilities.
- ii. Whether the Constitution and the relevant laws mandated the representation of two persons with disability in the County Assemblies.
- iii. Whether the High Court had jurisdiction to hear and determine a dispute on the nomination of members of county assembly that was usually heard by the Resident Magistrate’s Court designated by the Chief Justice.
- iv. Whether political parties fulfilled their responsibility to ensure adequate representation of persons with disabilities (PWDs) in the County Assemblies, National Assembly, and Senate by submitting party lists with PWD nominees ranked high enough to secure special seats allocated proportionally by the IEBC.
- v. Whether the allocation of special seats to persons with disabilities (PWDs) by the IEBC, based on the ranking of PWD nominees in the party lists submitted by political parties and proportional to the seats won by the respective parties, infringed upon the rights of PWDs against discrimination.
- vi. Whether the IEBC erred in nominating persons to the special seats in the Taita Taveta County Assembly based on the party lists submitted by political parties, which determined the order and priority of persons with disabilities nominees.

### **Relevant provisions of the Law**

#### **Constitution of Kenya**

##### **Article 177 – Membership of the County Assembly**

(1) *A county assembly consists of—*



1. *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;*
  2. *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;*
  3. *the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and*
  4. *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.*

#### **Held**

1. Articles 22 and 258 of the Constitution of Kenya conferred *locus standi* on any person to brought an action where there was a breach of the Constitution or a threatened breach in relation to a right or freedom. The petitioner had the *locus standi* to institute the instant proceedings as she was alleging a contravention of a fundamental right of persons with disabilities (PWDs).
2. Articles 90, 97(1)(c), 98(1)(b), (c), (d) and (177 of the Constitution as read with sections 34 and 36 of the Elections Act and section 29 of the Persons with Disabilities Act provided that:
  1. PWDs could not purport to discriminate against other groups of people as that would be in contravention of the Constitution;
  2. the names in the party list were submitted to the 1<sup>st</sup> respondent by a political party forty-five (45) days before the general election;
  3. the order of the names was given to the 1<sup>st</sup> respondent by the political party;
  4. neither a person with disability nor the youth nor the marginalized group had a greater advantage than the other or was placed in a higher priority to the other in the party list;
  5. the 1<sup>st</sup> respondent's role in party lists was to ensure that the party list comprised the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed;
  6. the filling of the special seats was to be done after the results of the general elections had been announced; and
  7. the special seats allocated to political parties were in proportion to the total number of seats won by candidates of the political party at the general election
1. Neither the Constitution of Kenya nor the Persons with Disabilities Act, concluded that it did not see any provision of the law that mandated the representation of two PWDs in the County Assemblies. As such there was no contravention of the freedom against discrimination as provided under article 27(4) of the Constitution.
2. Nomination of PWDs was not to be done by the 1<sup>st</sup> respondent. It was the responsibility of political parties to furnish the 1<sup>st</sup> respondent with their party lists in order of priority which it had to verify that such lists had complied with articles 90 and 177 of the Constitution. The 1<sup>st</sup> respondent would then allocate the slots for the special seats which were determinant on the total number of seats won by candidates during a general election.
3. The fact that other Counties had more PWDs nominated under the special seats did not mean that PWDs in Taita Taveta County were marginalized as allocation to special seats was proportionate to the number of seats the candidates in different parties had won. Appreciably, the 1<sup>st</sup> respondent was



