REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

ELECTION PETITION APPEAL NO. 1 OF 2018

LYNNET MBULA MUTULA.....APPELLANT

-VERSUS-

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....1ST RESPONDENT

COUNTY ASSEMBLY OF MAKUENI.....2ND RESPONDENT

JUSTUS MUTUA MASESI.....3RD RESPONDENT

WIPER PARTY.....4TH RESPONDENT

(AS CONSOLIDATED WITH ELECTION PETITION NO. 2 OF 2018)

JUSTUS MUTUA MASESI.....APPELLANT

-VERSUS-

LUCAS MULINGE WAMBUA.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...2ND RESPONDENT

COUNTY ASSEMBLY OF MAKUENI.....3RD RESPONDENT

WIPER PARTY.....4TH RESPONDENT

LYNNET MBULA MUTULA.....1ST INTERESTED PARTY

SOPHIA MUTIO MUTUA.....2ND INTERESTED PARTY

GEDION MUINDE MWANGO.....3RD INTERESTED PARTY

(AS FURTHER CONSOLIDATED WITH ELECTION PETITION NO. 4 OF 2018)

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....APPELLANT

-VERSUS-

LUCAS MULINGE WAMBUA.....1ST RESPONDENT

JUSTUS MUTUA MASESI.....2ND RESPONDENT

WIPER DEMOCRATIC MOVEMENT KENYA.....3RD RESPONDENT

COUNTY ASSEMBLY OF MAKUENI.....4TH RESPONDENT

LYNNET MBULA MUTULA.....1ST INTERESTED PARTY

SOPHIA MUTIO MUTUA.....2ND INTERESTED PARTY

GEDION MUINDE MWANGO.....3RD INTERESTED PARTY

JUDGMENT

(Being Appeals from the Judgment of Hon. J.N. Mwaniki (SPM) in the Senior Principal Magistrate's Court at Makueni in Election Petition No. 2 of 2017, delivered on 14th February 2018)

INTRODUCTION

1. There are three appeals arising from the judgment and decree of the Senior Principal Magistrate Court at Makueni delivered on 14th February, 2018 in Election Petition number 2 of 2017.

2. Election Petition Appeal No.1 of 2018 was filed by Lynnet Mbula Mutula. In her appeal she has named IEBC, THE ASSEMBLY, MASESI and WIPER as the 1st, 2nd, 3rd and 4th Respondents respectively.

3. MASESI filed Election Appeal Petition NO. 2 OF 2018. He has named WAMBUA, IEBC, THE ASSEMBLY, WIPER, APPELLANT herein, SOPHIA and MWANGO as the 1st, 2nd, 3rd, 4th Respondents and 1st, 2nd and 3rd as Interested Parties respectively.

4. On its part IEBC filed Election Appeal NO. 4 OF 2018 by naming WAMBUA, MASESI, WIPER and THE ASSEMBLY as 1st, 2nd, 3rd, 4th Respondents. The Appellant herein, SOPHIA and MWANGO are named as the 1st, 2nd 3rd Interested Parties respectively.

5. For the purposes of the hearing of the appeals, directions were given that the three [3] be heard together and be the subject of one judgment.

6. Election Petition Appeal No. 4 of 2018 was declared the lead file for purposes of recording proceedings. For convenience, the parties will herein after be referred to as follows:-

- Independent Electoral & Boundaries Commission **(IEBC)**
- County Assembly of Makueni **(the Assembly)**
- Wiper Democratic movement Kenya **(Wiper party)**
- Lynnet Mbula Mutua **(Lynnet)**
- Justus Mutua Masesi **(Masesi)**
- Lucas Mulinge Wambua **(Mulinge)**
- Sophia Mutio Mutua **(Sophia)**
- Gedion Muinde Mwango **(Mwango)**

BACKGROUND

7. The background of the matter is that following the general elections conducted on 8th August 2017, the wiper party was entitled to additional seats in the Assembly and they were to be filled through nomination in accordance with the Constitution and relevant election laws.

8. There were 14 seats under the gender top up category and they were to be shared among the various political parties. Under the marginalized group category, wiper party was allocated 3 seats out of 4.

9. For some reason, Lynnet was nominated under both the gender top up and marginalized lists. Upon realizing the anomaly, wiper party wrote to IEBC seeking to have Lynnet's name replaced with that of Mulinge in the marginalized list however, contrary to Wiper party's wishes, the IEBC replaced her with Rose Mutinda Ndibo in the gender top up list and retained her in the marginalized list.

10. Accordingly, the replacement was reflected in the corrigenda that was published by IEBC in Gazette Notice No. 8752 of 6th September 2017.

11. Feeling aggrieved and shortchanged by the process of nomination, Mulinge, filed Election Petition No. 2 of 2017 in the Senior Principal Magistrate's Court, Makueni.

12. His main contention was that upon rectification of the double allocation to Lynnet, one of the slots should have been given to him as per the letter written by wiper party to IEBC. According to him, the allocation of the three seats was not equal and proportionate

13. In his petition, Mulinge prayed for the following orders;

i. A declaration that the election and nomination of Justus Mutua Masesi as a Member of County Assembly of Makueni is unconstitutional, unlawful and hence invalid and an order for nullification of the said nomination/election.

ii. A declaration that the Petitioner Lucas Mulinge Wambua is the duly nominated and/or elected Member of the County Assembly of Makueni pursuant to the party list of Wiper Democratic Movement-Kenya representing marginalized groups under the category of marginalized clan.

iii. Costs of the suit.

14. After hearing the petition, the learned Trial Magistrate concluded that the list submitted by Wiper Party to IEBC was irregular because it prioritized the only 3 available seats to the youth. According to him, it ought to have alternated among the categories in the groups. Consequently, he gave orders which had the effect of restructuring wiper party's list and affecting parties that did not participate in the petition.

