REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELECTION APPEAL NO. 30 OF 2014

IN THE MATTER OF ELECTIONS ACT, 2011 AND THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS PETITIONS RULES, 2013)

AND

IN THE MATTER OF MEMBERS NOMINATED TO THE NYERI COUNTY ASSEMBLY AND GAZETTE NOTICE NO. 15096 PUBLISHED IN KENYA GAZETTE DATED 29TH NOVEMBER, 2013)

BETWEEN

MARY WAIRIMU MURAGURI…..…….....…1ST APPELLANT

JOSEPH KANYI KING'ORI……..…..….....….....….2ND APPELLANT

REGINA WANJIRU MACAHARIA….....…3RD APPELLANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC)…….....…..…1ST RESPONDENT

THE NATIONAL ALLIANCE PARTY….....2ND RESPONDENT

NAOMI WANGECHI GITONGA…….....3RD RESPONDENT

HANNAH WARUKIRA KABUI…….....……4TH RESPONDENT

ANN NYAMBURA WANG'OMBE….....……..5TH RESPONDENT

LEAH MUMBI NJOROGE…….....….6TH RESPONDENT

(AS CONSOLIDATED WITH APPEAL NO. 31 OF 2014)

BETWEEN

KEZIA WARUINI MWANGI…….....……..1ST APPELLANT

LUCY NYAGUTHI…….....2ND APPELLANT

SALOME WAIRIMU KAGO…….....…..3RD APPELLANT

JECINTA WAMBUI WAMAE…….....…4TH APPELLANT

JOSEPHINE MUTHONI MURIITHI.....…..5TH APPELLANT

ELIZABETH WAMBUI NJEE…….....……..6TH APPELLANT

LUCY MUGURE WANYITU…….....……..7TH APPELLANT

NANCY WANJIKU GACHICHIO….....……8TH APPELLANT

SALIMA ULEDI…….....9TH APPELLANT

ANASTACIA WANJIRU NJUKIA….....…….10TH APPELLANT

VERSUS

IEBC…….....……...1ST RESPONDENT

THE NATIONAL ALLIANCE PARTY.....……..2ND RESPONDENT

NAOMI WANGECHI GITONGA…….....….....3RD RESPONDENT

HANNAH WARUKIRA KABUI…….....…...4TH RESPONDENT

ANNA NYABURA WANG'OMBE….....…….5TH RESPONDENT

LEAH MUMBI NJOROGE…….....…….6TH RESPONDENT

(Being appeals from the judgment and decree delivered on 5th June 2014in Nyeri Chief Magistrates' Court Election Petition No. 2 of 2013 (Hon. Wilproda Juma (Mrs))

BETWEEN

NAOMI WANGECHI GITONGA…….....……1ST PETITIONER

HANNAH WARUKIRA KABUI….....…..2ND PETITIONER

ANN NYAMBURA WANG'OMBE.....…..3RD PETITIONER

LEAH MUMBI NJOROGE…….....…..4TH PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION….....….1ST RESPONDENT

THE NATIONAL ALLIANCE PARTY…….....2ND RESPONDENT

KEZIAH WARUINU MWANGI…….....…….....3RD RESPONDENT

LUCY NYAGUTHI…….....…..…4TH RESPONDENT

SALOME WAIRIMU KAGO…….....……..5TH RESPONDENT

JECINTA WAMBUI WAMAE…….....…..…6TH RESPONDENT

MARY WAIRIMU MURAGURI…….....…7TH RESPONDENT

JOSEPH KANYI KING'ORI…….....…..8TH RESPONDENT

REGINA WANJIRU MACHARIA.....……9TH RESPONDENT

JOSEPHINE MUTHONI MUREITHI….....….10TH RESPONDENT

ELIZABETH WANGUI NJEE…….....……11TH RESPONDENT

LUCY MUGURE WANYITU…….....12TH RESPONDENT

NANCY WANJIKU GACHOCHO…….....…….13TH RESPONDENT

ANASTACIA WANJIRU NJUKIA…….....……14TH RESPONDENT

ANASTACIA WANJIRU NJUKIA…….....……15TH RESPONDENT

JUDGMENT

By a special issue of the Kenya Gazette of 17th July, 2013, a notice identified in the Gazette as No. 9794 was issued notifying all and sundry that in exercise of the powers conferred upon it by **articles 90** and **177** of the **Constitution**, **sections 34 to 37** of the **Elections Act, 2011** and **Regulations 54** and **55 of the Elections(General) Regulations, 2012,** the Independent Electoral and Boundaries Commission (herein "the IEBC") had declared persons named in the schedule to the notice as validly nominated to represent various political parties in their respective County Assembly wards throughout the Republic of Kenya.

Among those nominated to represent the National Alliance (TNA) party to the County Assembly of Nyeri were all the appellants in appeal No. 30 of 2014 and all the respondents in the appeal herein except, of course, the IEBC and the TNA party.

The gazettment by the IEBC of the nominees to the County Assembly of Nyeri was, however, challenged in this Court at Nairobi, through **High Court Constitutional Petition No. 236 of 2013**; the petition was filed against the IEBC as the sole respondent. Although I did not have occasion to look at the pleadings in that petition, the gazettment of the nominees appears to have been the issue in contention in that petition because when the petition was dismissed by the High Court, the dispute was escalated to the Court of Appeal in **Civil Appeal No. 169 of 2013** and one of the statements made by the Court of Appeal in its judgment overturning the High Court decision was:-

> ***"2. In their petition to the High Court (Petition No. 236 of 2013) the Appellants complained that despite their names being on the National Alliance Party (TNA) list, and in contravention of the Constitution as well as the Elections Act and the Rules and Regulations made there under, the Independent Electoral Boundaries Commission (IEBC), gazetted the names of other persons. The Appellants in particular complained that although the names of those gazetted members were also on the TNA list, they are not members of TNA and that in picking them the IEBC ignored the constitutional requirement of regional balance." (See page 2 of the***

judgment, underlining mine).