- bound by the order that was given in the party lists and it could not alter the order of the names. It could not interfere with the will of political parties. It could only reject the list if the same was not in accordance with the provisions of article 177(1)(c) of the Constitution which stipulated that the party list shall include eight candidates, at least two of whom shall be persons with disability, two of whom would be the youth and two of whom shall be person representing a marginalized group.
4. It must be ensured that the list did not contain more than two-thirds of either gender as provided for in articles 81(b),(c) and 100 of the Constitution. The procedure for the rejection and re-submission of the party lists was well set out in Part II of the Elections (Party Primaries and Party Lists) Regulations.
  5. The petitioner did not demonstrate that she approached it with a view to having the list amended and it neglected to do so or that the procedure prescribed in Elections (Party Primaries and Party Lists) Regulations was not complied with. She did not also demonstrate that she exhausted all the dispute resolution mechanisms stipulated in regulation 27 (1) of the Elections (Party Primaries and Party Lists) Regulations that provided that every political party shall establish an internal dispute resolution mechanism in relation to the party primaries and party lists. In the absence of any proof, the 1<sup>st</sup> respondent could not be faulted for having acted as it had been directed by the political parties as regards the nomination of PWDs to the special seats of the 2<sup>nd</sup> respondent.
  6. While the High Court has unlimited original to hear civil and criminal cases and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened as provided in article 165 of the Constitution, it could not delve into matters where statute had given jurisdiction to other courts and/or tribunals. The moment the 1<sup>st</sup> respondent gazetted the names of the persons who had been listed in the party lists in order of priority, it became *functus officio*. The only recourse was for the petitioner to institute proceedings before an election court which in the case of members to the county assemblies ought to have been at the Resident Magistrate's Court designated by the Chief Justice as stipulated in section 75(1)(a) of the Elections Act.
  7. The proper court that should have heard the matter was the Magistrate's court at Voi. The 1<sup>st</sup> respondent did not err in nominating persons to the special seats in the manner that it did. In any event, even if she had succeeded in demonstrating that it had not done so, the proper court ought to have been the Magistrate's Court which was mandated by law to hear and determine election petitions relating to members of the county assemblies. The instant matter was not a matter where there was a breach of the Constitution or a threat in relation to a right or fundamental freedom that could have brought this matter within the ambit of the High Court for determination. It was a dispute relating to a party list that was governed by the provisions of article 177 of the Constitution, the Elections Act and the Elections (Party Primaries and Party List) Regulations.
  8. Where mechanisms to resolve a dispute had been set out by the Constitution, the High Court must tread very cautiously not to assume jurisdiction in any matter just because the same touched on a provision in the Constitution. It must allow other courts and tribunal to hear and determine matters that the had been mandated by statute to deal.
  9. Whereas the right to be allocated a special seat was not constitutional in nature as it was determined by the ranking of a nominee in a party list and was proportional to the seats won by candidates of a political party, political parties would have walked the talk by submitting names of PWD nominees ranked high in the party list. The lower the rank of a name of a PWD in a party list, the less the chance of a special seat being allocated to a PWD. PWDs had their own unique needs and only they know where the shoe pinched. There was therefore need for political parties to seriously consider PWDs as critical members in the County Assemblies, National Assembly and Senate as a matter of urgency for the realisation of their civic rights. That was a right that could and should be realised immediately as it did not require any financial implication in its realisation.



10. As special seats were allocated proportionally to the number of seats won by candidates of a political party, it could not be said that if a PWD was not allocated a special seat following submission of a party list, then his or her right has been infringed upon because the party lists were submitted to the 1<sup>st</sup> respondent in order of priority of the political parties. PWDs must therefore lobby to be ranked high up in the party list so as to make it in the County Assemblies, National Assembly and Senate.

*Petition dismissed.*

### **Orders**

*Each party was to bear their costs.*

### **Citations**

#### **Cases**

##### **Kenya**

1. *Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & 5 others; United Disabled Persons of Kenya & another (Interested Parties)* Petition 155A of 2011; [2012] KEHC 5406 (KLR) - (Explained)
2. *Mwakumbaku, Sabastian R & 2 others v County Government of Taita Taveta & another* Petition 4 of 2015; [2016] KEHC 5538 (KLR) - (Explained)
3. *Mwicigi, Moses & 14 others v Independent Electoral and Boundaries Commission & 5 others* Petition 1 of 2015; [2016] eKLR - (Applied)
4. *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another* Petition 147 of 2013; [2013] eKLR - (Explained)
5. *Northern Nomadic Disabled Person's Organization (NONDO) v The Governor, County Government of Garissa & another* Constitutional Petition 4 of 2013; [2013] KEHC 467 (KLR) - (Explained)
6. *Ruwa, Randu Nzai & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others* Constitutional Application 6 of 2012; [2012] KEHC 575 (KLR) - (Explained)
7. *Temoi, John Mining & another v Governor of Bungoma County & 17 others* Petition 2 & 2 'A' of 2014; [2014] KEHC 5453 (KLR) - (Explained)

