



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 409 OF 2017

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 90,35 (1) (B) AND 38 (1) OF THE CONSTITUTION OF KENYA,
2010**

AND

IN THE MATTER OF CONTRAVENTION OF REGULATION 54 (8) OF THE ELECTIONS (GENERAL) REGULATION 2012

AND

**IN THE MATTER OF CREATION AND PUBLICATION OF PARTY LISTS FOR SPECIAL SEATS AND ALLOCATION OF
SUCH SEATS TO POLITICAL PARTIES**

BETWEEN

NATIONAL GENDER AND

EQUALITY COMMISSION (NGEC).....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....RESPONDENT

AND

CENTRE FOR RIGHTS EDUCATION

AND AWARENESS (CREAW).....1STINTERESTED PARTY

CRAWN TRUST.....2NDINTERESTED PARTY

UNITED DISABLED PERSONS OF KENYA.....3RDINTERESTED PARTY

JUDGMENT

The Parties

1. The Petitioner is a constitutional Commission established under Article 59 (4) of the Constitution and Section 3 (1) of the National Gender and Equality Commission Act. [1] Its mandate includes promoting gender equality and freedom from discrimination and to monitor, facilitate

and advise on the integration of principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulation in all public and private institutions for all its target groups including women, youth, persons with disabilities, the elderly, minorities and marginalized groups. It brings this Petition in Public interest.

2. The Respondent is the **Independent Electoral & Boundaries Commission (IEBC)** a constitutional Commission established under Article **88 (1)** of the Constitution. It is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament which includes the regulation of process by which parties nominate candidates for election.[\[2\]](#)

3. The first Interested Party is **Centre for Rights Education and Awareness (CREAW)**, a non-governmental Organization championing women rights in Kenya including leadership and governance.

4. The second Interested Party is **CRAWN Trust**. It engages in social justice initiatives and empowerment of socially excluded members of the society, particularly women and the youth with traditional focus on marginalized parts of Kenya.

5. The third Interested Party is **United Disabled Persons of Kenya**, a federation of organizations for persons with disabilities in Kenya. Its mandate is to advocate for the rights of persons with disabilities in all spheres of life.

The Petitioners' case

6. The Petitioner avers that prior to the 2017 general elections, **56** political Parties, as required by law, submitted their party lists to IEBC by **24th** June 2017, but upon scrutiny, IEBC found that all the party lists did not comply with the Constitution or the election Regulations because of:-

- a. Failure to alternate men and women as the law require;
- b. Submitting incomplete lists;
- c. Lack of documentary proof of age for the youth and persons with disability;
- d. Failure to upload photos of nominees and submit the same in hard copies;
- e. Amendment of party lists outside IEBC remarks, including deletion of names initially submitted and reorganization of names of nominees to alter priority;
- f. Erroneous prioritization of members of dominant tribes and ethnic communities into persons with disabilities party lists in counties and exclusion of minority and ethnic communities.
- g. Failure to alternate candidates of the male and female gender in the persons with disabilities lists with men being given priority in majority of lists;
- h. Failure to prioritize persons with disabilities in lists for marginalized groups.

7. The Petitioner also averred that by a notice published in newspapers on Friday the **21st** July 2017, IEBC and the Political Parties Disputes Tribunal (PPDT) advised aggrieved persons to lodge complaints arising from the "final" Party lists with the IEBC Dispute Resolution Committee and the PPDT between Friday **21st** July 2017 to Sunday the **23rd** July 2017. It avers that the said complaints were to be heard from **21st** July to the **28th** July 2017. The Petitioner states that no Party lists had been published whether in newspapers or on IEBC's websites at the time. Further, the Petitioner avers that it notified IEBC that the notice did not comply with the law because:-

- a. The notice did not indicate the date the party lists was published;
- b. The notice gave aggrieved parties only two days to file complaints which fell on a week-end, yet all the complaints were to be filed in Nairobi by the special groups across the country even though some had mobility challenges;
- c. That the time line of **21st** to **28th** July was less than ten days provided in law.
- d. That there was no list in existence at the time the political parties, candidates, special interest groups and the general public could refer to.

8. Further, the Petitioner avers that IEBC uploaded the re-submitted and non-compliant raw party lists on its website, which list was replicated in news papers, and that the website publication did not comply with the party lists Rules and Regulations. Hence, the Petitioner avers that Kenyans were disenfranchised because:- "Many Kenyans could not freely access the published list from the newspapers because **23rd** July 2017 was not a working day; and the website upload was not easily accessible to many Kenyans due low ICT illiteracy and connectivity challenges; further, the online documents were bulky and difficult to read.

9. The Petitioner further states that IEBC published the same list in the Nation Newspapers and the Standard Newspaper on Sunday the **23rd** July 2017, which list he Petitioner states was not the final list because:-

i. The Political Parties Dispute Tribunal (PPDT) handled over 700 complaints, out of which 169 arose from party lists, yet IEBC failed to update party lists to incorporate the outcome of those complaints lodged with IEBC and PPDT since the outcome of the complaints atomically changed the contents of the lists, hence the said list cannot be said to be final;

ii. That the re-submitted party list still flouted the law in that it contained discrepancies in that IEBC did not state what it did after finding that the list flouted the law, and that there were allegations that IEBC altered the party lists by changing the priority of names, hence the final list contemplated by the law was never published.

10. The Petitioner further avers that IEBC violated the law by Gazetting the Party List Guidelines published in Gazette Notice Number **5735**. Further, the Petitioner avers that by failing to issue guidelines that parties must follow when making party lists, **IEBC** left it to political parties to make their own rules. In particular the Petitioner avers that:-

i. IEBC failed to prescribe the actual pre-qualifications that a candidate should have before he can be regarded as a member of a special interest group to be put on a party list;

ii. Failed to provide rules governing priority to be observed by parties in drawing up party lists;

iii. Failed to provide the manner of ensuring ethnic balance reflecting diversity of the people of Kenya;

iv. Failed to include the requirement for ethnic balance in the case of party lists for county assembly lists.

11. The Petitioner also avers that despite raising the above concerns, IEBC failed to address them. Further, the Petitioner also avers that the allocation formula was illegal, and that by the time the elections were held, the final list was yet to be published. It avers that following the declaration of the 2017 election results, IEBC illegally published Gazette Notice No. **8379** of **25th** August 2017 purportedly allocating special seats in the National Assembly and the Senate. The Petitioner avers that on **28th** August 2017, IEBC published Gazette Notice Number **8380** purportedly allocating special seats in County assemblies throughout the country based on the raw, non-compliant initial party lists. The Petitioner alleges that the entire process was contrary to constitutional tenets of transparent and verifiable electoral process because:-

i. Gazette Notice No. **8479**, IEBC failed to publish guidelines for to Political Parties. As a consequence parties had the discretion of picking unsuitable candidates;

ii. Absence of verification of party lists. As a consequence, IEBC Gazetted persons who did not belong to the special interest groups.

iii. Non publication of priority guidelines to be used by parties;

iv. Arbitrary and illegal alteration of party lists such as changing persons from top of the list and substituting with others.

v. As for Gazette Notice Number **8380**, seats were allocated without verifying the voter registration status.

vi. Failing to Gazette any person with disabilities in **18** counties listed in Paragraph **51 (b)** of the amended Petition. As a consequence, persons with disabilities will not be represented in the said counties.

vii. Section **7 (1)** of the County Governments Act envisions each County government to have **6** nominated members for the marginalized groups, yet IEBC assigned **4** marginalized seats in each County and that **2** seats are unfilled or unaccounted for in all **47** counties while cases of double allocation were noted in some counties, violation of the **2/3** gender rule in some counties, non implementation of orders issues by the PPDT and breach of Section **7 (2)** of the County Governments Act.

