



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION APPEAL NO. 4 OF 2017

PERPETUA MPONJIWA.....APPELLANT

VERSUS

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

EVE MALENYA.....2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY.....3rd RESPONDENT

JUDGEMENT

1. The Judgment herein relates to an Election Petition Appeal No. 4 of 2018, filed by the Petitioner (herein “ the Appellant”), following the Judgment delivered on the 12th January 2018, by the Honourable Magistrate, Hon. Elizabeth Usui, Senior Principal Magistrate(SPM), in the Election Petition No. 3 of 2017.

2. The Appellant appeals against the whole judgment on the following grounds as here below reproduced that:-

(a) *The Learned Magistrate failed to consider and adequately address the evidence produced and the documents adduced in Court thereby arriving at an absurd conclusion;*

(b) *The Learned Magistrate of the Trial Court failed to consider and adequately apply the relevant Electoral Laws and more specifically.*

(i) *Article 90 and 177 (1) (b) of the Constitution relating to election of Members of County Assembly through the Party List;*

(ii) *Sections 123, 34, 35, 36, 37 and 80 of the Elections Act;*

(iii) *Regulations 54 and 55 of the Elections (General) Regulations;*

(iv) *Regulations 7(g) of the Elections (Nomination & Party List);*

(v) *Regulations as published in Gazette Notice Number 5735;*

(vi) *Sections 39 and 40 of the Political Parties Act; and*

(vii) *Rule 15, 16 and 20(2) of the Orange Democratic Party Rules and Constitution.*

(c) *The Learned Trial Magistrate ignored the issues presented by the Petitioner and purported to frame other issues which did not cover the range of the testimony/Affidavits and documentary evidence adduced in Court;*

(d) *The Learned Court failed to address itself on the issues before the Court therefore leading to an injustice contrary to the Constitution and the written law of the Country;*

(e) *The Learned Court misdirected itself on the law and practice relating to enjoining a party as an Interested party thereby allowing the Interested Party to be enjoined as a Respondent with full rights to oppose and file documents in Court;*

(f) *The Learned Magistrate failed to consider the legal principles and maxims governing admission and participation of an*

Interested Party in suits and erroneously allowed the Interested Party to frame issues and participate in the trial as a party in the suit;

(g) The Learned trial magistrate erred in law and in fact and failed to consider the evidence adduced in relation to the qualification and eligibility of the 2nd Respondent for nomination as a Member of County Assembly for Nairobi City County;

(h) The Learned trial Court erroneously failed to consider and make a finding on the 2nd Respondent's nomination despite the fact that the 2nd Respondent did not controvert the averments by the Petitioner;

(i) The Learned Court failed to appreciate and misapprehended the decision of the Independent Electoral and Boundaries Commission Dispute Resolution Committee in the Independent Electoral and Boundaries Commission Complaint Number 13 of 2017;

(j) The Learned Court failed to properly interpret the provisions of Regulation 55(2) of the Elections (General) Regulations and erroneously held that the 1st Respondent had jurisdiction to reject the party list after publishing the list in the dailies more than 14 days from the date of receiving the final list from the party;

(k) The trial Court failed to hold that the Petitioner being duly and legally qualified candidate for nominations through the Party List for the Member of County Assembly Nairobi County was unduly and illegally replaced by the 2nd Respondent who was not qualified;

(l) The Learned trial Magistrate erred in law and fact in failing to protect the order of priority of the qualified candidates in the party list and specifically failed to interpret the law in accordance with the provisions of Article 259;

(m) The Learned trial Magistrate failed to consider the Petitioners infringed political rights under Article 38, fair administrative action rights under Article 47, rights to access and accurate information under Article 35 and fair hearing rights under Article 50 of the Constitution of Kenya and make a finding thereof;

(n) The Learned trial magistrate failed to appreciate and make a decision on the fact that the Interested party just like all other political Parties, having been established under the Constitution, regulated and funded by the public in accordance with the political parties Act, is a public body bound by the same Constitution and must be held accountable by its members and the public at large;

(o) The Learned trial Magistrate failed to consider and make a decision on the fact that the 1st Respondent is a Commission established under the Constitution of Kenya hence bound by the provisions of Article 249.

3. As a result of the aforesaid, the Appellant is seeking for orders that:-

(a) The Appeal be allowed with costs;

(b) The Judgment of the Honourable Magistrate's Court at Milimani Commercial Courts, Nairobi delivered on the 12th January 2018, be set aside;

(c) A declaration be made that the Petitioner/Appellant Perpetual Mponjiwa was the valid nominee for the Orange Democratic Party for position of the Member of the Nairobi City County Assembly, under the Gender top up category and therefore should be gazetted as such with immediate effect;

(d) An order revoking the Gazzettment of the 2nd Respondent as a nominated/elected member of the Nairobi City County under the Gender top up category on account of illegality and irregularities be issued;

(e) This Honourable Court makes a stern decision against those culpable perjury, contempt of Court and election offences; and

(f) This Honourable Court provides any other reliefs that may seem just.

4. The Appellant averred that, she is a life member No. 002773 of the Orange Democratic Movement party (herein "the ODM Party") since 2016, as evidenced by the Life Membership Certificate availed. That she participated in the Party's nominations for the Member of the County Assembly (MCA) for Kileleshwa Ward, in Nairobi and was successful. However, the Provisional Nomination Certificate was issued to her opponent one Elias Otieno Okumu, whereupon she filed a dispute with the Party in accordance with the Internal Dispute Resolution Mechanism (herein "the IDRM") and she was successful.

5. However the opponent appealed the decision of the Internal Dispute Resolution mechanism to the Political Parties Dispute Tribunal (herein "PPDT") but the decision of IDRM was upheld. That the matter went on Appeal to the Court of Appeal, and the Party was ordered to conduct fresh Primaries. However, the opponent approached the Party's National Elections Board to intervene and spearhead a consensus. The Party then made a decision that she would be nominated under Article 90 and 177 (1) (b) of the Constitution of Kenya, while the opponent would get the Party Certificate to contest in the General Election for the seat of a Member of Nairobi City County Assembly. She obliged and instructed her Counsel Mr. Faraji Chipinde to sign the consent to that effect. The consent order was filed in Civil Appeal No. 176 of 2017 and adopted as the Court's order on the 12th July 2017.

