



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**ELECTION PETITION APPEAL NO. 1 OF 2017 AS CONSOLIDATED WITH ELECTION PETITION APPEAL NO. 2 OF 2017**

*(Being an appeal arising from the entire Ruling delivered by the Principal Magistrate Hon James Ong’ondo on the 15<sup>th</sup> November, 2017 at Siaya.*

JUDITH AKINYI AJWALA.....1<sup>ST</sup> APPELLANT

MAURAY ASEWE OUKO.....2<sup>ND</sup> APPELLANT

VERSUS

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

FILLY AKOTH ONDITI.....2<sup>ND</sup> RESPONDENT

ANDREW OMWENDE OMOLO.....3<sup>RD</sup> RESPONDENT

SIAYA COUNTY PEOPLE WITH DISABILITY NETWORK (SCPWDN)...1<sup>ST</sup> INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT (ODM).....2<sup>ND</sup> INTERESTED PARTY

-BETWEEN-

JUDITH AKINYI AJWALA.....PETITIONER IN ELECTION PETITION NO. 1 OF 2017

MAURAY ASEWE OUKO.....PETITIONER IN ELECTION PETITION NO. 2 OF 2017

VERSUS

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

IN ELECTION PETITION NO. 1 & 2 OF 2017

FILLY AKOTH ONDITI.....2<sup>ND</sup> RESPONDENT ELECTION IN PETITION NO. 1 OF 2017

ANDREW OMWENDE OMOLO.....3<sup>RD</sup> RESPONDENT IN ELECTION PETITION NO. 2 OF 2017

SIAYA COUNTY PEOPLE WITH DISABILITY NETWORK.....1<sup>ST</sup> INTERESTED PARTY

ORANGE DEMOCRATIC MOVEMENT.....2<sup>ND</sup> INTERESTED PARTY

**JUDGMENT**

1. On 22<sup>nd</sup> September, 2017, the Appellants herein **JUDITH AKINYI AJWALA** and **MAURAY ASEWE OUKO** filed the Election Petitions Nos. 1 and 2 of 2017 respectively as voters within Siaya County, Persons Living with Disability and as persons who had applied to be considered for nomination by their Political Party, Orange Democratic Movement, ODM, for members of Siaya County Assembly under the category of Persons Living with Disabilities respectively.

2. The appellants' respective Election Petitions in the Election Court were Election Petition No. 1 and 2 of 2017 respectively.

3. The 1<sup>st</sup> Respondent herein IEBC in response to the Election Petitions raised an identical Preliminary Objection in both Election Petition No. 1 and 2 of 2017 by way of Notices of Motion dated 29<sup>th</sup> September, 2017 respectively which culminated in the Ruling dated 15<sup>th</sup> November, 2017 delivered by Hon James Ongondo, Principal Magistrate who was the duly Gazetted Elections Magistrate. The preliminary objections sought the striking out of the two election petitions and for the petitioners to pay costs of the petition on the grounds that:

*i. The petition was fatally defective as the cause of action is not from an election petition [sic] as envisaged in Section 75 of the Elections Act No. 24 of 2011.*

*ii. That the proper jurisdiction of this matter lies with the stipulated law under Article 88 of the Constitution of Kenya*

*iii. Section 74 of the Elections Act provides that the settlement of nomination disputes whose jurisdiction is not with the Chief Magistrate's Court [sic].*

*iv. That matters in the petition were the same and or substantially the same as those that arose in Nairobi HC Election Nomination Appeal NO. 34 of 2017-Mauray Asewe Ouko and Judith Akinyi Ajwala v ODM and IEBC; Nrb Political Parties Disputes Tribunal Complaint No.380 of 2017 Absalom v ODM; Nrb PPDT Complaint No. 414 Consolidated with No 416 - Mauray Asewe Ouko and Judith Akinyi Ajwala v ODM and IEBC;*

*v. The petitioner has admitted having filed the High Court Matter and is thereby bound by her pleadings;*

*vi. The 2<sup>nd</sup> Interested Party's Party List was first submitted to the 1<sup>st</sup> Respondent on 12<sup>th</sup> June, 2017 and the petitioner is accordingly out of time in filing this incompetent suit;*

*vii. There are no declaration of election results as provided for in election petition filed under the Election Act No. 24 of 2011.*

4. The Notices of Motion for preliminary objection were supported by the affidavits of Salome Oyugi, the IEBC Manager, Political Parties Campaign Financing.

5. The Hon Ongondo, PM after considering the preliminary objection on jurisdiction of the court found and held that he had no jurisdiction to hear and determine the petition and on that account proceeded to down his tools. The learned Election Magistrate was of the view that the disputes before him were not election disputes contemplated by Section 75A of the Elections Act. In his view, the law does not contemplate that a petition would arise from a nomination but from an election where results have been declared. He ordered that each party do bear their own costs of the petition.

6. Aggrieved by the said Ruling, the Appellants herein jointly preferred these two consolidated appeals by filling two different Memoranda of Appeal dated 13<sup>th</sup> December 2017 as amended with leave of court and by consent, vide the Amended Memorandum of Appeal dated 5<sup>th</sup> April 2018.

7. The Appellants raised nine (9) grounds of Appeal in the Memorandum of Appeal dated 13<sup>th</sup> December 2017 as Amended in the Amended Memorandum of Appeal dated 5<sup>th</sup> April 2018.

8. These are:

i. The learned Magistrate erred in law and in fact in finding that the nomination list was in the hands of IEBC at the point of the dispute before it.

ii. The learned Magistrate erred in law and in fact by finding that the dispute relates to a nomination exercise.

iii. The learned Magistrate erred in law and in fact by finding that the dispute ought to be determined by IEBC.

iv. The Learned Magistrate failed to consider that this was a dispute arising subsequent to the declaration of results.

v. The learned Magistrate ought to have considered that the subject nominees had been gazette subsequent to a declaration of electoral results and that the special seats had thus been filled.

vi. The learned Magistrate erred in law and in fact by relying on the decision of the in **Election Appeal No. 34 of 2017 Asewe Ouko & Judith Akinyi Ajwala –vs- Orange Democratic Party & Independent Electoral and Boundaries Commission** to arrive at its decision without bearing in mind that it related to a dispute over a nomination list arising prior to an election or the declaration of results of an election.

vii. The learned Magistrate erred in interpretation of the jurisdiction of the IEBC as prescribed by Article 88(4) € of the constitution.

viii. The learned Magistrate erred in finding that they had no jurisdiction Honorable tribunal erred in fact and in law in arriving at a decision that amounted to mocking the justice system and in clear breach of Article 159(2) (a) of the Constitution of Kenya, 2010.

ix. The learned Magistrate erred in fact and in law in failing to appreciate and consider the overwhelming evidence on record thereby arriving at a decision which is self-defeating and not capable of addressing the entire dispute.