12. The Petitioner also avers that IEBC misused its powers under Article **90** of the Constitution by assisting powerful politicians to reward undeserving persons, and by un lawfully arrogating to itself the mandate of choosing or selecting leaders to sit in Parliament and County Assemblies under the guise of allocating seats to special interest groups. The Petitioner also avers that IEBC violated Articles **10, 88 (5), 90, 249 (1) and (2), 81, 2 (2), 10 (1) & (2) (c)**, and **177** and Section **36 (3), (4)** of the Elections Act^[3] and Regulation **54 (8)** of the Elections (General) Regulations, and hence infringed the sovereign right of Kenyans. As a consequence of the foregoing, the Petitioner seeks the following reliefs from this court:-

i. A declaration be issued that the election of special seat members to county assemblies under Article **177 (1) (b) & (c)** as read with Article **90** of the Constitution must conform to the constitutional principles of ethnic inclusivity and protection of ethnic minorities and marginalized groups, pursuant to Article **56** and **100** of the Constitution.

ii. A declaration be issued that the election of special seat members to county assemblies under Article **177 (1) (b) & (c)** as read with Article **90** of the Constitution is subject to the same priority rules applicable in the election of special seat members to the Senate as set out in Article **98 (1) (c) and (d)** of the Constitution, in line with the broad and purposive principle of constitutional interpretation, as read with Section **36 (3)** of the Elections Act.

iii. A declaration be issued that the lists published by the Independent Electoral and Boundaries Commission (IEBC) in the Nation Newspaper and the Standard Newspaper on Sunday the **23rd** July 2017 is not the final party list contemplated by regulation **54 (8)** of the Elections (General) Regulations 2012.

iv. A declaration be issued that the Independent Electoral and Boundaries Commission (IEBC) is legally obligated to reject an incomplete party list that does not comply with Article **90 (2) (a)** of the Constitution as read section **34 (6)** of the Elections Act, and Regulations **55 (3A)** of the Elections (General) Regulations.

v. A declaration be issued that the Independent Electoral and Boundaries Commission (IEBC) failed to steadfastly supervise the entire elections for special seats reserved for special interest groups, in violation of its mandate under Article **90 (2)** of the Constitution.

vi. A declaration be issued that the Submission of Party Lists Guidelines published in the Kenya Gazette Notice No. 5735 published on 12th June 2017 by the Independent Electoral and Boundaries Commission (IEBC) violates substantive constitutional and statutory provisions therefore is unconstitutional and illegal, hence null and void.

vii. A declaration be issued that the Gazette Notice No. 8379 published on 25th August 2017 and Gazette Notice No. 8380 published on 28th August 2017 purporting to allocate special seats in the National Assembly, Senate and all county assemblies in Kenya pursuant to Article 90 (3) as read with Article 97 (1) (c), 98 (1) (c) and (d) violates Articles 81 and 90 of the Constitution therefore is unconstitutional, illegal, null and void, and that they be quashed in their entirety.

viii. A declaratory order be issued that the purported allocation of **ALL** the Special Seats contemplated by Article 90 of the Constitution whether in the Senate, National Assembly, and the County Assemblies in **ALL** the 47 counties in Kenya was based on party lists that are unconstitutional, therefore Gazette Notices No. 8379 and 8380 have been derived therefrom are by themselves illegal, therefore null and void.

ix. An order be issued quashing the past, continuing and or future swearing in of **ALL nominees to the special seats** contemplated by Article 90 of the Constitution whether in the National Assembly, Senate and all County Assemblies throughout Kenya that are based on Gazette Notices No. 8379 and 8380 since published based on the Results of General Elections conducted on 8th August 2017 with immediate effect.

x. Alternative to (ix) above, an order be issued suspending the continuing and or future swearing in those County Assemblies throughout Kenya that are yet to swear in **nominees to special seats** contemplated by Article 90 of the Constitution that are based on the Gazette Notices No. 8379 and 8380 since published on the Results of General Elections conducted on 8th August 2017 with immediate effect.

xi. An order of Mandamus be issued directed to the Independent Electoral and Boundaries Commission (IEBC) to compel them to publish ANEW in the Kenya Gazette only those final party lists that legally compliant, including the names of successful complainants who had lodged complaints before the IEBC Dispute Resolution Committee and the Political Parties Dispute Tribunal, and excluding the rejected party lists; together with the allocation formula to be used to allocate special seats in the Senate, National Assembly and all County Assemblies under Article 90 of the Constitution within three (3) days of this Order.

xii. An order of Mandamus or a mandatory injunction be issued directed to the Independent Electoral and Boundaries Commission (IEBC) to compel it to publish only those legally compliant Final Party Lists for special seats regulated by Article 90 of the Constitution, and the allocation formula to be applied thereto, before the date of **each** future General Election in accordance with the law in force by that time.

xiii. The costs of this Petition be awarded to the Petitioner.

Respondents' Response to the Petition

13. **Salome Oyugi**, the Respondents' Political Parties and Campaign Financing swore the Replying Affidavit dated **18th** September 2017. She avers that IEBC's mandate stems from Article **90 (2)** and **97** of the Constitution which grants it power to allocate seats to political parties in proportion to the total number of seats won by candidates of the Political Party at the general election. Further, she averred that IEBC issued legal notice number **69** to provide for all issues regarding the nominated seats. She further averred that pursuant to Article **90** of the Constitution, all Political Parties submitted their party lists to IEBC on **24th** June 2017 for allocation of special seats on the basis of proportional representation for the August **8th** 2017 General Election.

14. **M/s. Oyugi** further averred that guided by Section **36** of the Elections Act, [4] IEBC reviewed the list for compliance and parties were thereafter required to amend the lists in compliance with the applicable law and guidelines. She also averred that the final party lists were received on **19th** July 2017 and published in the dailies on **23rd** July 2017 and uploaded at the Commissions' website. She deposed that **IEBC** substantially complied with the law and the issues of double allocation were resolved through a corrigenda.

15. She further averred that aggrieved parties filed their complaints with the IEBC Dispute Resolution Committee and the PPDT and that the disputes were heard and determined between **21st** July and **28th** July 2017. Further, she averred that those who obtained orders resubmitted amended lists as per the court orders. Also, she averred that the public were advised that the final party list to be used stood as published on **23rd** July 2017 except for changes effected pursuant to court orders.

16. She also averred that the allocation of seats was as per formula provided under Regulation **56 (2)** of the Election (General) Regulation, 2012, which is the number of seats won by a Political Party divided by the total number of seats multiplied by available seats for allocation in the respective houses. Further, she averred that Article **90 (2) (a)** of the Constitution does not provide the minimum number a party is required to submit, but only provides for a list of persons qualified under the law, therefore liberty is left to the Political parties to provide a list of names within their abilities.

