



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

ELECTION PETITION APPEAL NO. 01 OF 2018

DAMARIS NYARANGI MOUNI.....PETITIONER

=VERSUS=

1. WAFULA W. CHEBUKATI.....1ST RESPONDENT

2. THE I.E.B.C.....2ND RESPONDENT

3. IRENE NYAKERARIO.....3RD RESPONDENT

4. CLERK NYAMIRA COUNTY ASSEMBLY....4TH RESPONDENT

{Being an Appeal from the Judgement and Decree delivered

on 28th February 2018 by Hon. M. O. Wambani – CM

arising from Election Petition No. 3 of 2017

at Nyamira Chief Magistrate's Court}

JUDGEMENT

The Appellant herein was the Petitioner in the Election Petition in the Court below. The background of that Petition was that during the Elections of August 2017 the Appellant was nominated by the Orange Democratic Movement (ODM) Party under the gender top-up and was duly gazetted by the 1st and 2nd Respondents as was required of them under the law. Her gazettement was contained in a Kenya Gazette Notice No. 124 dated 28th August 2017. Thereafter on 7th September 2017 the Appellant was duly sworn in as a Member of the County Assembly of Nyamira County. Up to that time there was no order challenging her nomination or questioning her credibility as a Member of the County Assembly. Everything however changed on 8th September 2017 when the 1st Respondent published a Gazette Notice No. 8879 in which the name of the Appellant was deleted and substituted with that of the 3rd Respondent.

On 12th September 2017 the Appellant filed a petition in the Resident Magistrate's Court at Nyamira challenging the decision of the 1st & 2nd Respondents which degazetted her name and inserted the name of the 3rd Respondent and also seeking an order to restrain the 4th Respondent from swearing in the 3rd Respondent. The petition was heard by Hon. M. O. Wambani, Chief Magistrate, who upon considering the evidence by all the parties dismissed the petition hence paving the way for the 3rd Respondent to be sworn in as a Nominated Member of the County Assembly. The Appellant sought and obtained an order to arrest the swearing but unfortunately it was overtaken by events as the 3rd Respondent had been sworn in on 1st March 2018 while the order was issued on 6th March 2018. Being aggrieved, the Appellant preferred this appeal based on the following grounds:-

1. THAT the Learned Trial Magistrate erred in Law by substantially relying on extraneous matters, supposition, conjectures and own theories to make determination on fundamental issues, rather than material and evidence on record, thereby arriving at erroneous determination contrary to the law and rule of evidence.

2. THAT the Learned Trial Magistrate erred in Law by reaching a determination which was in violation of the Constitution of Kenya 2010, the Election Act and the Rules and by unlawfully upholding the gazettement of the 3rd Respondent in Kenya Gazette Volume No. 133 dated 8th September 2017 without appreciating the law.

3. THAT the Learned Trial Magistrate erred in Law and fact when she held that the Petitioner was not properly nominated by the ODM Party contrary to the Provisions of Section 34 (1) of the Election Act and the Constitution.

4. THAT the Learned Trial Magistrate erred in Law and fact when she failed to appreciate that the mandate of the 1st & 2nd Respondents ceased to exist on the 28th august, 2017.

5. THAT the Learned Trial Magistrate erred in Law and fact by failing to appreciate that the gazettelement of the Appellant amounted to a declaration of a result and therefore any challenge or dispute ought to have been mounted by way of an election petition.

6. THAT the Learned Trial Magistrate erred in Law and fact when she purported to address the issues which ought to have been discharged by different quasi judicial body before the gazettelement of the Appellant on the 28th august 2017 contrary to the Provisions of Section 74 of the Election Act.

7. THAT the Learned Trial Magistrate erred in Law and fact when she relied on the evidence of the Respondents alone without evaluating the evidence by the Appellant hence shifting the onus of proof to the Appellant.

8. THAT the Learned Trial Magistrate erred in Law when she held that the Appellant failed to explain the source of the court order which was not verified by the authorized personnel a fact which was beyond her jurisdiction.

9. THAT the Learned Trial Magistrate's judgement, decree and certificate of determination contravened the mandatory provisions of Section 83 of the Election Act.

10. THAT the Learned Trial Magistrate erred in Law by failing to properly evaluate, analyze and apply the evidence before her thereby reaching erroneous decision.

11. THAT the Learned Trial Magistrate misapprehended the application of law, principles and or authorities/case laws thereby reaching unconstitutional and illegal decision which contravenes and seek to upset the principles and laws espoused in plethora of case laws cited by the parties before her and applicable to similar cases as that before her.

