



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYAHURURU
ELECTION APPEAL NO.13 OF 2018

MARGARET WANJIRU IRERI.....1ST APPELLANT

ESTHER WANJIKU MUHOHO.....2ND APPELLANT

JOSEPH KARIUKI WAITHERA.....3RD APPELLANT

V E R S U S

MONICA GATHONI GITHAE.....1ST RESPONDENT

SOLOMON KIMANI KURIA.....2ND RESPONDENT

I.E.B.C.....3RD RESPONDENT

JUBILEE PARTY.....4TH RESPONDENT

GEOFFREY NGARUIYA KARIUKI.....5TH RESPONDENT

JUDGMENT

The three appellants namely, Margaret Wanjiru Ileri, Esther Wanjiku Muhoho and Joseph Kariuki Waithera (1st to 3rd appellants respectively) were aggrieved by the judgment of Hon. Wanjala, Chief Magistrate, delivered on 27/2/2018. They filed this appeal by a memorandum of appeal dated 13/3/2018 against Monica Gathoni Githae, Solomon Kimani Kuria, the Independent Electoral and Boundaries Commission (IEBC); Jubilee Party and Geoffrey Ngaruiya Kariuki (1st to 5th respondents respectively).

The appeal is based on the following nine (9) grounds:

- 1. That the learned magistrate erred in law by failing to appreciate that the dispute before her was a nomination dispute under Article 88(4)(e) of the Constitution and the Petitioners having failed to challenge the party list when they were invited to do so by the Independent Electoral and Boundaries Commission, they could not later challenge the list by way of Election Petition.***
- 2. That the learned magistrate erred in law by failing to appreciate that she had no jurisdiction to entertain the dispute before her.***
- 3. That the learned magistrate having found that the Appellants were indeed members of***

marginalized groups erred in law by nullifying their election by relying on a technicality about the description.

4. That the learned magistrate erred in law by relying on a minor irregularity (description) which did not affect the result.

5. That the learned magistrate erred in law by failing to appreciate that it is not mandatory to include youths and persons living with disability during the nomination.

6. That the learned magistrate erred in law by directing Jubilee Party and IEBC to include the two Petitioners in the new list and by so doing failed to appreciate that in law, it is only the party which can consider who to nominate.

7. That the learned magistrate erred in law and in fact by failing to appreciate that under Section 34(6) of the Election Act the only requirement is that the nomination lists must be in accordance with the parties nomination rules and the Constitution.

8. That the learned magistrate erred in law by failing to consider the provision of Article 100 on who are marginalized.

9. That the learned magistrate erred in law by failing to appreciate

(a) Burden of proof in Election Petition

(b) Standard of proof in Election Petition.

The appellants therefore pray that the appeal be allowed and the court further finds that the petition No.1/2017 was not proved and proceed to dismiss it with costs.

The background of this matter is that the 1st, 2nd and 3rd appellants and the 1st, 2nd and 5th respondents are all members of the Jubilee Party, 4th respondent, in Nyandarua County. They had applied to be nominated in the party list for Nyandarua County Assembly in the General Elections that took place on 8/8/2017. The 1st to 3rd appellants, the 5th respondent were listed on the Jubilee list together with the 1st& 2nd respondents together with two others, all totaling 8 applicants; that the 1st to 3rd appellants and 5th respondent were duly nominated and gazetted on 28/8/2017 as members of the Nyandarua County Assembly representing marginalized groups. The 1st and 2nd respondents were aggrieved by the said nomination and filed petition No.1 of 2017 in the Chief Magistrate's Court challenging the nomination contending that it violated the Electoral Laws and the Constitution of Kenya, in that the appellants and 5th respondent did not qualify to represent special interest groups and especially the cluster described as ethnicity; that the list did not include persons with disability and the youth. The court rendered its judgment on 27/2/2018 allowing the petition declaring the nomination unlawful and invalid. The court also ordered that the 3rd & 4th respondents do come up with a fresh list of nominees which would include the 1st and 2nd respondents to represent marginalized groups in strict compliance with the law. The above decision provoked this appeal.

In this appeal, the IEBC is the 3rd respondent, a Constitutional Commission which is established under Article 85 of the Constitution and charged with the conduct of elections and related purposes. The Jubilee party is the 4th respondent, a registered political party to which both, the appellants and the 1st, 2nd and 5th respondents belong.

This appeal was supported by the 3rd, 4th and 5th respondents. The 1st and 2nd respondents had objected to the joinder of the 5th respondent to the appeal but this court's order of 4/7/2018 allowed him to join and support the appeal.

