



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 434 OF 2017

In the matter of contravention of Articles 2, 3,10,90, 177 & 178 of the Constitution of Kenya

and

In the matter of Election of Members of the County Assembly of Nairobi under Articles 177 (1) (b) and (c) of the Constitution

In the matter of Section 36 (30 of the Elections Act and the Elections (Party Primaries and Party Lists) Regulations, 2017

BETWEEN

Zahara Mohammed.....1st Petitioner

Ogolla Odhiambo Joab.....2nd Petitioner

Daisy Chebet Chumo.....3rd Petitioner

versus

Independent Electoral & Boundaries Commission

(IEBC)1st Respondent

Jubilee Party of Kenya.....2nd Respondent

JUDGMENT

Introduction

1. The original Petition was filed on 5th September 2017 by six Petitioners against the first and second Respondents herein. On 20th September 2017, an amended Petition was filed removing the second, fourth and fifth Petitioners from this Petition and left only the first, third and sixth Petitioners. The amendment also enjoined three interested parties to this Petition.

2. A further amended Petition was filed on 21th November 2017 with the leave of the Court. This time, the sixth Petitioner was removed from the case and the fifth Petitioner who had been removed in the first amendment was reinstated. Also, in the further amended Petition, the interested Parties were removed from the Petition. For record purposes and ease of reference in order to avoid confusion in view of the said amendments, I will refer to the Petitioners as follows:- **Zahara Mohammed (first Petitioner), Ogolla Odhiambo Joab (second petitioner) and Daisy Chebet Chumo (third Petitioner).**

3. The first 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. [\[1\]](#)

4. The second Respondent is a Political Party duly registered under the Political Parties Act. [\[2\]](#)

The Petitioners' case

5. The Petitioners aver that they are registered voters in Nairobi and that they were nominated by the second Respondent as nominees to occupy special seats of the County Assembly of Nairobi via a notice of amendment dated 31st August 2017.

6. The Petitioners further aver that the first Respondent on 28th August 2017 erroneously Gazetted less names in the Kenya Gazette for nominated Members of the County Assembly of Nairobi despite due notice of amendment by the second Respondent. Further, the Petitioners aver that the list Gazetted by IEBC for nominees for special seats for the second Respondent was full of repetition, duplication of names and omission of deserving nominees, thus posing the risk of having less nominated members of the County Assembly of Nairobi.

7. The Petitioners also averred that the list Gazetted by IEBC as nominees for the second Respondent is erroneous as it contained less numbers of nominees for special seats thus contravening Article 177 (1) (c) of the Constitution. Further, they aver that the list of the marginalized members of the second Respondent contravenes a consent order dated 31st July 2017 issued by the Political Parties Tribunal (PPDT).^[3] The Petitioners also aver that the said members were sworn in on 6th September 2017 notwithstanding that the second Respondent wrote to IEBC regarding the said errors and omissions.

8. It is also averred that the publication of the Gazette Notice Vol. No. CXI. NO. 124 dated 28th August 2017 as regards the list of nominees for special seats of the National Assembly contravened the provisions of Article 177 (1) (c) of the Constitution as read with section 36 (1) (f) of the Act.^[4]

9. The Petitioners also state that the Constitution and the Elections Act^[5] lays down the criteria to be followed, that is, the list must prioritize persons living with disabilities, the youth and the marginalized communities, but that the list provided by the second Respondent does not meet this criteria. The Petitioners further aver that the entire list of nominated members published in Gazette Notice Vol. CXIX.N.124 dated 28th August 2017 was unconstitutional ab initio on account of inclusion of less names of nominees for special seats of the Nairobi County thus contravening the Constitution and the Act. As a consequence, the Petitioners seek the following reliefs:-

- a. That the Honourable Court do make a declaration that the omission by IEBC to nominate the stipulated number of nominees for the marginalized list representing Nairobi County Assembly is unconstitutional and contravenes the Elections Act.
- b. That an order do issue directing IEBC to Gazette the Petitioners herein as nominees for the second Respondent in the marginalized list of Nairobi County Assembly.
- c. That costs of this Petition be catered for.