12. THAT it is proposed to ask this honourable court for Orders that;

(a) The judgement, decree and certificate of determination issued by court be set aside, quashed, rescinded and/or varied.

(b) The honourable court be pleased to substitute an Order allowing the Appeal herein by allowing the petition dated 12th September 2017 in its entirety.

(c) That it be determined that the appellant herein DAMARIS NYARANGI MOUNI was duly nominated and gazette as a member of Nyamira County Assembly.

(d) THAT the certificate of determination of petition issued pursuant to Section 86 (1) of the Election Act, be recalled and annulled.

(e) Costs of the appeal herein and those incurred in the subordinate court be borne by the 3rd Respondent.

(f) Any such and or further orders that the honourable court shall deem just and expedient in the circumstance.

As the Trial Magistrate did not award the Respondents costs of the petition but instead that each party was to bear their own costs, the 3rd Respondent also preferred an appeal on that issue. That appeal is premised on only one ground which is that:-

“1) The Honourable Magistrate erred in law and in fact by ordering each party to bear their own costs without any valid reasons, ground and or special circumstances thus abusing her discretion and known tenets of law as “costs following the event” in litigation”.

The appeals by both the Appellant and the 3rd Respondent were vehemently opposed with the 3rd Respondent filing a replying affidavit dated 6th April 2018 in opposition to the main appeal.

The two appeals were canvassed through written submissions which Counsel subsequently highlighted orally on 30th May 2018.

On the appeal on the merits, Mr. Nyambati, Learned Advocate for the Appellant framed the following five issues for determination:-

1. Whether the 1st and 2nd Respondents had the mandate and capacity to degazette or revoke and replace the Appellant as a nominated member of county assembly after her gazettelement on 28th of august 2017.

2. Whether the trial magistrate erred in law and fact by failing to appreciate the law and analyze the evidence as submitted by the appellant.
3. Whether this court has the powers to declare and nullify the gazette of the 3rd respondent through Kenya Gazette Volume No. 133 of 8th September 2017.
4. Whether this court can set aside the judgement and allow the appeal.
5. Who should bear the costs of this appeal?

On the first issue Mr. Nyambati was categorical that the 1st and 2nd Respondents acted beyond their mandate. He submitted that the mandate of the 1st and 2nd Respondents was to receive, supervise and declare the results from the names submitted by the Political Parties for nomination and that upon declaration of those results through gazette they became fuctus non official. Mr. Nyambati submitted that Section 88 (4) of the Constitution as well as Section 34 (10) of the Elections Act prohibits the 1st and 2nd Respondents or any other person interfering with the submitted list until the end of the term of Parliament. He stated that Section 74 (1) of the Elections Act controlled and limited the mandate of the 1st & 2nd Respondents. He further submitted that the 1st & 2nd Respondents could only have arbitrated the dispute on who between the Appellant and the 3rd Respondent should have been nominated before the gazette. He submitted that after the gazette the Appellant became an elected Member of the County Assembly and her election could only be challenged in an election petition, before an Election Court. To support his submission he relied on the decision of the Supreme Court in **Moses Mwigigi & 14 Others [2016] eKLR** where he quoted the Court as holding inter alia:-

“[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 as to the validity of results from the IEBC to the Election Court.

[107] it is therefore clear that publication of the gazette notice marks the end of the mandate of the 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.”

Mr. Nyambati also relied on the decision of the Court of Appeal in **Rose Wairimu Kamau & 3 Others =V= IEBC C/App No. 169 of 2013** in which he quoted the Court of Appeal as stating:-

“...in reaching the conclusion, we are alive to the fact that once nominees to Parliament and County Assemblies under Article 97 (1) (c) and 177 (2) respectively have been gazette.....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 Article 105 of the Constitution or part viii of the elections Act as the case may be.”

Counsel also cited **Jaldesa Tuke Deballo =V= IEBC & Another 2015 eKLR** where the above decision was also followed. He submitted that the action taken by the 1st & 2nd Respondents in regard to the nomination of the Appellant was contrary to the provisions of Section 34 (10) as read with Section 74 of the Elections Act and was therefore irregular, null and void. He submitted therefore that the decision of the trial court that the IEBC had the mandate to act as it did was extremely unfortunate and irregular and was contra the decisions of the superior courts. He urged this Court to find as Chacha Mwita J did in **Rahma Isaak Ibrahim =V= IEBC & 2 Others [2017] eKLR** that:-

“In purporting to delete the petitioner’s name as a duly nominated Member of Mandera County Assembly and substitute it with that of the 1st Interested Party, the IEBC acted outside its mandate. The speaker of the county assembly of Mandera could not lawfully swear in the 1st Interested Party consequent to the illegal gazette notice no. 8752 of September 6th, 2017.”