The Applicant's Submissions:

The appellants who were represented by Mr. Karanja filed Submissions on 9/7/2018 together with a list of authorities.

Although the appellants filed 9 grounds of appeal, Mr. Karanja decided to summarize and argue three of them, namely:

- 1. Whether or not the Chief Magistrate's Court had jurisdiction to make the determination under challenge;**
- 2. Interpretation of marginalized groups;**
- 3. Prioritization of the party list.**

Counsel submitted that 1st – 3rd the appellants, the 1st, 2nd and 5th respondents being members of the Jubilee Party, applied for nomination as members of County Assembly, Nyandarua pursuant to Article 177(1)(c), Article 90(1) and Section 36 of the Elections Act; that the above 6 and 2 others were classified as falling under the marginalized group under Section 36(1)(f) of the Elections Act and their names were forwarded to IEBC for nomination in accordance with Article 90(2)(b) which provides that the candidates be listed in the alternate of male and female in the priority in which they are listed. Counsel further submitted that Section 36(f) reiterates the above provision and adds that the list must include 2 persons with disability, 2 youths and 2 persons representing marginalized groups; that the Jubilee Party submitted the names in order of priority as is required of it, as follows:

- | | | |
|---|---|----------------------|
| 1st appellant was No.1 | - | Female |
| 5th respondent was No.2 | - | Male |
| 2nd appellant was No.3 | - | Female |
| 3rd appellant was No.4 | - | Male |
| 1st respondent was No.5 | - | Female |
| 2nd respondent was No.8 | - | Male – youth. |

Having received the list, IEBC published it on 23/7/2017 as forwarded to it and invited any part, aggrieved by the list to lodge an objection with IEBC under Article 88(4)(e) of the Constitution but none was lodged; that the 1st respondent confirmed to have seen the list but did not complain whereas the 2nd respondent denied seeing the list but denied that he would have objected to it anyway because he did not know about prioritization.

On the question of jurisdiction, Mr. Karanja submitted that he raised the issue with the Chief Magistrate's court indicating that under Article 88(4)(e) of the Constitution and Section 74 of Elections Act, 2011; that the court had no jurisdiction to entertain the petition; that it is the IEBC charged with the mandate to resolve any dispute arising from nomination and priority lists and that is why IEBC had invited objections upon publishing the list. In support of this submission, the appellants relied on the following authorities:

- 1. National Gender and Equality Commission V IEBC 2013 Pet.147/2003 (NRB) where IEBC had received a party list which was challenged by the plaintiff in court and the court held that the IEBC had the mandate to publish the list under Reg.54(8) of General Regulations and if any party was aggrieved by it, they could complain to the IEBC.**
- 2. Counsel also made reliance on the decision in Isaiah Gichu Ndirangu v IEBC and 4 others**

Pet.83/2015 (NRB) where the court considered the decision of **National Gender (Supra)** and held that in addressing disputes regarding nomination, the first port of call is the IEBC Dispute Resolution Committee and if dissatisfied with the decision of the committee, then they can come to court.

3. The third decision is that of **Moses Mwicigi & 14 others v IEBC Pet.1/2015** in which the Supreme Court underscored the objective of the Dispute Resolution Mechanism by the IEBC. In the said case, the High Court had declined jurisdiction and the Supreme Court upheld the High Court decision and observed that if there is a dispute over nominations, then the parties should follow the dispute resolution mechanism by the IEBC.

Counsel stated that the Court ruled that it had jurisdiction having been gazetted by the Hon. The Chief Justice to hear the Petition. Mr. Karanja further submitted that since jurisdiction is everything, once he raised the issue, the court should have considered it first and have the issue is still outstanding. He argued that the nomination dispute arose on 23/7/2017. It should have been filed with IEBC within 7 days and determined before gazettelement which took place on 28/8/2017. It was his view that all disputes on nominations have to be settled before elections. See also **Diana Keithi Kilonzo & another v IEBC Pet.359/2013**.

On marginalization, counsel urged that the 1st and 2nd respondents' misconstrued the term by contending that it means youth and people living with disability. Counsel adopted the definition of the word given in the decision of **Rangal Lemeiguran and others v A.G. Misc.Appl.305/2004** where the court defined 'marginalized' or special interest as that which cannot be captured by normal electioneering process.

See also, **Micah Kigen and 2 others v Attorney General Pet.268 & 398/2012** where J. Majanja observed that the term special interest is infinite and various depending on the party and did not only include youth and persons with disability.

Counsel submitted that each of the applicants applied for nomination in various categories:

1st appellant presented herself as a single mother and that single mothers are marginalized in Nyandarua.