### **The Appellants' submissions**

9. In their joint written submissions dated 6th May 2018, the appellants' counsel submitted in support of the appeals dated 13<sup>th</sup> December, 2017 and asserted that the Learned Magistrate at page 3 of his ruling, paginated as page 501 in the Record of Appeal correctly framed the question at the first paragraph- *"the question which brings out the issue of Jurisdiction is whether what is before me is an Election Petition as a Member of a County Assembly. This is because my jurisdiction regarding election is conferred by law at Section 75(1) A of the Election Act No. 24 of 2011."*

10. It was submitted that the Learned Magistrate proceeded to find that he lacked Jurisdiction arguing that he only had jurisdiction to entertain Election Petitions disputes emanating out of elected members of County Assembly and not Nominated members of County Assembly as provided for under Section 75(1) A of the Election Act No. 24 of 2011.

11. In the view of the appellant, the Learned Magistrate failed to appreciate that once a Nomination list submitted by a Political Party is placed in the hands of the 1<sup>st</sup> Respondent, and the 1<sup>st</sup> Respondent herein proceeds to Gazette names out of the said list after a General Election in accordance with Article 90(1), (2) and (3), 177(1)(c) of the Constitution of Kenya 2010, the names so Gazetted becomes elected members of that Assembly.

12. It was further submitted that as the Appellants were filing their various Petitions, the 1<sup>st</sup> Respondent had Gazetted names of persons nominated by the 2<sup>nd</sup> Interested Party herein in accordance with the 2<sup>nd</sup> Interested Party's strength in the Siaya County Assembly and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein had each taken oath of office.

13. It was therefore submitted that it was a travesty of justice for the Learned Magistrate to consider persons duly Gazetted by the 1<sup>st</sup> Respondent under L. N. No. 69 of 2017 at page 62 of the Record of Appeal, persons who had taken oath of office as nominated as opposed to persons elected as they are properly referred to under Article 90 of the Constitution of Kenya 2010.

14. According to the appellant, it is now settled that the 1<sup>st</sup> Respondent has no mandate to entertain any dispute emanating out of a Party List after gazetting names of nominated members of the County Assembly under Article 177 and Section 74 of the Elections Act and that it is only the Election court which can entertain a dispute arising therefrom. Reliance was placed on the Supreme Court decision in Moses Mucigi & 4 others –Verses – Independent Electoral & Boundaries Commission (2016) eKLR where the Supreme Court considered the issue of IEBC's mandate after declaration of Election results and the court went on to state with regard to the legal position after gazetting those nominated to be;

*"[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."*(emphasis) added.

15. Further reliance was placed on the case of **Claudia Chebet Kosgei & 2 others v Jubilee Party & 2 others [2017] eKLR** wherein the above position of the Supreme Court was upheld.

16. **The case of Rahma Issak Ibrahim –vs.- Independent Electoral & Boundaries Commission & 2 others(2017) eKLR** was also cited at paragraph 32 thereof where E.C Mwita J held that in law, once IEBC concludes elections for the party top up lists and gazettes names of those who have been nominated to the National Assembly, Senate and County Assembly, that nomination becomes an election and can only be challenged through an election petition.

17. In this case, it was submitted that the 3<sup>rd</sup> Respondents name was not duly gazetted in the Daily Nation of 23<sup>rd</sup> July 2017 to enable any citizen with an issue to approach the 1<sup>st</sup> Respondent's Internal Dispute Resolution as was held in the case of **National Gender and Equality Commission –Vs.- Independent Electoral and Boundaries Commission & Another (2013) eKLR**.

18. It was submitted that Regulation 54 of the General Regulation's provides at Regulation 54(8) that the Commission shall publish the final party list in at least two newspapers with nationwide circulation. According to the appellant, the 3<sup>rd</sup> Respondent who is the only elected person under PWD's was not in the said final publication of 23<sup>rd</sup> July, 2017 or at all and that if the 3<sup>rd</sup> Respondent name made it to the final list then the 1<sup>st</sup> Respondent did not comply with its own Regulations 54(8).

19. Citing Article 90, 177, 159(2) (a), and sections 34(1) and 36(1)(f) and Section 75 (1) A of the Elections Act and the interpretations as captured in the above stated authorities cited by the Appellants it was submitted that:

a. The Learned Magistrate misapplied and or misinterpreted the law that the dispute herein ought to have been determined by IEBC under Article 88(4)(e) of the Constitution notwithstanding the fact that at the time of filing the Petitions by the Appellants, the General election had been concluded seats allocated under Article 90 of the Constitution, names gazette and the 2<sup>nd</sup> and 3<sup>rd</sup>

Respondents duly sworn in as members of County Assembly Siaya County.

b. That the dispute more specifically against the 3<sup>rd</sup> Respondent herein arose after the declaration and gazette of the 3<sup>rd</sup> Respondent herein on the 28<sup>th</sup> August 2017 vide gazette Notice No. 8380, vol. CX-IX- No. 124 at page 4995 and at page 62 of the record of Appeal since the 3<sup>rd</sup> Respondent herein featured nowhere as a nominee in the final list published by the 1<sup>st</sup> Respondent on the 23<sup>rd</sup> July 2017 to warrant the appellants to invoke the 1<sup>st</sup> Respondent's jurisdiction under Article 88(4)(e) of the Constitution.