##### **South Africa**

*Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 - (Mentioned)

### **Statutes**

##### **Kenya**

1. Civil Procedure Act (cap 21) sections 1A, IB, 3, 3A- (Interpreted)
2. Constitution of Kenya, 2010 articles 27(4); 36(3); 38(3); 54; 81(b),(c); 90; 97(1)(c); 98(1)(b), (c); 90; 100; 165; 177 (1), (c)- (Interpreted)
3. Election (Party Primaries and Party Lists ) Regulations, 2017 (Act No 24 of 2011 Sub Leg) part II; regulation 27 (1) - (Interpreted)
4. Elections Act, 2011 (Act No 24 of 2011) sections 34, 35, 36, 75- (Interpreted)
5. Persons With Disabilities Act, 2003 (Act No 14 of 2003) section 29 - (Interpreted)
6. Political Parties Act, 2011 (Act No 11 of 2011) sections 39, 40- (Interpreted)

### **Advocates**

None mentioned



## JUDGMENT

### Introduction

1. On October 17, 2017, the petitioner herein filed a notice of motion application dated October 13, 2017 pursuant to the provisions of order 40 rule 40(1) and order 51 rules (1), (3) and (13) and section 1A, IB, 3, & 3A of the Civil Procedure Act and all the enabling provisions of the law. She had sought an order for mandatory injunction directed at the 2<sup>nd</sup> respondent to forthwith cease from conducting any House business pending the hearing and determination of the petition that was also dated October 13, 2017 and filed on October 17, 2017.
2. She sought the following reliefs in her petition That:-
  1. This honourable court be pleased to issue a declaration that the actions of the 1<sup>st</sup> respondent to fail to gazette the nomination of at least one (1) male and one (1) female to represent persons with disabilities violated the rights of the petitioner and the interested party herein.
  2. This honourable court do make a finding that the failure to gazette the nomination of at least one (1) person to represent the persons with disabilities was discriminatory and therefore illegal in the face of the law.
  3. This honourable court be pleased to find that owing to 1 and 2 hereinabove, the 2<sup>nd</sup> respondent's continued transacting business discriminated the petitioner and violated their constitutional rights.
  4. This honourable court be pleased to direct the 1<sup>st</sup> respondent to cause to be gazetted the name of Janet Warighe Mwakachola ID No 2XXXXXX and Darius Kazungu Kinusa ID No 1XXXXXX who were persons with disabilities to represent the petitioner, interested parties and other persons with disabilities within Taita Taveta County.
  5. That this honourable court be pleased to award costs of the petition to the petitioner.
3. On November 13, 2017, the 1<sup>st</sup> respondent filed a reply to the petition of even date. In response to the said application, on December 13, 2017, it filed grounds of objection of the same date. The 2<sup>nd</sup> respondent did not file any responses to the petitioner's said application and petition. The petitioner contended that this meant that the 2<sup>nd</sup> respondent had conceded to the prayers in her application.
4. The aforesaid application was not heard as the petition proceeded for hearing. The petitioner's written submissions were dated December 3, 2017 and filed on December 4, 2017. The interested parties' written submissions were dated January 8, 2018 and filed on January 12, 2018. The 1<sup>st</sup> respondent's written submissions and list of authorities were dated and filed on December 11, 2017. The 2<sup>nd</sup> respondent's written submissions were dated and filed on January 16, 2018. Its bundle and list of authorities dated January 15, 2018 were also filed on January 16, 2018.

### The Petitioner's and Interested Parties' Case

5. The petitioner averred that the 1<sup>st</sup> respondent conducted general elections on August 8, 2017 but that it erred when in its Gazette Notice No 8380 that was published on August 28, 2017, it failed to nominate one (1) male and one (1) female person with disability representatives in the 2<sup>nd</sup> respondent herein. She said that the 1<sup>st</sup> respondent nominated persons with disabilities (PWDs) in all Counties throughout the Republic of Kenya except in Taita Taveta County.