Respondents' Response to the Petition

10. **Salome Oyugi**, the Respondents' Political Parties Manager swore the Replying Affidavit dated 2nd October 2017 in Response to the Amended Petition. No further affidavit was filed after the further Amended Petition. She averred that the Petition is incurably defective, incurably incompetent and devoid of merit as this court lacks jurisdiction to entertain the matter. Further, she averred that the Petitioners failed to exhaust all the avenues for resolving the dispute before filing this Petition in line with section 40 of the Political Parties Act.^[6] Also, she averred that the Petitioners failed to demonstrate that the first Respondent erroneously Gazetted, omitted and or replaced their names from the list of persons who were nominated by the second Respondent to represent the minority groups in Nairobi County and the said assertions are purely speculative. Further, she averred that the Petition has been overtaken by events.

11. M/s Oyugi further averred that the Petitioners have not provided details of the alleged constitutional violations, and that IEBC's role is limited to Articles 84 (4) and 90 (2) of the Constitution. Further, she averred that section 35 of the Act requires Political Parties to submit their respective party list to IEBC at least 45 days before the date of the general elections, emphasis being that the onus is on a party to prepare its party nomination list. She also averred that in conformity with the provisions of section 34 (6A) of the Act as read with Regulation 55 (2), IEBC reviewed the lists within 14 days and required parties to resubmit their amended lists in line with the law and the guidelines published vide Gazette Notice 5735 of 12th June 2017.

12. Further, she averred that the Political Parties including the second Respondent re-submitted their lists in accordance with Regulation 53 (3) and pursuant to Regulation 54 (8), IEBC published the final party list as resubmitted by the second Respondent on Sunday 23rd July 2017 both in the Nation and Standard Newspapers. Further, she averred under Regulation 35 of the Act, it's the sole prerogative of the second Respondent to prepare and submit its party nomination list which ought to be in compliance with the constitution pursuant to its nomination rules and in so doing IEBC has no role and cannot edit or alter the same once submitted.

13. She also averred that pursuant to an order issued by the PPDT,^[7] the second Respondent submitted a re-constituted list to the Respondent on 17th August 2017. She further averred that Susan Mukungu Kavaya's name was repeated because the second Respondent had repeated the same in its list, but nevertheless, the same was corrected vide a corrigenda published on 6th September 2017, hence, there is no risk of less nominated members as alleged. Further, she averred that the Gazette notice published No.124 of 28th August 2017 was published in accordance with the law and that there is no legal requirement that a voter can only be nominated to the county of his residence. M/s Oyugi also deposed that the persons listed as youth in the party list were qualified under Article 177 (1) (c) of the Constitution and that IEBC is required to draw from the list in the order given by the Party.^[8] Hence, she averred, IEBC exercised its mandate under the Constitution and the governing statutes.

14. In addition to the above Affidavit, IEBC also filed an amended Response to the Petition on 6th October 2017 and a further amended Response to the Petition on 4th December 2017. The crux of the responses is that IEBC performed its functions in accordance with the law.

The Second Respondent

15. The second Respondent did not file any Response to this Petition nor did it file submissions.

Issues for determination

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

- a) Whether this Court has jurisdiction to hear and determine this Petition..
- b) Whether the Petitioners have established any blame on the part of IEBC

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

17. The original Petition as drawn to the extent that it challenged the nomination process of special seats which had been Gazetted and members duly sworn was a non-starter by dint of the clear provisions of the law governing the subject and the Supreme Court decision in the case of Mwicigi & 14 Others vs IEBC & 5 Others.[\[9\]](#) The amended Petition filed on 20th September 2017 did not help the situation. The further amended Petition filed on 21st November 2017 was in my view an attempt to evade the highly dispositive jurisdictional hurdle. Whether the amendments cured the jurisdictional hurdle is the subject of the next inquiry.

18. The further Amended Petition seeks a declaration that the IEBS's omission to nominate the stipulated number of nominees for the marginalized list representing Nairobi County is unconstitutional and a further order directing the Petitioner to gazette the Petitioners as nominees for the second Respondent in the marginalized list of Nairobi County Assembly.

19. The Petitioners argued that the entire list that as Gazetted was unconstitutional to the extent that it contained less names and argued that the Petitioner be Gazetted to fill the remaining slots. The argument is premised on a letter annexed to the applicants affidavit dated 31st August 2017 from the second Respondent addressed to IEBC stating that the second Respondent had noted an omission in the Gazette Notice published on 28st August 2017 and asking for some errors to be corrected.