6. That subsequently the Independent Electoral and Boundaries Commission (herein "IEBC") complied with the consent and allowed Elias Otieno to contest on the Party ticket accordingly. However, IEBC upon receipt of the Party list of Gender Top up Members informed the Orange Democratic Movement Party that, the Petitioner appeared in their data base as an Independent Candidate. A fact which was not true. However, she obtained a printed copy of her membership status from the Registrar of Political Parties and presented it to Independent Electoral and Boundaries Commission officials, one Salome Oyugi, who acknowledged that there was an error, and notified the Party to abandon the content of the information to them.

7. On 23rd July 2017, Independent Electoral and Boundaries Commission published in two main local dailies and IEBC website, the final Party list of the members, under the Gender Top Up category; where the Petitioner appeared as No. 23 on the list and the 12th woman, in order of priority, thus resolving the issues arising from the nominees for membership. However, she felt that, position No. 23 had placed her at a disadvantage position which would not guarantee her a nomination slot. She therefore enhanced communication with the Party and Independent Electoral and Boundaries Commission, to enhance that position.

8. That on the advice of Salome Oyugi, the Petitioner filed a claim with Political Parties Dispute Resolution Tribunal (PPDT) for compliance with the consent order, whereupon an order was made directing ODM to comply and list her in a favourable position. However, upon service of the order, Salome Oyugi told her that, the PPDT had no jurisdiction over Independent Electoral and Boundaries Commission. To have the consent order enforced, she filed a suit HCCC No. 411 of 2017, against the Independent Electoral and Boundaries Commission and the Party which concluded on 31st August 2017.

9. Subsequently, she noted that 14 women were nominated from the Gender top up list of Party, where the 14th woman was No. 27 on the published Party List, which meant that she was still qualified to be nominated. However, further scrutiny revealed that her name had been blotted out and replaced with the name of Eva Malenya, who was a total stranger having appeared nowhere on the Party list until, the 28th August 2017, when the names were gazetted.

10. That the 1st Respondent being a public body failed to comply with the law and the Court of Appeals consent order and illegally gazette the 2nd Respondent as the ODM party's Nominee for the Member of Assembly for Nairobi County. As a result of the above she filed an Election Petition No. 3 of 2017 dated 4th September 2017, in the Chief Magistrate's Court at Nairobi against Independent Electoral and Boundaries Commission and Eva Malenya, as the 1st and 2nd Respondents respectively and the Clerk of the Nairobi City County Assembly as an Interested Party.

11. The Petitioner was seeking for the prayers in the Petition as hereby reproduced:-

(a) The swearing in of the 2nd Respondent be stopped;

(b) Declaration that, the process that led to the gazetting of the 2nd Respondent was irregular and illegal;

(c) Revocation of the Gazetting of the 2nd Respondent as a Member of the Nairobi City County Assembly;

(d) Gazetting of the petitioner Perpetua Mponjiwa as the nominated Member of the Nairobi City County under the Gender Top up category & consequently swear her in;

(e) Recommend investigation & pros of IEBC officers who were involved in the fraud and;

(f) any other relief the Hon. Court may deem fit.

12. The Petitioner avers that the 1st Respondent failed to comply with the law, the consent order and illegally gazetted the 2nd Respondent as the Party's nominee for the Member of Nairobi City County Assembly and that the 1st Respondent acted in contravention of her rights under the Constitution of Kenya, the Political Parties Act and the Election Act. That these actions and omissions reek of inducement or undue influence and are not justified in law.

13. On 22nd September 2017, the 1st Respondent filed a Response to the Petition and conceded that, indeed it was an Interested Party, in the Civil Appeal No. 176 of 2017, but was not a Party to the consent order therein which was required the ODM Party to guarantee the priority of the Petitioner's name on their list. The 1st Respondent argued that it has no prerogative in the list of Party members since it is the Party that gives the list of its members and the order of preference.

14. The 1st Respondent further argued that, it is required by law, under the Elections (General) Regulations Elections Party Primaries & Party List Regulations 2017, on submissions of Party list to ensure that, all Party lists comply with the Rules. That according to the Regulations of 2017, the names of the Party list shall be in the order of preference of the Party and in compliance with Article 90 and 177 (1) (b) and 177 (2) of the Constitution of Kenya. That the 1st Respondent ensures that the Members contemplated in clause (1) (b) (c) nominated by Political Parties is proportionate to the seats received in the Elections in that County by each Political Party, under paragraph (a) in accordance with Article 90 (3) of the Constitution of Kenya. That the ODM Party garnered 14 seats under the Gender Top Up category in the Nairobi County and the order of priority remained the Party's prerogative.

15. It is noteworthy, that the 2nd Interested Party herein; Orange Democratic Movement Party (ODM) was not named as a Respondent in the Petition and was only joined therein following the hearing and determination of a Notice of Motion Application dated 2nd November 2017, where the Court allowed the Party to join the Petition as the 2nd Interested Party and thereafter filed a Reply to the Petition.

16. Salome Oyugi filed a Replying affidavit on behalf of the ODM Party, literally reiterated what the 1st Respondent averred, save to add that pursuant to the Judgment in IEBC/NM/PL/13/2017, and following the powers of the 1st Respondent under Article 88 (4) (e) and Section 74 of the Election Act 2011, the ODM Party re-submitted its Nairobi County Party List for Gender Top up on 10th August 2017, which list served as a final list for Nairobi County, under the Gender top up category. However the Petitioner's name had been removed from the List. In that regard the 1st Respondent has no power to alter the Party lists or determine the identity of persons to appear on the List.

17. The 2nd Respondent filed a Response to the Petition but the same was struck out vide a ruling delivered by the Court on 15th November 2017, where the Court observed that the 2nd Respondent had offended the provisions of Rule 11 (1) of Parliamentary and County Election Petition Rules, 2017 and invoked Rule 11 (8) and struck out both the Notice of Appointment of Advocate and the Response to the Petition as being irregularly and improperly in record. The 1st Interested Party did not take an active part in the hearing of the Petition.

18. However, the Petitioner filed Supplementary Affidavit dated 13th October 2017, in response to the averments by the 1st Respondent and the Replying affidavit by Salome Oyugi. She took issue with the list that omitted her name arguing that it was cooked up for purposes of defeating justice. She further stated that although the 1st Respondent was not a Party to the suit in which the consent order was entered, she was an Interested Party therein. Finally, that she was not a party to Complaint No. 13 of 2017.

19. The proceedings in the trial Court commenced on 5th September 2017. The Petitioner reiterated the averments in her pleadings and requested the Court to revoke the Gazette Notice under which the 2nd Respondent was gazetted as a Member of the County Assembly and replace with the 2nd Respondent with her name. Olga Karani testified on the same day absorbing the Party of any blame, while the 1st Respondent's witness Salome Apiyo maintained that IEBC acted within mandate.