6. It was her averment that the 1<sup>st</sup> respondent's action was discriminatory and in contravention of the provisions of article 27(4), 54, 90, 97(1)(c), 98(1)(b)(c), 100 and 177 of the *Constitution of Kenya, 2010* and sections 34 and section 36 of the *Elections Act* No 24 of 2011 and as a result, the 2<sup>nd</sup> respondent was not properly constituted to conduct business in the Taita Taveta County.
7. She pointed out that Joan Akinyi Adino and athman Moze both of the Orange Democratic Movement Party were nominated to represent the minority, Frank Jumapili Mnare of Jubilee Party was nominated to represent the ethnic minority while Jackson Nyambu Mwagharo was nominated by the Social Democratic Party to represent the youth. Nine (9) other persons were nominated as the Gender top up list.
8. In her oral submissions, she added that there was a Disability Bill that was pending in the 2<sup>nd</sup> respondent and that if no PWD was nominated to sit in the 2<sup>nd</sup> respondent, then PWDs would suffer greatly as they were the only ones who could understand their own needs. She therefore urged this court to address the infringement of their rights.
9. The interested parties supported the petitioner's petition and submissions. They added that the 1<sup>st</sup> respondent's failure to nominate a PWD violated the very establishment of the 2<sup>nd</sup> respondent because it violated the provisions of article 27(4) of the *Constitution of Kenya* that provides that no person shall be discriminated on grounds of disability amongst other grounds.
10. It was also their submission that they had power to institute the proceedings herein by virtue of article 22 of the *Constitution of Kenya* stipulates that every person has the right to institute court proceedings claiming that a right of fundamental freedom in the Bill of Rights had been denied, violated or had been infringed upon.
11. They relied on the cases of *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another* [2013] eKLR, *Northern Nomadic Disabled Person's Organisation (Nondo) vs Governor of Garissa & another* [2013] eKLR, *Kenya Society for the Mentally Handicapped (KSMS) vs Attorney General & 7 others* [2012] eKLR and *Prinsloo vs Van der Linde & Another* 1997 (3) SA 1-12 (CC) to buttress their case.
12. In the case of *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another* (*supra*), the holding in was that courts should not give sweeping interpretations to the law and that the realisation of the rights of PWDs ought to be incremental.
13. In the case of *Northern Nomadic Disabled Person's Organisation (Nondo) vs Governor of Garissa & Another* (*supra*), the court therein emphasised the immediate realisation of the freedom against discrimination. In the case of *Kenya Society for the Mentally Handicapped (KSMS) vs Attorney General & 7 others* (*supra*), Majanja J held that the courts would declare any action discriminatory if a petitioner proved discrimination.

### **The 1<sup>st</sup> Respondent's Case**

14. The 1<sup>st</sup> respondent's case was that its role with regard to article 177(1)(c) of the *Constitution* where the nomination of members in the party list has been done by the political parties themselves was merely supervisory. It averred that neither the petitioner nor the interested parties showed that they had presented it with complaints about the said nomination and it failed to take action.
15. It was emphatic that its role was limited to supervision, conduct, announcement and declaration of results and did not have power to choose for a party which member would make it in the party list and



the petitioner therefore erred in instituting the suit against it. It urged this court to dismiss the petition herein with costs to it as it was fatally defective and incurable.

### **The 2<sup>nd</sup> Respondent's Case**

16. The 2<sup>nd</sup> respondent was emphatic that this court had no jurisdiction to hear and determine this matter as it was an electoral dispute that ought to have been heard by the Magistrate's Court. It was emphatic that the 1<sup>st</sup> respondent's role was limited to settling election disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to declaration of election results.
17. It added that the dispute herein was an election petition as the nominated members were deemed to have been duly elected and the proceedings having been filed outside the statutory period, then the same were defective.
18. It also contended that the member whose nomination was being challenged had to be made a party to the proceedings herein. It pointed out that the members the petitioner was challenging were not parties to the suit herein and if the matter was to be determined as prayed, then they would have been condemned unheard.
19. It therefore urged this court to dismiss the petition with costs to it and the 1<sup>st</sup> respondent as the 1<sup>st</sup> respondent fully complied with the provisions of the Constitution and Elections Act.