17. She also averred that Article **90 (2) (c)** of the Constitution deals specifically with party lists and excludes the need for County Assemblies to reflect regional and ethnic diversity. Hence, she stated, party lists in County Assemblies need not reflect regional and ethnic diversity. She added that Section 7 of the County Government Act^[5] was amended to conform with Article **100 (2) (c)** of the Constitution, hence the requirement for community and cultural diversity in the County Assembly was excluded. Further, she averred that names with no sufficient details were rejected. She also stated that the nomination is a party affair and the parties have a duty to follow the guidelines and as long as the Party follows the law and guidelines, the Constitution allows Political Parties with representation in assemblies to nominate persons for the special seats on proportionate basis.

18. **M/s. Oyugi** also averred that IEBC Gazetted the actual formula it came up with and forwarded and publicized it to all Political Parties and stakeholders including the Petitioner. She also stated that the constitution does not make provision as to who takes priority between the youth and people with disabilities in the County assembly. She also stated that the Petitioner did not table evidence that any one got into the list through corruption.

19. As for the National Assembly, she averred that IEBC ensured that there were workers, people with disabilities, ethnic minority and gender and that it was not its duty to dig into details to establish whose girlfriend was in the list. She averred that IEBC did all that it was legally required to do, hence the allegations of altering the list are untrue. Further, she averred that the orders sought herein are ill-advised and overtaken by events, that failure to issue Regulations cannot invalidate the list and that Section **34 (6B)** of the Elections Act^[6] is not couched in mandatory terms; and lastly, that the court should not issue orders affecting Political Parties who are not parties in these proceedings.

Affidavit of a one Thadayo Wadoya Masibo

20. On record is an the affidavit sworn by a one **Thadayo Wadoya Masibo**. He is not a party in this case nor did he apply to be enjoined. None of the Parties referred to his Affidavit nor did he seek to address the Court. He avers that he applied for nomination as Member of County Assembly representing people living with disability. In 2013 he was nominated by ODM party but IEBC replaced his name with a person who was not disabled. He states that in 2017 he was the only one from **Bungoma County** in special list in ODM Party. Further, on **23rd** July 2017, his name was listed in the marginalized group nominees to Bungoma County Assembly list in the Sunday Nation but in the final list that was submitted to Kenya Gazette his name had been excluded and that he learnt that the Party interfered with the original list.

21. As pointed out above, the above person is not a party in this Petition and his interest has not been demonstrated. I am unable to rely on this Affidavit. In any event, his allegations are against ODM Party and not IEBC. The Affidavit adds no value to this Petition.

Petitioners' Supplementary Affidavit

22. The Petitioner filed a supplementary Affidavit sworn by **Winfred Lichuma** on **9th** November 2017. She avers that the amended Petition challenges the legality and constitutionality of IEBC's allocation of all special seats in the National Assembly, the Senate and all the **47** County Assemblies throughout Kenya. She also averred that these proceedings affect more than 2,000 special seats, hence it would require more than **2,000** individual Petitions in many election court stations throughout Kenya with a risk of multiple divergent judicial determinations. She also averred that the Petitioner has brought this Petition in public interest on behalf of all members of special interest groups. Further, she averred that this Petition raises questions of constitutional, statutory and regulatory interpretations, and compliance thereof by IEBC before, during and after the **8th** August 2017 General Elections, hence the issues transcend any singular election petition.

23. She reiterated that IEBC failed in its obligations to ensure only final party lists were submitted and reject incomplete party lists and that under Section 37 of the Act, additional lists can only be submitted after the original list has been exhausted. Further, she averred that IEBC failed to compel political parties to amend their lists to comply with court orders, examples of which include complaint Nos. **425 of 2017, 427 of 2017, 428 of 2017, 527 of 2017 and 552 of 2017**. Further, she averred that IEBC Gazetted persons who are not residents or registered voters of Lamu as Lamu County as nominated MCA'S.

24. She also averred that Gazette notice No. **8752** of **6th** September 2017, which was a corrigenda amending Gazette Notice No. **8380** is illegal for offending Section **34 (10)** of the Elections Act^[7] which expressly prohibits amendment of Party lists during the term of the County Assembly for the elected candidates and that it did not meet the conditions for allocating seats under Section **37 (1)** of the Act and no final list existed as required under the law.

25. The Interested Parties did not file any affidavits, but they supported the Petitioners case and the submissions by the Petitioners' Advocate.

Issues for determination

26. From the above diametrically opposed facts presented by the parties, I find that the following issues distil themselves for determination:-

- a) Whether or not this Court has jurisdiction to hear and determine this Petition.
- b) Whether or not the reliefs sought are likely to affect persons who are not parties to this Petition.
- c) Whether IEBC failed in exercising its legal mandate of supervising the entire elections for the special interests group seats for the August **8th** 2017 general elections.
- d) Whether this Petition is was rendered moot after the nominations were Gazetted and the subsequent swearing in of the nominated persons.

Whether or not this Court has jurisdiction to hear and determine this Petition.

27. The Petitioners counsel submitted that this Petition raises a global challenge to the manner in which IEBC conducted the special seats elections under Article 90 of the Constitution. He invited this court to distinguish the decisions in *Moses Mwigigi & 14 Others vs IEBC & 5 Others*[8] and *Hassan Ali Joho vs Suleiman Said Shahbal & 2 Others*[9] where the Court held that the election courts are clothed with special jurisdiction derived from the constitution, Elections Act[10] and applicable regulations and that once form 38 is issued declaring a winner of an election, jurisdiction over the election outcome shifts to the election court.

28. Counsel drew a parallel in the holding in *Johnson Muthama vs Minister for Justice and Constitutional Affairs and Another* [11] where the court held that the Petition had been brought to protect the rights enshrined in the Constitution just like the present Petition. He also cited *National Gender and Equality Commission vs IEBC & Another*[12] and argued that the two cases were filed under similar circumstances as in the present case, namely, prior to the Gazettement of the election courts and gazette notices declaring any party list nominees as having been duly elected to any special seats.

29. Further, he cited *East African Railways vs Anthony Sefu*[13] where it was held that no statute shall be so construed as to oust or restrict the jurisdiction of the superior court in the absence of unambiguous language to that effect and that the Bill of Rights should not be watered down[14] and that no single provision of the constitution should be used to defeat the other. [15] He urged the court to adopt an interpretation that most favors the enforcement of rights[16] arguing that constitutional provisions concerned with the same subject must be construed together.[17]

30. He argued that the jurisdiction of this court flows from Articles 19, 20, 21, 22, 23, 165 (3) and 258 of the Constitution, hence, to hold that Rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules as ousting the jurisdiction of the court would be to deny and refuse expeditious, just and appropriate judicial remedy. He submitted that the constitutional issues raised herein can only be addressed by challenging the issues raised globally.

31. Further, he argued that this Petition affects all the 12 National Assembly nominees, 20 Senate nominees and over 2000 Country Assembly nominees, and that the determination of this Petition will affect ALL 56 Political Parties who submitted their party lists for special seats nominations and all their members, all of whom have stakes in the outcome of this case. He submitted that procedural rigidities of election petitions are a judicial impediment because no single petition can contain all the issues raised herein. Also, he argued that it would be impracticable and costly to file too many petitions, and that only this court can invalidate the Gazette notices pursuant to its vast jurisdiction. He submitted that no election Petition can conclusively address all the issues raised in this Petition because an election court is confined to the parties before it, hence, it cannot nullify the entire Gazette notice.