GROUNDS OF APPEAL

15. Appeal No. 1 was filed by Lynnet on 16/02/2018 and raised the following 6 grounds;

a. That the learned magistrate erred by issuing an order to nullify the election of the appellant when she was not a party to the election.

b. The learned magistrate erred in law by violating the appellant's right to a fair hearing.

c. The learned magistrate erred in law by condemning the appellant without giving her an opportunity to be heard.

d. The learned magistrate erred in law by issuing an order that persons who were not party to the election petition/nor contest the election be declared duly nominated and/or elected.

e. The learned magistrate erred in law by acting in excess of jurisdiction.

f. The learned magistrate erred in law in issuing orders that had not been prayed for in the petition.

16. Appeal No. 2 was filed by Masesi on 09/03/2018 and raised the following 12 grounds;

a. That the learned magistrate erred in law in rendering a decision on matters outside the parameters of the election petition before him.

b. The learned magistrate erred in law in making orders directly affecting persons who were not parties to the election petition before him.

c. The learned magistrate erred in law in holding that the party list submitted by wiper party to IEBC under Section 34 (3) of the Elections Act, 2011 was irregular to the extent that it did not alternate between the categories in the marginalized groups.

d. The learned magistrate erred in law in making a determination on matters not directly arising in the petition by sitting on appeal on the judgment of the Political Parties Dispute Tribunal delivered on 31st July 2017.

e. The learned magistrate erred in law by allocating himself jurisdiction to determine the order of prioritization in the political party list contrary to Article 171(2) of the Constitution and Section 34 (5) of the Elections Act, 2011.

f. The learned magistrate erred in law by usurping the duties of IEBC to review party lists and ensure compliance with prescribed regulation as set out in Section 36(6A) of the Elections Act and thus acted without jurisdiction

g. The learned magistrate erred in law by usurping the rights reserved for political parties under Article 177(1)(b) and (c) of the Constitution and Section 36 for political parties Act to determine the order of priority in the party list by re-organizing the party list submitted by wiper party to IEBC.

h. The learned magistrate erred by holding that the participation of wiper party in the proceedings was deemed to represent the interests of Lynnet who was not a party to the proceedings and thus violated her rights to fair hearing under Articles 25 and 50 of the Constitution.

i. The learned magistrate erred in law in granting orders which were not sought in the petition.

j. The learned magistrate erred in failing to take into account the totality of the evidence thus reached the wrong conclusion against the weight of the evidence.

k. The learned magistrate erred in failing to consider the Appellant's submissions at all and thus incorrectly construed Section 36 (1) (f) of the Elections Act.

l. The learned magistrate having correctly set out the burden and standards of proof in election petition erred by failing to evaluate the evidence on record against the said standard of proof and thus reached the wrong conclusion.

17. Appeal No. 4 was filed by the IEBC on 14/03/2018 and raised the following 9 grounds;

a. That the learned magistrate erred in law by issuing an order to nullify the Election of Masesi without taking into consideration the Electoral Laws, submission and case law as filed by the appellant.

b. The learned magistrate erred in law by holding that the list as submitted by wiper party dated 14th August 2017 did not alternate between male and female as per section 36 (2) of the Elections Act, 2011.

c. The learned magistrate erred in law by reconstructing the marginalized party list of wiper party dated 14th August 2017, the same being without jurisdiction of the Court.

d. The learned magistrate erred by electing Sophia and Mwango to the Assembly yet they were not parties in Election Petition No.2 of 2017.

e. The learned magistrate erred in law by nullifying the election of Lynnet who was not a party to the petition therefore condemning her unheard.

f. The learned magistrate erred in law by violating Lynnet's right to a fair hearing.

g. The learned magistrate erred in law by rendering decisions that were not prayed for in the petition.

h. The learned magistrate erred in law by determining the order of prioritization of the party list whose sole responsibility being that of the wiper party.

i. The learned magistrate erred in law by failing to evaluate the evidence on record vis a vis the burden and standard of proof relating to election petitions.

18. Having looked at the judgment of the trial Court, the grounds of appeal, the rival submissions and the authorities cited by the parties, it is my view that the issues for determination are as follows;

i. Whether the learned trial magistrate acted in excess of jurisdiction by reorganizing the marginalized party list of wiper party.

ii. Are there parties who were condemned unheard?

iii. What was the scope of the petition before the trial Court?

SUBMISSIONS

APPELLANT NO 1 SUBMISSIONS

19. It is submitted that the Appellant though not a party to the Petition before the subordinate court she has a right to prefer an appeal. This was the determination in the case of **Law Society of Kenya Nairobi Branch Vs. Malindi Law Society & 6 Others [2017]Eklr.**

20. As pointed out above, the Appellant was not named, in the Petition before the trial court, as a party to the Petition. It is also evident from the proceedings that the she did not participate in the said proceedings.

21. It follows therefore that the decision to nullify her election as a member of the County Assembly of Makueni was not only irregular and unfair but it was in violation of her constitutional right to a fair hearing. The judgement herein violated the following rights that are guaranteed under the Constitution:-

22. **Article 27(1)** that provides that;

"Every person is equal before the law and has the right to equal protection and equal benefit of the law."

23. Having not presented her case before the trial Court, the adverse judgement herein fails to accord the Appellant equal protection and benefit of the law.

24. **Article 50(1)** that provides as follows:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

25. It is a cardinal principle of the rule of law that before any person is condemned vide a judicial or quasi-judicial proceedings he/she must be given an opportunity to be heard.