### **Legal Analysis**

20. In the case of Randu Nzai & 2 others vs the Secretary, Independent Electoral and Boundaries Commission & 9 others [ 2012] eKLR, the court therein held that any person could institute proceedings under article 22 of the Constitution of Kenya, 2010.
21. In the case of John Mining Temboi & Another vs Governor of Bungoma County & 17 others [2014] eKLR, Mabeya J observed thus:-

“ A literal interpretation of articles 22 and 258, in my view confers upon any person the right to bring an action in more than two (2) instances. Firstly, in the public interest, and secondly, where a breach of the Constitution is threatened in relation to a right or fundamental freedom.”
22. Further, article 258 of the Constitution of Kenya provides as follows:-
  1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or threatened with contravention.
  2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by:-
    - a. a person acting on behalf of another who cannot act in their own name;
    - b. a person acting as a member of, or in the interest of, a group or class of persons;
    - c. a person acting in the public interest; or
    - d. an association acting in the interest of one or more of its members.
23. In the case of Sabastian R Mwakumbaku & another v County Government of Taita Taveta & another [2016] eKLR, this very court arrived at the same conclusions as the courts in the cases of Randu Nzai



Ɖ 2 others v Secretary, Independent Electoral and Boundaries Commission Ɖ 9 others (*supra*) and John Mining Temboi Ɖ Another vs Governor of Bungoma County Ɖ 17 others (*supra*).

24. This court was therefore satisfied that the petitioner herein had the locus standi to institute the proceedings herein as she was alleging a contravention of a fundamental right of PWDs. The question of whether or not she had raised a constitutional issue was a different matter altogether. Whether this court was properly seized of this matter could only be answered by interrogating the several provisions in the Constitution of Kenya, 2010, the Elections Act No 24 of 2011 and the Election (Party Primaries and Party Lists) Regulations 2017.
25. In answering this question, this court first had due regard to article 177 of the Constitution of Kenya. The same provides as follows:-
1. A county assembly consists of—
    - a. 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;
    - b. 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;
    - c. the number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and
    - d. 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.
26. Article 90 of the Constitution of Kenya stipulates that:-
1. 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 article 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists.
  2. 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-
    - a. 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;
    - b. 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
    - c. except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.



3. The seats referred to in clause (1) 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.
27. Section 34 of the *Elections Act* No 24 of 2011 provides as follows:-
1. The election of members for the National Assembly, Senate and county assemblies for party list seats specified under articles 97(1)(c) and 98(1)(b)(c) and (d) and article 177(1)(b) and (c) of the *Constitution* shall be on the basis of proportional representation and in accordance with article 90 of the *Constitution*.
  2. Xx
  3. Xx
  4. A political party which nominates a candidate for election under article 177(1)(a) shall submit to the Commission a party list in accordance with article 177(1)(b) and (c) of the *Constitution*.
  5. The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.
  6. Xx
  7. The party lists submitted to the Commission shall be valid for the term of Parliament.
28. Under section 35 of the *Elections Act*, it is further provided that :-
- “apolitical party shall submit its party list to the Commission at least forty-five days before the date of the general election.”
29. Article 36(3) of the *Elections Act* stipulates that:-
- “The party list referred to under subsection (1)(f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.”
30. Article 36(8) of the *Constitution* provides that:-
- “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.”
31. Article 38(3) of the *Constitution of Kenya* provides that:-
- “Every adult citizen has the right, without unreasonable restrictionsto be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”
32. This court noted that the civic right relating to voting was also specifically stated in section 29 of the *Persons with Disabilities Act No 14 of 2003*. The said section 29 of the *Persons with Disabilities Act* provides as follows:-
- “All persons with disabilities shall be entitled at their request, to be assisted by persons of their choice in voting in presidential, parliamentary and civic elections.”
33. The following can be discerned from the aforesaid provisions of the law:-