c. That the learned Magistrate erred in his interpretations of the Jurisdiction of IEBC as prescribed under 88(4)(e) of the constitution as compared to his Jurisdiction conferred to him vide Section 75(1) A of the Elections Act No. 24 of 2011.

d. That the Learned Magistrate misapplied and/or misconstrued Hon Justice Musyoka Judgment in **Election Nomination Appeal No. 34 of 2017 Mauray Asewe Ouko and Another -Versus- IEBC & Another** by failing to realize that at the time the Honourable Judge was pronouncing himself on the matter the General Elections had not happened, the 1<sup>st</sup> Respondent had since closed its Internal Disputes Committee since they only heard seven (7) days to hear and determine disputes and that it is the 1<sup>st</sup> Respondent who had misdirected the general public to approach Political Parties Disputes Tribunal vide their advertisement which can be found at page 86 of the record of appeal.

e. That the Petitions before the Election court were disputes which arose after the general election and which was in clear breach of Article 177 (c) of the Constitution as read together with Article 90 the Constitution and Sections 34(1), 36(1) (f) of the Elections Act No. 24 of 2011 and the same was properly before the Learned Magistrate pursuant to jurisdiction conferred upon him vide Section 75(1)A of the Elections Act No. 24 of 2011.

20. Against this backdrop, it was submitted that the Learned Magistrate erred in law in interpreting that the dispute presented by the Appellants herein under Petition No. 1 and 2 of 2017 respectively fell outside the scope of the Jurisdiction conferred upon him vide section 75(1) A of the Elections Act.

21. This court was urged to proceed and set aside the Learned Magistrate's Ruling dated 15<sup>th</sup> November, 2017 and affirm that the Appellants herein were properly before the election Court and that the petitioners be allowed to prosecute their individual petitions as prayed in prayer 4 and/ or 5 of the Amended memorandum of Appeal. The appellants also prayed that in the alternative this court do invoke section 78 (1) (b) of the Civil Procedure Act to remand the case for trial court of competent jurisdiction other than Hon. Ongondo PM on priority and or that the court do pursuant to section 78 (1) (a) of the Civil Procedure Act do determine the case finally. The appellants also prayed for costs of the Appeal.

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

22. The 1<sup>st</sup> Respondent IEBC filed its submissions dated 10th May 2018 contending that the dispute herein revolves around the membership of the appellants to the ODM party and the nominations to the said ODM 2<sup>nd</sup> interested party herein party lists to the special seats under Articles 90 and 177 of the Constitution.

23. It was further submitted that the dispute arose on 23<sup>rd</sup> July 2017 when the IEBC published the list as presented to I by political parties for nominations to the special seats. It was submitted that in view of the fact that the appellants were complaining that their names were left out of the list and their applications were not considered, then the IEBC has the mandate to reject a nominee submitted by a political party for any elective post if that nominee is not qualified to be elected a such rejection by the 1<sup>st</sup> Respondent shall not invalidate the entire party list. Further, that the 1<sup>st</sup> respondent was obligated to, upon rejection of the party list to inform the political party of the decision and request the [political party to submit another name, as per Elections (General) Regulations, 2012 at Regulation 54(5-8).

24. It was therefore submitted that the dispute having arisen prior to the gazette of the nominated members to the County Assembly on 28<sup>th</sup> August 2017, the same cannot be challenged by way of an election Petition before an election court.. reliance was placed on **Claudia Chebet Kosgei & 2 others v Jubilee Part and 2 others**[2017]eKLR where **Mrima J** held inter alia that the petitioner had the option of challenging the Jubilee Part's refusal to shortlist him for nomination through the party internal dispute resolution process or by lodging an appropriate complaint before the Political Parties Disputes Tribunal as what he complained of happened way before the conduct of the general elections.

25. On the question of jurisdiction of election courts to hear and determine disputes in relation to nominations to the party lists it was submitted that the IEBC is mandated by Article 88(4) (e) of the Constitution to hear and determine any electoral disputes arising prior to an election, as given effect by section 74 (1) of the Elections Act No. 24 of 2011.

26. It was submitted that there is an established procedure on resolution of nomination disputes that arise prior to an election i.e the Party Internal mechanisms, then to the to the Political parties Disputes Tribunal and an appeal therefrom to the High Court n points of law and facts.

27. It was submitted in contention that this dispute is not suited for resolution by the Elections Court and that it had been subject of decisions before the High Court and the PPDT dismissing the same on account of jurisdiction as it arose before gazette of the 3<sup>rd</sup> Respondent hence within the jurisdiction of IEBC.

28. It was submitted that the dispute having arisen before elections were held, on ly IEBC can resolve it as an election petition can only be filed and determined by a court after an election has taken place. It was therefore submitted that this appeal lacks merit and should therefore be dismissed with costs.

## **The 2<sup>nd</sup> respondents' submissions**

29. The 2<sup>nd</sup> Respondent filed submissions challenging the competency of the Petitioner's Appeal and contended that from the manner in which the appellant has framed the grounds of appeal as per the Memorandum and amended memorandum of appeal, the appeal offends the provisions of the law in that: Section 75 (4) which grants the right of appeal to this Court on matters of law only and that the section stipulates: "An appeal under subsection (1A) shall lie to the High Court on matters of law only —"

30. It was therefore submitted that this Honorable court's jurisdiction to entertain an appeal of this nature is limited by the provisions of Section 75(4) of the Elections Act to matters of law only. The 2<sup>nd</sup> Respondent reproduced all the grounds of appeal wherein the appellant claims that:

*i. The learned Magistrate erred in law and in fact in finding that the nomination list was in the hands of IEBC at the point of the dispute before it.*

*ii. The learned Magistrate erred in law and in fact by finding that the dispute relates to a nomination exercise.*

*iii. The learned Magistrate erred in law and in fact by finding that the dispute ought to be determined by IEBC.*

*iv. The learned Magistrate erred in law and in fact by relying on the decision of the in Election Appeal No. 34 of 2017 Asewe Ouko & Judith Akinyi Ajwala –vs- Orange Democratic Party & Independent Electoral and Boundaries Commission to arrive at its decision without bearing in mind that it related to a dispute over a nomination list arising prior to an election or the declaration of results of an election.*