26. The impugned judgement went contrary to the said established jurisprudence.

27. The Appellant should have been given a chance to say why her election ought not to be nullified and to state the law. See the Case of **Singh Gill V. Chief Election Commissioner AIR 1978 SC 851 the Supreme Court of India**.

28. In the case of **JMK V. MWM & Another [2015] eKLR,** the Court of Appeal reiterated the fact that the right to be heard is jealously guarded by our Courts.

29. The court held thus:-

> ***"The Courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made".*** *See also* ***In ONYANGO V. ATTORNEY GENERAL (1986-1989) E.A 456****, Nyarangi, JA asserted at Page 459;*
>
> ***"I would say that the principle of natural justice applies where ordinary people who would reasonable expect those making decisions which affect others to act fairly."***

30. At Page 460 the learned judge added:

> ***"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

31. The Court of Appeal interrogated the application and elements of **Article 50(1) of the Constitution** in the case of **Judicial Service Commission V. Gladys Boss Shollei & Another [2014]eKLR** in stating as follows:-

> ***"[87] Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body……."***

32. For purposes of and in the context of electoral laws, a nomination of a member of a County Assembly or Parliament is an election.

33. It is therefore a requirement of the law that once a person has been nominated to a County Assembly, his nomination may only be nullified through the established law and procedure on election Petitions.

34. The Supreme Court of Kenya has pronounced itself on the above issue in the case of **Moses Mwicigi & 14 Others Vs. Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR.** The Court stated:-

> ***"[101] 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) and (c) of the constitution? Is it after issuance of Gazette Notice by the IEBC or the close of elections when the nomination process begins?***
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> - - -
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> ***[105] It is plain to us that the constitution and electoral law envisages the entire process of nomination for the special seat including the act of gazettement of the nominees' names by the IEBC, as an integral part of the election process.***
>
> ***[106] The Gazette Notice in this case signifies the completion of the 'election through nomination' and finalizes the process of constituting the Assembly in question….***
>
> ***[107] it is therefore clear that the publication of the Gazette Notice marks the end of the mandate of the IEBC, regarding the nominations of party representatives, and shifts any consequential dispute to the Election Courts.***
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> - - -
>
> ***[115] The Elections Act confers jurisdiction upon magistrates' courts to determine the validity of the election of a Member of a County Assembly…."***

35. The Court of Appeal has equally pronounced itself in the case of **Rose Wairimu Kamau and 3 Others Vs. Independent Electoral and Boundaries Commission C.A No. 169 of 2013, cited in Rahma Issak I v. IEBC & 2 others [2017] eKLR** as follows:-

> ***"In reaching the conclusion, we are alive to the fact that once nominees to parliament and county Assemblies under Article***

97(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 Article 105 of the Constitution or part VIII of the Election Act as the case may be."

36. It was thus submitted that, the lower court was not seized of an election petition for removal of the Appellant or challenging her membership to the Assembly.

37. Without such a petition in place, the court acted in excess and without jurisdiction in determining the validity of the election of the Appellant.

APPELLANT NO 2 SUBMISSIONS

38. It is submitted that the trial Magistrate erred in law by issuing an Order to nullify the Election of the 2nd Respondent without taking into full consideration the Electoral Laws, Submissions and Case Law as filed by the Appellant.

39. The Constitution under Article 90 (1) provides that elections for seats in Parliament and for members of county assemblies shall be on the basis of proportional representation by use of party lists.

40. Section 34 (5) of the Elections Act 2011 provides that the party lists under subsections (2), (3) and (4) shall be submitted in order of priority. The 3rd Respondent re-submitted its party list to the Appellant which fully complied with the Zebra requirement as per Article 90 (1) (b) of the Constitution of Kenya.

41. The role of the Appellant is only to review the list and being satisfied with the same proceeded to gazette the names of the 3 listed nominees. The Appellant therefore strictly adhered to the Constitution and the Electoral Laws.

42. The Learned Magistrate erred in law by holding that the list as submitted by the 3rd Respondent dated 14th August, 2017 did not alternate between male and female as per Section 36(2) of the Elections Act, 2011.

43. Section 36 of the Elections Act provides for allocation of special seats as follows:-

(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 prioritise a person with disability, the youth and any other candidate representing a marginalized group.

44. The final list dated 14th August, 2017(see page 75 of the Record of Appeal) complied with the Zebra Requirement. The list alternates between male and female.

45. The Marginalized group was only entitled to 3 seats owing to the allocation formula as follows:-

NAME	CATEGORY OF MARGINALISED
• **Urbanus Kyalo Wambua**	**Youth**
• **Lynnet Mbula Mutua**	**Youth**
• **Justus Mutua Masesi**	**Youth**

46. The Learned Magistrate erred in law by reconstructing the marginalized party list of the 3rd Respondent dated 14th August, 2017 the same being without the jurisdiction of the Court.

47. It is clear from the Judgment that the trial court misdirected itself in managing the party list. The mandate to prepare and designate a party list lies squarely with the political party. The Appellant nor the court can on its own motion or otherwise rearrange a party list.

48. Any attempt to reconstruct the party list by any party other than the Political Party would be tantamount to interfering with the nomination process rules of the party.

49. Also, the 1st Respondent did not demonstrate before the court that the County Assembly of Makueni lacks representation from other categories being persons with disabilities, or marginalised women.