On the first issue he concluded that the 1st & 2nd Respondents had no jurisdiction to degazette the Appellant and replace her with the 3rd Respondent because jurisdiction is everything as was held in the case of the owners of motor vessel **“Lilians” =V= Caltex Oil Kenya Limited (1989) KLR 1**.

On issue No. 2 Mr. Nyambati submitted that the jurisdiction of the Trial Magistrate ought to have been confined to the areas complained against in the petition. He submitted that she was also bound by the decisions of the superior courts that were cited before her but instead she erred in law and fact in relying on unfounded documents produced by the Respondents. He contended that the letter upon which the Trial Magistrate’s decision was hinged was neither signed by a Deputy Registrar or a Judicial Staff designated for that purpose. He submitted that the authenticity or otherwise of that letter was not supported by any minutes and that it was necessary for the Respondents to have produced the pleadings cited in the purported appeal or attach documents and minutes demonstrating that without the court order the names of the Appellant could not be gazetted. Mr. Nyambati contended that the Respondents did not call an officer from the ODM Party or from the Judiciary to back their claim and in the absence of such crucial witnesses the Trial Court’s judgement was wrong and irregular. He likened this to shifting of the burden of proof to the Appellant and submitted that it was irregular, null and void. He further submitted that the Appellant had denied knowledge of the purported court order and that in any event as the 1st & 2nd Respondents had no mandate to degazette the Appellant the Trial Magistrate’s decision was based on extraneous and unfounded evidence and that she adjudicated issues that were not before her for determination.

Mr. Nyambati submitted that this being the first appellate court it has the capacity to interrogate the legality of the evidence, documents, law and judgement and make the necessary orders.

On issue No. 3 Mr. Nyambati submitted that this Court has power to nullify the gazette notice no. 133 of 8th September 2017 of the 3rd Respondent. He urged this Court to be persuaded by Mwita J's decision in **Rahma Isaak Ibrahim =V= IEBC & 2 Others [2017] eKLR** and make a similar declaration as he did saying that the issue before that court was similar to the one in this case.

On whether this Court can set aside the judgement of the lower court and allow the appeal, Mr. Nyambati argued that it can and should as according to him from the analysis herein, the law and evidence, the judgement was wrong and this appeal is merited.

On who should bear the costs of this appeal Mr. Nyambati submitted that as it is now settled that costs follow the event this court should exercise its discretion and award the costs to the Appellant.

The 1st & 2nd Respondents retained the firm of Sisule & Associates to represent them in this appeal. The said Advocates framed the following three issues for determination: -

- “a. Whether the Learned Magistrate had jurisdiction to look into the validity of the process of Nomination of the Appellant herein;*
- b. Whether the Appellant was validly nominated to the County Assembly; and*
- c. Who should bear the costs of these proceedings?”*

Counsel then sought to answer those issues but before that, Counsel submitted that grounds 1, 2, 10 and 11 in the Memorandum of Appeal are vague and wide and particulars are not provided. Counsel also observed that no submissions were presented in regard to grounds 6 and 9. In regard to their issue (a) Counsel submitted that the corrigenda that deleted the Appellant's name was done in good faith on the basis that the Commission was not aware the Appellant had been sworn in at the time. Counsel submitted that the issue of the Appellant's nomination was specifically pleaded at paragraph 23 of the petition and that the issue having been brought before the Court it was not necessary for any petition or cross petition to be filed in order for the Court to make a determination on it. Counsel submitted that even had the Trial Court made a determination that the 3rd Respondent was not validly nominated the Court was still mandated to make a determination on the validity of the Appellant. Counsel contended that the jurisdiction of the trial court was not just based on Sections 75 (3) and 80 of the Elections Act but that it was admitted by the Appellant both before the trial court and in this appeal. Counsel argued that a party cannot bring an issue before the court and then object to its determination as in the present case.

He submitted that parties are bound by their pleadings as was held in the case of **IEBC & Another =V= Stephen Mutinda Mule & 3 Others [2014] eKLR**. Counsel submitted therefore that grounds 1, 3, 6 and 10 of the appeal are unfounded as the trial court did not consider any extraneous matters.