32. The Respondent's counsel did not address the question of jurisdiction in their submissions.

33. Jurisdiction is so fundamental that once the court's jurisdiction to hear a matter is challenged, or an issue touching on jurisdiction arises, it must be dealt with and resolved first before any other step in the proceedings. The law is that where the court lacks jurisdiction to entertain a cause or matter, the entire process, no matter how well conducted, is an exercise in futility, for the proceedings are a nullity ab initio.

34. The law is by now well settled that jurisdiction is the lifeblood of any adjudication and where it is lacking it would render any proceedings, no matter how well conducted, liable to be set aside for being a nullity.[18] It is also true that a Court's jurisdiction flows from either the Constitution or legislation or both, hence, 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. [19] Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[20]

35. On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court put it succinctly when it stated:-[21]

"Jurisdiction is determined on the basis of the pleadings,[22]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

36. Article 165 (3) (d) of the Constitution provides that the High Court shall have jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of- (i) The question whether any law is inconsistent with or in contravention of this Constitution; (ii) The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; (iii) Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the two levels of governments;

37. Article 87 (1) of the Constitution provides that "Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes." The Petitioners counsel placed heavy reliance and emphasis on the decision rendered in *National Gender and Equality Commission vs IEBC & Another*. [23] It is settled law that a case is only an authority for what it decides. The Supreme Court of India eloquently put it as follows:-[24]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it..., every judgment must be read as applicable to the

particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)

38. The ratio of any decision must be understood in the background of the facts of the particular case.^[25] It is also an established principle of law that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.^[26] The bottom line is that each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.^[27] Numerous leading decisions on the value or precedents have emphasized time without a number that in deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.^[28] Accordingly, to decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice.

39. It is common ground that the original Petition was filed on 21st August 2017. It is also common ground that the special seats were Gazetted on 25th August 2017 and 28th August 2017 respectively as having stood elected under Article 90 of the Constitution. There were no conservatory orders in place as at the time of the Gazettement. The effect of the Gazettement altered the entire legal landscape in this case. This development changed the facts and circumstances of this case, making it distinguishable from National Gender and Equality Commission vs IEBC & Another^[29] relied upon where the Gazettement had not been done. Also, in the case Johnstone Muthama cited above, the Petition challenged the constitutionality of some provisions of the Elections Act^[30] which is distinguishable from the facts of this case.

40. The nominated persons having been Gazetted four days or so after this Petition was filed, they became members of either the National Assembly, the Senate or the County Assemblies. From that moment, the dispute became an electoral dispute within the meaning of Article 87 of the Constitution. That being the case, the question that follows is whether the nominations can be challenged by way of this Petition? In other words was this case overtaken by events?

41. The law on this point in this country has been reiterated time without a number in a catena of authorities. The Supreme court of Kenya in the case of *Moses Mwicigi & 14 Others vs I.E.B.C & 5 Others*^[31] correctly captures the law on this point. The Apex court of Kenya pronounced itself as follows:-

"...It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettement of the nominees' names by the IEBC, as an integral part of the election process.

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

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

42. The Supreme Court pronounced itself with sufficient clarity in the above case. Upon being Gazetted, the dispute shifted to the election court. The Petitioner ought to have taken the cue and pursue the dispute in the appropriate forum. It is not sufficient to lament that the Gazettement was done during the pendency of the Petition, nor is it a valid ground to argue that the Petitioner would be required to file over two thousand Petitions. First, even in the elective seats, Petitions are usually filed across the country, heard and determined within six months. Secondly, a global Petition challenging all nominations in the country is totally inappropriate. Most of the complaints raised here are case specific as shown by some of the examples cited.

43. Counsel for the Petitioner did not attempt to distinguish the facts of this case with the above Supreme Court Decision in *Moses Mwicigi & 14 Others vs I.E.B.C & 5 Others*.^[32] Article 163 (7) of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court. Clearly, the above decision, coming from the Apex court in this country as it does, is binding to this court by dint of Article 163 (7) of the Constitution.^[33] The binding nature of the Supreme Court decisions under Article 163 (7) of the Constitution is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court^[34] and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.^[35]

44. It is beyond argument that, by dint of the above clear provisions of the Constitution, the Supreme Court decision cited above, the conclusion becomes irresistible that this Court lacks jurisdiction to entertain this Petition. On this ground alone, I find and hold that this Petition must fail.

a) Whether or not the reliefs sought are likely to affect persons who are not parties to this Petition.

45. A casual look at the reliefs sought in the amended Petition, particularly all the prayers in the amended Petition leave no doubt that if granted, they are bound to affect both the persons who were nominated and sworn into the various posts and the 56 Political Parties which prepared and submitted the lists to IEBC. More fundamental is the truth that such drastic orders if granted will divest the persons sworn their posts and the Parties which sponsored them. This raises a fundamental legal issue, that is whether or not a Court of law can issue final orders adversely affecting persons or bodies who are not before the court.

46. Serious allegations have been made against the Political Parties who are not before this court and this court is being invited to make orders affecting their rights. For example, Political Parties have been accused of submitting lists which did not comply with the law and

illegally rewarding cronies and girl friends with the nominations.

47. The Respondents' counsel submitted that this court should not issue orders affecting Political Parties who are not parties to this Petition. Counsel observed that though the Petitioner makes serious allegations of corruption and impropriety against the Political Parties, the Petitioner did not enjoin them in this Petition. He submitted that quashing the Gazette Notice affecting the removal of the nominated persons who have already been sworn into office goes against the most fundamental constitutional rule of fair hearing. [36]

48. No explanation was offered for not enjoining the Political Parties, yet disparaging allegations have been made against them. The explanation offered by the Petitioners' counsel for not enjoining the persons who were nominated and subsequently sworn in is that it would require over two thousand Petitions to be filed all over the country which he argued would be costly and could lead to differing judicial opinions. He argued that (i) the initial Petition was filed long before the special seats were Gazetted on 25th August 2017 and 28th August 2017 respectively as having stood elected under Article 90 of the Constitution; (ii) that the Petition was filed prior to Gazettement of the election courts on 15th September 2017; (iii) that the proceedings are challenging due observance of the values and principles enshrined in the Constitution, the Elections act and the Regulations, and in some instances failure to gazette prescribed number of nominees; (iv) that there is no challenge to specific identifiable nominee or seats to warrant an election petition; (v) a distinction must be drawn between an election Petition and a constitutional petition in that the 2 differ in many aspects such as the rules and available reliefs.

49. It cannot be disputed that invalidating the impugned Gazette Notices would inevitably lead to divesting all the Members of the National Assembly, the Senate and the County Assemblies who were nominated and sworn their respective positions. It is also common knowledge that the Political Parties play a central role in the allocation of the said seats, hence a determination that nullifies the entire process will be an indictment to them and it will directly affect them. The Petitioner states that 56 Political Parties submitted their lists for nominations. A challenge to the process leading to the preparation of the Party Lists by the Political Parties, or a challenge to the process leading to the allocation of the seats to the Political Parties and a challenge to the Gazette Notices in question is a direct attack on the role of the Political Parties.