50. In **Civil Appeal Number 266 of 2013, Linet Kemunto Nyakeriga and Another Versus Ben Njoroge and 2 Others**, the court observed in page 7 that;

> ***"It follows that it is the responsibility of the parties to choose their preferred candidate and rank them in order of priority of preference. The seats won by each party are filled by candidates in the order they appear on the parties respective list. The definition of "party list" under Section 2 of the Elections Act suggest ownership of the list by the political party that has prepared it. The practice indeed the law, in jurisdictions with a closed list system is that the power over who gets the reserved seats resides with the party themselves and no other authority".***

51. The Court further observed in page 8 that;

> ***"The list serves as a reservoir of candidates in any of the eventualities enumerated above.It is clear from what we have said upto this point that the IEBC,in a closed list system has no power to rearrange the list or pick out from the list any other candidate apart from the parties' preferred candidate listed at the top of the list if only one candidate is required..."***

52. It is contended that the Learned Magistrate erred in law by electing the 2nd and 3rd Interested Parties to the County Assembly of Makueni yet they were not parties in the Election Petition 2 of 2017.

53. The 2nd and 3rd Interested Parties herein were not parties in Election Petition 2 of 2017 yet they are beneficiaries of an unjust process and are therefore not entitled to be elected at this stage. The 2nd and 3rd Interested Parties stand a chance in case the duly elected nominated members of the County assembly either die or resign from the party.

54. The 1st Interested Party was not a party in Election Petition 2 of 2017. The Order to degazzette her from the list whereas she is sworn in as a member of the County Assembly for Makueni County and continues to represent the Interest of her community is rather adverse and contrary to her right to fair administrative action under Article 47 of the Constitution.

55. The trial court denied the 1st Interested Party's right to fair hearing the same being in violation of Article 50 of the Constitution of Kenya. The court should have dealt with the question referred to it without bias and it must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a Court whose duty is to meet out justice.

56. The trial court pronounced itself on matters that were not prayed for in the Petition. It is important to note that whereas the trial court can exercise its inherent jurisdiction to make orders that were not prayed for in the Election Petition, the aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it.

57. The Learned Magistrate erred in law by determining the order of prioritization of the party list whose sole responsibility being that of the 3rd Respondent.

58. In the case of **National Gender and Equality Commission**, the Court observed in paragraph 50 **"Section 34(6) of the Elections Act, 2011** specifically provides that,

> ***"The party lists submitted to the commission under this section shall be in accordance with the Constitution or nomination rules of the political party concerned." This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties....."***

59. Thus it is submitted, that the role of determining the order of prioritization of a party lists squarely lies with the Political Party. The IEBC strictly adhered to the Constitution and Electoral Laws in allocating Special Seats to the County Assembly of Makueni.

60. The Learned Magistrate erred in law by failing to evaluate the evidence on record vis a vis the burden and standard of proof relating to election Petitions., when a party approaches the court for relief, the party must present all evidence necessary to support its allegations.

61. The **Evidence Act, Under Sections 107, 108 and 109** which provide as shown below:

> **107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**
>
> **108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**
>
> **109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The 1st Respondent did not provide**

sufficient evidence against the nomination of the 2nd Respondent to prove so.

62. In the case of **Emmanuel O Achayo Versus ODM and 2 Others, Election Petition Appeal Number 46 of 2017**,the court observed in page 6 that;

> ***"The party nomination or primaries are part of the elective management cycle. In election petitions or nomination disputes the burden of proof rests with the party making the allegations at challenging the outcome or alleging, misconduct on the other. The standard of proof in election cycle cases has been held to be higher than the proof on balance of probability but lower than the standard proof beyond reasonable doubt required in criminal cases. Allegations of electoral malpractice like for instance bribery require higher proof. It seems clear to this court, therefore, that a petition as compared to other matters of a 'civil nature', has to be proved on a much higher standard of proof…."***

RESPONDENT NO 3 AND INTERESTED PART (WDM-K PARTY) SUBMISSIONS

63. Throughout the trial hearing, it is clear from the record that this burden constantly remained with the Petitioner as no credible or cogent evidence was ever adduced to warrant the shifting of the burden to the Respondents.

64. The Petitioner laid out allegation of failure to abide by constitutional principles relating to the submission of party list. However the petitioner did not show which rule the Wiper Democratic Movement and or Independent Electoral and Boundaries Commission breached in the submission and approval of the party list.

65. The evidence before the court shows that Wiper Democratic Movement-Kenya was by a ruling of the Political parties Disputes Tribunal required to resubmit its party list. The court while finding the there was substantial compliance with the decree of the tribunal, proceeded to nullify the list.

66. This was misdirection on the part of the trial magistrate. The subordinate court in effect constituted itself into an appellant court or enforcement court on the decision of the PPDT.

67. In the case of **Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc S.C. 91/2002,** which case was cited with approval in the presidential petition of **Raila Odinga[2013**] in the following words;

> ***"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

68. In Raila Odinga –vs- IEBC case (Supra) the supreme court further stated as follows;

> ***"Another important principle in election petitions is that, the Petitioner is bound by his pleadings and bound to prove the case he has pleaded. He is not permitted to make a case outside the pleadings. His affidavits and documents must be consistent with, and support, the case he has pleaded."***

69. See also **The Supreme Court in Raila [2017]** cited with approval the Supreme Court of India in **Arikala Narasa Reddy –Vs- Ventaka Ram Neddy Reddygari & Another, Civil Appeals Nos. 5710 -5711 of 2012 [2014] 2SCR** in which the Court stated as follows:

> ***"In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings."***

70. See also **Lemanken Aramat -vs- Harun Meitamei Lempaka & 2 Others [2014] eKLR**, **Ferdinard Ndung'u Waititu –vs- Independent Electoral & Boundaries Commission & 8 Others (2013) eKLR.**

71. It is clear from the judgment that the learned trial magistrate veered far off the case that had been placed before him and proceeded to determine the petition and issue orders which were not prayed for.

72. The issue of the validity of party list for Wiper Democratic Movement-Kenya was not before the court. The issue was whether the petitioner was entitled to be elected in place of the 3rd Respondent. The court in veering off this primary issue before it fell into error.