*v. The learned Magistrate erred in fact and in law in failing to appreciate and consider the overwhelming evidence on record thereby arriving at a decision which is self defeating and not capable of addressing the entire dispute.*

31. Reliance was placed on the case of **NARC Kenya Party and Another –vs- Independent Electoral and Boundaries Commission and Another, (2014) Civil Appeal Election Petition No. 2 of 2014 eKLR** citing **EBC & another v Stephen Mutinda Mule & 3 Others (2014) Nairobi Civil Appeal No. 219 of 2013 eKLR** where the Court stated:

*"...It is therefore quite strange and improper that each of the seventeen grounds, without exception commences with a standard expression, "the judge erred in fact and law" or "the learned judge erred in law and in fact". Clearly the drafters of the memorandum did not have the legal provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal."*

32. On the question of whether this was an election dispute, it was submitted on behalf of the 2<sup>nd</sup> Respondent that the **dispute herein arose prior to the gazettelement of the 2<sup>nd</sup> Respondent as a Member of the County Assembly of Siaya**. Further, that indeed, the petitioner succinctly outlines the sequence of alleged breaches of the law by the 1<sup>ST</sup> Respondent and the 2<sup>nd</sup> Interested party, under paragraph 17 of his petition, in the following terms;

*"That your petitioner states that had the 2<sup>nd</sup> interested party herein followed the law in considering the application before it before submitting its list to the 1<sup>st</sup> Respondent herein and had the 1<sup>st</sup> Respondent not ceded its constitutional mandate under the law, misled the Petitioner together with the general public on the body mandated under the law to entertain his complaint over the party list published on the 23<sup>rd</sup> July 2017 and had the 1<sup>st</sup> Respondent heard the complaint by the petitioner herein, the Petitioner could have by law been one of the gazetted Nominated Members of County Assembly of Siaya County"*

33. According to the 2<sup>nd</sup> Respondent, Article 88 (4) (e) of the Constitution, and Section 74 (1) of the Elections Act, 2011, confer to the Independent Electoral and Boundaries Commission jurisdiction to settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes arising after the declaration of election results.

34. It was submitted that on several occasions, the courts have affirmed that they will not entertain a dispute which falls within the jurisdictional competence of the IEBC or any other body or tribunal. Reliance was placed on the case of **Francis Gitau Parsimei & Others v National Alliance Party & Others, Constitutional Petition (Nairobi) No. 356 of 2012;** where the Court held:

*"It is also my view that Article 88(4)(e) and section 74(1) of the Elections Act, 2011 provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or where it has been demonstrated that the process has failed."*

35. Further submission were that Courts have also established a principle that where the law establishes a dispute resolution procedure, then that procedure must be followed. Reliance was placed on **Kipkalya Kiprono Kones v Republic & 6 others [2006] eKLR**, where the court cited from both **The Speaker of The National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported)** and **Wanyoike vs Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP)** and stated:

*"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the Court observed in Karume's Case."*

36. The 2<sup>nd</sup> Respondent urged the court to dismiss the appeal with costs.

### **The 3<sup>rd</sup> Respondent's Submissions**

37. The 3<sup>rd</sup> Respondent filed submissions opposing the appeal and urging this court to uphold the preliminary objection as per the ruling of the Principal Magistrate Hon Ongondo delivered on 15<sup>th</sup> November 2017.

38. According to the 3<sup>rd</sup> Respondent, the major issue for consideration in the present appeal is whether the trial magistrate was justified in upholding the preliminary objection on jurisdiction.

39. It was submitted that it is settled law that jurisdiction is everything and once a court finds that it lacks jurisdiction it has no business continuing to hear and determine the matter. This was the position in the case of *Owners of the motor vessel "Lillian S -vs -Caltex OIL (Kenya) (1989) KLR.*

40. On the law regarding nomination to County Assemblies Article 87 of the Constitution was referred to and a submission made that Article 88 (4) of the Constitution confers on the IEBC the mandate of :

**e. The settlement of electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;**

.....

**k. The monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties."**

41. It was further submitted that Section 74 of the Elections Act also gives the IEBC jurisdiction to handle disputes relating to nomination of candidates by parties pursuant to Article 88(4)(e) of the Constitution, which position, according to the 3<sup>rd</sup> Respondent, is also reiterated in the Independent Electoral and Boundaries Commission Act at Section 4 (e).

42. It was therefore submitted that from the above legal provisions, the first port of call that was available to the appellant upon being dissatisfied with the decision of the 2<sup>nd</sup> interested party to nominate the 3<sup>rd</sup> respondent herein was to lodge the complaint with the Independent Electoral and Boundaries Commission (IEBC). Instead, it was submitted that the Appellant went forum shopping at the Political Parties Disputes Tribunal and even further to the High Court whereupon their appeal was dismissed for the same reason of want of jurisdiction.

43. It was submitted that Parliament intended to enact a law to govern resolution of disputes arising from nomination of candidates to the County Assemblies and that that is the foundation for Section 74 (1) of the Elections Act and Section 4(e) of the Independent Electoral and Boundaries Commission Act which bestow the jurisdiction to determine disputes relating to nomination of members of the County Assemblies to be determined by the IEBC.

44. ***On whether the Petitioners utilized the Commission's dispute resolution mechanism as required of them before approaching the Magistrates Court***, it was submitted that the Appellants ignored this fundamental and mandatory procedure enshrined in the above quoted legislations and as such the Magistrate's Court was justified to uphold the preliminary objection for want of jurisdiction. Reliance was placed on ***Isaiah Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others [2016] eKLR.***

45. It was therefore submitted that where the Procedure for dispute resolution is well spelt out in the law, it should be adhered to at all times., as was stated in ***Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No 3 of 2010*** that:

**"...It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered obsolete." (Emphasis added.)**

46. Further reliance was placed on other decisions made in regard to parties disputing nominations of members moving the IEBC as the first port of call, as was held in ***Republic vs Speaker of County Assembly of Nyandarua and Another Exparte David Mwangi Ndirangu, Miscellaneous Application No.414 of 2013, in Narc Kenya and Another vs Independent Electoral and Boundaries Commission Another, Election Petition No.12 of 2013, and in Beatrice Nyaboke Oisebe vs Independent Electoral and Boundaries Commission 2 others, Civil Appeal No. 179 of 2013.***

47. It was submitted that in the above cited decisions, the parties alleged violation (s) of the Constitution and the various electoral laws in regard to the nominations and in that regard, their first port of call was the Commission's Dispute Resolution Committee. Being dissatisfied with decision of the Committee, they thereafter approached the Courts. That it is thus clear that the parties did not bypass the Commission's dispute Resolution Avenue as the Appellants have now done.