2nd appellant is a young lady.

3rd appellant is a youth and boda boda rider.

5th respondent is an elderly man aged 79 years representing the elderly; that the 1st respondent admitted in her evidence that women in Nyandarua are marginalized and that the 2nd and 3rd appellants are also marginalized persons; that when forwarded to IEBC the names were properly categorized with 1st appellant marginalized on the basis of her status, the 5th respondent on age, 2nd appellant based on gender and age; and 3rd respondent was marginalized by fact that he is a *boda boda* rider. However, what was provided in the gazette notice erroneously indicated that they were nominated based on ethnicity which error arose during printing and it is because of that error that court found the nomination to be invalid.

As regards the court's order that the 1st and 2nd respondents be included in the list, counsel stated that by that order, the court was overstepping its mandate because the party list can only be in accordance with the party's list under Section 36 of Election Act and Article 177(1)(c) of the Constitution; that the list presented by Jubilee was closed and not even IEBC could change the order of priority.

3rd and 4th respondents' submissions

Mr. Maloba appeared for the 3rd respondent and held brief for Mr. Ombasa who represented the 4th respondent. Both counsel had filed submissions. Mr. Maloba associated himself with the submissions

made on behalf of the appellants. Counsel raised two issues for determination;

(1) whether the 1st – 3rd appellants and 5th respondents were nominated in accordance with the Constitution and attendant laws;

(2) whether the 1st and 2nd respondents were entitled to petition the subordinate court.

According to counsel, the 1st, 2nd, 3rd appellants 1st, 2nd and 5th respondents all applied for nomination by Jubilee and each political party was expected to have 8 candidates on its list, 2 people with disability, 2 youth, 2 marginalized group and that no particular group was to be given priority over the other; that the court misdirected itself in misinterpreting the law on provisions of the party list and that IEBC had no authority to substitute its preference with that of the party; that the nomination of 1st – 3rd appellants and 5th respondent was in conformity with the law.

On whether the 1st and 2nd respondents were entitled to petition the court, it was counsel's view that they were not. He made reliance on ***Isaiah Gichu Case (Supra)*** and Section 74(1) of Elections Act which provides that it is the IEBC charged with the responsibility of settling disputes arising from nominations; that the dispute before the court was on nomination and the 1st and 2nd respondents should have approached the IEBC to resolve it; that by this court directing Jubilee Party to come up with lists to include 1st and 2nd respondents, it was acting in excess of the court's mandate. Mr. Maloba urged that the appeal be allowed.

On the question of costs, counsel was of the view that even if the appeal is disallowed the 1st and 2nd respondents should be condemned to pay costs because they slept on their rights.

The 5th respondent's submissions:

Mr. Maina, counsel who appeared for the 5th respondent filed written submissions dated 18/7/2018 and highlighted them. Counsel raised 4 issues for consideration which are:

(a) Whether or not the dispute before the court was a nomination dispute or a pre-election results declaration dispute within the meaning of Article 88(4)(e) of the Constitution and thus the Lower Court had no jurisdiction?

(b) Whether or not the Lower Court had power to order the inclusion of the 1st and 2nd respondents in the fresh nomination list noting that 'NOMINATIONS ARE PURELY POLITICAL PARTY AFFAIRS'?

(c) Whether the Lower Court acknowledged that the 5th Respondent fell within the cluster of marginalized groups within the meaning of Article 100 of the Constitution and particularly the ELDERLY/BUSINESS SUB-CLUSTER?

(d) Whether the 5th Respondent can be punished purely on the basis of a descriptive error occasioned by the IEBC in publication of the Gazette Notice and whether he had any control over the IEBC in publication process?

(e) Whether the 1st and 2nd Respondents, just like the 5th Respondent being party members stood equal chances of nomination and retain chances of future nomination?

Counsel associated himself with the submissions of the appellants and the 3rd and 4th respondents. On the issue of jurisdiction, counsel added that what was before the court was a pre-election dispute within the meaning of Article 88(4)(e) of the Constitution or a nomination dispute. He said that the court's finding that the party list did not comply with the law, but that the gazette notice invited all the aggrieved persons

to lodge a dispute pursuant to Section 74 of the Elections Act; that the court was clear that what aggrieved the 1st and 2nd respondents was not the gazette notice but the publication carried in the Sunday Nation of 23/7/2017; that even though nomination is part of the election process, the law has set out a mechanism of settlement of pre-election disputes. Counsel made reliance on the decision of **Republic v IEBC ex parte Charles Ondari Chebet JR.(Nakuru)3/2013** which was quoted in **Kennedy Moki v Rachel Kaki Nyamai and 2 others Election Appeal No.4/2018** where the Court of Appeal considered the meaning of Article 88(4)(e) of the Constitution and Section 74 of the Elections Act on nomination as pre-election disputes and the courts found that the court is precluded from determining such disputes.