73. The issue as to whether the party list for the marginalised category was valid or not was not pleaded by the Petitioner. The trial court erred in deciding the petition on a matter that was not pleaded.

74. The petition before the trial court had four parties. The prayers sought affected the parties involved directly. It was contemplated by the parties that were the petition to succeed, only the 3rd Respondent and the Wiper Democratic Movement- Kenya would have been directly prejudiced. The election of the 3rd Respondent would have been nullified and Wiper Democratic Movement-Kenya would have lost its preferred Member of County Assembly.

75. In reaching his determination, the learned trial magistrate made adverse orders directly affecting the rights of Lynnet Mbula Mutula and to the advantage of Sophia Mutio Mutua and Gedion Muinde Mwango. The three were not parties to the petition and no order had been sought in relation to those persons.

76. In effect, the trial court proceeded to make a determination against persons without according them the constitutionally protected right to fair hearing. This was an error on a point of law which can only be cured by reversal of the trial courts judgment.

77. Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Thus, a person whose interests and rights are likely to be affected by a decision has a constitutional right to be given a hearing before any adverse decision is taken. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached.

78. In the case of **Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR** the court stated as follows:-

> ***"…The right to fair hearing is evidently closely intertwined with fair administrative action .The oft cited case of Ridge v Baldwin [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put is as a 'duty lying upon everyone who decides anything' that may adversely affect legal rights."***

79. Further **Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639** on the right to be heard states that:

> ***"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audialterampartem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."***

80. As a matter of constitutional imperative entitled to a process which is procedurally fair in the course of decision making if such decisions impact on their rights or interests. This right is not only a cardinal principle of natural justice but it is now a constitutional imperative.

81. What does this right really mean? The Court of Appeal in **Civil Appeal 52 of 2014 JSC ¬Vs¬ Mbalu Mutava & Another [2015] eKLR** cited with approval the house of Lords Landmark decision in **Ridge –Vs- Baldwin [1964] AC 40** where it was held that the rules of natural justice apply both in judicial and administrative functions.

82. In that case Lord Reid making a finding on the administrative situation where the right to be heard is mandatory said as follows:

> ***"where there must be something against a man to warrant his dismissal, there I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation".***

83. See also **J.M.K vs M.W.M & Another [2015]eKLR**, **Onyango vs Attorney General (1986-1989) EA 456.**

84. It is further submitted that the learned trial magistrate acted in excess of jurisdiction when he rearranged the priority in which the Wiper Democratic Movement–Kenya party list for the maginalised had been presented. The right to nominate and determine the priority constitutionally is vested in the political party as provided in article 177 of the constitution.

85. Upon presentation of the list, the power to draw from the list and gazette duly nominate members is vested in the IEBC. The IEBC further has the power to approve the list in accordance with the provisions of article 177 of the constitution and sections 34, 35 and 36 of the Elections Act.

86. It was misdirection on the trial court to usurp the powers of both the political party to determine the priority and the IEBC approve the list and to draw from the names of those to be gazetted. In the event of a dispute on the prioritization or the listing, jurisdiction to adjudicate is granted to the political parties' disputes tribunal with a right of appeal to the High Court. Again the trial court erred in law by allocating itself the jurisdiction to sit on appeal on the decree of the PPDT of 31st July 2017.

87. In **Lewises Juma Otete - Vs- Orange Democratic Movement [2017] eKLR** Justice Muchelule found that the Political Parties Disputes Tribunal had power to enforce its own orders and that any appeal from an order of the Tribunal lies to the High Court.

88. In **Diana Kethi Kilonzo & Another vs IEBC & 10 Others [2013] eKLR** it was held as follows;

> ***"An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC's powers. This would be contrary to the institutional independence of IEBC granted by Article 249 of the constitution. Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted….."***

2ND AND 3RD INTERESTED PARTIES' WRITTEN SUBMISSIONS

89. The interested parties 1 & 2 submitted that neither did the Learned Magistrate concern himself with matters not placed before him nor grant prayers not sought in the petition.

90. Going by the issues raised in the election Petition, the issues framed for determination during the pre-trial conference and the orders granted, the Learned Magistrate confined himself to issues raised in the petitions and granted prayers in line with the petition and prayers.

91. Under **Section 75(3) of the Elections Act, 2011**, the Court has broad discretion on the orders to give. It states;

> **75. County election petitions**
>
> **(1) ……**
>
> **(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) …….**
>
> **(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.**

92. It is contended that the Learned Magistrate did not in any way sit or purport to sit on appeal on the decision of the Political Parties Dispute Tribunal of 31/07/2017.

93. The Political parties Dispute Tribunal in Complaint No. 512 of 2017 dealt with a challenge by a party member namely Ahmed Mohammed Ibrahim to the party list forwarded to the Appellant by the 3rd Respondent as at 21/07/2017 when the Appellant published a public notice on party lists. The outcome of the Complaint was nullification, by the Tribunal, of the 3rd Respondent's party list. The 3rd Respondent subsequently submitted a fresh list as directed by the Tribunal.

94. In the election Petition, the Learned Magistrate only dealt with the question of the legal effect of the decision of the Tribunal in terms of whether it affected only the 3rd Respondent's marginalized list or the gender top up list too. The court found that it affected both marginalized list and gender top up list.

95. It is clear from the above that the Learned magistrate did not in any way sit on appeal or in any way disturb the decision of the Tribunal but merely interpreted the same (as called upon by the parties to) to determine whether it touched only on marginalized list or both marginalized list and gender top up list.