It is apparent from this statement that the gazettment of the nominees in issue not only preceded the constitutional petition but was also the action upon which the petition was based.

And while allowing the appeal the Court of Appeal was categorical that:-

> ***"…we allow the appeal and hereby set aside the TNA nomination for the Nyeri County representatives. TNA shall within fifteen days of the date hereof submit to the IEBC a proper party list. The IEBC shall in turn gazette the nominees within seven days of the receipt of the list."***

In coming to this conclusion the Court of Appeal upheld the petitioners' complaint that the list submitted to IEBC was not representative enough since the wider Nyeri County was not fairly represented and, in particular, none of the nominees on the nominees' party list hailed from Mathira and Mukurweini constituencies.

In a bid to comply with Court of Appeal's order TNA submitted to IEBC a list in which the names of some of the nominees on the original list were retained while the rest were deleted and replaced with names of fresh nominees. The new list with the details of the amendments was gazetted by the IEBC in yet another special issue of the Kenya Gazette of 29th November, 2013 as Gazette notice No. 15096.

The 3rd to 6th respondents herein were casualties, so to speak, of the amended list of nominees in the sense that their names were replaced with fresh nominees. Being aggrieved by the decision taken by TNA and the IEBC, they lodged an election petition in the magistrates' court on 24th December, 2013 to challenge that decision. Besides TNA and the IEBC who were named as respondents to the petition, the nominees in the amended list (who are now appellants herein) were also sued. In the petition, the respondents prayed for the following orders:-

a. **THAT** a declaration be issued to declare that the Court of Appeal judgment dated and delivered on 8th November, 2013 in **Rose Wairimu Kamau & 3 Others Vs. The IEBC Civil Appeal No. 169 of 2013** quashed the nomination of The National Alliance (TNA) Party representatives to the Nyeri County Assembly nominated vide Gazette No. 9794 published in the Kenya Gazette of 17th July, 2013.

b. **THAT** a declaration be issued that Gazette Notice No. 9794 published in **the Kenya Gazette** of 17th, July 2013 was quashed by the judgement of the Court of Appeal dated and delivered on 8th November, 2013 in **Rose Wairimu Kamau & 3 Others Vs. The IEBC Civil Appeal No. 169 of 2013** to the extent that it applies to the representatives of The National Alliance (TNA) party in the Nyeri County Assembly.

c. **THAT** a declaration be issued to declare that Gazette Notice No.15096 published in **The Kenya Gazette** of 29th November, 2013 is null and void *ab initio* to the extent that it purports to amend Gazette Notice No. 9794 to replace the Petitioners with the 3rd - 6th Respondents as representatives of the 2nd Respondent in the Nyeri County Assembly.

d. **THAT** a declaration be issued to declare that under Articles 90 and 177 of the Constitution the 3rd - 6th Respondents have not been validly nominated and/or elected as Members of Nyeri County Assembly.

e. **THAT** a declaration be issued to declare that the 2nd Respondent has violated Articles 90 and 177 of the Constitution and Section 34-37 of the Elections Act, 2011 in purporting to nominate the 3rd - 6th Respondents pursuant to the judgement of the Court of Appeal dated and delivered on 8th November, 2013 in **Rose Wairimu Kamau & 3 others Vs. The IEBC Civil Appeal No. 169 of**

2013.

f. **THAT** a declaration be issued to declare that as consequence of the judgement of the Court of Appeal in **Rose Wairimu Kamau & 3 others Vs. The IEBC Civil Appeal No. 169 of 2013** dated and delivered on 8th November, 2013 the 7th - 15th Respondents are not Members of the Nyeri County Assembly.

g. **THAT** a declaration be issued to declare that by dint of the judgement of the Court of Appeal in **Rose Wairimu Kamau & 3 others Vs. The IEBC Civil Appeal No. 169 of 2013** dated and delivered on 8th November, 2013 the 1st Respondent had no power to amend Gazette Notice No. 9794 published in The Kenya Gazette of 17th July, 2013 to the extent that it applied to nominees of the 2nd Respondent in the Nyeri County Assembly.

h. **THAT** the Honourable Court be pleased to issue an order quashing and/or invalidating Gazette Notice No. 15096 published in **The Kenya Gazette** of 29th November, 2013 to the extent that it specifies that the 3rd - 6th Respondents are validly nominated or elected as members of the Nyeri County Assembly under the list submitted by the 2nd Respondent pursuant to the judgment of the Court of Appeal in **Rose Wairimu Kamau & 3 Others Vs. The IEBC Civil Appeal No. 169 of 2013** dated and delivered on 8th November, 2013.

i. **THAT** the Honourable Court be pleased to issue an order quashing and/or invalidating Gazette Notice No. 9794 published in **The Kenya Gazette** of 17th July, 2013 to the extent that it specifies that the 7th - 15th Respondents are validly nominated or elected as members of the Nyeri County Assembly on the Ticket of the 2nd Respondent.