20. The parties thereafter, filed their respective submissions which were subsequently highlighted. On 12th January 2018, the Court delivered its Judgement on the Petition, whereby the Petition was dismissed with Costs not exceeding Kenya shilling Two Hundred Thousand (Ksh 200,000.00) in favour of the 1st Respondent.

21. The Parties herein agreed to dispose of the hearing of the Appeal by filing submissions which I have considered in this decision. The submissions are based on the grounds of Appeals under the following heads:

a) Failure to consider and adequately address the evidence documents produced, and/or adduced in court and apply the relevant laws;

b) Ignoring the issues presented by the Petitioner for determination and framing other issues not covered by the Affidavit and documentary evidence;

c) The court misdirecting itself on the law and practice relating to admission, and participation of an Interested party in suits;

d) Failure to consider qualification and illegibility of the 2nd Respondent for nomination as a member of County Assembly for Nairobi County,

e) Failure to appreciate the role of IEBC's Dispute Resolution Committee in Complaint No. 13/2017 and holding that the 1st Respondent had jurisdiction to reject the Party list after publishing the list in the Dailies;

f) Failure to consider that the Petitioner's Constitutional right had been infringed and make a finding thereon;

g) Failure to find both the 1st Respondent and the 2nd interested party in the Petition accountable and bound by the Provisions of the Constitution.

22. Before I consider these grounds, I note that submissions were filed on behalf of the 2nd and 3rd Respondents. However the 2nd Respondent did not participate in the hearing of the Petition and in my considered opinion she is not legally eligible to participate in the hearing of the Appeal herein. The submissions will therefore be deemed to have been filed on behalf of the 3rd Respondent.

23. Be that as it were, the submissions invited the Hon Court to consider the issue of its jurisdiction, whereby it is argued that, the jurisdiction of the Court, is provided for under Section 75(4)(1) of the Elections Act. That the said provisions states that, an Appeal from the decision of the Resident Magistrate Court, in a Petition as to the validity of the Election of a Member of a County Assembly, shall lie to the High Court on matters of law only. Therefore Rule 34 of the Election (County and Parliamentary Election Petition) Rules 2017, cannot oust the clear and unequivocal provisions of the said Section. I concur that indeed that is the correct position in law. However, I note that, the Parties herein have deposed to a lot of factual issues, which basically consists of the evidence adduced at the Trial Court. The Court will restrict itself to issues of law only.

24. I shall now consider the grounds of Appeal raised. The first ground relates to the joinder of the Orange Democratic Movement Party, (the 3rd Respondent herein), to the Petition, as an Interested Party. In this regard, the Petitioner submitted that, although the Honourable Magistrate in the judgment faulted the Petitioner for failing to include the Party, as a Respondent to the Petition, Ms. Olga Karani, swore an Affidavit, on 28th August 2017, in response to High Court Petition No. 411 of 2017, at Nairobi, where she indicated, that the Petitioner was in the Party list and remained at position 23, as earlier published. That at this point, the Party List was absolutely in the hands of the 1st Respondent, meaning that the Petitioner's name was omitted during gazettement.

25. Therefore, there was no cause of action against the Orange Democratic Movement Party. That one cannot sue a Party in the absence of any cause of action against that Party. The Appellant relied on the case of; *Odinga and Others vs Chesoni & Another, Misc. Civil Application No. 602*, where the Court held that;

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it.”

26. It was submitted that the Honourable Magistrate not only allowed the joinder of the Orange Democratic Movement Party against the provisions of the law, but gave them too much rights which included filing a Response to the Petition. That, the Orange Democratic Movement Party could not possibly have adverse interest in the Petition having, recorded a consent with the Petitioner and having stated under oath through Affidavit of 28th August 2017, that the Appellant’s position in the Party list remained intact.

27. It was argued that the Application for joinder was made at the behest of Oglu Karani’s personal interest. That if the Honourable Magistrate for any reason found that there was indeed a cause of action against the Orange Democratic Movement Party, she should have invoked Section 80 of the Elections Act, No. 24 of 2011, than blame the Petitioner over deliberately hidden reasons. The joinder of the Party prejudiced the Petitioner’s case.

28. Further, the Honourable Magistrate failed to deal with illegal matters that arose being that:

a) Oglu Karani claimed during cross examination that she neither signed the supporting affidavit that accompanied the Application for joinder nor the Replying affidavit;

b) She further confessed that she never appeared before a Commissioner for oaths by the name Miller Wanjala Bwire and that she has never met him; and

c) That it emerged that the commissioning signature were fundamentally different that even an expert would not be required to ascertain the difference.

29. However, the 1st Respondent responded by submitting that, it is instructive to note that, while the Appellant opposed the inclusion and participation of the 2nd and 3rd Respondents in this case, the bulk of the arguments in her submissions majorly faulted the decision of the Learned Magistrate, in relation to the position and roles of the 3rd Respondent and its official. The only major grievance against the 1st Respondent is that it ought to have ensured that the Appellant’s name was in the final Party list.

30. The 1st Respondent further submitted that the Appellant’s failure to include the Party as a Respondent was a reckless and misguided stance taken, since her Petition was largely pegged on the publication of a list prepared, amended and submitted for publication by Orange Democratic Movement Party. Further the exercise of allocating of members by 1st Respondent under Article 90 and 177(1) (b) of the Gender top up Category begun with the Orange Democratic Movement Party and the 1st Respondent’s mandate was to ensure that a list of qualified candidates was submitted.

30. It therefore followed that any subsequent Petition filed by the Appellant would necessitate the enjoinder of the Party as a Respondent to the case. In that regard any orders made whether adverse or not would have affected the Party.

31. The Honourable Magistrate was therefore correct in faulting the Appellant for not enjoining the Party as a Respondent to the suit. That in making its ruling to allow the Party to be enjoined as an Interested Party to the Petition, the Trial Magistrate found that the Party was a necessary Party, that would help the Court determine the procedure followed in nomination of Party list. That the Party only participated as an Interested Party and not a litigant. Neither was the Party seeking for any actual remedies.

32. in that case, the Appellant cannot at this stage of Appeal, be heard to raise the argument that the Trial Court not only allowed the joinder of the Orange Democratic Movement Party against the provisions of the law but gave them too many rights, including filing a response and setting issues for determination. The extent to which the Party would participate was determined at a Pre-trial conference to which the Appellant was a Party.

33. Further, the arguments raised by the Appellant against Orange Democratic Movement Party’s official Oglu Karani, on alleged fraud and malicious intentions against the Appellant only buttressed the need for participation of the Party in the suit as a crucial Respondent. No other party can best respond and assist the Court in establishing the truthfulness of these allegations.