As to whether the 5th respondent was acknowledged as falling within the marginalized group; under the cluster of the elderly/business, counsel stated that the 5th respondent presented his application to the Jubilee party which found that he merited nomination; that the court did acknowledge that he did apply for the said slot; it was admitted by 1st and 2nd respondents that the elderly people are marginalized in Nyandarua County and therefore the court erred in disqualifying him for having been described in the Gazette as ethnic minority. Counsel submitted that once the 5th respondent submitted his name, he had no control on how he was described in the list by the IEBC. Counsel acknowledged the error in the gazette notice in describing the 5th respondent but that he cannot be punished for the error made by IEBC.

As regards the order issued by the court, counsel submitted that it was made in error because the Jubilee Party cannot be directed by the court on who to include in the Party List; that the 1st respondent having been 5th on the list stands a chance of nomination should a position arise in Jubilee.

1st and 2nd respondents submissions:

Mr. Kariuki Njiiri, counsel representing the 1st and 2nd respondents filed written submissions dated 20th July, 2018 which he highlighted. On the question of jurisdiction, counsel submitted that the same was canvassed before the trial court and the court determined it on 7/12/2017 where the magistrate ruled that having been gazetted as an election court by the Chief Justice, she had jurisdiction and further that, the 1st – 3rd appellants and 5th respondent having been nominated, the only way to challenge the nomination was by way of an election petition. Counsel said that the ruling was not challenged and the matter is therefore *res judicata*.

As regards the prayers granted by the court, counsel argued that the petition challenged the gazette notice which categorized the special category which the appellants and 5th respondent were nominated as minority/ethnicity. Counsel however submitted that Salome Oyugi who swore an affidavit in reply, representing the IEBC, 3rd respondent, did not indicate that the categorization was an error and the categorization goes to the core/root for which one is nominated and hence the gazette was irregular; that based on Regulations 54 to 57 of Elections Regulations, the court had to nullify the gazette notice; that the appellants did not exhibit the application forms to demonstrate that there was an error in the gazette notice published by IEBC.

On the question of burden of proof; counsel submitted that the 1st and 2nd respondent testified in court, were subjected to intense cross examination and it was clear that the 3rd and 4th respondents failed to comply with the law; that the 4th respondent did not reply to the petition and should not have filed any reply to this appeal. Counsel also urged that the 3rd and 4th respondents have not filed any appeal on costs and cannot therefore challenge the order on costs.

As regards the question of jurisdiction, counsel's stand is that the law provides that once there is gazettelement, the process can only be challenged before an election court and IEBC has no jurisdiction.

As to the Court's Order that a new list be provided including the 1st and 2nd respondent, counsel urged that the court was right to do so as it gives a chance to the 1st and 2nd respondents to be nominated.

In a rejoinder to the 1st and 2nd respondent's submissions, Mr. Karanja, the appellant's counsel submitted that they could not have filed an appeal on the court's ruling on the issue of jurisdiction because there are no interlocutory appeals in an election petition and besides the issue of jurisdiction was determined in the judgment.

According to counsel, the cause of action herein arose when the list was published in the Daily Nation on 23/8/2017 i.e. the list to IEBC and having failed to challenge the list, they cannot come to court by way of election petition.

As to whether IEBC should have rejected the list, counsel said that Salome Oyugi representing 3rd respondent indicated that a non-compliant list had earlier been rejected and another was filed; that the list was for marginalized minority not ethnic minority; that all the appellants filed their statements indicating their category which was not challenged; that they were subjected to cross examination and failure to attach the applications cannot be an issue at this stage.

I have considered the grounds of appeal, the pleadings before the Lower Court, the Judgment, Submissions of Counsel in this appeal and case law referred to. It is not in dispute that the appellants, the 1st, 2nd and 5th respondents all being members of the Jubilee Party applied to be nominated as members of the County Assembly of Nyandarua in the 2017 General Elections under Special Interest Group.

Section 7 of the County Government Act, 2012 provides that apart from elected members, other members must be nominated to represent the minority or special interests. The special interests have been defined to include those interests which normal electioneering process has failed to capture and represent. In the case of ***Rangal Lameinguran (Supra)*** the court in addressing the issue of special interest, had this to say:

“Although the Constitution does not define special interests contemplated by Section 33(1) of the Constitution, they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all in a democracy. In other words special interests means those interests which the normal electioneering process has failed to capture and represent.....”