On issue (b) Counsel submitted that the Gazette Notice relied upon by the Appellant cannot be looked at in isolation and the entire process must be considered to determine the validity of the nomination of the Appellant. Counsel submitted that the Appellant herein was not in the final party list published by the 2nd Respondent in the Daily Nation and Standard Newspapers dated 23rd July 2017. However on 10th August 2017, ODM submitted to the 2nd Respondent an amended party list pursuant to an alleged court order dated 27th July 2017 issued in Election Nomination Appeal No. 32 of 2017 where ODM was ordered to include the Appellant's name in the Gender Top-up List. That however it later transpired that the court order was not genuine. Counsel submitted that Regulation 54 (8) of the Elections (General) Regulations requiring publication of party lists is not idle as in essence, the requirement for publication affords the public an opportunity to review the lists to see if they comply with the Constitution as well as to enable parties invoke the dispute resolution process provided under the Constitution. That pursuant to its mandate to settle electoral disputes including those arising from nominations and as the commission has received complaints regarding the authenticity of the court order it had the mandate to investigate the veracity of the complaints.

Counsel submitted that the 2nd Respondent in carrying out its mandate under Article 90 of the Constitution it has an obligation as does every state organ, in accordance with Article 249 (1) to: (a) protect the sovereignty of the people; (b) secure the observance by all state organs of democratic values and principles; and (c) promote constitutionalism. Counsel submitted that no mala fides has been established against the commission and that having established there was a fraudulent act, it published a corrigenda to safeguard its constitutional mandate. Counsel urged this Court to invoke Article 249 of the Constitution in deciding this appeal.

On the burden of proof, Counsel for the 1st & 2nd Respondents submitted that the evidential burden keeps shifting and on this cited **Raila Amolo Odinga & Another =V= IEBC & 2 Others Petition No. 01 of 2017**.

Counsel further submitted that as no witness from ODM testified then the Appellant's position that she was correctly nominated cannot be taken as the party position. He stated that for that reason the case of **Rahma Isaack Ibrahim =V= Independent Electoral & Boundaries Commission and 2 & Others (Supra)** is distinguishable as in that case first the Jubilee Party swore an affidavit in favour of the Petitioner and secondly the court was not an election court and therefore could not look into the validity of the nomination of the Petitioner.

Counsel for the 1st & 2nd Respondents cast doubt on the validity of the minutes produced by the Appellant as “DNM-001” saying that the same are not certified and do not in any case address why her name was not on the list submitted to the commission on July 19th 2017. Counsel also submitted that the Appellant had equally failed to address the issue of the order upon which she bases her nomination but which order was fraudulent but instead takes a very narrow view that the issues surrounding it were outside the scope of the petition. As for the letter from the Judiciary, Counsel submitted that the argument it is written by an unauthorized official falls flat as the same is written by the Deputy Registrar. He (Counsel) contended that the evidence of Pw2 and Pw3 did not attest to the validity of the Appellant's nomination and that she did not therefore prove that she was validly nominated. Replying on the case of **Paul Kimori Maranga & Another =V= Joel Omagwa & 2 Others [2013] eKLR** where **Odd Jobs =V= Mubia [1970] EA 476 CA** was cited with approval, Counsel for the 1st & 2nd Respondent submitted that a court could base its decision on an unpleaded issue if the same was left to it to decide. He contended that the

issue of the illegal court order was an issue that arose at the trial and was pleaded by the 1st and 2nd Respondents and it was therefore alive for the court to determine. Replying on the decision of the court of Appeal in **Mapis Investment (K) Ltd =V= Kenya Railways Corporation [2005] 2 KLR 410** which was cited with approval in **Peter Kimori Maranga & Another =V= Joel Omagwa & 2 Others (Suppra)**, Counsel for the 1st & 2nd Respondent submitted that no action should be founded on illegal or immoral conduct and that the Appellant cannot pursue a legal remedy in the manner she does. Counsel reiterated his contention that the Appellant was not validly nominated and submitted that the declarations sought in the petition and the memorandum of appeal herein cannot issue as they would amount to this Court condoning an illegality. He submitted therefore that the Appellant is not entitled to the reliefs sought.

On the issue of costs, Counsel submitted that his Court should award the costs of this appeal to the 1st & 2nd Respondents in line with the ordinary rule that costs follow the event. He urged this Court to find that the appeal has no merit.