96. In the case of **Rahma Issak Ibrahim v Independent Electoral & Boundary Commission & 2 others [2017] eKLR**, the court had this to say on the court's jurisdiction on matters of party lists;

> ***"…in law, once iebc conducts elections for the party top up lists and gazettes names of those who have been nominated to the national assembly, senate and the County Assembly, that nomination becomes an election and can only be challenged through an election petition."***

97. It is submitted that the marginalized list should alternate between youth, persons with disabilities and other marginalized categories among qualified candidates as was the finding of the Learned Magistrate as opposed to all slots going to only the youth category in the marginalized list.

98. The Appellant's decision to allocate all the available slots to the persons whose names appeared in the 1st, 2nd and 3rd positions on the list notwithstanding that they all fell under the youth category was constitutionally flawed and irregular. That the proper allocation of the available three slots was the one that ensured both the youth, women, persons with disability and other marginalized categories are given consideration in that the priority principle should be applied as per the individual category and not the way the Appellant did.

99. The relevant constitutional and statutory provisions for purposes of party lists for county assembly members as cited in **Moses Mwicigi & 14 others -Vs- Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** are Articles 90, 100 and 177 of the Constitution of Kenya, 2010, Sections 34 and 35 of the Elections Act, 2011 and regulations 54 and 55 of the Elections (General) Regulations, 2012.

100. It is contended that, the purpose of introduction of representation by way of party lists under marginalized category under Articles 90, 100 and 177 of the constitution of Kenya, 2010 was to redress the marginalization of the categories of the youth, persons with disabilities and other marginalized categories in positions of leadership in accordance with the constitutional values and principles of governance provided

under Article 10 of the Constitution of Kenya, 2010.

101. Applying the rules of interpretation of the Constitution, as per the authority in **National gender and Equality Commission vs. Independent Electoral and Boundaries Commission and another [2013] eKLR,** it is submitted that allocation of available slots on party lists to only one category of marginalized persons i.e. the youth as was the case herein amounts to erroneous interpretation of the relevant constitutional and statutory provisions.

102. The court in dealing with the issue of interpretation of the Constitution had this to say;

> ***"22…this court is enjoined to be guided by the provisions of Article 259(1) which provides that the constitution shall be interpreted in a manner that promotes its purpose, values, principles, advances rule of law and the human rights and fundamental freedoms in the Bill of rights and permits development of the law and contributes to good governance…The Appellant, in allocating the 3 slots to the persons appearing as 1st, 2nd and 3rd on the 3rd Respondent purportedly acted under Section 34(5), Elections Act, 2011 which provides; "The party lists under subsections (2), (3) and (4) shall be submitted in order of priority."***

103. It is urged that, the prioritization envisaged under the above provision is one on category basis and not necessarily simply picking the names that come first in the entire list. The proper approach would mean picking the first name in youth category, first name in women category, first name in persons with disability and in that order for other marginalized categories.

104. Further, the prioritization principle cannot override the larger purpose of advancement of the agenda on affirmative action which runs through the constitutional and statutory provisions on party lists on marginalized categories.

105. The prioritization principle should be interpreted in a manner that as much as possible, promotes the inclusion of all categories under the marginalized list as opposed to one category.

106. It is submitted that the allocation of available slots, while adhering to the order of priority should be implemented in a manner that promotes the national values and principles of governance enshrined in the Constitution to wit promoting the affirmative measures (meant to remedy marginalization of the youth, women, persons with disability and other categories) contained in Articles 10, 90, 100 and 177 of the Constitution.

107. Having accepted the 3rd Respondent's list as compliant, the Appellant was bound, in allocating the available 3 slots, to pick the persons appearing as priority in each category under the marginalized list instead of simply picking the first three persons on the list.

108. Section 36(3), Elections Act, 2011 calls upon the players to prioritize certain persons in allocating slots. It states; the party list referred to under subsection (1)(f) shall prioritise a person with disability, the youth and any other candidate representing a marginalized group.

109. It is submitted that the above provision of the law is not an idle provision and the Appellant ought to have given priority to the said persons. Also, Section 36 (f) of the Elections Act provides; 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.

110. In the case of **Micah Kigen and 2 others V. Attorney General [2012] eKLR** cited with approval in the case of National Gender and Equality Commissions (Supra), the court emphasized the role of the Appellant and 3rd Respondent in ensuring that party lists meet the criteria set out in the Constitution and the legislations. It stated;

> ***"…Article 90(2) bestows upon the IEBC the responsibility of ensuring that the party lists meet certain criteria set out in the Constitution and Legislation. The Political parties themselves, just as any other person or state organ are bound to observe all provisions of the Constitution including those that require that the rights of minorities, youth and persons with disabilities be promoted and protected…"***

111. It is contended that the Magistrate's decision touching on persons not a party to the petition was not erroneous. In its judgment, the election Court nullified the election and nomination of the 1st interested party and directed the election and gazzettement of the 2nd and 3rd interested parties.

ANALYSIS AND DETERMINATION

The party list

112. It is evident that the orders issued by the trial magistrate reorganized the marginalized list submitted by the wiper party to the IEBC. What this Court needs to examine is whether the actions of the learned trial magistrate have any legal backing.

113. Under **Article 177(2)** of the Constitution of Kenya, 2010 *(herein after 'the Constitution')*, political parties have the mandate of nominating members to occupy special seats in the County Assemblies under both the gender top-up and marginalized group categories.

114. After preparation of the party list, it is the IEBC, under **Article 90 (2)** of the Constitution that is responsible for the conduct and supervision of elections for those seats.

115. If a member is not satisfied by the list prepared by his/her party, this essentially means that there is a dispute between the member and his/her political party and the proper forum to arbitrate the dispute is the Political Parties Dispute Tribunal (PPDT) established under **section 39** of the **Political Parties Act**, No. 11 of 2011.