The same issue was considered in ***Micah Kigen and 2 others (Supra)*** went further to define special interests when it stated:

“The nature and extent of what constitutes special interests is defined by the party nominating the candidates and in this respect, I agree with counsel for the Attorney General, that a reading of the Article 97(1)(c) as proposed by the petitioners would be too restrictive. The provision refers to a broader term “interests” rather than a more restrictive term “groups.” The nature of special interests requiring representation is infinite and various and political party must be permitted to define those interests from time to time. As the Constitution must be read broadly, I think reading special interests ejusdem generis with the youth, persons with disabilities and workers as contended by Ms. Kilonzo would be too restrictive to take into account any special interests that may emerge in future and which the political party may consider require representation.”

From the above definition, it is the party that determines who will be included in the special interest groups. The court also meant that special interest is not a term that can be limited but may change with circumstances and time.

The 1st and 2nd respondents challenged the nomination of the appellants and 5th respondents as MCAs.

The relevant Constitutional and legal provisions that deal with nomination of MCAs are Articles 90 and 177 of the Constitution and Section 36 of the Elections Act.

Article 90 deals with allocation of party list seats. It provides as follows:

“Article 90

(1) Elections for the seats in Parliament provided for under Articles 97(1)(c) and 98(1)(b)(c) and (d) and for the members of County Assemblies under 177(1)(b) and (c) shall be on the basis of proportional representation by use of party lists.

(2) The IEBC shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that:-

(c) Each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1) within the time prescribed by National Legislation.

(b) Except for the case of seats provided for under Article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed.

(c) Except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

(3) The Seats referred to in clause (1) shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election.”

Article 177(1) of the Constitution provides for membership of the County Assembly and it reads as follows:

“177(1) A County Assembly consists of

(a).....

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

(c) the number of members of marginalized groups including persons with disabilities by an Act of Parliament;

(d).....

(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).....

(4)....”

Provisions of the Elections Act gave effect to Articles 90 and 177 of the Constitution. Part III of the Elections Act and in particular Section 34 – 37 provides for party lists.

Section 36 provides for allocation of special seats. It states as follows:

“36(1) a party list submitted by a political party under.....

(e) Article 177(1)(b) of the Constitution shall include a list of the number of candidates

reflecting the number of wards in the County.

(f) Article 177(1)(c) of the Constitution shall include 8 candidates, at least two of whom shall be persons with disability; two of whom shall be youth and two of which shall be persons representing marginalized group.

(2) A party list under subsection (1)(a) (c)ii (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 prioritize a person with disability, the youth and any other candidate representing a marginalized group.

(4) Within thirty days after the declaration of the election results, the Commission shall designate, from each qualifying list, the party representations on the basis of proportional representation.

(5).....

(6).....

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

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

(9) The allocation of seats by the Commission under Article 177(1)(b) and (c) of the Constitution shall be proportional to the number of seats won by the party under Article 177(1)(7) of the Constitution.”

The appellants, 5th respondent and the 1st and 2nd respondent's names were listed and forwarded to the 3rd respondent with alternates between male and female as required by Article 90(2)(b) and Section 36(1) (f).

They were listed as follows:

- 1. Margaret Wanjiru Ileri – Female*
- 2. Kariuki Geoffrey Nyaruiya – Male*
- 3. Muhoho Esther Wanjiku – Female*
- 4. Joseph Kariuki Waithera – Male*
- 5. Monica Muthoni Githae – Female*
- 6. Hillan Mugo Zachery – Male*
- 7. Murigi Tabitha Njeri – Female*
- 8. Solomon Kimani Kamau – Male*

In so far as the list contained female and male in the alternative, the 3rd respondent complied with the law

as per Article 90 and Section 36(2) of Elections Act.

It was the duty of the Jubilee party to come up with the list which accorded with Article 177 1(c) and Section 36 of the Elections Act. The Lower Court faulted the 3rd respondent for failing to prioritize the youth and People with disability (PWD) in the listing.

The court in its Judgment at paragraph 138, said ***“looking at the party list that IEBC published it puts persons with disabilities and youth outside the priority of those likely to be nominated. Therefore, when the list included the names of the petitioners (1st and 2nd respondents) in positions not likely to be nominated they were not following the law and IEBC being in charge of supervising nominations had power to send such a list back to the party to comply with the law as required.”***

The appellants, 3rd, 4th and 5th respondents all argued that the court misdirected itself in arriving at the above finding because it was Jubilee party that had the discretion on how to prioritize the nominees in the list.