In her judgment delivered in court on 5th June, 2014 the learned magistrate found for the respondents and allowed the petition; in particular, the learned magistrate held that the nominees gazetted by the Independent Elections and Boundaries Commission (IEBC) to represent various interest groups in the County Assembly of Nyeri County were not validly nominated and therefore she set aside their nominations; she also held the gazette notice no. 15096 of 29th November, 2013 in which the new list of the nominees was published was of no consequence. The learned magistrate, therefore, directed TNA and the IEBC to comply with the law and conduct fresh nominations to the Nyeri County Assembly.

It is this judgment by the learned magistrate that provoked this appeal. The appellants initially filed two separate appeals but they were subsequently consolidated on 20th June, 2014 since they arose from the same judgment; in the consolidation order, this court directed that the appellants in appeal No. 30 of 2014 be described as the 1st to 3rd appellants while those in appeal No. 31 of 2014 would be 4th to 13th appellants, in the order in which they appealed.

The record shows that prior to its consolidation with appeal No. 30 of 2014, appeal No. 31 of 2014 had initially been filed in the High Court at Nairobi on 10th June, 2014 as appeal No. 227 of 2014 but by an order made on 12th June, 2014, the court (Waweru, J) directed that the appeal be transferred to the High Court at Nyeri; it was subsequently transferred and received by the Chief Magistrate on 16th June, 2014.

The memoranda of appeal in the two appeals reveal that the appellants were aggrieved with the decision of the learned magistrate on the following grounds:-

1. The learned magistrate erred in law by failing to find that the petition was filed out of time as stipulated by law in respect of appellants viz **Mary Wairimu Muraguri, Joseph Kingori and Regina Wanjiru Macharia**.

2. The learned magistrate erred in law by upholding that she had jurisdiction to interpret, execute or otherwise enforce the judgment of the **Court of Appeal in Civil Appeal No. 169 of 2013, Rosemary**

Wairimu Kamau & 3 Others versus The IEBC.

3. The learned magistrate erred in law in finding that theappellants were not validly nominated pursuant to the **Gazette Notice number 9794 of 2013** published on 17th July, 2013.

4. The learned magistrate erred in law in invalidating the nomination of the appellants pursuant to the judgment of the **Court of Appeal in Civil Appeal No. 169 of 2013,Rosemary Wairimu Kamau & 3 Others versus The IEBC** in which they were not parties thereto.

5. The learned magistrate erred in law by holding that she had jurisdiction to interpret and or enforce the provisions of the constitution.

6. The learned magistrate erred in law in finding that the Gazette Notice Number 9794 had been quashed by the **Court of Appeal in Civil Appeal No. 169 of 2013, Rosemary Wairimu Kamau & 3 Others versus The IEBC.**

7. The learned magistrate erred in law in failing to hold that The National Alliance was constitutionally bound to comply with the **Court of Appeal judgment in Civil Appeal No. 169 of 2013, Rosemary Wairimu Kamau & 3 Others versus The IEBC** by submitting a new list of nominees in 15 days

8. The learned magistrate erred in law in failing to hold that the fresh nomination as ordered by the **Court of Appeal in Civil Appeal No. 169 of 2013, Rosemary Wairimu Kamau & 3 Others versus The IEBC,** were outside the parameters of the Constitution, the Elections Act and the National Alliance (TNA) party itself given that the same was done within 15 days.

9. The learned magistrate erred in law by finding that the gazette notice number 15096 of 29th November, 2013 was a corrigenda and not a proper amendment to the Gazette Notice No. 9794 of 17th July 2013.

10. The learned magistrate erred in law by finding that the gazette Notice number 15096 was not properly done and further by narrowly interpreting the word "corrigenda" to mean "an error in printed work" instead of holding that it was proper and legal amendment to the Gazette number 9794.

11. The learned magistrate erred in law in only considering the petitioners' submissions and totally disregarding the appellants' answers to the petition, the supporting affidavits thereto, the appellants' case, submissions and authorities.

The appellants in **Appeal No. 31 of 2014** raised more or less the same grounds set forth hereinabove. They are all consistent in their prayers in the respective appeals that this court be pleased to order that the decision of the learned magistrate be set aside and declare them as having been validly nominated as members of the County Assembly of Nyeri and were properly serving as such. The 1st to 3rd appellants are particular that they were validly nominated by the Gazette Notice Number 9794 of 17th July, 2013. The appellants also sought for the costs of the appeal and the petition in the magistrates' court.

My predecessor at the High Court station at Nyeri Wakiaga, J., set the appeal for directions (on the hearing of the appeal) on 3rd November, 2015. It would, however, appear that no directions were taken on that date apparently because the court was not sitting supposedly because this was on or around the transition period when several judges were leaving their previous stations and taking new ones to which they had been posted. The directions were therefore taken before me, as the new resident judge at the station on 21st November, 2014.

On the material day parties agreed to have the appeal disposed of by way of written submissions and directions were given to this effect; it was directed that they would be highlighted on 17th February, 2015. On material day Mr Kibe who represented the 3rd to 6th respondents, informed the court that he was unable to comply with the directions and file submissions on behalf of his clients; he asked for fourteen more days to comply. The rest of the parties agreed to indulge him and the court adjourned the

highlighting of submissions to 14th May, 2015.