48. Accordingly, it was submitted by the 3<sup>rd</sup> Respondent that the instant appeal lacks merit and therefore the same should be dismissed with costs.

### The 3<sup>rd</sup> Respondent's Submissions

49. The third respondent opposed the appeal and filed written submissions urging this court to uphold the ruling of the trial magistrate delivered on 15<sup>th</sup> November 2017.

50. In the view of the 3<sup>rd</sup> Respondent, the major issue for consideration in the present appeal is whether the trial magistrate was justified in upholding the preliminary objection on jurisdiction.

51. In his view, it is settled law that jurisdiction is everything and once a court finds that it lacks jurisdiction it has no business continuing to hear and determine the matter, as espoused in the case of *Owners of the motor vessel "Lillian S -vs -Caltex OIL(Kenya)(1989)KLR*.

52. It was submitted that the law regarding nomination to County Assemblies among others is clearly provided for under Article 87 of the Constitution, and that of specific importance is **Article 88 (4)** of the **Constitution** which outlines the mandate of the Independent Electoral and Boundaries Commission as:

e. *The settlement of electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*

.....

k. *The monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.*"

53. Further, that **Section 74 of the Elections Act** also gives the IEBC jurisdiction to handle disputes relating to nomination of candidates by parties pursuant to **Article 88(4)(e ) of the Constitution and that this** position is also reiterated in the Independent Electoral and Boundaries Commission Act which **Section 4 (e)**.

54. It was therefore submitted that it is clear from the above legal provisions that the first port of call that was available to the appellant upon being dissatisfied with the decision of the 2<sup>nd</sup> interested party to nominate the 3<sup>rd</sup> respondent herein was to lodge the complaint with the Independent Electoral and Boundaries Commission (IEBC). Instead, the 3<sup>rd</sup> Respondent submitted in contention that the Appellants herein went forum shopping at the Political Parties Disputes Tribunal and even further to the High Court whereupon their appeal were dismissed for the same reason of want of jurisdiction.

55. It was further submitted that Parliament intended to enact a law to govern resolution of disputes arising from nomination of candidates to the County Assemblies and that is the basis of **Section 74 (1) of the Elections Act** and **Section 4(e) of the Independent Electoral and Boundaries Commission Act**. These sections, it was submitted, bestow the jurisdiction to determine disputes relating to nomination of members of the County Assemblies to be determined by the IEBC. It was therefore submitted that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the Commission.

56. On the question of whether the Petitioners utilized the Commission's dispute resolution port as required of them before approaching the Magistrates Court, it was submitted that the Appellants ignored this fundamental and mandatory procedure enshrined in the above quoted legislations and as such the Magistrates Court was justified to uphold the preliminary objection for want of jurisdiction.

57. The 3<sup>rd</sup> Respondent contended that Reference of such disputed to the IEBC as the first port of call was a clear anticipation of the legislature and that that was the reason for enactment of the provisions for such a special procedure to be followed as was decided in **Isaiah Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others [2016] eKLR**.

58. **Further, that** procedure for dispute resolution is well spelt out in the law and should be adhered to at all times. Reliance was placed on the case of **Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No 3 of 2010** where the Learned Judge observed thus:

*"...It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered obsolete."* (Emphasis added).

59. The 3<sup>rd</sup> Respondent relied on other decisions made in regard to parties disputing nominations of members moving the IEBC as the first port of call including **Republic vs Speaker of County Assembly of Nyandarua and Another Exparte David Mwangi Ndirangu, Miscellaneous Application No.414 of 2013**; in **Narc Kenya and Another vs Independent Electoral and Boundaries Commission Another, Election Petition No.12 of 2013**, and in **Beatrice Nyaboke Oisebe vs Independent Electoral and Boundaries Commission 2 others, Civil Appeal No. 179 of 2013 where it was submitted**, that the parties did not bypass the Commission's dispute resolution avenue as the Appellants have now done.

60. On the whole, the 3<sup>rd</sup> Respondent submitted that the appeal herein lacks merit and therefore the same should be dismissed with costs.

61. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties did not file any submissions.

## Determination

62. I have carefully considered the appeal herein and the substance of the two preliminary objections which were upheld by the Magistrate's election Court, the appellants' grounds of appeal and the respective parties' advocates submissions.

The fundamental issue for determination in this first appeal is whether the Magistrates' Election court erred in upholding the preliminary objection as raised by the 1<sup>st</sup> respondent herein to the effect that he had no jurisdiction in the matter; and therefore whether this appeal is merited. The rest of the grounds of appeal can safely be diffused into this one important issue.

63. The question of jurisdiction of any court of law was settled by the **Supreme Court of Kenya vide Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others** [Ibrahim, JSC], which demystified jurisdiction, citing from the decision in the **Supreme Court of Nigeria Supreme Court Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others** where **Walter Samuel Nkanu Onnoghen, JSC** expressed himself thus:

*'...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...'*

64. On the source of a Court's jurisdiction, the Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows: -

*"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."*

65. The Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesu Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction:

*"So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."*

66. It therefore follows that once a Court finds that it has no jurisdiction then it must down its tools accordingly. There are no two ways about it. However, if a Court finds that it has jurisdiction over a matter it must not hesitate to discharge its duty as appropriate and determine a matter before it on merits, as it would be a mockery of justice for the a court of law to decline jurisdiction thereby leaving a litigant without a remedy.