20. Counsel for IEBC took issue with the manner in which the Petition was amended several times thereby metamorphosing into what he described as a totally different claim. He further submitted that the dispute herein arose from an election Process, hence this court has no jurisdiction as was held in Moses Mwicigi & 14 Others vs IEBC & 5 Others.[\[10\]](#) He also argued that the Petitioners did not exhaust the laid down dispute resolution mechanism.

21. It is beyond argument that 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.

22. 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.[\[11\]](#) 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.[\[12\]](#) Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[\[13\]](#)

23. 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. More fundamental is the truism that jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. This position was well stated by the South African Constitutional Court in the following words:-[\[14\]](#)

"Jurisdiction is determined on the basis of the pleadings,[\[15\]](#)... 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..."

24. A close examination of the further amended Petition leaves no doubt that despite the metamorphosis from the original Petition in a clear attempt to evade the jurisdictional hurdle, it still challenges nomination process. At paragraph six of the further amended Petition, the Petitioners accuse the IEBC of erroneously Gazetting less names in the Kenya Gazette of 28th August 2017. They also impugn the Gazetted list for being full of repetitions, duplication and omission and for containing less names, hence the Petitioners term it as unconstitutional. They now want this court to order that their names be included in the list. In other words, they want this court seated here, to order them duly nominated and or direct IEBC to include them in the list. The bottom-line is that by challenging the said Gazette Notice, this Petition discloses an election dispute.

25. Article 87 (1) of the Constitution provides that "Parliament shall enact legislation to establish mechanisms for timely settling of electoral

disputes. Pursuant to the above Article, Parliament enacted the Elections Act. The preamble to the Act reads.. ' An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes."

26. The nominated persons having been Gazetted, from that moment, any dispute on the Gazette notice including who ought to have been in the list or was omitted became an electoral dispute within the meaning of Article 87 of the Constitution. That being the case, the question that follows is whether the Gazette notice can be challenged by way of this Petition.

27. The Supreme court of Kenya in the case of Moses Mwicigi & 14 Others vs I.E.B.C & 5 Others^[16]correctly captured 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.

28. The Supreme Court pronounced itself with sufficient clarity in the above case. Upon Gazettement being done, the dispute shifted to the election court. 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.^[17] 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^[18] 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.^[19]

29. 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.

30. Section 34 (7) of the Elections Act provides that "The party lists submitted to the Commission shall be valid for the term of Parliament." Sub-section (10) of the same section provides that:- "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.**"

31. My reading of the above section is that after the Gazettement, it was not open for the second Respondent to write a letter asking for the corrections. The period for making corrections had closed, hence the letter relied upon by the Petitioner is of no value. Further, the purported request to "correct" the list which in simple terms is a request to amend the list flies on the face of the foregoing provision. Such a request lacks legal basis and is an invitation to this Court to violate the above provisions. It is not only a direct affront to the law, but an open invitation to this Court to descent into the arena assigned by the law to Political Parties and IEBC.

32. Further, as the Respondent's Counsel argued, the Petitioners did not exhaust the statutory laid down dispute resolution mechanism. Article 88 (4) (e) of the Constitution mandates the IEBC to determine nomination disputes. This provision is replicated in section 74 (1) of the Elections Act.^[20]The Petitioners ought to have utilized the said mechanism prior to the gazettement of the Party lists.

33. As stated above, upon the Gazettement of the Party lists, any dispute relating to the election in question escalates in to an election dispute, and the attempt to clothe this dispute with alleged violation of provisions of the Constitution or violation of the Petitioner's Rights cannot breathe life to this Petition.

Whether the Petitioners have established any blame on the part of IEBC

34. The Petitioners counsel submitted that the law lays down the nomination criteria which is to prioritize persons living with disability, youth and marginalized communities and that list of nominees by the second Respondent did not satisfy this criteria. Further, counsel argued that IEBC was duty bound to Gazette the list as presented.^[21]

35. The Respondent's counsel submitted that the Petitioners did not demonstrate that IEBC erroneously gazetted or omitted to Gazette or replaced their names from the list of persons who were nominated by the second Respondent to represent the minority groups. Further, he argued that IEBS's role is provided for under Article 88 (4) & 90 (2) of the Constitution. He also submitted that under Section 35 of the Act, it is the prerogative of the second Respondent to prepare and submit its party lists which must comply with the constitution.

36. Any analysis of the relevant provisions of the Constitution and the Act is necessary in order to appreciate the role of IEBC and establish whether indeed it failed in any manner to act in conformity with the law. The starting point in such a discourse would be Article 90 of the constitution which 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.