Counsel for the 3rd Respondent began his submissions by accusing the Appellant of abandoning the grounds in the memorandum of appeal and settling out fresh grounds which according to him is in breach of Order 42 Rule 3 (4) of the Civil Procedure Rules. Counsel then outlined the process of nominating members of the county assemblies under the party list. He submitted that the names of the nominees were published in the Sunday Nation of 23rd July 2017 but the Appellant was not one of them as she had not applied to be nominated. That moreover she did not move either the Political Parties Disputes Tribunal or the Independent Electoral & Boundaries Commission to challenge the list as published but instead sought to have her name included by means of a fake court order purported to have been obtained from the High Court in Nairobi Election Nomination Appeal No. 32 of 2017. Counsel submitted that the decision of the trial court was properly based on Article 90 (2) (b) of the Constitution and that it properly came to the conclusion that the party list which the court should have considered was the one published in the Sunday Nation 23rd July 2017. Counsel wondered what else the Appellant relied upon if it was not the impugned court order as she not having been on the party list could not otherwise have been nominated.

On jurisdiction Counsel for the 3rd Respondent submitted that the Appellant had no right to file an election petition when she had not exhausted the otherwise laid processes of addressing her grievances. Counsel urged this Court to find that the appeal has no merit and dismiss it with costs to the 3rd Respondent. To support his submissions, Counsel relied on the following cases:-

- **Ben Njoroge & Another =V= The Independent Electoral Boundaries Commission & 2 Others (citation not given).**
- **National Assembly =V= James Njenga Karume [1999] eKLR.**
- **Isaiah Gichu Ndirangu & 2 Others =V= The Independent Electoral & Boundaries Commission & 4 Others [2016] eKLR.**

There were no submissions for the 4th Respondent who preferred to remain neutral.

On the appeal on costs, Counsel for the 3rd Respondent (who is the Appellant on that issue) submitted that it is now settled that costs follow the event. He submitted that even the Advocate for the Appellant acknowledged this in his submissions. He contended that election petitions are no ordinary cases and that they should be handled as cases with a distinct jurisdiction. He observed that time was spent in preparations and the 3rd Respondent was represented by an Advocate who travelled all the way from Nairobi and who had to be accommodated in Kisii and as such she was entitled to the costs. Basing his argument on Section 30 (2) of the Election Petition Rules [2017] he contended that the 3rd Respondent had pleaded for costs and that the finding that each party bears their own costs was not based on merit but was to the contrary an abuse of discretion. He urged this Court to allow the appeal on costs and award the costs of the petition to the 3rd Respondent.

On his part, Mr. Ombachi, Advocate for the Appellant, submitted that costs are in the discretion of the Court and this Court can interfere with the trial Magistrate's exercise of discretion only if it is satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision or that her exercise of the discretion led to an injustice. To support this submission he relied on the case of **Mbogo & Another =V= Shah [1996] EA page 96**. He submitted further that the Appellant had failed to demonstrate the injustice she has suffered of as a result of the Trial Magistrate's decision on costs and further that she had not distinguished the issue of law which could warrant this court to interfere with that discretion. He contended that the trial court's discretion was judicious and proper and took cognizance of all provisions of the law and the circumstances of the case. He urged this court to dismiss the appeal on costs with costs to the Appellant.

The 1st, 2nd and 4th Respondents did not file written submissions on the appeal on costs but at the highlighting Mr. Kirenga, Advocate who appeared for the 1st and 2nd Respondents submitted that they supported the appeal on costs and that it should be allowed. Miss. Michoma, Advocate for the 4th Respondent reiterated that her client was non-partisan and an implementer of the decision and as such neither opposed nor supported the appeal or cross appeal.

The petition in the court below was about election of members of the County Assembly through the party lists. The Petitioner who is now the Appellant in this appeal contended that she had been duly nominated by her ODM Party in accordance with Section 34 (2) of the Elections Act, that she was then gazetted as such and later sworn in thus effectively making her a Member of the County Assembly of Nyamira under Article 177 (1) (b) of the Constitution. She contended therefore that the subsequent action by the 1st and 2nd Respondents to re-allocate her seat to the 3rd Respondent was in breach of Section 34 (7) and (10) of the Elections Act which provide that the party lists submitted to the commission were to be valid for the term of Parliament and could not be altered. She contended that once gazetted she effectively became an elected member of the County Assembly and her election could only be nullified by an election court. She therefore urged the court to, inter alia, issue a declaration first that she was validly nominated as a Member of the County Assembly of Nyamira under Gender Top-up and gazetted on 28th August 2017. Secondly a declaration that any challenge to her nomination after gazettement and swearing in could only be by way of an election petition, and thirdly a declaration that the gazettement of the 3rd Respondent by the 1st & 2nd Respondents on the 8th September 2017 was irregular, null and void. She also sought an order of certiorari to quash the gazette Notice No. 133 dated 8th September 2017 by which the 3rd Respondent was gazetted.