67. The subject of nomination of Members to the County Assemblies (and to Parliament) and party lists has its origin in the Constitution. Since this matter relates to the membership of a County Assembly, **Article 177** of the **Constitution** (Membership of a County Assembly) is relevant. The Article stipulates that:

*'177. (1) A County Assembly consists of:*

*(a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;*

*(b) The number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;*

*(c) The number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and*

*(d) The Speaker, who is an ex officio member.*

*(2) The members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.*

**(3) The filling of special seats under clause (1) (b) shall be determined after declaration of elected members from each ward.**

68. This legal provision is the source of the political parties' mandate to nominate members to the County Assembly. The purpose of the said provision is to guarantee that no more than two-thirds of the membership of the County Assembly belong to the same gender and to further safeguard and ensure the representation from the marginalized groups including persons with disabilities and the youth.

69. The members contemplated under Article 177(1)(b) and (c) above are nominated by political parties, proportionate to the number of seats garnered in (a) above. Those members can only be 'drawn' from a list which is prepared by a political party and presented to the 1<sup>st</sup> Respondent IEBC which list is eventually published in the Kenya Gazette by IEBC. That list is what is referred to as '**the party list.**'

70. **Article 90** of the **Constitution** (Allocation of party lists seats) provides for party lists seats as follows:

**(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.**

**a. 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.**

**(2) The seats mentioned 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 foregoing legal provision clearly places specific duties on IEBC relating **to inter alia the conduct and supervision of elections for seats for nomination purposes**. In undertaking the said duty, IEBC is further guided by *inter alia* the Elections Act (hereinafter referred to as '**the Act**') under **Sections 34, 35 and 36** thereof. For purposes of this appeal, I will only reproduce the relevant provisions in the said sections of **the Elections Act** which include: -

**"34. (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.**

**(6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and -**

**(a) issue the political party with a certificate of compliance; or**

**(b) Require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.**

**(6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists.**

**(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 subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.**

**(9) The party list shall not contain a name of a candidate nominated for an election.**

**(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.**

**35. A political party shall submit its party list to the Commission at least forty-five days before the date of the general election.**

**36. (1) A party list submitted by a political party under-**

*(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 priorities 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.*

*(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.*

*37.(1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.*

*(2) Notwithstanding the provision of Section 34 (10), if there are no more candidates on the same party's list, the Commission shall require the concerned political party to nominate another candidate within twenty -one days.*

*(3) A vacancy in any seat in a political party list shall not be filled three months immediately before a general election.*

*(4) Where a political party fails to comply with the provisions of subsection (2) the Commission shall not allocate the seat for the remainder of the term of Parliament or the County Assembly.*

72. Further guidance on party lists is provided for under **Part X of the Elections (General) Regulations, 2012** (hereinafter referred to as **'the Regulations'**) being **Regulations 54 to 56B** inclusive. That is the legal rubric on party lists.

73. However, during either the preparation or implementation of the party list, a dispute may arise. That is the case in this matter. The law contemplated such scenarios as well. To that end the law made a complete provision for all electoral disputes including those likely to arise from the party lists. The **Constitution** under **Article 87 (Electoral disputes)** provides as follows: -

*“(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*

*(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*

*(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.”*

74. The **Constitution** further created the institution of IEBC in **Article 88**. One of the constitutional mandate bestowed upon IEBC relates to settling of electoral disputes. **Article 88(4)(e)** provides as follows: -

*“the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results....”*

75. The legislation on electoral disputes contemplated under **Article 87(1)** of the **Constitution** is the **Elections Act**. Like in the case of **Article 88(4) (e)** of the **Constitution**, **Section 74** of the **Elections Act** also mandates IEBC to resolve disputes arising from nominations but not election disputes. That section provides as follows: -

*“(1) Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the*

*declaration of election results.*

*(2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.*

*(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is.*

76. The Constitution and the Election Act bar IEBC from dealing with disputes relating to elections or disputes after an election. The disputes falling outside the ambit of IEBC become the preserve of the Election Courts. In this regard, **Section 2 of the Elections Act** describes an ‘**election court**’ as: -

***“The Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the Constitution or the Resident Magistrate’s Court designated by the Chief Justice in accordance with Section 75 of this Act.”***

77. Any dispute relating to nomination of members of the County Assembly, would be handled by the Resident Magistrate as designated by the Chief Justice in accordance with section 75 of the Elections Act.

78. It is worth noting that the Petitions before the Magistrate’s Court were filed after the conduct of the general elections of 04/08/2017. More specifically, the Petitions were filed on 22<sup>nd</sup> September, 2017. It is therefore the humble view of this court that IEBC had no jurisdiction over the matter of nomination of political party candidates for consideration or gazettelement by the IEBC. This is so because by that time, elections had already taken place and therefore the role of IEBC in the nomination exercise had lapsed.

79. That being the position, the question which now begs an answer is whether on the face of the law and facts, the Magistrate’s Court had jurisdiction over the petition relating to party nominations to the County Assembly. To answer the above question, a determination as to whether a dispute arising from a party list is an election dispute must be made, but first a look at the jurisdiction of the Magistrate’s Court. Section 75 of the Elections Act stipulates:

***“75. County election petitions***

***(1) A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county.***

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

***(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.***

***(3) In any proceeding brought under this section, a court may grant appropriate relief, including—***

***(a) a declaration of whether or not the candidate whose election is***

***questioned was validly elected;***

***(b) a declaration of which candidate was validly elected; or***

***(c) an order as to whether a fresh election will be held or not.***

***(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—***

***(a) filed within thirty days of the decision of the Magistrate’s Court; and***

***(b) heard and determined within six months from the date of filing of the appeal.***

80. The Supreme Court in the case of **Moses Mwigigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others (2016) eKLR** answered the question with such clarity. The dispute in that case was similar to the one before this Court. The matter began in the High Court with two separate proceedings. There was **Nairobi Judicial Review No. 218 of 2013** where the applicants sought an order of *certiorari* to quash the decision of the IEBC Nomination Dispute Resolutions Committee which dismissed their complaints on *inter alia* the grounds that the dispute on the party lists was a purely internal matter within a political party and the parties ought to have invoked the party’s dispute resolution mechanism or moved to the Political Parties Disputes Tribunal. The High Court (**Mumbi, Majanja and Korir, JJ.**) dismissed the Judicial Review application in light of the reasoning of the IEBC Nomination Tribunal on account of lack of jurisdiction. The other proceedings were in **Nairobi High Court Constitutional Petition No.238 of 2013** where the Petitioners sought a declaration that the list of nominees to the Nyandarua County Assembly published in the IEBC website violated **Articles 90, 98, 174 and 177 of the Constitution**. This petition was also dismissed on the holding that the mode of distribution of the nomination slots was a party matter and that the High Court lacked jurisdiction.