Two days before the date for highlighting of submissions and more particularly on 12th May, 2015 Mr Kibe sought to move the court by way of a motion dated 12th February, 2014 under certificate of urgency seeking to stay the appeal proceedings herein pending the hearing and determination of an application his clients had lodged in the Supreme Court seeking to challenge the decision of the Court of Appeal in **Civil Appeal No. 169 of 2013, Rosemary Wairimu Kamau & 3 Others versus The IEBC.** I declined to grant any orders on the application because parties had already taken directions on the appeal and they had all agreed on when their respective submissions were to be highlighted. Most importantly, the respondents were well aware of the processes they had initiated to challenge the Court of Appeal decision at the time directions were taken and if they thought it was wise to have the Supreme Court decide on their appeal before this appeal is heard they would not only have raised the issue at the time of taking the directions but they also would not have consented to those directions.

Still not satisfied, Mr Kibe raised the same issue on 14th May, 2015 when parties were supposed to be highlighting their submissions and urged that the matters before the Supreme Court were directly related to the issue or issues at hand in this appeal. Incidentally, it is the same morning of 14th May, 2015 that Mr Kibe filed his submissions outside the period which he had been granted.

For the reasons I gave in my ruling on whether the application ought to be heard first I again declined to stay the proceedings and directed the parties to highlight their submissions as earlier directed; in ruling as I did, it was my humble view that the application seeking stay of proceedings was subject to the court's directions that had earlier been given on the hearing of the appeal. It is against this background that parties finally highlighted their submissions for and against the appeal.

If there is one decision that preoccupied the minds of the parties both in the election court and in this court is the decision of the Court of Appeal in **Civil Appeal No. 169 of 2013 Rosemary Wairimu Kamau & 3 Others versus the IEBC.** The decision was at the heart of the election petition against the appellants and no wonder it was pivotal in the judgment that was subsequently delivered by the Chief Magistrates' Court. Considering its centrality in the election petition and in this appeal it is useful to revisit it here.

As noted earlier, the appeal itself arose out of a judgment delivered in a constitutional petition **No. 236 of 2013** filed by one Rose Wairimu Kamau and three others against the Independent Electoral and Boundaries Commission in the Constitutional and Human Rights Division of this Court at Nairobi. In that petition, the petitioners sought for declarations that a list of nominees to the Nyeri County assembly published by the IEBC violated **articles 10, 90 and 177** of the **Constitution**; that the list as published was also unconstitutional to the extent that it purported to exclude Mathira and Mukurweini constituencies; that an original list of nominees to the Nyeri County Assembly as confirmed by the National Alliance Party (TNA) vide its letter of 25th March, 2013 and supported by all elected leaders vide letter dated 16th March, 2013 was the proper list of nominees to the Nyeri County Assembly by the TNA party. The petitioners also sought for a mandatory injunction compelling the IEBC to adhere to the original list of nominees of members allegedly endorsed by the TNA on 25th March, 2013.

The High Court dismissed the petition and held that the petitioners were seeking a reconstitution of the party list submitted to IEBC outside the time permitted by **section 35** of the **Election Act, 2011** for submission of such lists. The court also held that the issues raised by the petitioners were within the petitioner's party's mandate to resolve since they concerned the manner of constituting a party list. The court held further that failure to include persons from other constituencies is not of itself decisive of the lack of diversity in the party list.

The petitioners were aggrieved by the decision of the High Court and so they appealed against it in the Court of Appeal. The latter was persuaded that the petitioners were legitimately aggrieved and allowed the appeal; in their judgment which appears to have triggered the events in the magistrates' court the learned judges of appeal held that;

> ***"…we allow the appeal and hereby set aside the TNA nomination for the Nyeri County representatives. TNA shall within fifteen days of the date hereof submit to the IEBC a proper party list. The IEBC shall in turn gazette the nominees within seven days of the receipt of the list."***

In coming to this conclusion the Court of Appeal upheld the petitioners' complaint that none of the nominees on the nominees' party list hailed from Mathira and Mukurweini constituency; the court therefore found the list submitted to IEBC not to have been fair and representative enough.

With this decision a stage was set for the petition that was subsequently filed in the magistrates' court by the respondents. The prayers in the petition which I outlined verbatim earlier in this judgment are clear that the petitioners sought the magistrates' court to, ***inter alia***, declare what they thought the learned judges of appeal must have meant in their judgment. This, in my view, was unnecessary because the order which must have been drawn out of the judgment of the Court of Appeal pursuant to **rule 34(2) (a)** and **(b)** of its rules must have been clear on the decision of the court. If any party, including the petitioners, had any problem with the form of the order embodying the court's judgment then under **rule 34 (d)** the order should have been taken before the presiding judge of the bench that heard the appeal for interpretation after each of the contesting parties had been given a hearing.

For clarity it is necessary to reproduce these provisions here; the pertinent parts of the provision state as follows:-

> ***34.(2) where a decision of the Court was given in a civil application or appeal-***
>
> ***(a) the party who has substantially been successful shall within 14 days from the date of judgment prepare a draft of the order and submit for approval of the other parties;***
>
> ***(b) the party to whom the draft has been submitted shall approve the same within seven days from the date of delivery;***
>
> ***(c) if all parties approve the draft, the order shall, unless the presiding judge otherwise directs, be in accordance with it;***
>
> ***(d) if the parties do not agree on the form of the order, or if there is non-compliance with sub-rules (a) and (b), the form of the order shall be settled by the presiding judge or by such judge who sat at the hearing as the presiding judge shall direct, after giving all the parties an opportunity of being heard;***
>
> ***(e) if the parties are unable to agree which party was substantially successful, the Registrar, on the application of either party, which application may be made informally, and after giving all parties an opportunity of being heard, shall direct by which party the draft is to be prepared, and such directions shall be final.***