37. The Elections Act, [\[22\]](#) 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.

38. Section **34** of the Elections Act [\[23\]](#) 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**.

39. 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.

40. 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.

41. From the above provisions, it is clear that Political Parties play a central role in the Preparation of Party lists. This role was appreciated in the case of National Gender and Equality Commission vs IEBC & Another. [24] 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."

42. A similar position was stated by the Supreme Court in the case of Moses Mwigigi & 14 Others vs Independent Electoral and Bondaries & 5 Others [25] cited earlier 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."

43. The above decisions 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. In compliance with Section 27 of the Elections Act, [26] IEBC published Legislative Supplement No. 28, Legal Notice No. 69 being the Elections (Party Primaries And Party Lists) Regulations, 2017. IEBC has a limited role in the development of Party lists for seats in question. The preparation of Party Lists falls within the prerogative of the Political Parties.

44. IEBC issued Gazette Notice number 5735 of 12th June 2017 prescribing the general and specific requirements for Party Lists, the nomination procedures for the various seats and the formula for allocation of the seats. 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. 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 errors or omissions in the list presented by the Party, or in the nomination process, the problem can only traced to the Party which has the sole prerogative of generating the list and not IEBC.

45. I also find merit in the holding in Micah Kigen 2 Others vs . A.G. & 2 Others [27] where the court observed that the nature and extent of what constitutes special interests is to be defined by the party nominating the candidates and regional balance does not apply to county assembly seats. [28]

46. 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. IEBC only reviews the lists for compliance and requires parties to

amend their lists in compliance with the law, and once the final list is submitted, it is published in the dailies and uploaded in the Commissions' Website. There is no evidence that these crucial steps were omitted. There is no evidence that the IEBC did not notify the public the final party lists to be used for the allocation of special seats to the National and County Assemblies, except for changes effected by the parties pursuant to orders from the IEBC Dispute Resolution Committee or the Political Parties Dispute Tribunal.

47. The Petitioners had the option of utilizing the statutory laid down mechanism and challenge the final list before it was Gazetted. As stated above, IEBC carried out its mandate in conformity with the law, 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 law and in any event as the court held in *Linet Kemunto Nyakeriga & Another vs Ben Njoroge & 2 Others*^[29] 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. Further, it has not been shown that the names Gazetted by IEBC were not as listed in the lists supplied by the Political Party.

48. 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 review the Party Lists to confirm conformity with the law, and if the Party Lists do not conform with the law, IEBC returns the lists to the Political Parties, as it did in this case with clear instructions to comply. Once the final list is submitted, IEBC allocates seats on the basis of lists submitted by the Political Parties. There is nothing to show that IEBC failed in its mandate, nor is there evidence to demonstrate that IEBC Gazetted names which were not in the list submitted to it.

49. The Petitioners argue that the IEBC failed to correct the list presented by the second Respondent even after being requested to do so vide the letter dated **31st** August 2017. As stated above, the Gazettement had already been done signaling the end of the nomination process. IEBC had no powers to amend the list except pursuant to a Court order. The law is explicit that a party list submitted shall not be amended during the term of Parliament or the County Assembly, as the case may be, for which the candidates are elected. Thus, the attempt by the second Respondent to amend the already Gazetted list flies on the face of said clear legal provisions discussed earlier.

Disposition

50. 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 8th day of May 2018

John M. Mativo

Judge

[1] Article 88 (4) of the Constitution

[2] Act No.11 of 2011

[3] In cause number 384 of 2017

[4] Ibid

[5] Ibid

[6] Act No.11 of 2011

[7] In Complaint No. 387 of 2017, *Sunctus G.Ndegwa & Others vs Jubilee Party*

[8] See Article 177 (1) (f) of the Constitution

[9]{2015}eKLR

[10] Infra

[11]See *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* {1989} KLR 1

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

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

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

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

[16] Supra

[17] 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

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

[19] 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

[20] Act No. 24 of 2011

[21] Counsel cited Lydia Nyaguthii Gathendu vs IEBC & 17 Others {2015} eKLR

[22] Chapter 7, Laws of Kenya

[23] Ibid

[24] Supra

[25] {2016} eKLR

[26] Supra

[27] Pet No. 268 & 398 of 2012

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

[29] {2014} eKLR