81. Both matters generated appeals to the Court of Appeal which appeals were consolidated and heard together. They were **Appeals No. 224 of 2013** and **No. 238 of 2013**. The Court of Appeal in its judgment faulted the High Court in declining jurisdiction and proceeded to quash the decision of the IEBC Nomination Dispute Resolutions Committee and revoked the Gazette Notice by IEBC and ordered the TNA Party to submit a fresh party list within 7 days of the order. The Court also declared that the IEBC's list of nominees to the Nyandarua County Assembly in its website violated the provisions of **Articles 90, 98, 174 and 177** of the **Constitution** and further that it was unconstitutional to the extent that it purported to discriminate against some constituencies in the County. The dispute then found its way to the Supreme Court.

82. Among the several questions which the Supreme Court answered in its decision rendered on 26/04/2016 include two which are very central and material to this matter. Those questions are 'At what point did the appellants become 'elected' MCAs for Nyandarua County Assembly and at what point in time does the Court become clothed with jurisdiction to determine disputes relating to the nomination of members of a County Assembly, by virtue of Article 177(2) (b) of the Constitution.' The apex Court, in an in-depth analysis and in consideration of the **Constitution, the Elections Act, the Independent Electoral and Boundaries Commission Act, the Political Parties Act, the Elections (General) Regulations** and other relevant judicial decisions answered the said twin questions in **paragraphs 91 to 107** inclusive of its judgment. For purposes of this appeal, I will reproduce hereunder paragraphs **95, 96, 102, 103, 104, 105, 106** and **107** of the said judgment and as follows: -

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

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

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

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

**“(7) For purposes of Article 177 (1) (b) of the Constitution, the Commission shall draw from the list under subsection(1) (e), such number of special seat members in the order given by the party, necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender,**

**“(8) For purposes of Article 177 (1) (c) of the Constitution, the Commission shall draw from the list under subsection (1) (f) four special seat members in the order given by the party.**

**(9) The allocation of seats by the Commission under Article 177 (1) (b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177 (1) (a) of the Constitution.”**

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

**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.**

83. The issue of the '**election of nominated members**' to the County Assembly and Parliament was also dealt with by the Court of Appeal in the case of **Rose Wairimu Kamau & 3 others vs. IEBC C.A. No. 169 of 2013**. In a concurrent finding the Court had the following to say: -

**'.....In reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Articles 971 (c) and 177 (2) respectively have been gazetted ... they are deemed elected members of Parliament and the County Assemblies and any challenge to their membership has to be by way of election petitions under Articles 105 of the Constitution or Part VIII of the Elections Act as the case may be.’ (emphasis added).**

84. The appellant petitioners in their petitions before the Magistrate's court were clear by their supporting affidavit sworn on 22<sup>nd</sup> September 2017 which was way after the 4<sup>th</sup> August General Elections that on 23<sup>rd</sup> July, 2017 the IEBC published the list as presented to it by various political parties to be considered for nomination to the Siaya County Assembly in line with Article 90 (3) of the Constitution as read with Article 177(c) and Section 34(1) and 36(1) of the Elections Act.

85. The Petitioners/ appellants further lamented that the IEBC in gazetting the names of nominees disregarded the party list forwarded to it by Siaya County ODM Office and that it considered only one person with Disability yet there ought to be 2 nominees being persons with disabilities and of the opposite gender.

86. It was further deposed that the 2<sup>nd</sup> Respondent was gazetted as elected member of the Siaya County Assembly, representing persons with disabilities while an appeal was pending.

87. What clearly emerges from the above affidavits and pleadings by the appellants is that they were complaining on the gazetting of nominated members of the Siaya County Assembly by IEBC contrary to the Constitution.

88. Those contests were therefore to a nomination through gazetting hence this was one mode of election by way of nomination since once gazetting is done, only an election court can or has jurisdiction to deal with the dispute, not the IEBC. I am fortified on this point, by the holding by the Supreme Court in the **Moses Mwicigi case** (supra) which had the following to say: -

***"117. It is clear to us that the Constitution provides for two modes of 'election.' The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition.'***

89. Differently constituted, the Court of Appeal in the case of **Jaldesa Tuke Debalo vs. Independent Electoral and Boundaries Commission and Another (2015) eKLR** held:

***"We are cognizant of the principle that upon gazetting of members of the County Assembly, they are deemed to be elected members of the County Assembly..."***

90. From the foregoing, therefore, it is now settled law that once IEBC publishes the Gazette Notice of the names of the nominees to the County Assembly then that marks the end of the nomination process and the people whose names so appear in the notice stand 'elected' into the County Assembly. It is also settled that any challenge to that 'election by nomination' can only be entertained by way of an election petition and not otherwise.

91. Accordingly, the election petitions by the appellants herein having been filed after the gazetting of nominees and after the general elections, they were properly suited before the elections court to have their dispute resolved on merit.

92. In **David Okeka Oyugi V. Muslim Dida and 2 others (2016), eKLR**, the court held that ***election petitions include such petitions that challenge the outcome of the electoral process. And an electoral process includes nominations and gazetting of members of the County Assemblies.***

93. For that reason, I repeat for emphasis and clarity that IEBC has no jurisdiction to handle an election petition arising out of a nomination process which was characterized by gazetting of the nominees such as this one because this is an election petition arising subsequent to gazetting of the nominated members of the Siaya County Assembly. It is my view therefore that only an election court can deal with such a dispute and not the IEBC.