As I understand them, these provisions suggest that no court other than the Court of Appeal itself has jurisdiction to interpret the form an order extracted from its ruling on an application or a judgment in an appeal takes. It is only that court that has the capacity to probe its own mind and expressly state its decision where, for instance, the implication of such a decision or the extent of a party's success or failure in such decision is not clear or is contested. The declarations sought, more particularly those concerning the import of the decision of the court of appeal would, in my view have been resolved in the context of the provisions of **rule 34. (2), (a), (b) (c) and (d)** of the Court of Appeal Rules rather than through a substantive suit lodged for that purpose. And the petitioners had every right to move the court appropriately because as far as I can gather from the Court of Appeal's judgment, though they were not parties to the appeal before it, they were invited by the court to make representations because, so I suppose, the court must have realised that its decision will affect them in one way or the other; they were therefore not strangers to the appeal as such.

It is also worth noting that the decision of the Court of Appeal in issue here was not being cited as an authority to support a particular legal position in which event the court before which it was cited would be entitled to adopt what in its view is the rationale behind the decision; on the contrary, it was a decision which, taking into account the prayers sought in the petition, was at the heart of the petition itself. It follows that the precise form which the order embodying the decision was thought to have taken rather than what appeared on its face was beyond the jurisdiction of the magistrates' court.

It is also not lost to me that some of the declarations sought by the petitioners in their petition are synonymous with the prayers sought in the appeal in **Civil Appeal No. 169 of 2013 Rosemary Wairimu Kamau & 3 Others versus the IEBC** but which were not granted. By asking the magistrates' court to interpret the decision of the Court of Appeal in the manner they proposed in those declarations, they were effectively asking the court to grant them what the Court of Appeal did not grant yet purporting to cite the court's decision as the basis for those declarations. This, to me, was, improper.

The ultimate decision of the Court of Appeal was in fairly simple terms and for the third time in this judgment, I have to reproduce it here to emphasise my point. The Court said:-

> ***"…we allow the appeal and hereby set aside the TNA nomination for the Nyeri County representatives. TNA shall within fifteen days of the date hereof submit to the IEBC a proper party list. The IEBC shall in turn gazette the nominees within seven days of the receipt of the list."***

If I have to break it into distinctive parts, I would outline those parts as follows:-

1. The judgment of the High Court was overturned;

2. The nominations by TNA to the Nyeri County Assembly were set aside;

3. TNA was under obligation to submit to IEBC a "proper party list";

4. The "proper party list" was to be submitted within fifteen days of the date of judgment; and, finally

5. The IEBC ought to have gazetted the list within seven days of the date of its receipt from TNA.

In her judgment, the learned magistrate seems to have been of the same mind because at page 25 of her decision (or page 53 of the record of appeal), she made the following remarks:-

> ***"We have to move from the premise that it is agreed that the court of appeal in the case of Rose Wairimu Kamau set aside the nomination of the Nyeri county assembly and threw the ball at TNA to compile a list of nominees and present it to IEBC for gazettment".***

Having correctly appreciated the import of the decision, the only question that should have concerned the magistrates' court, as it is now the concern of this court in the determination of this appeal, is whether the decision or the order of the Court of Appeal was complied with and in particular parts (3), (4) and (5) thereof which I have outlined hereinabove.

In attempting to answer this question one issue that came to the fore in the parties' submissions is the place of the law generally governing nominations of representatives by political parties to County Assemblies vis-à-vis the order by the **Court of Appeal in Civil Appeal No. 169 of 2013 Rosemary Wairimu Kamau & 3 Others versus the IEBC.**

On their part, the petitioners in the election petition specifically cited **Articles 90** and **177(1) (b)** and **(c)** of the **Constitution** and **section 35** of the **Elections Act, 2011** which, in their view, were breached by the respondents. It is worth reproducing these provisions of the Constitution here; they state as follows:-

> ***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 Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that—

(a) each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

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

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

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

And article 177 provides that:-

177. (1) A county assembly consists of—

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

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

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

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

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

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

(4) A county assembly is elected for a term of five years.

Articles 90 and **177** of the Constitution provide the constitutional basis for nominations of membership to the Parliament and county Assemblies and the two provisions say that such nominations shall be on the basis of proportional representation by use of party lists. In a way, the two provisions provide the legal framework for the nominations but the nitty-gritty of how these nominations are to be effected are provided by **sections 34, 35, 36 and 37** of the **Elections Act, 2011** and the regulations made thereunder. **Section 34** provides:-

34. Nomination of party lists members

(***1) The election of members for the National Assembly, Senate and county assemblies for party***

list seats specified under Articles 97(1)(c) and 98(1)(b)(c) and (d) and Article 177(1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2) A political party which nominates a candidate for election under Article 97(1) (a) and (b) shall submit to the Commission a party list in accordance with Article 97(1) (c) of the Constitution.

(3) A political party which nominates a candidate for election under Article 98(1) (a) shall submit to the Commission a party list in accordance with Article 98(1) (b) and (c) of the Constitution.

(4) A political party which nominates a candidate for election under Article 177(1) (a) shall submit to the Commission a party list in accordance with Article 177(1) (b) and (c) of the Constitution.

(5) The party lists under subsections (2), (3) and (4) shall be submitted in order of priority.

(6) The party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned.

(7) The party lists submitted to the Commission shall be valid for the term of Parliament.

(8) A person who is nominated by a political party under subsections (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

(9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.