116. The jurisdiction of the tribunal is established under section 40 of the Political Parties Act as follows;

The Tribunal shall determine—

> ***a. disputes between the members of a political party;***
>
> ***b. disputes between a member of a political party and a political party;***
>
> ***c. disputes between political parties;***
>
> ***d. disputes between an independent candidate and a political party;***
>
> ***e. disputes between coalition partners; and***
>
> ***f. appeals from decisions of the Registrar under this Act;***
>
> ***g. Disputes arising out of party primaries.***

117. Under section 40(2) however, the tribunal only becomes properly seized of the matter upon satisfying itself that the dispute has been heard and determined by the internal political party dispute resolution mechanism.

118. In **Petition No. 147 of 2013; National Gender & Equality Commission –vs- IEBC & 3 others, 2013 (eKLR)** the learned Judges of the Constitutional & Human Rights Division of the High Court expressed themselves as follows;

> ***"We therefore find and hold that Article 90(2) does not deal with elections leading to the constitution of party lists nor concern itself with the manner in which parties come up with the names on the lists. How the election of persons on the list is carried out is a matter entirely within the mandate of the respective political parties. It is for this reason that regulation 55 (1) of the General Regulations provides that, "The party list contemplated under regulation 54 [the lists under Article 90(1) of the Constitution] shall be prepared in accordance with the rules of the political party." Furthermore, paragraph 19 of the Second Schedule to the Political Parties Act (Act No. 11 of 2011) requires every party to have, "nomination rules and regulations with respect to elections of the party and rules governing the preparation of party lists."***

119. I associate myself with the sentiments of the learned Judges. I have also outlined the dispute resolution mechanism to be followed in case of a grievance which I believe the petitioner before the lower Court did not utilize because by the time he decided to seek legal redress; the nominated members had already been gazzeted.

120. To further buttress the position that generation of party lists is the sole mandate of political parties, **section 34(10) of the Elections Act, 2011** provides that, a party list submitted for purposes of nominating a candidate for election to the National Assembly, Senate and County Assemblies shall not be amended during the term of Parliament or County Assembly as the case may be, for which the candidates are elected.

121. In light of the foregoing, it is my considered view that reorganizing the marginalized list submitted by Wiper party amounted to amending it and to that extent, there was an error of law.

<u>Right to be heard</u>

122. Lyynet, Sophia and Mwango are the parties who were directly affected by the outcome of the lower Court petition despite not being parties to it.

123. Sophia and Mwango were beneficiaries because the orders required their inclusion into the Assembly. Lynnet was adversely affected because the orders had the effect of nullifying her election as a nominated member of the Assembly.

124. Mr. Mutua, learned Counsel for Lynnet submitted that Article 47 of the Constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He went on to say that a person whose interests and rights are likely to be affected by a decision has a constitutional right to be given a hearing before any adverse decision is taken.

125. He relied on the case of **Kenya Human Rights Commission v Non-Governmental Organizations' Co-Ordination Board [2016] eKLR** where the court stated as follows:-

> ***"…The right to fair hearing is evidently closely intertwined with fair administrative action .The often cited case of Ridge v Baldwin [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put is as a 'duty lying upon everyone***

who decides anything' that may adversely affect legal rights."

126. Further he relied on **Halsbury Laws of England, 5th Edition 2010 Vol. 61** at **para 639** where it is stated as follows:

> ***"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."***

127. In **Civil Appeal 52 of 2014** ***JSC –Vs- Mbalu Mutava & Another [2015] eKLR*** the Court of Appeal cited with approval the house of Lords Landmark decision in Ridge -Vs- Baldwin [1964] AC 40 where it was held that the rules of natural justice apply both in judicial and administrative functions.

128. In that case **Lord Reid** making a finding on the administrative situation where the right to be heard is mandatory said as follows:-

> ***"where there must be something against a man to warrant his dismissal, there I find an unbroken line of authority to the effect that an officer cannot be dismissed without first telling him what is alleged against him and hearing his defence or explanation".***

129. Clearly, jurisprudence from our Courts as well as from the celebrated English Courts is replete with authorities which have a unanimous view that a man should not be condemned unheard. Lynnet must have been sitting pretty and caring less about the proceedings before the lower Court and I dare say that the verdict was an ambush on her.

130. It is my considered view that the participation of wiper party in the proceedings cannot be said to have represented Lynnet's interests. Having been elected to the Assembly through nomination, she had a legitimate expectation that her removal would be preceded by due process.

131. To buttress this position, the case of ***J.M.K vs M.W.M & Another [2015]eKLR*** is relevant. The court of appeal found that the principles of natural justice were violated in the case where specific adverse findings were made by the industrial court against the managing director even where the company itself was a party to the proceedings.

132. The court found that the managing director had to be enjoined in the proceedings for any adverse finding against the company's Managing Director to be deemed lawful.

Scope of the petition before the trial Court

133. From the pleadings and specifically the prayers in the petition before the trial Court, it is quite clear that the issue was whether Mulinge was entitled to be elected in the place of Masesi. This is in line with the now well established principle that parties are bound by their pleadings.

134. The principle was established **in the case of Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc** S.C. 91/2002, which case was cited with approval by the Supreme Court of Kenya in the Presidential Petition of *Raila Odinga [2013]*, Judge Pius Aderemi J.S.C. expressed himself as follows;

> ***"…it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

135. The Supreme Court went on to state as follows;

> ***"Another important principle in election petitions is that, the Petitioner is bound by his pleadings and bound to prove the case he has pleaded. He is not permitted to make a case outside the pleadings. His affidavits and documents must be consistent with, and support, the case he has pleaded. The Supreme Court in Raila [2017] cited with approval the Supreme Court of India in Arikala Narasa Reddy –v- Ventaka Ram Neddy Reddygari & Another, Civil Appeals Nos. 5710 -5711 of 2012 [2014] 2SCR in which the Court stated as follows:-***
>
> ***"In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings."***

136. The issue which this Court needs to interrogate at this juncture is whether, based on the evidence placed before the trial Court, Mulinge was entitled to be so elected. In fact, that is the point at which this appeal turns.