34. It was further submitted that, the Appellants argument that no document was produced to controvert the allegation that, the 2nd Respondent was not a member of the Party, is contradictory, as at the same time, she opposes the inclusion of the Party as an Interested Party and its participation in the Appeal. That the question of qualification of the 2nd Respondent was peripheral and could not be entertained by the Learned Trial Magistrate as a major issue. The Court only dealt with the issues before it that related to the roles of the Parties sued, mainly the 1st Respondent, and it rightfully did so.

35. On the issue of inclusion of the 2nd Respondent, the 1st Respondent submitted that the Honorable Court must allow the 2nd Respondent to participate in the proceedings as adverse statements have been made against her. In any event, the 2nd Respondent is the “winner” in this election and the outcome of this case affects her directly.

36. The case of; *Mohamed Abass Sheikh -vs- Boundaries Commission (IEBC) & 2 others* [2018] eKLR, was cited where it was held:

“Another important feature to note in the legal jurisprudence of election laws is that it is noteworthy that the Election Petition rules provide for who should be a mandatory Respondent in an election Petition. Rule 9 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, provides that:

“The Commission shall:

(a) be a Respondent in every Petition filed under these Rules;” and

In Aboub Ali V Independent Electoral and Boundaries Commission and 2 others [2013] eKLR, the Court stated that:

“The Constitution, the Election Act and the Election Petition Rules require that the successful candidate be made a party to the Petition because such candidate is the primary target of such election Petition. He is the one who will be the first person to suffer the consequences of the nullification of the particular election result. Where the Petitioner does not include the successful candidate as a party in the Petition such Petition lacks legal substratum and is liable to be struck out.”

37. The 3rd Respondent on its part submitted that, it was the Party that nominated the 2nd Respondent, having generated the Party List from which the 2nd Respondent was nominated. Its role was to demonstrate how the process of preparation of the Party List was conducted, which it did in accordance with the directions of the Court. That once allowed participation in the proceedings, the Interested Party had all the rights to lead such evidence and make submissions on issues that would affect it. It is therefore untenable and contrary to the law, to interfere with the learned Magistrates discretion and expunge all the pleadings, herein proceedings as submitted by the Appellant. Further, it is noteworthy that the 3rd Respondent only participated within the parameters set by the Court.

38. As aforesaid, the following facts that emerge from the pleadings and record of Appeal reveal that the Petitioner did not sue the 3rd Respondent as a Party to the Petition. However, the 3rd Respondent applied successfully and was enjoined in the matter as an Interested Party. Subsequently, the 3rd Respondent fully participated in the proceedings by filing a Replying Affidavit dated 28th August 2017, in response to the Petition; and eventually called a witness, one Olga Karani, the National Deputy Treasurer, of the Orange Democratic Movement Party. The 3rd Respondent then filed submissions at the close of the proceedings just as the other Parties who participated in the Petition. It is therefore clear that the 3rd Respondent fully participated in the proceedings in the same manner as the Petitioner, and the 1st Respondent.

39. The issue that arises is whether the Trial Court erred in allowing the 3rd Respondent, as an Interested Party to fully participate in the proceedings therein. In this regard, the Learned Hon. Magistrate had this to say in the Ruling delivered on the issue:-

“The 1st Respondent has stated that it followed the law in the Gazettement of the 2nd Respondent and as per the names in the party list presented by the proposed Interested Party. That, being the case, I am satisfied that, the proposed Interested Party’s case may not be well articulated in their absence and may suffer prejudice. The brief oral submissions by the Applicant’s Counsel have demonstrated the Interested Party’s interest in the matter and its counter with the issues before Court. I am satisfied that, the Interested Party’s participation will enable the Court to effectively and completely adjudicate on issues raised in the matter.”

40. I have considered the rival submissions and the Ruling of the Trial Court on the issue in question and I find that, taking into account the following factors that: the main issue in the Petition revolved around the Party list which originated from Orange Democratic Movement Party, and published by the Independent Electoral Boundaries Commission and the fact that the Appellant relies entirely on the list published on 23rd July 2017, and subsequently amended, further that the Appellant relies on the Consent order, in which the Orange Democratic Movement Party allegedly agreed to ensure she is nominated and guaranteed a priority position, in the list of Special Members category, under Article 90 and 177(1)(b) of the Constitution of Kenya, then the Trial Court made the right decision in allowing the Orange Democratic Movement Party to be joined as an Interested party; the Petitioner having opted to omit it as a Party to the Petition.

41. However, the parameters of an Interested Party participating in any matter before the Court are now settled, as evidenced by the case law cited by the respective Parties in support thereof. I have considered the same herein, and find that, an Interested Party remains just as such. The Interested Party in a suit is not in the same position as the main parties to the litigation.

42. As stated in the case of; *J. Lebov & Another vs The Director of Kenya Forest Services & Another HCCC No. 273 of 2013*, the Interested party is neither Plaintiff nor Defendant. In Muruatetu’s case, the Supreme Court of Kenya held that, an Interested party should not be allowed to frame its own issues or introduce new issues for determination by the Court. The issues remain those framed by the Principal Parties. However, in this matter, the Interested Party fully participated in the proceedings and even framed issues for determination.

43. In view of the settled law, I find that, although the Trial Court lawfully allowed the 3rd Respondent to be enjoined in the proceedings as an Interested Party, it misdirected itself by allowing the Interested Party to fully participate in the proceedings as stated herein, placing it on the same pedestal with the main Parties. The participation should have been limited to the purpose for which they sought to be enjoined, to assist the Court appreciate the Party’s procedure for nomination of the relevant categories of members.

44. Be that as it were, the question is, whether the Petitioner suffered any prejudice by virtue of the 3rd Respondent’s full participation in the proceedings. I find that, the Appellant did not suffer any prejudice. This is informed by the fact that, the Appellant was accorded an opportunity to cross-examine the 3rd Respondent’s witness, as evidenced herein. The Appellant has also heavily relied on the testimony of that witness to argue her case on Appeal as outlined above.

45. I have also considered the Appellant’s submissions that, the Court should stop the Orange Democratic Movement Party further

participation in this matter and expunge all the documents it has filed from the records on the ground that, they are a product of fraud and that the 3rd Respondent was irregularly enjoined in the proceedings and allowed too many rights.

46. That argument is not tenable at this stage. Those issues should have been dealt with at the Trial Court. The Appellant did not Appeal against the decision in the ruling allowing the 3rd Respondent to be enjoined in the Petition. In conclusion I find that the 3rd Respondent was lawfully and legally allowed to join in the proceedings in the Trial Court as an Interested Party, and it fully participated beyond lawful limits or parameters of an Interested Party, the Appellant was not prejudiced in the given circumstances.