(10) ***A party list submitted for purposes of subsections (2), (3), (4) and (5) shall not be amended during the term of Parliament or the county assembly, as the case***

may be, for which the candidates are elected.

Section 35(1) says that the party list must be submitted to the IEBC on the same day as the day designated for submission to the Commission by political parties of the nominations of candidates for an election before the nomination of candidates for election as members of parliament, women county representatives, senators and members of the county assembly. **Section 36** provides the details of the number, the gender, the age and the physical disposition of the nominees. **Subsection (4)** thereof provides that the IEBC shall designate from the party list the party representatives on the basis of proportional representation within 30 days of the declaration of the election results. **Section 37** deals with the re-allocation of a special seat if a representative from a political part list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representation.

Regulation 55 of the **Elections (General) Regulations, 2012** states that the party list shall be prepared in accordance with the nomination rules of the political party concerned. It is consistent with **section 34(6)** of the **Elections Act** which as noted provides that ***"the party lists submitted to the Commission under this section shall be in accordance with the constitution or nomination rules of the political party concerned".***

The relevant provision in the constitution of TNA would be **Article 29** which provides for party lists; **clauses (1) (a) to (e)** mirror the provisions of section **36 (1) (a) to (e)** of the **Elections Act**. **Clause (2)** is also similar to **section 36(2)** except that it adds that besides alternating between male and female candidates in the priority in which they are listed, the nomination shall also reflect the regional and ethnic diversity of the people of Kenya. Under **Article 90(2) (c)** of the Constitution, this requirement would not

be applicable to nominations to county assembly seats.

The rest of the clauses spell out that the positions have to be advertised in at least two leading local newspapers within time frames stated by the national legislation (clause4) and that the National Oversight Board is to constitute a five member panel from amongst its members to receive and process applications for the nominations (clause 3). The panel is required to refer its report to the National Oversight Board for ratification (clause 5) and that persons who are nominated are those persons who meet academic and professional qualifications.

Strictly speaking party lists out of which the IEBC designates nominees to represent political parties and various interest groups is submitted before the election for elective posts; the IEBC is in turn bound to declare the nominees as duly nominated within thirty days of the declaration of the results of these elective positions at all levels of representation.

Thus goes the general overview of the constitutional, statutory and the regulatory framework of nominations not only to the county assemblies for which we are concerned here but also for representations in the National Assembly and the Senate.

This legal framework, in my view, contemplates nominations that precede the general elections; it does not contemplate a scenario where a political party has been ordered by a court of law to carry out nominations within a specific timeframe after the general elections. Where, as in this case, a political party and the IEBC are required to carry out the nominations and gazette the nominees within a specific period these two entities can only fall back the parties' constitution or nomination rules (**as prescribed by section 34(6) of the Election Act)** to the extent that the provisions of their constitutions or nominations rules are consistent with the court's directives. If, by extension, any provision in the constitution or nomination rules requires them to take any action that will most likely lead them outside the premises of the court's order, they are under obligation to disregard such a provision and follow what the court has directed.

Coming back to the case at hand, the pertinent question is, did TNA and IEBC comply with the court order? The learned magistrate held that it did. It would help to let her speak for herself here:-

> ***"We have to move from the premise that it is agreed that the court of appeal in the case of Rose Wairimu Kamau set aside the nomination of the Nyeri county assembly and threw the ball at TNA to compile a list of nominees and present it to IEBC for gazettment. <u>It is evident that to a large extent and to the ability of the players, the orders were complied with.</u> The previously nominated assembly members realised that their position had changed, they were no longer nominated and they sought a way out." (See page 25 of the judgment or page 53 of the record). (Underlining mine).***

It is worth recalling that TNA was neither a party in the proceedings in the High Court nor in the Court of Appeal; although it was directed to implement an order arising from proceedings in which it had no opportunity to participate, it complied with the order and this compliance was not in doubt as demonstrated by the learned magistrate in her judgment.

There is no doubt that in coming to this conclusion, the learned magistrate must have considered the evidence of the TNA's Secretary General, Mr Onyango Oloo, who in his testimony elaborated how the party complied with the order. It is necessary to reproduce it, if not for anything else, to emphasise the learned magistrate's point. I am minded that under **section 75 (4)** of the Elections Act I have no licence to digress into matters of fact and therefore I am cautious not to make any suggestion that the learned magistrate erred in facts. In his evidence Mr Oloo testified:-

> ***"Sometime last year TNA received a judgment of court of appeal delivered where parties are indicated. TNA was directed by the court to submit a proper party list to IEBC for gazettment. The party was given fifteen days to do so. Five days lapsed by the time the order reached us. We had 10 days including weekend to work on.***

"I informed the Chairman since time was of essence we agreed to call all relevant parties, chairman of Nyeri County, two of his officials to get the views, held views with all the elected members of parliament to get their views. I also called the affected parties whose nomination had been set aside. I consulted elected members of the county assembly to enable me arrive at a fair way of comparing (sic) list. I did this because I did not have time to investigate the process in line with the nomination roles (sic) because time was of essence. The ruling observed that we did not adhere to regional representation which was there and some more members. Realizing that we had only had (sic) 13 slots to realize regional balances… compiled a list and forwarded to IEBC as directed…

"The court ruled on

-proper list

-equitable distribution

We totally agreed with the Court. The first list had been hurriedly done and ended up with 4 people from Nyeri town Constituency 4 people from Kieni constituency Othaya had 3, Tetu had 1, Mathira had 1, Mukurweini had nil. When we finally compiled ad as IBEC compiled,

Kieni had 2

Mukurweini -2

Othaya -2

Nyeri Town- 3

Mathira-3"

(See pages 106-108 of the proceedings and 183 to 185 of the record)

The rationale given for the redistribution was as follows:-

"The Court of Appeal ruling was clear as to what TNA was to do Tetu-1. The party has considered that the court of Appeal wanted us to provide for equity and not equality. We considered that Mathira constituency we had been anguished (sic), we had no presence, we decided to give them 2 they have 3. Nyeri town had 3, we realised they had benefited because they had a man in the marginalised list Joseph Kanyi. Tetu was interesting, it had 1 and now got 1 because we were not able to get a person even having asked the elected member; this led to the marginalised group.