137. Wiper party's initial list for the marginalized category was as follows;

	Name of nominee	Marginalized category
1.	Agnes Mutuku Musembi	Person with disability
2.	Gideon Muinde Mwango	Person with disability
3.	Sophia Mutio Mutua	Marginalised women
4	Urbanus Kyalo Wambua	Youth
5.	Lukas Mulinge Wambua	Marginalised clan
6.	Shadrack Ndonye Kinyili	Marginalised clan
7.	Justus Mutua Masesi	Marginalised clan
8.	Urbanus Mutisya Mulwa	Marginalised clan

138. The list was challenged by a registered Wiper party member through complaint No. 521/2017 at the Political Parties Dispute Tribunal (PPDT) whereupon the tribunal pronounced itself on 31st July 2017 and declared *inter alia* that the list was not reflective of the ethnic diversity of the people of Makueni hence null and void.

139. Wiper party went back to the drawing board and came up with the following list which was subsequently approved by IEBC.

	Name	Marginalized category
1.	Urbanus Kyalo Wambua	Youth
2.	Lynnet Mbula Mutua	Youth
3.	Justus Mutua Masesi	Youth
4	Sophia Mutio Mutua	Marginalised women
5.	Gedion Muinde Mwango	Person with disability
6.	Agnes Mutuku Musembi	Person with disability
7.	Lukas Mulinge Wambua	Marginalised clan
8.	Ahmed Mohammed Ibrahim	Ethnic minority

140. **Article 177(1) (c**) of the Constitution requires the membership of a County Assembly to have representation from marginalized groups. In order to give effect to this Article, **section 36 (1) (f)** of the Elections Act provides that a party list submitted pursuant to this Article 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 persons representing a marginalized group.

141. Further, **Section 36 (2) of the Elections Act** goes on to provide that a party list should contain alternates between male and female candidates in the priority in which they are given.

142. Evidently, the approval of the re-submitted list was in line with the Constitution and the election laws. From a keen look at the applicable laws and my research, I have not come across a requirement that there should be alternation among the categories. The finding of the learned trial magistrate was without a legal backing and therefore erroneous.

143. I note that Mulinge's arguments before the lower Court were based on the original party list which in my view ceased to exist once the re-submitted party list was approved by the IEBC. It is also noteworthy that there was no further challenge to that list in the manner provided for by the law.

144. IEBC's position, which I agree with, is that they could not replace Lynnet with Mulinge in the marginalized list due to considerations of the two thirds gender rule. The allocation of seats in the marginalized category is done prior to the allocation of seats in the gender top up category which essentially means that the gender of the nominees in the marginalized group category has a bearing on the calculation of the number of seats needed to ensure that not more than two thirds of the membership of the assembly is of the same gender.

145. As much as wiper party had their own views of how they would have wanted the double allocation to Lynnet to be rectified, IEBC has a Constitutional mandate to ensure compliance with the two thirds gender rule.

146. Consequently, the marginalized list re-submitted by Wiper remained undisturbed. Masesi was number 3 on the list while Mulinge was number 7. Consequently, Masesi had priority over Mulinge.

147. At this juncture, it is important to look at how a County Assembly should be constituted. Article 177 of the Constitution provides as follows;

> **A County Assembly consists of**;
>
> ***1. Members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;***
>
> > ***The number of special seat members necessary to ensure that no more than two-thirds of the memberships of the assembly are of the same gender;***
> >
> > ***The number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and***
> >
> > ***The Speaker, who is an ex officio member.***
>
> ***2. The members contemplated in clause (1)(b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90.***
>
> ***3. The filling of special seats under clause (1)(b) shall be determined after declaration of elected members from each ward.***
>
> ***4. A county assembly is elected for a term of five years.***

148. In my view, the various political parties that field candidates during a general election have a collective responsibility of ensuring compliance with Article 177 of the Constitution. In the current case, Wiper was the dominant party in Makueni County by virtue of the number of candidates that were elected through it's ticket.

149. It was therefore in a better position to assess and determine the category that was under-represented in the Assembly. It is highly probable that the party list was drawn with the aim of addressing any resultant deficiencies hence explaining why the youth were given priority in the list.

150. In my view, Mulinge should have demonstrated that the prioritization of the youth in the party list had led to non-compliance with Article 177 of the Constitution.

151. Be that as it may, that was not the case before the trial Court and I will therefore not belabor the point.

CONCLUSION

152. Mulinge was not entitled to be nominated in the place of Masesi. The petition before the trial Court should have been dismissed. The consolidated appeals have merit.

153. Thus the court makes the following orders;

> **i. The Appeals 1, 2 and 3 are allowed with costs to the Appellants in Appeals 1, 2 and 3 to be borne by LUCAS MULINGE WAMBUA capped at Kshs. 100,000/= to be paid equally to the Petitioners.**

ii. The lower court judgment is set aside and all orders thereof.

iii. The Petition No. 2 of 2017 is dismissed with costs to the Respondents, 1, 2 and Interested party therein capped at Kshs. 100,000/= to be paid equally.

SIGNED, DATED AND DELIVERED THIS 6TH DAY OF JULY 2018, IN OPEN COURT.

……..…….

C KARIUKI

JUDGE