At the hearing the Appellant produced a copy of her identify card and stated that she was a Life Member of the ODM Party as evidenced by a copy of her certificate of Life Membership. She also produced a copy of minutes through which she alleged her name was submitted for nomination. She emphatically denied that her inclusion in the party list arose from a court order and also denied that she presented a fake order. She admitted however that whereas her name was, not one of the names published by the Commission in the Standard and Sunday Newspapers dated 23rd July, 2017 that of the 3rd Respondent was. She maintained that it was she rather than the 3rd Respondent who was validly nominated.

The Appellant called two witnesses who accompanied her to her swearing in ceremony held on 7th September 2017. They however testified that they were not privy to the validity of her nomination.

The 1st and 2nd Respondents called Salome Oyugi an Advocate of the High Court working at the Commission as a Legal Officer. She testified inter alia that by 19th July 2017, which was the deadline, the ODM Party had submitted its final party list in regard to this election. She was categorical that the name of the Appellant was not in that list. She stated that the final list was published in both the Standard and Nation Newspapers of 23rd July 2017 and that according to the Commission that was the final list unless a dispute was lodged. She contended that the Commission issued a directive to that effect and stated that in the event a dispute was lodged, political parties were required to re-submit another list accompanied by the applicable order that directed review of that list. The witness further testified that on 10th August 2017 the Commission received another list from ODM and which now had the name of the Petitioner inserted as No. 5 the same number as that of the 3rd Respondent in this case. She stated that when the Commission inquired why the list had been resubmitted ODM informed them that it had a court order. The said order was then sent to the Commission electronically. According to her the order bore Case Appeal No. 32 of 2017 Constitutional and Human Rights Division – Nyarangi Damaris Mouni =V= ODM. She stated that it was upon receiving that order that they became suspicious as there had been no dispute lodged either with the Commission or the Political Parties Disputes Tribunal. She therefore wrote to the Court and on 11th September 2017 she received a letter to the effect that the order was not authentic. It was then that guided by Section 37 of the Elections Act that they nominated the 3rd Respondents.

The 3rd Respondent also gave evidence that she was validly nominated as her name unlike that of the Appellant was on the final party list submitted to the Commission by their Party (ODM). She testified that she was a Life Member of the party and that she had duly complied with the nomination procedure which required those interested to fill some forms in the party's website and submit them to the party headquarters together with an application form. She echoed the evidence of the witness for 1st and 2nd Respondents that the "court order" submitted by the Appellant so that she could be included in the party list was not authentic.

The 4th Respondent did not adduce any evidence.

This Court derives its jurisdiction in this appeal from Section 75 of the Elections Act. Section 75 (4) provides that an appeal shall lie to this Court on matters of law only. Rule 34 of the Election (Parliamentary and County Elections) Petition Rules, 2017 provides for the procedure of filing such appeals and at sub-rule (10) provides that this Court **"may confirm, vary or reverse in whole or in part, the decision of the court from which the appeal is preferred."** It further provides that **"this Court shall have the same powers and perform the same duties as are conferred and imposed on the Court exercising original jurisdiction."**

There is no dispute as to whether the issues in this appeal are issues of law. None of the parties raised objection as to the competence of both the appeal on the merits and on the issue of costs. Upon perusal of the petition, the grounds in the memorandum of appeal and upon considering the rival submissions of the Learned Advocates for the parties, I deduce the following issues for determination:-

- 1. Whether the Appellant was validly nominated as a Member of the County Assembly of Nyamira under the top-up list.**
- 2. Whether the action of the 1st & 2nd Respondents to reallocate her seat to the 3rd Respondent was ultra vires.**
- 3. Whether the Trial Magistrate acted without jurisdiction by delving into the validity of the process of the Appellant's nomination in the first place.**
- 4. Whether the 3rd Respondent was validly nominated as a Member of the County Assembly.**
- 5. Whether the award of costs in an election petition is a matter for the discretion of the election court.**
- 6. What are the orders of this court?**
- 7. Who shall bear the costs of this appeal?**