The issue of prioritization in the list was discussed in the case of ***Linet Kemunto Nyakerigo and another v Ban Njoroge & 2 others C.A.266/2013***. The Court of Appeal considered the guidelines issued by IEBC to political parties on how to prepare and submit party lists. The court reiterated the guidelines and said

“We reiterate what the guidelines provide:-

(b) The party list shall be a closed list that is the list may not be amended after it has been submitted to the Commission.

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 suggests ownership of the list by the political party that has prepared it. The practice, indeed the law, in jurisdictions with closed list system is that the power over who gets ‘the reserved seats’ resides within the parties themselves and no other authority.”

I am also guided by the decision in the ***National Gender and Equality Common Case Supra*** where the court was of the view:

“.....This role (court’s role in nomination dispute) does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the political parties.”

In ***Moses Mwicigi and 14 others Supra*** the court held at paragraph 95 and 96:-

“(95) The effect is that, the process of preparation of the party list is an internal affair of the political party, which ought to proceed in accordance with the National Constitution, the Political Party Constitution, the nomination rules as prescribed under Regulation 55.

(96) A political party has the obligation to present the party list to IEBC, which after ensuring compliance, takes the requisite steps to finalize the elections for those special seats. In the event of non-compliance by a political party, IEBC has power to reject the party list and to require the omission to be rectified by submitting a fresh party list or by amending the list already submitted.”

In the instant case, the 1st and 2nd respondents complain that they should have been listed in priority to the others but a reading of the above decisions clearly support the proposition that it was the Jubilee Party’s prerogative to decide how to rank the nominees and neither IEBC nor the court can have a role in it. It follows that the court erred when it directed that the 3rd and 4th respondents come up with lists including 1st and 2nd respondents in priority.

The other complaint by the 1st and 2nd respondent is that the party list did not cover the special categories of marginalized groups because the nominations were gazetted under marginalized ethnicity yet all the people are from the Kikuyu Community which is the dominant Community in Nyandarua and hence were not a minority.

In the petition, Salome Oyugi swore an affidavit and exhibited the list forwarded to IEBC by the Jubilee Party.

The list read:

- 1. Margaret Wanjiru Ileri – Female – Marginalized category, Ethnicity**
- 2. Kariuki Geoffrey Nyaruiya – Male – Ethnicity**
- 3. Muhoho Esther Wanjiku – Female – Minority**
- 4. Joseph Kariuki Waithera – Male – Minority**
- 5. Monica Muthoni Githae – Female – P.W.D.**
- 6. Hillan Mugo Zachery – Male – P.W.D.**
- 7. Murigi Tabitha Njeri – Female – Youth**
- 8. Solomon Kimani Kamau – Male – Youth**

In the gazette notice published by the IEBC on 28/8/2017, the list of the nominees was as follows:

- 1. Margaret Wanjiru Ileri – Female – Ethnic minority**
- 2. Kariuki Geoffrey Nyaruiya – Male – Ethnic minority**
- 3. Muhoho Esther Wanjiku – Female – Ethnic Minority**
- 4. Joseph Kariuki Waithera – Male – Ethnic Minority**

It is obvious that what was gazetted did not conform to what IEBC had received. Unfortunately, the appellants and 5th respondent did not exhibit their application forms for the court to ascertain under what category they applied although the affidavit of Salome Oyugi of IEBC, referred to above, indicated how they were categorized. The above notwithstanding, the 1st and 2nd respondent were cross examined at length. The 1st respondent admitted that the 1st appellant is a single mother and hence marginalized; that the 2nd appellant is a woman and a youth while the 3rd appellant is a youth and *Boda Boda* operator and both are marginalized people. She also admitted that the 5th respondent who is 79 years old applied under the category of the elderly and is a marginalized person.

Similarly, the 2nd respondent admitted that the 1st appellant is a single mother and therefore marginalized, 2nd appellant is a youth and qualifies as a marginalized person; that the 3rd appellant is a youth and *Boda Boda* leader and therefore marginalized; that the 5th respondent applied as an elderly person and hence marginalized; the gazettement of all the nominees as marginalized minority seems to have been an error made by the IEBC's. Having confirmed that indeed all the nominees are marginalized people, then the gazettement by IEBC of the appellants and 5th respondents as ethnic minority is a mere error or irregularity for which the appellants and 5th respondents cannot be held to blame. They should not suffer

for the mistake of IEBC. Had the court found that they did not fit in the special category of marginalized groups, then the nomination would have been irregular.