50. It is common knowledge that the successful candidates, having been duly sworn and assumed their respective offices, certain rights have accrued in their favour and a determination that invalidates their nomination will deprive them their positions without giving them an opportunity of being heard or without being afforded a fair process or being afforded the right to contest the decision or to apply for various forms of relief from this court. Also, the Political Parties having gotten their slots depending on their numerical strength in the respective houses stand to lose the slots courtesy of the reliefs sought in this Petition in which they are not parties.

51. In my view, the Political Parties and the persons who were nominated, Gazetted and sworn to their respective positions and are now members of the various houses and they are necessary parties to these proceedings. They ought to have been enjoined in this Petition. Certain rights recognized by the law have already accrued to the Political Parties and the nominated persons. Accrued rights cannot be taken away [37] even by a judicial pronouncement without affording the affected persons the opportunity of being heard. Such a decision will have been arrived at in total breach of the rules of natural justice, and it would be unconstitutional and a mockery of justice.

52. Evidently, the orders sought in this petition, if granted, will affect the Political Parties and persons who are not parties to this case. To me, such a scenario poses a danger of granting orders affecting other persons without giving them the benefit of a hearing. The law in cases of this nature was settled by the Supreme Court of India in two celebrated cases [38] in which it held that if a person challenges a selection process, successful candidates or at least some of them are necessary parties. The principle that comes out in such cases is that a person or a body becomes a necessary party if he is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. The principle of *audi alteram partem* has its own sanctity. That apart, a person or a body must have a legal right or right in law to defend or assail.

53. I find it appropriate to refer to the principle of natural justice as enunciated by the Supreme Court of India in *Canara Bank vs. Debasis Das*. [39] I may profitably reproduce the same here below:-

“Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.”

54. And again:-

“Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance....”

55. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a

procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals. Perhaps I should add that the principles of natural justice are now entrenched in the Constitution.

56. Apart from the right to fair administrative action^[40] and the need for independence and impartiality, the right to a fair hearing under Article 50 (1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body.

57. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.^[41] Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.^[42]

58. The above passages state the basic principle behind the doctrine of natural justice, that is, no order should be passed behind the back of a person who is to be adversely affected by the order. A person challenging the selection process as far as the nominations or elections jurisprudence is concerned is bound to make the successful candidates parties.

59. The Supreme Court of India put it succinctly when it stated:-^[43]

“No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the... Code of Civil Procedure,... provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner-plaintiff....More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post...”

60. The decisions cited above are graphically clear that where a selection or a nomination process is under challenge, there can be no shadow of doubt that they are necessary parties. In my view, the first defect in this petition is that of non-joinder of necessary parties.^[44] Those who were vitally concerned, namely, the successful candidates and the Political Parties.^[45] A Court ought not to decide a case without the persons who would be vitally affected by its judgment being before it as respondents.

61. Rule 5 of The Constitution of Kenya (Protection on of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013^[46] provides that *“A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.”* I do not think that this rule can provide refuge in the clear circumstances of this case whereby it is clear the orders sought are directed at parties who are not before the court.

62. In view of my above analysis on the non-joinder of the Political Parties who admittedly play a central role in the nomination process and the successful candidates who have already assumed office, I find that the orders sought in the amended Petition seeking reliefs directly affecting persons who are not parties before the court would amount to condemning the persons to be likely affected without affording them the opportunity to be heard. The said prayers cannot issue.

c) Whether IEBC failed in its mandate of supervising the entire elections for the special interest group seats for the August 8th 2017 general elections.

63. The Petitioner prays for a declaration that IEBC failed to steadfastly supervise the entire elections for special seats reserved for special interest groups, in violation of its mandate under Article 90(2) of the Constitution. In this regard the Petitioners counsel submitted that IEBC having violated Article 90 of the Constitution, the violation rendered the allocation of all the seats illegal, null and void. He argued that IEBC failed to ensure the lists conformed with the Constitution, the Elections Act^[47] and Regulations; and that IEBC failed to publish final party lists and the formula before the general elections as mandatorily required.

64. He argued that having failed to observe the law, IEBC could not lawfully allocate the seats. He submitted that the constitution permits a limited and narrow administrative or facilitative role upon Political Parties and IEBC. He argued the role of Political Parties includes choosing from among its membership eligible candidates for the said seats in accordance with their internal party rules and determining order of priority in accordance with elections law and the regulations and submitting the party lists to IEBC.

65. He also argued that IEBC failed to give guidelines for formulating party lists and/or it prepared and published defective party list guidelines which fell short of constitutional and statutory standards. He submitted that the lists submitted by all the Political Parties suffered latent legal defects, hence they were illegal, null and void and that they were illegally published in the gazette notices. He also argued that the gravity of IEBS' failure to conduct and supervise special seats elections in accordance with Article 90 of the Constitution vitiates the legality and constitutionality of the entire allocation of the special seats in the National Assembly, the Senate and County Assemblies. Consequently, he urged the court to find that the allocation of ALL the special seats in the Senate, the National Assembly and County Assemblies after the 8th August General Elections was illegal, null and void.

66. Counsel for IEBC submitted that the IEBC guided by the provisions of Section 36 of the Elections Act^[48] reviewed the lists submitted by the various political parties for compliance, and that the Political Parties whose list did not meet the statutory and constitutional threshold, were there after required to amend their lists in compliance with the applicable laws and guidelines. He argued that the final party lists which were compliant with the law were received by the Respondent on 19th July 2017 and published in the dailies on 23rd July 2017, and uploaded on the commissions website.

67. Counsel also submitted that any person who was aggrieved by the published final party list filed disputes before the IEBC's Dispute Resolution Committee and the Political Parties Dispute Resolution Tribunal. He submitted that the disputes were heard and determined between 21st July and 28th July 2017 and the Political Parties seized with court orders re-submitted their amended lists as per the court orders, hence, the final list stood as published on 23rd July 2017 except for changes effected pursuant to orders from the IEBC's Dispute Resolution Committee and or the Political parties Dispute tribunal. He further submitted that IEBC pursuant to Article 90 and Section 34 (6B) by a Gazette Notice, issued Regulations prescribing guidelines to be complied with in the preparation of party lists, and published the Elections (Party Primaries and Party Lists) Regulations, 2017 submission of Party Lists through the Gazette Notice No. 5735 dated 12th June 2017.

68. Further, he submitted that nomination of members to party list seats is an internal Political Party affair and has been intended to be guided by the nomination rules of the Political Parties. He also argued that Article 90 (2) of the Constitution is clear that it is the duty of Political Parties participating in the general election to prepare and submit party lists. He submitted that Regulation 88 (1) of the Election (General) Regulations, 2012 (the General Regulations) provides that party lists shall be prepared in accordance with the nomination rules of political parties. Counsel submitted this position was reiterated in National Gender and Equality Commission vs IEBC & Another, ^[49] and Moses Mwigigi & 14 Others vs Independent Electoral and Boundaries & 5 Others.^[50]

69. Counsel submitted that in submitting the Elections (Party Primaries and Party Lists) Regulations, 2017, submission of Party Lists, IEBC performed its constitutional and statutory role. He also submitted that the language used in section 34 (6B) of the act is not mandatory, hence, failure to issue the guidelines does not render the process a nullity.