Issues No. 1 and 3 are intertwined and shall therefore be considered together. It was Mr. Nyambati's submission both here and in the Court below that the decision of the trial court was based on an extraneous issue which was not before it for determination. My finding however is that by seeking a declaration that she was validly nominated as a Member of the County Assembly of Nyamira, the Appellant herself brought the whole issue of her nomination within the jurisdiction of the Court. To determine whether or not she was entitled to that declaration the Court had of necessity to determine whether she was indeed validly nominated. In my view it would not have been possible to determine that issue without delving into the issue of the process by which she was nominated. That in my view included inquiring into how her name made its way into the party list in the first place. Indeed in her testimony she began by telling the Court that she was a Life Member of the ODM Party and that through it she applied to be nominated as a Member of the County Assembly of Nyamira. She even exhibited the minutes by which she alleged her name was submitted to the party for nomination. That list is an annexure to her further affidavit sworn on 31st October 2017 and filed on even date. The issue of the process by which she was nominated was essential in determining whether she had been validly nominated. This is because the process was being questioned by the 1st, 2nd and 3rd Respondents who claimed that she had found her way

into the party list through fraudulent means. That issue was raised in the affidavits of their witnesses and was also raised in their testimonies. It is in my view therefore a central issue in the petition. In the light of the issues raised by the Respondents both in their affidavits and their testimonies and the subsequent submissions of their Advocates, the Court would have taken a very narrow view if it swept the issue under the carpet. It is my finding that the trial magistrate did not err either in law or in principle in considering the said issue. Indeed the issue is also central to this appeal because this Court cannot without going into the same determine whether the Appellant was validly nominated and whether the Commission acted ultra vires in deleting her name and replacing it with that of the 3rd Respondent.

I have answered issue number 3 so now I move to issue No. 1. On this issue it is my finding that the Appellant was not validly nominated as a Member of the County Assembly. Before one was nominated by the ODM party one had to first be a Member of the party and secondly apply to be nominated. The party like all others was then required to submit a list of their successful applicants to the Commission. This is what is in Section 34 of the Elections Act referred to as a party list. The minutes produced by the Appellant show that she indeed applied to be nominated. Her name appears on the list for West Mugirango Constituency. That however is as far as it goes because according to Minute 4/6/2017 all that transpired concerning that list is that it was read to the panel for discussion. Unlike in the case of the applicants for Senate and National Assembly where the panel made a conclusive minute as to who qualified for nomination it was not so for the Member of the County Assembly. Moreover those minutes have nothing to show that the names were thereafter forwarded to the headquarters to formally nominate the applicants. They cannot therefore be the evidence of how her name got into the party list much as they are proof that she applied for nomination.

The burden to prove how her name got into the party list was on the Appellant. Apart from the aforementioned minutes she had no other explanation. On the other hand there was cogent evidence from the 1st & 2nd Respondents' witness that her name got its way to the party list through a court order. The Appellant vehemently denied that this was the case but in the absence of any other explanation I find it to be so. Salome Oyugi, the witness for the 1st & 2nd Respondents testified that she dealt with the issue of the Appellant's nomination personally. She testified that the Appellant's name was not in the final list that the Commission received from the ODM Party and which the Commission published in the Standard and Nation Newspapers of 23rd July, 2017. This in essence means that her application for nomination was not successful and that her party did not nominate her. However, the 3rd Respondent's name appeared in the list which means that her application for nomination was successful. Salome Oyugi told the Court that when later the Commission received a list with the Appellant's name listed in the same order (Number 5) as the 3rd Respondent, she became curious because whereas the Commission and the Political Parties had a procedure for dealing with disputes arising from party lists, none of those tribunals had received a dispute regarding the ODM Party list for Nyamira County upon the publication of that list in the Newspaper. She stated that when she inquired from the Party, they told her that they had included the Appellant's name pursuant to a court order. She produced that court order that she first received from the Party electronically but which was later served upon her personally. It transpired later that the order was not a genuine court order. Clearly therefore the Appellant had made her way into the party list through fraudulent means. She was not therefore validly nominated as a Member of the County Assembly for Nyamira and her subsequent swearing as a Member of the said Assembly was null and void abinitio.