- a. PWDs could not purport to discriminate against other groups of people as that would be in contravention of the Constitution;
  - b. The names in the party list were submitted to the 1<sup>st</sup> respondent by a political party forty five (45) days before the general election;
  - c. The order of the names was given to the 1<sup>st</sup> respondent by the political party;
  - d. Neither a person with disability nor the youth nor the marginalised group had a greater advantage than the other or was placed in a higher priority to the other in the party list;
  - e. The 1<sup>st</sup> respondent's role in party lists was to ensure that the party list comprised the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed;
  - f. The filling of the special seats was to be done after the results of the general elections had been announced.
  - g. The special seats allocated to political parties were in proportion to the total number of seats won by candidates of the political party at the general election;
34. Having looked at the Constitution of Kenya and the Persons with Disabilities Act, this court did not see any provision of the law that mandated the representation of two (2) PWDs in the County Assemblies as had been indicated in the letter dated September 12, 2017 that was addressed by Cyril Maghanga Disability Services Officer, Taita Taveta County to the Governor of Taita Taveta County and annexed in the petitioners notice of motion application.
35. If this was the case, then it would have contravened the provisions of article 27(4) of the Constitution of Kenya as it would have given PWDs a more special status in nomination to party lists and thus discriminate against other persons. Indeed, article 27(4) and (5) of the Constitution of Kenya states that:-
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
  5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
36. It was also evident from the aforesaid provisions of the law that nomination of PWDs was not to be done by the 1<sup>st</sup> respondent. It was the responsibility of political parties to furnish the 1<sup>st</sup> respondent with their party lists in order of priority which it had to verify that such lists had complied with article 90 and article 177 of the Constitution. The 1<sup>st</sup> respondent would then allocate the slots for the special seats which were determinant on the total number of seats won by candidates during a general election.
37. The petitioner did not disclose the party she belonged to in her petition. She did not also indicate the total number of seats that were won by her party so as to demonstrate that PWDs from her party were entitled to one (1) or two (2) special seats. What was evident in her petition was in Taita Taveta County, Orange Democratic Party and Jubilee Party nominated persons to represent the marginalised group while Social Democratic Party nominated a person to represent the youth.
38. The fact that other Counties had more PWDs nominated under the special seats did not mean that PWDs in Taita Taveta County were marginalised as allocation to special seats was proportionate to the number of seats the candidates in different parties had won. Appreciably, the 1<sup>st</sup> respondent was bound



by the order that was given in the party lists and it could not alter the order of the names. It could not interfere with the will of political parties.

39. It could only reject the list if the same was not in accordance with the provisions of article 177(1)(c) of the *Constitution of Kenya* that stipulates that the party list 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 marginalised group. The list must ensure that the list does not contain more than two thirds (2/3) of either gender as provided in article 81 (b) and (c) and article 100 of the *Constitution of Kenya*. The procedure for the rejection and re-submission of the party lists is well set out in Part II of the *Elections (Party Primaries and Party Lists) Regulations*.
40. As the 1<sup>st</sup> respondent rightly pointed out, the petitioner did not demonstrate that she approached it with a view to having the list amended and it neglected to do so or that the procedure prescribed in Elections (Party Primaries and Party Lists) Regulations was not complied with. She did not also demonstrate that she exhausted all the dispute resolution mechanisms stipulated in regulation 27 (1) of the *Elections (Party Primaries and Party Lists) Regulations* that provides as follows:-
- “Every political party shall establish an internal dispute resolution mechanism in relation to the party primaries and party lists.”
41. If she was dissatisfied by the resolution of the dispute through the internal dispute resolution mechanism, she could have approached the Political Parties Tribunal established under section 39 of the *Political Parties Act* No 11 of 2011 for resolution of any dispute before the 1<sup>st</sup> respondent gazetted the names in the party list. Section 40 of the *Political Parties Act* provides as follows:-
- “The Tribunal shall determine disputes between a member of a political party and a political party.”
42. In the absence of any proof that the petitioner raised issues relating to the party list, the 1<sup>st</sup> respondent could not be faulted for having acted as it had been directed by the political parties as regards the nomination of PWDs to the special seats of the 2<sup>nd</sup> respondent.
43. Having said so, this court noted that the petitioner did not appear to have had a problem with the party list that was published by the 1<sup>st</sup> respondent. Her concern was that it failed to nominate a PWD in the 2<sup>nd</sup> respondent herein. There was therefore need to establish which was the right forum for the petitioner to have lodged her complaint.
44. Appreciably, while the High Court has unlimited original to hear civil and criminal cases and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as provided in article 165 of the *Constitution of Kenya*, it cannot delve into matters where statute has given jurisdiction to other courts and/or tribunals.
45. Noteworthy, the moment the 1<sup>st</sup> respondent gazetted the names of the persons who had been listed in the party lists in order of priority, it became functus officio. The only recourse was for the petitioner to institute proceedings before an election court which in the case of members to the county assemblies ought to have been at the Resident Magistrate’s Court designated by the Chief Justice as stipulated in section 75(1)(a) of the *Elections Act*. The proper court that should have heard this matter was therefore the Magistrate’s court at Voi.