70. At this juncture I turn to the relevant provisions of the law. Article 90 of the constitution provides 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 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.

71. The Elections Act,^[51] defines “party list” means a party list prepared by a political party and submitted to the Commission pursuant to and in accordance with Article 90 of the Constitution and sections 28, 34, 35, 36 and 37 of the Act.

72. Section 34 of the Elections Act^[52] provides that:-

(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) A political party which nominates a candidate for election under Article 97(1)(a) and (b) shall submit to the Commission a party list in accordance with Article 97(1)(c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98(1)(a) shall submit to the Commission a party list in accordance with Article 98(1)(b) and (c) of the Constitution

(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) 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.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

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

(9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.

(10) A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case may be, for which the candidates are elected.

73. Also relevant is section 35 and 36 of the Act which provides that:-

35. (1) A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Articles 97(1)(a) and (b), 98(1)(a) and 177(1)(a) of the Constitution.

74. Section 36 on Allocation of special seats provides that:-

(1) A party list submitted by a political party under—

(a) Article 97(1)(c) of the Constitution shall include twelve candidates;

(b) Article 98(1)(b) of the Constitution shall include sixteen candidates;

(c) Article 98(1)(c) of the Constitution shall include two candidates;

(d) Article 98(1)(d) of the Constitution shall include two candidates;

(e) Article 177(1)(b) of the Constitution shall include a list of the number of candidates reflecting the number of wards in the county;

(f) Article 177(1)(c) of the Constitution shall include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be person representing a marginalized group

(2) A party list submitted under subsection (1)(a), (c), (d), (e) and (f) shall contain alternates between male and female candidates in the priority in which they are listed.

(3) 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.

(4) 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.

(5) The allocation of seats by the Commission under Article 97(1)(c) of the Constitution will be proportional to the number of seats won by the party under Article 97(1)(a) and (b) of the Constitution.

(6) The allocation of seats by the Commission under Article 98(1)(b), (c) and (d) of the Constitution shall be proportional to the number of seats won by the party under Article 98(1)(a) of the Constitution.

(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.

75. From the above provisions, one conclusion becomes irresistible, namely the Political Parties play a central role in the Preparation of Party lists. This role was appreciated by the court in the case of National Gender and Equality Commission vs IEBC & Another, [53] which Petitioner heavily relied on, but with respect, selectively cited paragraphs which are favorable to their arguments. At paragraph 45 of the judgment, the court stated "...how the election of persons on the list is carried out is a matter entirely within the mandate of the respective political parties. It is for this reason that regulation 55 (1) of the General Regulations provides that, "The party list contemplated under regulation 54 {the lists under Article 90 (1) of the Constitution} shall be prepared in accordance with the rules of the political party." Furthermore, paragraph 19 of the Second Schedule to the Political Parties Act (Act No. 11 of 2011) requires every party to have, "nomination

rules and regulation with respect to elections of the party and rules governing the preparation of party lists."

76. A similar position was stated by the Supreme Court in the case of Moses Mwicigi & 14 Others vs Independent Electoral and Boundaries & 5 Others^[54] also cited earlier (and which the Petitioner invited us to distinguish with this case) in which the court held that:-

[95] 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.

[96] 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 political party, IEBC has power to reject the party list, and to require the omission to be rectified, by submitting a fresh list or by amending the list already submitted."

77. The above decision summarizes the correct legal position on the role of Political Parties in preparing Party lists. The role and mandate of IEBC is to ensure that the party lists comply with the law.

78. The Petitioners counsel also argued that IEBC failed to prescribe legally compliant party lists guidelines published in Gazette Notice No. **15735** of **12th** June 2017. Further, he argued, IEBC issued substantially deficient and defective party lists guidelines which did not meet the requirements of Section **36** of the Elections Act,^[55] hence it abdicated its mandate which led to unchecked abuse by the Political Parties. He submitted that in absence of proper guidelines, Political Parties chose their cronies in a shambolic and corrupt exercise. Counsel argued that IEBC had an obligation to prescribe clear guidelines, and flouted the guidelines by admitting persons who were not people with disabilities.

79. He submitted that IEBC failed to publish guidelines to ensure that the legal requirement for regional and ethnic inclusivity is observed and failure to require priority listing in all party lists. Further, he argued that the guidelines did not meet the minimum legal requirements. He also submitted that IEBC failed to reject incomplete party lists for non compliance with the law and allowed addition of names outside the time frames. Counsel also argued that IEBC failed to ensure the lists alternated men and women to accord Section **36 (2)** of the Elections Act.^[56]

80. Counsel for IEBC submitted that the Regulations met the legal threshold as required by Section **36** of the Elections Act^[57] and laid down the general requirements to be met in the preparation of the party lists by the Political Parties. In particular, he argued, IEBC urged the Political Parties to comply with the Constitution and statutory provisions and also encouraged Political Parties to ensure that they meet the gender requirement by ensuring the order of nominees in the party list to alternate between women and male, one woman and one man for the Senate and where the list did not comply, the Political Party was sent back to amend and comply, and upon receiving the list and being satisfied it conformed to the law, IEBC proceeded to Gazette the lists.

81. He also submitted that in compliance with Section **27** of the Elections Act,^[58] IEBC published Legislative Supplement No. **28**, Legal Notice No. **69** being the Elections (Party Primaries And Party Lists) Regulations, 2017. Also, he argued that IEBC has a limited role in the development of Party lists for seats contemplated under Articles **97(1),(b),98 (1)(b),(c)** and **(d)** of the Constitution which falls within the prerogative of the political parties.

82. I have carefully examined the Gazette Notice number **5735** of **12th** June 2017 annexed to the Petitioners original Petition. It prescribes the general and specific requirements for Party Lists, the nomination procedures for the various seats and prescribes the formula for allocation of the seats. Having read the entire document, I find no merit in the spirited attacks on the said Gazette Notice propounded by the Petitioner. IEBC is not supposed to micro-manage the process or enter into the internal affairs of the Political Parties. Where the Political Parties fail to comply with the regulations in the nomination processes, the aggrieved Party has recourse in the PPDT. More fundamental is my finding that the Petitioner has failed to prove any blame on the Part of IEBC as far as the contents of the said Gazette notice is concerned and if there were failures in the nomination process, the Petitioner carefully omitted to include the Political Parties in these proceedings, hence, as held earlier, the orders sought cannot issue orders against Parties who are strangers to this case.

83. The Petitioners' counsel argued that the Political Parties failed to submit prove of age for their youth nominees, hence their lists were ineligible and further, the party lists which did not contain photographs did not satisfy Regulation **54 (2)**. Also counsel argued that IEBC failed to reject lists that did not prioritize People with Disabilities as provided under Section **36 (3)** of the Act.

84. Counsel for the Respondent submitted that the Regulations were clear that a youth must be a person who has attained **18** years and below **35** years, and where documentary prove was not provided, parties were invited to provide. As for people with disabilities for the county Assemblies, counsel submitted that the constitution's view is equality and does not make provision on who takes priority.