That then brings me to the 2nd issue which is whether the action of the 1st and 2nd Respondent to reallocate her seat was without jurisdiction. The leading case on this issue is **Moses Mwicigi & 14 Others =V= IEBC & 5 Others [2016] eKLR** which Mr. Nyambati for the Appellant cited in his submissions. In that case the Supreme Court made it clear that the publication of the gazette notice marks the end of the Commission's jurisdiction in so far as nominations are concerned. The Court of Appeal has also maintained that position as can be seen in **Rose Wairimu Kamau & 3 Others =V= IEBC C/Appeal No. 169 of 2013** and there are also numerous High Court decisions where the case of Moses Mwicigi & 14 Others (Supra) has been followed. This Court agrees with those decisions and is also bound by the decisions of the two superior courts. The 1st Respondent and the Commission could therefore have had no jurisdiction to degazette the name of a person who had validly been nominated and replace it with another unless it was under the circumstances provided in Section 37 of the Elections Act. It is my finding however that the circumstances in this case were different. In this case the Appellant was not validly nominated and as I have stated having found her name into the list through fraudulent means her being on the list, her nomination by the Commission and subsequent gazetting were all void abinitio. It was a nullity. As was held in **Scott =V= Brown, Doering, McNab & Co. (3) (1892) 2QB 724 Lindley J at page 728** which was quoted with approval in **Mistry Amar Singh =V= Serwano Nofunira** and later by the Court of Appeal in **Mapis Investment (K) Limited =V= Kenya Railways Corporation [2006] eKLR**:

“...No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not if the evidence adduced by the plaintiff proves the illegality the court ought not to assist.”

As stated by Lindley J. the above legal principle is not confined to indictable offences. In my view it applies even to the circumstances of cases such as this. In the premises I am not persuaded that the 1st & 2nd Respondents acted beyond their jurisdiction in degazetting the Appellant. Salome Oyugi did due diligence and confirmed that the order was a fraudulent order. Like the Trial Magistrate I refuse to aid a party who was implicated in an illegality.

On whether the 3rd Respondent was validly nominated it is my finding that she was. Her name not only appeared in the party list published in the two dailies on 27th July 2017 but it was also in the amended list presented to the Commission after the Appellant purportedly obtained a court order to be included. Her name was also gazetted. Unlike the Appellant, she applied, was successful and her name was forwarded to the Commission by her Party for nomination. Issue No. 4 is therefore answered in the affirmative.

What about the issue of the costs in the lower court. The costs in an election petition are provided for under Section 84 of the Elections Act which states:-

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

Rule 30 (1) of the Election Petition Rules 2017 then provides the manner in which such costs may be assessed or taxed. Section 84 of the Elections Act by the use of the word “**shall**” makes it mandatory for the election court to award costs. Thereafter the court may elect to

proceed in any of the ways provided under Rule 30 (1) of the Election Petition Rules. The election court has no discretion whether or not to award costs. My so saying is fortified by the decision of the Court of Appeal in **Rozaah Akinyi Buyi =V= Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR** where although they were dealing with the 2013 Petition Rules the Judges held:-

Rule 37 proceeds to make provision for taxation and recovery of costs in ways not dissimilar to civil proceedings so that whereas the relevant provision in the Civil Procedure Act (Section 27) gives the court or judge a discretion on award of costs, Section 84 of the Elections Act mandates the election court to award costs and shall order who shall pay the same....”

It will therefore be seen that the Appellant’s petition had failed and the election court had no option but to award costs to the Respondents in view of the provisions of law we have cited under the Elections Act and the Rules...” (Underlining mine)

The Trial Magistrate therefore misdirected herself in proceeding on the premise that costs in the petition were in the discretion of the court. Having dismissed the Appellant’s petition she ought to have awarded costs to the Respondent.

So what are the orders of this Court?

1. That this appeal is dismissed with costs to the Respondents.

2. That as I am empowered to do by Rule 34 (10) of the Election Petition Rules 2017, I hereby make a declaration that the 3rd Respondent was validly nominated as a Member of the County Assembly of Nyamira.

3. That the appeal by the 3rd Respondent on costs succeeds and the said costs of the petition (in the Lower Court) are awarded to the Respondents. Those of the 1st and 2nd Respondents are capped at Kshs. 400,000/=, those of the 3rd Respondent at Kshs. 400,000/= and those of the 4th Respondent at Kshs. 150,000/= only being that apart from being present in Court the 4th Respondent did not participate in the petition.

4. That the costs of the Respondents in this appeal shall likewise be capped as follows:

(a) Those of the 1st and 2nd Respondents at Kshs. 200,000/=.

(b) Those of the 3rd Respondent at Kshs. 200,000/=.

(c) Those of the 4th Respondent at Kshs. 50,000/=.

It is so ordered.

Signed, dated and delivered in Nyamira this 19th day of July, 2018.

E. N. MAINA

JUDGE