94. The Supreme Court in the **Moses Mucigi case**[supra] case made it clear that:

***"a Gazette notice signifies completion of Election through nomination and finalizes the process of constituting the County Assembly in question and that it is therefore clear that publication of the Gazette Notice marks the end of the IEBC mandate and shifts any consequential dispute to the election court. The apex Court further stated that the gazette notice also serves to notify the public about those who have been "elected" to serve as nominated members of the County Assembly."***

95. In **Wamboko v Kibunguchi & another [2008]KLR 477**, it was held that ***an election court has jurisdiction to hear and determine a petition where one of the issues is nomination of a candidate-as nomination is a process of election.*** Further, in **Luka Lubwayo & Another v Gerald Otieno Kajwang & Another [2013]eKLR** the Court stated that:

***"The Constitution seems to widen the scope in a petition to determine whether a person has been validly elected as a Member of Parliament and the question of validity may encompass the clearance to run.***

96. Accordingly, this court has no difficulty in finding and holding that the Election Petitions Nos. 1 and 2 of 2017 filed before the Magistrates' Court at Siaya by the appellant herein related to an election dispute and was therefore properly filed in an Election Court, the Magistrate's Court duly designated by the Chief Justice as the appropriate Election Court pursuant to **Section 75(1A)** of the Elections Act. For that reason, I find and hold that the preliminary objection as to the jurisdiction of the Magistrate's Court to hear and determine the Election Petition had no merit and the same ought to have been dismissed.

97. From the foregoing discourse and in consideration of the facts of this case and the applicable law, I am satisfied that the Magistrate's

Court had and has the requisite jurisdiction to entertain the petitions filed before it by the appellants herein. This is so because the nomination dispute before the election court went to the root of electoral process and is therefore an issue of substance that goes to the root of an election and so an election court has jurisdiction to hear and determine the dispute.

98. This court is aware that an election court is a court with special jurisdiction and availability of alternative remedies and procedures under general law should not be a bar to remedies and procedures under the electoral law.

99. Albeit the appellant urged this court by way of an amended memorandum of appeal to wholly determine the petition under section 78 of the Civil Procedure Act, regrettably, this court does not possess the necessary jurisdiction to hear and determine the dispute and therefore it would be usurping the Magistrate's Court's Jurisdiction if it did so especially where the petition was determined on the basis of a preliminary objection and not on its merits. In other words, as original jurisdiction is conferred by statute on the Magistrates Court, the High Court cannot assume any original jurisdiction to hear and determine the election dispute for County Assembly nominees.

100. In addition, this court was asked to, in the alternative, remit the petition for consideration by any other magistrate other than Hon James Ong'ondo, PM. I have considered the request. However, I find that the Hon Ong'ondo made the decision in good faith and on the material placed before him. There is nothing suggestive that he was biased in his decision making. It is for that reason that I would hesitate remitting the Election Petition to any other magistrate other than Hon. James Ong'ondo to hear and determine on its merits.

101. Before I conclude, I must mention the concern by the 1<sup>st</sup> Respondent in its submissions that the grounds of appeal as framed challenge facts and that they are not based on the law and that as such the appeal is incompetent.

102. It is true that the law only permits an aggrieved party to file an appeal on points of law only. Nonetheless, albeit the appellants' grounds of appeal are framed in a manner suggestive of challenge to facts, it is important to first and foremost appreciate the fact that a preliminary objection is a pure point of law and once a decision is made on it upholding it, then a challenge to the decision can only be a challenge in law and not in fact. An appeal should therefore not be rendered incompetent simply because the grounds of appeal are framed as if they challenge facts. I find in the appeals herein no factual matters capable of being determined since the preliminary objections were predicated on the jurisdiction of the court to hear and determine the Election Petitions, which is a pure point of law that met the threshold in the celebrated case of **Mukisa Biscuit Company vs West End Distributors Limited (1969) EA at page 701** wherein a preliminary objection was defined as follows:

***“A preliminary Objection is in the nature of what used to be a demurrer. It raises pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper rising of points by way Preliminary Objection does nothing but unnecessarily increase costs and occasion confusion on issues. This improper practice should stop.”***[Emphasis added].

103. As to what amounts to matters of law, the court in the case of **The Attorney General v David Marakaru [1960] EA484** as approved by the Court of Appeal in **Timammy Issa Abdalla v Swalleh Salim Swaleh Imu & 3 Others [2014]** held that:

***“A decision is erroneous in law if it is one to which no court of law could reasonably come; which is the same thing as a decision of fact in which there was no evidence to support.”***

104. As a consequence thereof, I find and hold that in the circumstances of this appeal, the framing of the grounds of appeal to include a challenge to facts is a mere procedural technicality. It is a matter of form that is curable under Article 159 of the Constitution which clearly stipulate that no procedural technicality shall impede access to justice. I say so being persuaded that a question of whether a court has jurisdiction in any matter is a pure question of law and not otherwise.

105. In the end, the objection as to the form of the grounds of appeal is hereby overruled.

106. Accordingly, I make the following final orders:

***a. The appeal herein is allowed.***

***b. The preliminary objection filed by the 1<sup>st</sup> respondents before the Magistrate's Election Court as allowed by the Magistrate's election Court be and is hereby overruled and dismissed.***

***c. The Learned Magistrate's Ruling and order made on 15<sup>th</sup> November, 2017 is hereby set aside and substituted with an order that the Appellants herein were properly before the Magistrate's Election Court.***

***d. The Petitioners' Election Petitions are hereby restored and forthwith returned to the Magistrate's Election Court for fresh consideration on their merits, in the manner stipulated by law, and shall be heard and determined by Hon. James Ong'ondo, Principal Magistrate, Siaya Principal Magistrate's Court, being the designated Elections Magistrate under section 75 of the Elections Act.***

***e. The Petitioners are hereby allowed to prosecute their individual petitions as prayed in prayer No. 4 and/ or 5 of the Amended Memorandum of Appeal.***

***f. Each Party shall bear their own costs of this appeal.***

Dated, signed and Delivered at Siaya this 11<sup>th</sup> Day of June, 2018.

**R.E ABURILI**

**JUDGE**

**In the presence of:**

Mr Wanyanga Advocate for the appellants

Mr Rakewa Advocate for the 3<sup>rd</sup> respondent

N/A for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent

Interested parties present

Court Assistants: Brenda and Laban