85. It is my view that if at all any person was illegally nominated as a nominee for 'youth or as a person with disability' that particular nomination ought to have been challenged by way of a Petition but not a global challenge as in this Petition seeking to make a global determination which as stated earlier will affect persons who are not before this court.

86. I also find merit in the submission by the Respondents' counsel on the alleged failure to issue guidelines to ensure only eligible members of special interest groups are included in the party lists, where he cited Micah Kigen 2 Others vs . A.G. & 2 Others^[59] where the court observed that the nature and extent of what constitutes special interests is to be defined by the party nominating the candidates in this respect and the submission that ethnic and regional balance does not apply to county assembly seats.^[60]

87. Counsel for the Petitioner argued that IEBC failed to publish the final list as contemplated under Regulation **54 (8)**, and or it published incomplete lists. Counsel argued that the Party lists were not final in so far as they did not comply with court orders issued by the PPDT and the IEBC Dispute Resolution Committee.

88. Responding to this argument, the Petitioners counsel submitted that that Political Parties are required to submit their party list to the Commission at least 45 days before the date of the general election and upon receipt of the party lists, IEBC is to publish the final party list. Counsel submitted that all Political Parties submitted their party lists to the Commission on 24th June 2017 for the allocation of special seats on the basis of proportional representation for the August 8th 2017 General Election. He also submitted that, IEBC reviewed the lists for compliance and required parties to amend their lists in compliance with the law, and that the final lists were received by 19th July 2017, published in the dailies on 23rd July 2017 and uploaded on the Commissions' Website. He submitted that the Commission notified the Public that the final party lists to be used for the allocation of special seats to the National and County Assemblies stood as published on 23rd July 2017 except for changes effected by the parties pursuant to orders from the IEBC Dispute Resolution Committee or the Political Parties Dispute Tribunal. Thus, aggrieved persons filed their disputes in the said forums and lists were amended as appropriate to comply with the court orders. He added that IEBC published the final lists on 23rd July 2017.

89. The allegation that IEBC defied some orders from the PPDT and failed to update the party lists to accord to the Court orders is jurisprudentially unsustainable. This is because from the copies of the orders or ruling annexed to the supplementary affidavit of Winfred Lichuma, it is clear that in all the cases relied upon, only the Political Parties were sued and IEBC was not a party in the said cases. It is an elementary point of law that court decisions only bind the parties before the Court. But more pertinent is the fact there is absolutely no evidence that IEBC was served with the said orders. The logical position is that the Political Party concerned after losing the case was required to forward an amended list to IEBC. This has not been shown to have been done. Worse still, the Petitioner opted not to enjoin the Political Parties in this case, and expects the court to make a determination against the IEBC based on allegations directed at parties who are absent from the court.

90. The Petitioners counsel also argued that IEBC illegally allocated special seats for People with disabilities to ineligible persons, eg in Lamu County; that it failed to allocate seats for no reasons in 17 counties; that it allocated more than one seat to one person eg Migori and Nairobi Counties, that there was under-allocation of seats, that it over allocated gender top up seats; that it violated two thirds gender rule in 8 counties; that it failed to allocate gender top up list to some parties eg NARC Kenya; that it irregularly allocated special seats to unregistered voters such as in Lamu County; that it published an illegal corrigenda contrary to section 34 (1) of the Elections Act, [61] and that it disenfranchised nominated members of County Assemblies initially Gazetted in Gazette No. 8380 a violation of their rights under Article 38 (3) (c) to hold office without a hearing.

91. Counsel submitted that the court has jurisdiction to nullify the gazette notices published pursuant to Article 90. Citing Morgan & Others vs Simpson & Another [62] and Ben Njoroge vs IEBC & 2 Others [63] argued that the gazette notices did not reflect the will of the people and argued that the societal goals to embrace and promote the welfare of vulnerable and special interest groups is under attack and submitted that the court has a duty to protect societal goals. [64]

92. Counsel for IEBC On the question of supervision of the preparation of party lists, citing Article 90 (2) of the Constitution submitted that IEBC carried out its mandate, it published guidelines and issued Regulations, and where the lists did not comply, the Political Parties were invited to amend the lists in compliance with the lists and in any event as the court held in Linet Kemunto Nyakeriga & Another vs Ben Njoroge & 2 Others [65] after a careful analysis of the mandate of IEBC under Article 88 (4) of the Constitution, the said provision does not in any way give IEBC mandate to participate in the actual nomination, in view of the fact that under Article 88 (e) it would be the arbiter in the event of any dispute arising from nomination exercise.

93. On the alleged illegal allocation of seats, counsel submitted that the allocation was on the basis of lists supplied by the Political Parties. Further, the alleged allocation of more than one seats to one person, was caused by clerical errors which were rectified and amended through a Gazette notice and further in allocating the special seats under Article 177 (1) (c), IEBC relied on the provisions of Section 36 (8) of the Act and that the alleged over allocation and under allocation was corrected through Gazette Notice Number 8752 of 6th September 2017.

94. Further, on the 2/3 gender rule, counsel submitted that the same does not translate to 50-50, but in some counties like Isiolo and Vihiga, the allocation was 3 female and 1 male and 3 male and 1 female respectively, hence, the seats were not allocated irregularly and that the nominees were selected by their respective parties. He argued that in any event the role of IEBC is to allocate seats on the basis of lists submitted by the parties and the Lamu seats referred to were as a result of lists submitted by the respective parties which lists were found to be compliant, and in any event, no one filed a dispute at the IEBC Dispute Resolution Committee or the PPDT. On the legality of the corrigenda in Gazette Notice No. 8572 amending Notice 8380, counsel argued that what IEBC did was to correct clerical errors.

95. On the allegation that IEBC altered the Party lists, counsel submitted that no evidence was tendered and in any event IEBC followed the list as presented and that the seats were allocated were proportionate to the seats won by the Parties. Further, he argued that the order sought will have the effect of divesting the nominated persons their seats, which can only be done by way of an election Petition. [66]

96. Upon analyzing the earlier cited provisions of the Constitution, the Election laws and the Regulations, and applying the law and the authorities cited herein above to the above facts, I conclude that the role of IEBC is to allocate seats on the basis of lists submitted by the Political Parties. This position that been appreciated in several Court decisions in this Country among them Linet Kemunto Nyakeriga & Another vs Ben Njoroge & 2 Others, [67] National Gender and Equality Commission vs IEBC & Another, [68] and Moses Mwigigi & 14 Others vs Independent Electoral and Bondaries & 5 Others. [69] There is nothing to show that IEBC failed in its mandate. In fact, most of the allegations are directed against the Political Parties which are not parties in this Petition, yet, as earlier stated, the Political Parties were necessary parties in these proceedings.

d) Whether this Petition is was rendered moot after the nominations were Gazetted and the subsequent swearing in of the nominated persons.

97. *The Parties did not directly address this issue, though it is in my view relevant.*

98. During the pendency of this Petition, IEBS Gazetted the persons who were nominated and they were all subsequently sworn and assumed

their respective position in the National Assembly, Senate and the County Assemblies. This brings into sharp focus the law of *mootness* which inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. *Mootness* issues can arise in cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged, and in which claims have been settled.