47. The next ground of Appeal relates to the 2nd Respondent's participation in the proceeding before the Trial Court. The Appellant submitted that, the 2nd Respondent having failed to respond to the Petition, a judgment should have been entered against her. Further the Trial Court erred in law and in fact, by failing to consider the evidence adduced in relation to the qualification and eligibility of the 2nd Respondent for nomination as a Member of County Assembly for Nairobi County.

48. The Appellant submitted that, the 2nd Respondent's name appeared for the first time in the Kenya Gazette Notice Volume CXIX No. 124 of 28th August 2017 and since the 2nd Respondent was not a beneficiary of any Pre-election Court directives, no other satisfactory explanation was adduced in Court that would remedy this illegality. The Appellant referred the Court to the decision in Petition No.3 of 2017, in Nyamira Court, where the Honourable Chief Magistrate M. Wambani, held therein that, the ODM Party and IEBC's reasoning that, the appearance of the Petitioner's name (therein) in the Gazette Notice without having been published and without being a beneficiary of the Pre-election Court directives was a consequence of fraud.

49. It was submitted that, similarly, the 2nd Respondent's name herein appearing directly in the Gazette Notice without having been a beneficiary of the Pre-election Court directives and skipping all the other names in the list of qualified candidates in order of their priority, can only be a product of fraud or collusion between Ms Olga Karani and the IEBC officials.

50. However the Respondent submitted that in light of Appellant's pleadings, the question of the 2nd Respondents membership to the 3rd Respondent's Political party was not available for determination. The pleadings did not raise the issue of the qualifications of the 2nd Respondent as an issue for determination. Further the alleged letter, from the Office of the Registrar of Political Parties, alleging that the 2nd Respondent was not a member of the third Respondent herein, was introduced through a supplementary Affidavit, filed with leave on the conditions that the Appellant would stick to issues pleaded in the Petition. That the issue of membership to a Political Party is one that can only be determined on the basis of the information from the Political Parties as held in the case of; *Salma Florence Bwogi Ochieng v Orange Democratic Movement Party [2017] eKLR*.

51. Further that the Appellant never produced any document from the Political Party, to prove the allegation that the 2nd Respondent is not its member; and neither did she produce a document from NARC Kenya to prove that NARC Kenya recognized the 2nd Respondent as its member. Similarly, the document produced in support of the Petition was not certified as an authentic document from the office of the Registrar of Political Parties.

52. As aforesaid, the Court struck out both notice of appointment of Advocate and response to the Petition by the 2nd Respondent, both dated 27th October 2017 and filed in Court on 30th October 2017, for being irregularly and improperly on record, in the Ruling delivered by the Court on 7th November 2017, consequently, the 2nd Respondent did not participate in the hearing of the Petition.

53. In the Judgment delivered by the Trial Court, the Learned Honourable Magistrate stated as follows:-

“ In the Petition filed in this Court, the only issue by the Petitioner against the 2nd Respondent's nomination is that her name did not appear in the list forwarded to Independent Electoral and Boundaries Commission by Orange Democratic Movement and published on 23/7/2017 and thus was not qualified to be nominated.”

The Court went on to state as follows:-

“It is not denied that the 2nd Respondent did not appear in the list published on 23/7/2017.”

Finally, the Court states as follows:-

“If Independent Electoral and Boundaries Commission was satisfied that she (2nd Respondent) qualified to be elected and accepted her name, it discharged its mandate.”

54. It suffices to note that, among the prayers the Petitioner sought for in the Petition, were prayers that, the swearing in of the 2nd Respondent be stopped, that a declaration order be issued that the Gazettement of the 2nd Respondent was irregular and illegal and the Gazettement of the 2nd Respondent as a Member of Nairobi City Assembly be revoked.

55. The question that arises is whether, the Trial Court considered in its judgment the issue of qualification and eligibility of the 2nd Respondent for nomination as a Member of County Assembly for Nairobi County. It does appear that the Trial Court consolidated the issues for determination into one, namely; “whether the 1st Respondent in publishing the 2nd Respondent as the Orange Democratic Movement Party nominee for the Member of County Assembly for Nairobi under Article 177(1)(b) in Gazette Notice on 28th August 2017, acted within its mandate under the law”. The question remains as to whether; in determining this issue, the Court addressed the eligibility, of the 2nd

Respondent.

56. To answer this question, regard must be held to the final finding in the judgment of Court, as follows:-

“The Court finds that, the 2nd Respondent was validly nominated as the member of Nairobi County Assembly under Gender Top Up. The Respondent discharged its mandate under the Constitution and the Elections Act fully. The Petition is hereby dismissed with costs to the 1st Respondent and in any event costs not to exceed Kshs. 200,000/ (Two Hundred Thousand).”

57. However the evidence before the Trial Court included a document allegedly from the office of the Registrar of Political Parties, being a record showing that the 2nd Respondent was not a Member of Orange Democratic Movement Party and that she was a Member of Justice and Freedom party. Although the 3rd Respondent faults this evidence, it was not rebutted.

58. I find with utmost due respect to the Trial Court, this issue was not rebutted by the 2nd Respondent after her response to the Petition was struck out and neither was it interrogated in the Judgment. Bearing in mind that, the Party list submitted by the Orange Democratic Movement Party, was a list of its members, if indeed the 2nd Respondent was not a member of the Party, then an issue arises; as to whether she was qualified in law for nomination for the subject position.

59. According to the evidence before the Trial Court, the Orange Democratic Movement Party’s nomination Rules and Procedures pursuant to, Regulation 6 of the (Party Primaries and Party List) 2017, require that for a person to be nominated as a Member of the County Assembly under the Gender Top Up category, that person must inter alia “be a life member of the Party.” I therefore find that in the absence of evidence to rebut the Petitioner’s evidence on the qualification and eligibility of the 2nd Respondent to be nominated as herein, it was necessary that the Court interrogates whether the 2nd Respondent was indeed a life member of Orange Democratic Movement Party. The holding that the 1st Respondent had done so was not correct. The 1st Respondent was not the originator of the list. It was the Party that should have complied with its internal Rules and Procedures.