The other issue that is for consideration is whether the trial court had jurisdiction to determine this matter or in other words, was the dispute before the court a nomination dispute and if so which body should have heard the dispute. This issue was raised and argued as a Preliminary Objection before the trial magistrate. After hearing the parties, the court made its ruling and dismissed the Preliminary Objection and proceeded with the hearing of the petition.

I have seen the judgment of the court where the court revisited the issue of jurisdiction and held that it had the jurisdiction to entertain the election petition because it had been appointed by the Hon. The Chief Justice, gazetted as an election court and that once nominations had been gazetted, the only forum to challenge the decision was through a petition. Mr. Njiri, counsel for the 1st and 2nd respondent also argued that the appellants failed to appeal against the ruling and could not do so at this stage.

In reply to the above contention that the appellants have failed to appeal, I agree with appellants' counsel that in election petitions, there can be no appeals on interlocutory rulings because of the strict time lines within which petitions have to be heard and determined. The ruling on jurisdiction can only be dealt with at this stage.

In the case of *The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd (1989) KLR* (1) the Court stated as follows on the question of jurisdiction:

"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction." Also see *Macharia and another v KCB Ltd & 2 others C.A.2/2011 (Supreme Court)*.

In this case the appellants have argued that the petition is incompetent in view of Articles 87(2), 88(4) of the Constitution, Section 74(2) of the Elections Act, Regulations 2012, and Section 40 of the Political Parties Act. Article 87(2) provides for the filing of an election petition, other than that relating to presidential elections, within 28 days of declaration of results by IEBC. Article 88(4)(e) of the Constitution provides for creation and functions of IEBC. It states as follows:

"88(4) the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and in particular for (a).....(d).

(e) The settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

(f).....

(k)....."

Clearly, the above Constitutional provision confers resolution of nomination disputes on the IEBC, not the court.

Section 74 of the Elections Act 2011 provides that:

"74(1) Pursuant to Article 88(4) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

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

The political parties Act establishes a tribunal under Section 39(1) of the said Act and its jurisdiction is provided for under Section 40 of the said Act. It reads as follows:

“Section 40, 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 candidate partners; and***
- (f) Appeals from decisions of the Registrar under this Act.***

Notwithstanding subsection (1) the Tribunal shall not hear or determine a dispute under paragraph (a) (b) (c) or (e) when the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”

Flowing from the above provisions, the Constitution and legislature set out to enact various laws on resolution of disputes relating to electoral matters and it is incumbent upon the political parties and their members to adhere to those procedures. There is now a host of authorities that have held that when the Constitution or legislature prescribes the manner in which a dispute should be resolved, that procedure should be adhered to. In ***Speaker of National Assembly v Hon. James Njenga Karume C.A 92/1992 (2008) 1 KLR 425***, the court held ***“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed.”***

The above case was relied upon in ***Kimani Wanyoike v Electoral Commission and Act (1995) KLR***.

The case of ***Diana Kethi Kilonzo v IEBC and 2 others*** also underscored the above position when the court said:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution. So long as they comply with the Constitution and National Legislation. Those bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

In this case, Jubilee Party passed their lists to IEBC which published the list in the Nation Newspaper on 23/7/2017. The 1st respondent saw it but 2nd respondent denied having seen it. At the end of the list, which was shown to the trial court, any party that was aggrieved by the list was invited to lodge an objection or complaint with IEBC within 7 days. Both the 1st and 2nd respondent did not lodge any complaint which resulted in the names being gazette on 28/8/2017. The 1st and 2nd respondent denied having been aware that they should complain. However, ignorance of the law is no defence in Kenya.

I do agree with the appellants, 3rd, 4th and 5th respondents that the cause of action herein arose on 23/7/2017 upon the list being published. It was a nomination dispute and it was the duty of the 1st and

2nd respondent to lodge their objection or dispute with IEBC within 7 days in accordance with Article 88(4)(e) and Section 74(1) of Elections Act. By failing to file any complaint with the IEBC, the 1st and 2nd respondents forfeited their right to complain once the notices were gazetted. They could only approach this court, after the IEBC had carried out its mandate.