99. Generally, a case is not *moot* so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small. [70] Put differently, the presence of a “collateral” injury is an exception to *mootness*. [71] As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot. [72] Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim.

100. A matter is *moot* if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic. *Mootness* also arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.

101. Barely four days after filing this Petition, IEBC Gazetted the names of the nominated persons. There were no court orders stopping the Gazettement. As observed earlier, that development altered the entire legal landscape and its implication to this Petition is worth considering. It invites the Court to address the question whether this dispute was rendered moot or an academic exercise.

102. In addressing this I can do no better than cite the earlier cited Supreme Court of Kenya decision in the case of *Moses Mwigigi & 14 Others vs I.E.B.C & 5 Others* [73] the Apex court of Kenya rendered itself thus: - “...It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettement of the nominees’ names by the IEBC, as an integral part of the election process.

103. The Supreme Court proceeded to eloquently state that “*The Gazette Notice... signifies the completion of the “election through nomination,” and finalizes the process of constituting the Assembly in question... 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.*”

104. I have nothing useful to add, except to state that the Gazettement shifted the entire dispute to the election Court, thereby rendering this dispute moot or a mere academic exercise. The alleged shortcomings in the process in question are issues that can be raised the election Courts. In any event, the bottom-line of the Petitioners case is that it seeks to invalidate the nominations by challenging the entire process. Such a challenge, is a matter for the election Court.

105. In view of my analysis herein above, and the reasons enumerated above, the conclusion becomes irresistible that this Petition fails. Consequently, I dismiss this Petition with no orders as to costs.

Orders accordingly.

Dated at Nairobi this 4th day of **May** 2018

John M. Mativo

Judge

[1] Act No.15 of 2015

[2] Article 88 (4) of the Constitution

[3] Act No. 24 of 2011

[4] Act No. 24 of 2011

[5] Act No. 17 of 2012

[6] Act No.24 of 2011

[7] Act No. 24 of 2011

[8]{2015}eKLR

[9]{2013}eKLR

[10] Supra

[11]{2012}eKLR

[12] National Gender and Equality Commission vs IEBC & Another, {2013} eKLR

[13]{1971} 1EA 327

[14]Counsel cited A.G vs Kituo Cha Sheria {2017}eKLR

[15]Counsel cited Council of County Governors vs A.G. & Another {2017}eKLR

[16]Counsel cited A.G.vs Kituo Cha Sheria {2017}eKLR

[17]Counsel cited Mugambi Imanyara & Another vs A.G. & 5 Others {2017}eKLR

[18]See Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd {1989} KLR 1

[19]The Supreme Court of Kenya In the matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (unreported)

[20] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[21] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26

[22] *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[23] *Supra*

[24] *State of Orissa vs. Sudhansu Sekhar Misra*, MANU/SC/0047/1967

[25] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986

[26] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[27]In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[28]Ibid

[29] *Supra*

[30] *Supra*

[31] Ibid

[32] Ibid

[33]See *Woods Manufacturing Co. vs The King* {1951} S.C.R. 504 at page 515 and *Youngsam R (On the Application of) vs The Parole Board* {2017}EWHC 729

[34] *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others* {2017}eKLR

[35]See *Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others* {2015}eKLR citing *Sir Charles Newbold, P in Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195

[36] Counsel cited Article 50

[37]*Railway Board v. C.R. Rangadhamaiah* {1997} 6 SCC 623

[38]*Prabodh Verma vs. State of U.P* {1984} 4 SCC 251 and *Kumar Dingal vs. State of W.B* {2009} 1 SCC 768

[39] {2003} 4 SCC 557

[40] See Article 47 of the Constitution

[41] *Kioa v West* (1985), Mason J

[42] See *Onyango v. Attorney General*, [42] **Nyarangi, JA** asserted at page 459 that:—"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly." At page 460 the learned judge added:—"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at." And in *Mbaki & others v. Macharia & Another*, [42] at page 210, the Court stated as follows:—"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

[43] In *J.S. Yadav vs State of U.P. & Anr*, {2011} 6 SCC 570, at paragraph 31

[44] See decision by a three-judge Bench in *Prabodh Verma and Others v. State of Uttar Pradesh and Others*{1984} 4 SCC 251

[45] *Ibid*

[46] L.N. No. 117 of 28 June 2013

[47] *Supra*

[48] *Supra*

[49] *Supra*

[50] {2016}eKLR

[51] Chapter 7, Laws of Kenya

[52] *Ibid*

[53] *Supra*

[54] {2016}eKLR

[55] *Supra*

[56] *Ibid*

[57] *Ibid*

[58] *Supra*

[59] Pet No. 268 & 398 of 2012

[60] This position was upheld in *Commission for the Implementation of the Constitution vs the A.G. & Another*, {2013}eKLR

[61] *Supra*

[62] {1974} 3 ALL ER 731

[63] {2013} eKLR

[64] Counsel cited *Law Society of Kenya vs KRA & Another* {2017}eKLR

[65]{2014}eKLR

[66] Counsel cited *Moses Mwigigi case*(*Supra*), *Wairimu Kamau and 3 Others vs IEBC*,CA No. 169 of 2013 and *Jaldesa Tuke Debalo vs IEBC* {2015}eKLR.

[67] *Supra*

[68] *Supra*

[69] {2016}eKLR

[70] In *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), the Supreme Court discussed mootness at length in a complex child abduction case and held

that the dispute between the parents was not moot because issues regarding the custody of the child remained unresolved. The Court noted that the prospects of success of the suit were irrelevant to the mootness question, and uncertainty about the effectiveness and enforceability of any future order did not moot the case. *Chafin*, 133 S. Ct. at 1024-26. A case is moot, however, when the court cannot give any “effectual” relief to the party seeking it. See *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012); *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992); *Firefighter’s Local 1784 v. Stotts*, 467 U.S. 561, 571 (1984); see also *Tory v. Cochran*, 544 U.S. 734, 736-37 (2005) (death of attorney Johnnie Cochran did not moot injunction enjoining plaintiff from defaming Cochran). A case can, of course, become moot when the plaintiff has abandoned their claims, but such abandonment must be unequivocal. *Pacific Bell Telephone Company v. Linkline Communications*, 555 U.S. 438, 446 (2009).

[71] *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005).

[72] *Board of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987), illustrates the use of a damage claim to avoid mootness. Prisoners who were denied parole without a statement of reasons challenged the denial. They claimed that the state statute mandating release under certain circumstances created a liberty interest in eligibility for parole protected by the [Fourteenth Amendment](#). Plaintiffs sought damages as well as declaratory and injunctive relief. Although plaintiffs were later released, mooting their individual claims for injunctive relief, their damage claims remained alive. Because the immunity of defendants was not settled, the Supreme Court reached the merits, holding that plaintiffs had a cognizable liberty interest in the processing of their parole applications. The Court remanded the case for further proceedings. See also *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 478 n.1 (1989). An inability to pay a damages judgment at present does not moot a claim. See *United States v. Behrman*, 235 F.3d 1049, 1053 (7th Cir. 2000). However, if the judgment seemingly could never be paid, a claim might be dismissed on prudential grounds. See, e.g., *Federal Deposit Insurance Corporation v. Kooyomjian*, 220 F.3d 10, 14-15 (1st Cir. 2000).

[73] *Supra*