60. The other ground of Appeal is in relation to Complaint No. 13. The Appellant submitted that the Honourable Magistrate was at fault in finding that the decision No. 13, (which was produced in Court by the Appellant, after the IEBC deliberately failed to produce the same), affected the Petitioner’s position in the list and in directing the Party to renew its list based on “Diversity”. That even then, both the Petitioner and the 2nd Respondent, being young women of youthful age hail from the same region. Further that the 1st Respondent admitted through its witness during cross examination that, even though Complaint No. 13 was allowed, heard and determined, the Complainants therein never at all benefited from the decision. But importantly it suffices to note that the only change to the list of 23rd July 2017 was direct replacement of the Petitioner’s name with that of the 2nd Respondent.

61. It was submitted that, the 3rd Respondent, mischievously cited the decision in Complaint No. IEBC/NM/PL/13/2014, (Complaint No. 13) for replacing the Petitioner’s name with that of the 2nd Respondent. Further that the 1st Respondent published a Public Notice to the effect that, the hearing of disputes arising from Party list nominations and in particular complaints relating to statutory qualifications, requirements and non-adherence to the law and/or guidelines issued by the Commission, the preparation and submission of Party lists by members of the Public, registered voters, Institutions, Organizations, and Civil Society, shall be heard by, the Independent Electoral and Boundaries Commission Dispute Resolution Committee. Whereas Complaints against the respective Political Parties, on the conduct of Party list nomination or the selection of nominees of the Party members, and Party officials, shall be heard by the Political Parties Dispute Tribunal. That in that case, the Independent Electoral and Boundaries Commission should not have presided over Complaint No. 13.

62. The Appellant relied on the decision in Petition No. 1 of 2015, where the Supreme Court of Kenya held that, Independent Electoral and Boundaries Commission have no power to adjudicate over disputes arising from internal positions of Political Parties. It was submitted that the decision binds the Trial Court, and therefore Trial Court should have declared the decision of Independent Electoral and Boundaries Commission over complaint No. 13 as null and void. Having failed to do so, the Court should stamp its authority and declare the said decision null and void.

63. However in response, the 1st Respondent reiterated in its submission that the decision in the Complaint No. 13 did not adversely affect the Appellant. That, if the 3rd Respondent still chose to omit the Appellant’s name in its Final list submitted in August 2017, the 1st Respondent had no capacity to oppose the decision or compel the inclusion of the Appellant. Therefore the actions of the 1st in receiving the amended list from 3rd Respondent, with the name of the 2nd Respondent included and that of the Appellant omitted cannot be faulted on the mere ground that, the list was a product of a Dispute Resolution Committee’s decision.

64. It was further submitted that, the Appellant has needlessly cited Supreme Court Petition No 15 of 2015 to argue that, the 1st Respondent does not have powers to adjudicate over disputes arising from the Internal position of a Political Party. However, the case is misapplied, as on the flipside, the case reinforces the 1st Respondent’s argument that, it had no mandate of altering the Final list, submitted and published, since this would amount to meddling with the Internal political issues of the Party.

65. As regard the allegation of fraud, the 1st Respondent conceded that, indeed a Party list ought to bear the hallmarks of democracy, transparency, among other values; However, the 1st Respondent, has a limited role in fully enforcing the same, as the process of electing leaders whether by ballot or nomination entails treacherous political processes and the 1st Respondent is only a neutral and Independent organ.

66. The 3rd Respondent on its part maintained that, the 1st Respondent acted within its mandate under Article 88(4) to settle the dispute arising out of the Electoral processes and therefore the Learned Magistrate correctly made a finding that Independent Electoral and Boundaries Commission, had the jurisdiction to return the Party list for revision.

67. In the final Judgment, the Trial Court made the following finding on the issue of Complaint No.13:-

“it is this Court’s finding that, the Respondent had the mandate to entertain such disputes. It’s this Court’s further finding that these provisions of law are not in vain. It is not expected that disputes will be heard and determined just for the sake of it. The reasonable conclusion is that after the hearing and determination of such disputes the outcome would have a bearing to the already published Party list. Changes to the list were definitely anticipated by the Plaintiff having been a beneficiary of the Independent Electoral and Boundaries Commission mandate to determine such disputes.”

68. I have considered the issue and find that, in view of the fact that it forms part of the basis of the decision of the Trial Court, I will consider it alongside the others issues raised regarding the mandate of the 1st Respondent; in relation to Party list, the evaluation of the evidence and/or the application of the relevant electoral laws.

69. As regard these issues, the Appellant’s main grievance is that, the 1st Respondent did not rely on the valid Party list in gazetting members lawfully nominated by the Orange Democratic Movement Party, under the Gender Top Up category. She maintains that the valid and authentic list remains, the list published on 23rd July 2017.

70. That further, the letter written by PraxedesTororey on behalf of the 1st Respondent and the notice on the public portal of the 1st Respondent, produced by the Petitioner and unchallenged, reinforces the fact that the list published on 23rd July, 2017 remained the Final list. That, at page 12 of the judgment, namely; *Petition No. 22 of 2017, Hellena Kisiku Kitheka vs IEBC*, the Honourable Magistrate herein confirmed that the valid Party list herein, of 23rd July 2017, was the Final list.

71. The Appellant is basing her argument of the validity the list published on 23rd July, 2017, on a consent entered into between the 3rd Respondent and herself to the effect that, it shall guarantee her nomination under the Gender Top Up category and in a favourable position to guarantee she becomes a Member of the County Assembly in the Nairobi City County. That the said Consent was endorsed by the Court of Appeal and become an order of the Court.

72. I have considered the submission on the issue and I find that as already stated herein, there is no dispute that a Consent order was recorded in Civil Appeal No. 176 of 2017, on 24th June 2017 and eventually endorsed as an order of the Court in the Court of Appeal on 12th July 2017. It was subsequently partially enforced by the 1st Respondent when, one Elias Okumu Otieno, was allowed to retain the Nomination Certificate issued by the ODM Party following the Party’s Primaries held on 30th April 2017.

73. However, the 1st Respondent argues that it was not a Party to the matter in which the consent was recorded. But it suffices to note that, the evidence in the Trial Court reveal that; the 1st Respondent was an Interested Party in the matter. Even then, further evidence reveal that, the Appellant brought the Consent order to the knowledge of the 1st Respondent vide a letter dated 25th July 2017. This was before 10th August 2017, when the 2nd Party list was received by the 1st Respondent. The Appellant also notified Chairman of Independent Electoral Boundaries Commission, vide a letter written on 29th July 2017.

74. It further suffices to note that, although the 1st Respondent was not a Party to the Consent Order, the Returning Officer of Kileleshwa Ward was named as a Respondent in the Court of Appeal, where the Order was endorsed. He was notified of the mention date for the endorsement of the order, but failed to appear in Court on the material date.