46. In arriving at the said conclusion, this court was guided by holding in the case of *Moses Mwigigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] where the Supreme Court observed as follows:-

“...This position has been aptly remarked in the case of National Gender and Equality Commission, where the High Court thus observed (paragraph 50):

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

47. Having considered the petitioner’s petition, her written submissions and those of the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, this court came to the firm conclusion that the 1<sup>st</sup> respondent did not err in nominating persons to the special seats in the manner that it did. In any event, even if she had succeeded in demonstrating that it had not done so, the proper court ought to have been the Magistrate’s Court which is mandated by law to hear and determine election petitions relating to members of the county assemblies.

48. This was not a matter where there was a breach of the *Constitution of Kenya* or a threat in relation to a right or fundamental freedom that could have brought this matter within the ambit of the High Court for determination. It was a dispute relating to a party list that was governed by the provisions of article 177 of the *Constitution of Kenya*, the *Elections Act* and the *Elections (Party Primaries and Party List) Regulations*.

49. Where mechanisms to resolve a dispute have been set out by the *Constitution of Kenya*, the High Court must tread very cautiously not to assume jurisdiction in any matter just because the same touches on a provision in the said Constitution of Kenya. It must allow other courts and tribunal to hear and determine matters that the have been mandated by statute to deal.

50. This court empathised with the petitioner and the interested parties because if their party had more than (1) slot, of which they did not disclose which party they belonged to, then that party could have



at least given a submitted the name of a PWD high in the party list which would have given the 1<sup>st</sup> respondent to pick the same.

51. Indeed, whereas the right to be allocated a special seat was not constitutional in nature as it was determined by the ranking of a nominee in a party list and was proportional to the seats won by candidates of a political party, political parties would have walked the talk by submitting names of PWD nominees ranked high in the party list. Indeed, the lower the rank of a name of a PWD in a party list, the less the chance of a special seat being allocated to a PWD.
52. Indeed, PWDs have their own unique needs and only they know where the shoe pinches. There was therefore need for political parties to seriously consider PWDs as critical members in the County Assemblies, National Assembly and Senate as a matter of urgency for the realisation of their civic rights. This is a right that can and should be realised immediately as it does not require any financial implication in its realisation.
53. This court, however, wishes to emphasise and clarify that as special seats are allocated proportionally to the number of seats won by candidates of a political party, it cannot be said that if a PWD is not allocated a special seat following submission of a party list, then his or her right has been infringed upon because the party lists are submitted to the 1<sup>st</sup> respondent in order of priority of the political parties. PWDs must therefore lobby to be ranked high up in the party list so as to make it in the county assemblies, National Assembly and Senate.
54. For the reason that the submission of the names in the party lists was a function of political parties, the petitioner could not dictate to the 1<sup>st</sup> respondent who should have been allocated a special seat in the 2<sup>nd</sup> respondent as she had sought in her prayer for the reason that the 1<sup>st</sup> respondent picks the names in the order it has been given by a political party.
55. Finally, the petitioner herein is hereby reminded that persons who might be affected by orders must be made parties in to her suits. This is because firstly, such persons cannot be condemned unheard and secondly, courts cannot issue orders against persons who are not parties to a suit as this would be giving orders in vain.

### **Disposition**

56. In the premises foregoing, the upshot of this court's Judgement was that the petitioners' petition that was dated October 13, 2017 and filed on October 17, 2017 was not merited and the same is hereby dismissed.
57. In view of the nature of the matter herein, it is hereby directed that each party shall bear its own costs.
58. It is so ordered.

**DATED AND DELIVERED AT VOI THIS 6<sup>TH</sup> DAY OF MARCH, 2018**

**J. KAMAU**  
**JUDGE**