"The nomination process and selection process for it is very elaborate. Applicants have to apply to the party, names go to the Board, National office compiles names and return to the board for verification and confirm their party and return to headquarters. The original advert comes after an advert in two Newspapers. The National Oversight Board goes through them and verifies then the Secretary General submits names to IEBC. That exercise cannot be submitted in 2 months. The Court of Appeal gave 15 days and us not being party we had only 10 days to act… the ruling placed us in a rock and hard place and no matter how difficult it was we submitted their names and if IEBC felt it could change it could do so. We had three Regional Balance Equity. Time limit presented to us by the court. We considered that technically the court had ousted our roles (sic) and we had to go by the timelines." (Page 109-110 of the proceedings and 186-187 of the record).

It is this kind of evidence that must have led the learned magistrate to conclude that it was "…***evident that to a large extent and to the ability of the players, the orders were complied with."***

The order of the Court of Appeal was overriding and prevailed over those aspects of the Constitution of TNA relating to nomination of the members of the County Assembly if by complying with them it would not finalise the process within the court prescribed timelines. And the learned magistrate seems to have embraced this fact when she noted in her judgment that ***"…there is the TNA list, drawn without following procedure because the rules had in a way been ousted by the court of appeal decision, what did the IEBC as the electoral body do. They had a court order in hand and it did not matter how the list came, no oversight."*** (See page 28 of the judgment or 56 of the record)

Now, if the learned magistrate correctly found and held that the TNA and the rest of the players in this exercise obliged and complied with the law, it would, in my very humble view, be a contradiction of sorts to turn around and say that the party breached the same law; it either complied or it did not but it cannot have done both at the same time. My appreciation of the scenario is, as at the material time the only law applicable in the circumstances was the order of the Court of Appeal and as the TNA's Secretary General testified they had no option but submit to it; this must have been what he described as being placed ***"in a rock and hard place".***

A rear view of this point would be that if TNA was cited for contempt of court for failure to comply with the order and nominate the County Assembly members as directed, the party would not be heard to say that it chose to go by its own rules rather than obey the court order; those rules were supplanted by the order of the court to the extent it was applicable to the nomination process and its various aspects to the extent they were inextricably intertwined with the nomination timelines.

The issue, as it were, was not whether the petitioners should have been nominated; the correct question was whether those nominated met the constitutional and statutory criteria for such nomination following the decision of the Court of Appeal. Looking at the evidence at the trial and the submissions by counsel for the respondents in this appeal, I have not found any suggestion at all and neither has it been demonstrated that any of nominees does not fit the bill. All I can see is that by their exclusion, the respondents were mere casualties in the revised list of the nominees; however, that fact of their exclusion doesn't by itself suggest that the law was thereby breached and that it can only be said to have been followed if they were nominated. Granted, as the learned magistrate noted, the respondents may have been rendered jobless as a result of the reconstitution of list of nominees but that alone cannot be a reason to oust those who were nominated if they satisfied the threshold for such nomination; moreover, I did not hear any of them argue that it is only in the County Assembly of Nyeri that they can be productively engaged in any particular capacity.

The learned magistrate seems to have taken issue with the manner the nominees were gazetted; according to the learned magistrate the appellants should not have been gazetted by way of a corrigenda and in her view gazette notice No. 9794 of 17th July, 2013 in which the original list of the nominees was gazetted ought not to have been corrected in gazette notice No. 15096 of 29th November, 2013. The learned magistrate appears to have been infuriated with the deletions and insertions of names and if I understood her correctly, she would have preferred a clean list gazetted without these corrections or alterations.

In my humble view, nothing much ought to have turned on the form the gazette notice took as long, one, the persons whose names were gazetted as nominees to the County Assembly of Nyeri satisfied the constitutional and statutory requirements of nominees to the positions they were appointed and two, it is clear two any reader of the gazette in issue who the nominees to the County Assembly of Nyeri are. Whatever name is given to the notice, in my view, is a peripheral issue and inconsequential.

It must be pointed out that in allowing the appeal in **Civil Appeal No. 169 of 2013 Rosemary Wairimu Kamau & 3 Others versus the IEBC,** the Court of Appeal did not disqualify any of the nominees on the original list such that none of them could be said to have barred from being nominated in the subsequent list; the Court asked the TNA to come up with what it referred to as the "proper party list". Although the "proper list" was not defined by the court, I would take it to mean a list of names arrived at after taking into account the concerns raised in the judgment of the court the most prominent of which was fair representation of the county. I do not find anything wrong if some names from the original list were dropped and replaced with others for the sake of achieving what the Court of Appeal had in mind.

A question was raised by counsel for the 3rd to 6th Respondents as to whether this court has jurisdiction to hear this appeal.