The Court of Appeal in considering Article 88(4)(e) and Section 74 of the Elections Act in *Kennedy Moki's Case (Supra)*, cited in *Republic v IEBC ex parte Charles Onderi Chebet Nakuru JR.3/2013* where the Court said:

***“Therefore, my understanding of Article 88(4)(e) of the Constitution and Section 74 of the Elections Act is that any dispute relating to nominations to any electoral positions are required to be determined within a prescribed time; and those relating to nomination of candidates should be determined before the date of nomination or election whichever is applicable. Clearly, because of the limited time spans for determination of nomination disputes, political party nominations needed to be done well before the nomination dates to the Returning Officer Electoral bodies. As this did not happen, the aggrieved candidate must live with the choices of their political mandarins.*”**

In summary therefore, I find and hold that where there is a clear Constitutional and statutory provision for resolution of disputes including qualification and nomination disputes, this court's jurisdiction is precluded. This court's jurisdiction would only arise after due exercise by the mandated bodies, the Returning Officer and the Commission of their statutory mandate.”

In the circumstances of this case, I am guided by the above decisions that this being a nomination dispute, the election court is precluded from hearing and determining it. In affirming the above position, Justice Lenaola in the case of *Isaiah Gichu Ndirangu (Supra)* said at paragraph 57:

“I have deliberately set out the above decision with a view to highlighting the approach the courts have taken, which I believe is the correct one, in addressing disputes in regard to nominations pertaining to election matters. In the above cited decisions, I note that the parties alleged violation (5) of the Constitution and various electoral laws in regard to the nominations and in that regard, their first port of call was the Commission's Dispute Resolution Committee. Being dissatisfied with the decision of the Committee, they thereafter approach the courts.....”

In my view and guided by the various decisions, I have referred to the 1st and 2nd respondents failure or ignorance to exercise their rights by complaining to the IEBC Dispute Resolution Committee, forfeited their right to be heard and cannot be heard complaining before an election court.

In the case of *Moses Mwangi v IEBC (Supra)*, the Supreme Court underscored the seriousness with which parties and the court should respect the procedure set up in the Constitution and other statutes because adherence thereto helps to strengthen the institutions. The court held: (Paragraph 121)

“One of the objectives of our Constitution is the establishment of firm institutions that have a pivotal role in its implementation. Our electoral dispute – resolution regime has a continuum of institutions that require strengthening, through the judicial system: Namely; the Political Parties; the Political Parties Disputes Tribunal; and the IEBC. These have to comply with the Constitution, and the electoral laws and regulations. Participation of the people under Article 10 of the Constitution, in the affairs of the political parties, is not only a Constitutional duty on the part of the citizens, but also a vital pillar in the growth of parties, as democratic institutions under the Constitution. That political parties may evolve into stable institutions, requires the full participation of members in their affairs, particularly those that pertain to elections.”

I find that the Lower Court misdirected itself when it found that it had jurisdiction to hear a nomination dispute thus usurped the mandate of the IEBC Dispute Resolution Committee.

Flowing from the above finding, it follows that the court had no jurisdiction to order the Jubilee Party to come up with a fresh list to include the 1st and 2nd respondents in priority. Even if the court had jurisdiction to hear the matter, yet it would not have arrogated itself power which was purely in the hands of the political party to make party lists. In the case of Linet Kemunto Supra the court said:

“.....it follows that it is the responsibility of the parties to choose their preferred candidate and rank them in order of preference. The seats won by each party are filled by candidates in the order they appear on the party’s respective list. The definition of ‘party list’ under Section 2 of the Elections Act suggests ownership of the list by the political party that has prepared it.”

In National Gender case (Supra), the court held that the court had no role in directing the manner in which lists are prepared as that is the preserve of the political parties. I find that the court fell into error in directing how the party list should be prepared.

In the end, I allow the appeal the court not having had jurisdiction to entertain the petition and further find that the petition was not proved to the required standards which is below beyond reasonable doubt but above balance of probability. I hereby dismiss **Petition 1 of 2017**.

On costs, I find the error made in the gazette notice of 28/8/2017 by the 3rd respondent provoked the filing of the petition and I hold them partially responsible for the filing of the petition. The appellants and the 5th respondent are entitled to the costs of the petition and the appeal which will be payable by the 1st, 2nd and 3rd respondents.

Costs are capped at Kshs.1,000,000/= and the 3rd respondent will bear 50% while the 1st and 2nd respondents will bear 50%.

Dated, Signed and Delivered at NYAHURURU this 18th day of September, 2018.

.....

R.P.V. Wendoh

JUDGE

Present:

Mr. Mathee holding brief for Mr. L. Karanja for 3rd appellant

Mr. Kariuki Njiri for 1st and 2nd respondents

Ms. Kinuthia holding brief for Mr. Maina for 5th respondent

Ms. Kinuthia holding brief for Mr. Ombasa for 4th respondent

N/A - 3rd respondent

Soi – Court Assistant