75. It is also on record that by Olga Karani swore a Replying Affidavit dated 28th August 2017, to the effect that the Party had submitted a list of 85 candidates, in which the Appellant’s name was at No. 23, having taken into account the Consent order of the Court of Appeal.

76. Be that as it were, as aforesaid, the Appellant filed a Complaint at the PPDT being Complaint No. 485 of 2017, and the Tribunal on 29th July 2017, ordered that Orange Democratic Movement Party to reconstitute the list of nominees for the Members of County Assembly, in line with the Consent Order of the Court in Civil Appeal No. 176 of 2017. It was further ordered that the copy of the Judgment be transmitted to IEBC for necessary action. I therefore believe that all through both IEBC and the Party were well aware of the Consent order.

77. The question is; what then informed the 1st Respondent and the Orange Democratic Movement Party’s, failure to compliance with the Consent Order? And under what circumstances can a name of a person be removed from a Party List after the list is published?

78. I note from the Trial Court’s record that, when Sarah Apiyo testified on behalf of the 1st Respondent, she stated that, the list of 23rd July 2017 was Final at the time it was published, and it could only be amended by an order from PPDT or the IEBC’s Committee. According to her evidence, the list was sent back for review to reflect “diversity”. During cross-examination she admitted that she was aware of the Consent Order.

79. The Appellant argues that in the given circumstances the 1st Respondent and the 3rd Respondent; are guilty of Contempt of Court. However the Learned Magistrate in the final Judgment had this to say on the Consent order:-

“The Petitioner submitted that the Independent Electoral & Boundaries Commission did not ensure that the consent order between herself and Orange Democratic Movement Party was complied with. I however find that the Independent Electoral & Boundaries Commission’s mandate does not include interference with the manner in which a Party arrives at its list”.

80. I have considered the finding of the Trial Court as quoted above, and I concur that the 1st Respondent has no mandate to interfere with the Internal affairs of a Political Party. However, with utmost respect in this particular matter we are dealing with a Court order endorsed by

the Court of Appeal that ought to have been obeyed. The decision of the Court of Appeal binds all Court subordinate to it, from the High Court to the Quasi-Judicial and other Public bodies including; the IEBC and Orange Democratic Movement Party. The Trial Court having correctly found that there was a valid Consent order entered into by Orange Democratic Movement Party and the Appellant and which had not been complied with should have made a finding on the same. The failure to comply with the consent order amounts to contempt of the Court.

81. I note that the Trial Court further held that ;-

“How the party reconstituted the list after it was returned to it for reconstitution concerns the party alone and Independent Electoral and Boundaries Commission had no say in it except to discharge its mandate in confirming that the reconstituted list complied with the law. The party is not named as a Respondent in this matter and thus the Court will not delve into determining whether it had valid reasons for removing the Petitioner’s name from the list. As earlier noted by this Court, the only issue raised is that the 2nd Respondent was not eligible as her name did not appear in the publication for 23/07/2017. The Independent Electoral and Boundaries Commission and the Interested party have confirmed that the Petitioner’s name was deleted from the list and the 2nd Respondent’s name included when they reconstituted the list.” (emphasis mine)

82. I find that, indeed the Trial Court rightfully held that, the Independent Electoral and Boundaries Commission’s mandate was to confirm that the list reconstituted list “complied with the law.” The consent recorded in Court and endorsed by the Court of Appeal is law. Independent Electoral & Boundaries Commission was aware of the Consent order and more particularly that, Orange Democratic Movement Party was legally bound to obey the Consent order. Therefore for the same reason that, the Independent Electoral & Boundaries Commission returned the Party list published on 23rd July 2017, on the grounds of, inter alia, diversity, proof of life membership of the Party and/or registered voters, it should have inquired as to why the 3rd Respondent was not complying with the Consent order which it was aware of and had partially implemented as aforesaid.

83. The other issue that arose is; whether the 3rd Respondent simply removed the name of the Appellant and replaced it with the name of the 2nd Respondent when the Party list was reconstituted and whether it was acting on the direction given by the Independent Electoral & Boundaries Commission. It is not in dispute that the 2nd Respondent was not in the list published on 23rd July 2017. That she appeared for the first time in the Kenya Gazette Notice Vol. CXIX No. 124 of 28th August 2017.

84. In fact it suffices to note that the reconstituted Party list had no significant change other than the substitution of the Appellant’s name with that of the 2nd Respondent in the Petition. The names on the Party list published on 23rd July 2017 from numbers 1 to 27 remained the same save for the said substitution. It was a case of “cut and paste”. What then was the motive of the Party? Did the Party even consider the issues that arose in Complaint No, 13 and the decision made thereon and forwarded to it by the 1st Respondent? Did the 1st Respondent’s decision on Complaint No, 13 direct the 3rd Respondent to replace the Appellant’s name with that of the 2nd Respondent?

85. The Trial Court in the above quotation clearly confirms that the 1st and 3rd Respondent confirmed that after the list for 23rd July 2017 was sent back to the 3rd Respondent the name of the Appellant was removed and the name of the 2nd Respondent included.

86. What even transpires after the substitution did not comply with the law, in that, after the list was reconstituted, the members on the new Party list were not subjected to public scrutiny and/or participation as the list was not published.

87. In this regard, the Trial Court had this to say;-

“The Court agrees with the Petitioner that after the reconstitution, the public was not afforded the opportunity to scrutinize and raise any complaint against new entrants. That is the true (sic), but still finds that the law that has created that situation since publication came so close to the election date and that in itself cannot invalidate the nominations. If Independent Electoral & Boundaries Commission was satisfied that she qualified to be elected and accepted her name it discharged its mandate.” (emphasis mine)

88. I find that, although the Trial Court held that, failure to publish the names of the members on the substituted list in itself could not invalidate the nomination, in the same decision the Hon, Learned Magistrate referred to the case of; *National Gender and Equality Commission vs IEBC & Another (2013) eKLR*, where the Court held that, Regulations 54(8) and the Elections General Regulations 2012 requiring the Publication of a Party list is not idle. That part of IEBC’s responsibility is to publish the list in order to afford the public an opportunity to review the list to see whether they comply with the Constitution and for members of the public to know the persons proposed to be elected on the basis of the Party list.

89. That, publication enhances the Political Parties as a tool to propounding good governance, integrity, transparency and accountability. Another reason for publication of the list is to enable the Parties to invoke the Disputes Resolution Process provided for under the Constitution.