In his respectable view, counsel submitted that this court was deficient of the necessary jurisdiction because the appeal was heard outside the time within which it ought to have been determined. In urging as he did counsel cited **section 75(4)** of the Elections Act, 2011. For ease of understanding of this particular provision, it is necessary reproduce the entire section; it says;

75. County election petitions

> ***(1) A question as to validity of an election of a county governor shall be determined by High Court within the county or nearest to the county.***
>
> ***(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.***
>
> ***(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.***
>
> ***(3) In any proceeding brought under this section, a court may grant appropriate relief, including—***
>
> ***(a) a declaration of whether or not the candidate whose election is questioned was validly elected;***
>
> ***(b) a declaration of which candidate was validly elected; or***
>
> ***(c) an order as to whether a fresh election will be held or not.***
>
> ***(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—***
>
> ***(a) filed within thirty days of the decision of the Magistrate's Court; and***
>
> ***(b) heard and determined within six months from the date of filing of the appeal.***

My answer to counsel's question is clear from this provision of the law; **section 75(1A)** as read with **section 75(4)** are clear this court has the mandate to hear appeals emanating from election petitions in the magistrates' court. The proper question in my view is whether this jurisdiction can be exercised and determine an appeal which, for one reason or another has not been determined within the time frames set by the statute. Before I answer this question it is necessary to look at the circumstances of this case.

The first of the two consolidated appeals was filed on 9th June, 2014 while the second one was filed on 10th June, 2014. A strict application of **section 75(4) (b) of the Elections Act** would suggest that the latest date for resolution of this appeal should have been 10th December, 2014. As noted earlier in this judgment, I took over appeal from my predecessor at the station on 21st November, 2014 less than three weeks to the deadline. As at that time not even directions on the hearing of the appeal had been taken; in fact directions were given on the material day when parties agreed to have the appeal disposed of by way of written submissions.

Considering the number of the parties involved in the appeal, it was not going to be practicable for parties to file, exchange their submissions, highlight them and have the decision delivered within a period of less than three weeks. It must also be noted that, unlike the election courts which dealt with no other cases apart from the petitions before them, this court did not enjoy such a privilege and had to deal with this petition alongside other cases that deserved attention at the station. At the time of filing the appeal all the

appeals arising from the election petitions of the 2013 general elections had been disposed of and the courts had reverted to their usual cases.

Against the foregoing background the court directed the submissions be filed and exchanged amongst the parties within sixty days and parties come back for highlighting on 17th February 2015. Nobody questioned this directive and in fact when parties appeared in court on 17th February, 2015 for highlighting of their submissions, Mr Kibe who has initiated the challenge to the court's jurisdiction, asked for more time to file his submissions when everybody else was ready to proceed. Although he asked for and he was granted fourteen days to file the submissions, it was not until the morning of 12th May, 2015 when the parties returned for highlighting of their submissions that the counsel filed and served his submissions.

Considering the peculiar circumstances of this appeal it was not practicable to hear and determine the appeal within a period of six months. I would not take it on Mr Kibe but I would also suppose that having submitted to and participated in the proceedings outside the statutory time limits, the respondents acquiesced in the settlement of the dispute after the expiry of six months. Moreso I did not hear him complain that his clients have suffered prejudice or any more prejudice than the appellants as a result of the delay in determination of this appeal.

My inclination, in these circumstances is that regardless of the history and the circumstances surrounding the hearing of this appeal, the parties deserved to be heard and to have their appeal determined on merits rather than be dismissed on a procedural technicality which I think **section 75(4)(b)** is. It would, in my view be unfair and in fact a blatant miscarriage of justice if the appellants were denied their day in court because of a delay that was, in the instant case, occasioned by the administrative reorganisation of this court or for any other reason that is not attributable to their conduct.

Article 159 (2) (d) of the Constitution reminds us that one of the cardinal principals this court must be cautious of in exercising judicial authority is to administer justice without undue regard to procedural technicalities. Invoking this constitutional provision coupled with the peculiar circumstances of this appeal, I would conclude that despite the express provisions of **section 74(4)(b)** of the **Elections Act**, an appeal from the magistrates' court can be determined outside the six months period if circumstances so demand.

As I conclude this judgment, one other issue I must mention here is whether the election petition should have been filed in the first place; I raise this question because though the petitioners were seeking to take advantage of the Court of Appeal decision in their election petition, they were at the same time seeking to challenge the same decision in the Supreme Court. I only came to learn of this development when their counsel emerged with an application seeking to stay this appeal on the ground that the Supreme Court was seized of the same matter and that it was necessary these proceedings await the decision of the Supreme Court on the challenge they had either lodged or were in the process of lodging against the Court of Appeal decision. In my view, if the petitioners were not satisfied with the decision of the Court of Appeal, they abused the court process when they relied on the same decision to launch their petition in the magistrates' court.

For the reasons I have given, I am satisfied that the appellants' appeal is merited and I hereby make the following orders:-

1. The appellants appeal is allowed;

2. The judgment of the magistrate's court delivered on 5th June, 2014 and all the consequential orders made are hereby set aside;

3. The petition in the magistrates' court stands dismissed and I hereby declare that the appellants were validly nominated and gazetted as such to the County Assembly of Nyeri.

4. The appellants will have costs of the appeal and those of the petition in magistrates' costs as against the 3rd to 6th respondents.

Orders accordingly.

Dated, signed and delivered in open court this 14th July, 2015

Ngaah Jairus

JUDGE