90. If indeed as held by the Trial Court, that the publication of a list is not idle, then the purpose for which the publication is required under the law was not achieved in this matter, and as the publication was not done, the eligibility of the persons on the substituted list comes into issue. As aforesaid at the risk of repeating what is already said, it was part of the responsibility of the 1st Respondent, to ensure that, the Party list submitted herein complied with the law. That per se, in my considered opinion casts doubt on the validity of the nominees on the Party list submitted by the Orange Democratic Movement Party, for appointment as members of Member of County Assembly under the Gender Top Up list.

91. I find that although the Court found that the 3rd Respondent was not a Party to the Petition and therefore it would not delve into the reasons why the Appellants name was removed, it should not be lost that Orange Democratic Movement Party was legally bound to obey the Consent order it had recorded in Court. And unless it had any other lawful reason not to. The reason for the same was bound not advanced. Yet it fully participated in the Petition proceeding. Therefore with due respect, if there was a valid reason for removing the Petitioner's name from the list and including the 2nd Respondent's name, that reason should have been disclosed.

92. Be that as it were, I note that during the cross examination of Olga Karani as to why the Petitioner's name was removed, she stated that "there were many reasons why we removed her from the list for Independent Electoral & Boundaries Commission", she went on to state that "her name was removed because she is an Independent candidate. Further, "that the Petitioner had tormented the Party by taking it to Court several times and never informed the Party that she moved to be an Independent candidate." However, Ms Karani had earlier testified that "I am aware the Petitioner is a life member of the Party." Ms Olga Karani also testified in the Trial Court that, the Appellant did not qualify for appointment based on the Party's criteria used in committees. That she was brought as a person who had entered into agreement in a Petition she had filed in Court and that was before the first list was presented. Then her name was presented to the 1st Respondent but the Party did not confirm her status to membership. Further her name was brought the last day before presentation of the Party list and that she did not see the Court order although none of the Committee members raised objection to her inclusion in the first list. Ms Karani stated that, "therefore the consent was entered into as the Petitioner had put the Party under duress and the Party was running late". But the consent order was binding and the Party complied and nominated her.

93. So then what happened to inform the subsequent removal of her name from the reconstituted list? The Appellant alleges that the removal of her name and inclusion of the 2nd Respondent's name was a fraudulent scheme between the officials of Independent Electoral & Boundaries Commission and Orange Democratic Movement Party. However I find that these are matters of facts that will require evidence and should have been dealt with at the Trial Court. As already stated herein, the Court is considering issues of law.

94. In conclusion, I find that a Trial Court arrived at a correct decision in holding that the 1st Respondent as constituted under Article 88(4) (e) of the Constitution has the power to settle electoral disputes including disputes relating to or arising from nominations, but excluding Election Petitions and disputes subsequent to the declaration of Election Results. However, it is clear in this matter that as much as the Independent Electoral & Boundaries Commission exercised its statutory power in returning the list published on 23rd July 2017, to the Party for review, the list reconstituted herein did not comply with the law in particular the Consent Order. It also did not comply with the requirement for publication thereof for public participation. It therefore follows that, the list published on 28th August 2017 was not properly constituted. Similarly if it is only the 2nd Respondent's name that was introduced and the Petitioner's name removed from the list published on 23rd July 2017, as it does appear, then it means that, the list that remains valid is that of 23rd July 2017. I therefore find that, had the Trial Court arrived at the same decision, the Petition would not have been dismissed.

95. Be that as it were, I note that among the prayers sought for in the Petition included prayers for; declaration that the process that led to the gazettement of the 2nd Respondent was irregular and illegal, that the swearing of the 2nd Respondent be stopped and her gazettement as a Member of County Assembly of Nairobi City County be revoked. Taking into account that the Orange Democratic Movement Party had totally disregarded the Consent Order and thus were generally in contempt Court, then list re-submitted to the 1st Respondent was and is invalid.

96. As a result the orders sought for in the Petition should have been allowed and more so in view of the fact that the 2nd Respondent had not appealed and has not appealed against the decision to expunge her Response to the Petition from the record. Similarly she did not participate in the proceedings to rebut the allegations and/or evidence adduced against her.

97. Before I go to the prayers sought for in the Appeal I find that the Appellant raised other grounds which includes, whether the Trial Court properly applied the relevant Election laws, the infringement of the Appellant political rights and the Constitutional provisions that governs the 1st Respondent's and other public bodies. In my considered opinion the Trial Court properly addressed itself on the provisions of the law applicable herein. The rest of the issues herein are well covered in the findings of the Court.

98. I shall now consider the prayers in the memorandum of Appeal. The Appellant seeks for several prayers in therein and after considering the same, I find that based on the reasons stated herein, the Appellant has made a case on merit for the Appeal to be allowed and I hereby allow the Appeal in terms of prayer (a), save for the costs. In furtherance of the same, I hereby allow the Appeal in terms of prayer (2) in that I order that the Judgment of the Honourable Magistrates Court delivered on 12th January 2018, be and is hereby set aside.

99. It therefore follows that the gazettement of the Member of the Nairobi City County Assembly under the Gender Top Up category was not in accordance with the Consent Order endorsed by the Court of Appeal and was therefore is null and void. In view of the fact that the list that remains valid, is that of the 23rd July 2017, for the following reasons stated being: that it complied with the Consent order herein, it was properly published, the complainants in Complaint No. 13, did not benefit from the reconstituted list, neither did the reconstituted list alter the members from numbers 1 to 27, on the list of the 23rd July 2017, save for the Appellant, then the Appellant ought to equally benefit therefrom as did the other 13 members of the female gender thereon. Any contrary holding will amount to violation of the Appellant's constitutional rights on the ground of discrimination. In that regard I allow prayers (c) and (d) of the Appeal. However, prayer (e) is not allowed as it will require investigations and therefore cannot be granted.

100. Prayer (f) seeks that the Court may provide any other relief that it may deem just. Having allowed the Appeal and set aside the Judgment and taking into account the circumstances of this case, the Court directs that, Orange Democratic Movement Party should comply with the Consent order and the orders issued herein with SEVEN (7) days of this order in relation to the nomination of Members of the Nairobi City County Assembly, in particular, the Appellant under the Gender Top Up category,

101. Finally, in view of the fact that the Appellant did not include the Orange Democratic Movement Party as a Respondent in the Petition, and for the other reasons stated herein, I think it is in the interest of the Parties and justice that each party bears its own costs and I order

accordingly.

102. Those then are the orders of the Court.

Dated, delivered and signed in open Court this 17th day of July 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr Ogado.....for the Appellant

Mr Odour for Ms Ngetichfor the 1st Respondent

Mr Odourfor the 2nd Respondent

Mr Odour.....for the 3rd Respondent

Lang'atCourt Assistant