



**Bukura & another v Independent Electoral and Boundaries  
Commission & 2 others (Election Petition E007 & E006 of 2022  
(Consolidated)) [2023] KEMC 1 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEMC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE MANDERA LAW COURTS  
ELECTION PETITION E007 & E006 OF 2022 (CONSOLIDATED)**

**PW WASIKE, SRM**

**FEBRUARY 2, 2023**

**BETWEEN**

**ABDIWELLY HAJI BUKURA ..... 1<sup>ST</sup> PETITIONER**

**SUBAN AHMED ABDINOOR ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**UNITED DEMOCRATIC MOVEMENT ..... 2<sup>ND</sup> RESPONDENT**

**ABDOW BISHAR MAALIM ..... 3<sup>RD</sup> RESPONDENT**

**Nominated Members of County Assembly must be bona fide members of the nominating political party at the time of submission of the party list**

*The election petition challenged the nomination of the 3rd respondent to the Mandera County Assembly, alleging non-compliance with electoral laws. The petitioners argued the 3rd respondent was ineligible as he was not a party member at the time of nomination. The court examined issues of party membership, compliance with nomination laws, and procedural fairness. It found the 3rd respondent's nomination invalid and directed the IEBC to correct the gazette notice and recognized the petitioners as rightful nominees under the marginalized category.*

Reported by John Ribia

***Jurisdiction*** – jurisdiction of the Senior Resident Magistrate Court – jurisdiction in electoral disputes – jurisdiction to amend gazetted list of nominated Members of County Assembly in the face of procedural irregularities - whether the Senior Resident Magistrate Court had jurisdiction to order amendments to a Gazette Notice listing nominated Members of County Assembly and to declare the rightful nominees.

***Electoral Law*** – nominations – nomination of Members of County Assembly – process – legal requirements – party membership - whether the nomination process for the nominated Member of Mandera County Assembly (2022) was conducted in accordance with the Constitution, the Elections Act, and relevant regulations - whether



*the nominee for Member of Mandera County Assembly (2022) was a bona fide member of the political party at the time of nomination – whether the gazettement of a nominee as a nominated Member of County Assembly could be deemed to be legally valid in light of alleged procedural irregularities such as the lack of bona fide party membership and the alteration of the party list - whether gazettement of the nominee in the face of the irregularities was null and void - Constitution of Kenya articles 10, 38(3)(c), 47(2), 88(4)(e), 90(1)(2), and 177(1)(b)(c); Elections Act, 2011 section 28(1)(2), 34(8), 35, 36(8), 83, 86(1), and 107(1); Political Parties Act, 2011 section 38A, 38C (1) to (6), and 34; Elections (General) Regulations, 2012 regulation 54(3)(8), and 55; Elections (Party Primaries and Party List) Regulations, 2017 regulation 26(3).*

**Electoral Law** – nominations – nomination of Members of County Assembly – legal requirements – requirement to ensure representation of persons with disabilities and persons from marginalized groups in County Assemblies - whether the nomination process of Members of County Assembly Mandera, 2022, complied with constitutional principles ensuring representation of marginalized groups - Constitution of Kenya, 2010, articles 10, 38(3)(c), 47(2), 88(4)(e), 90(1)(2), and 177(1)(b)(c); Elections Act, 2011 section 28(1)(2), 34(8), 35, 36(8), 83, 86(1), and 107(1); Political Parties Act, 2011 section 38A, 38C (1) to (6), and 34; Elections (General) Regulations, 2012 regulation 54(3)(8), and 55; Elections (Party Primaries and Party List) Regulations, 2017 regulation 26(3).

**Electoral Law** – nominations – nomination of Members of County Assembly – role of IEBC in the nomination process - whether the Independent Electoral and Boundaries Commission (IEBC), in its role as the regulator of party nominations, was empowered to amend or alter the party list submitted by a political party - Constitution of Kenya articles 10, 38(3)(c), 47(2), 88(4)(e), 90(1)(2), and 177(1)(b)(c); Elections Act, 2011 section 28(1)(2), 34(8), 35, 36(8), 83, 86(1), and 107(1); Political Parties Act, 2011 section 38A, 38C (1) to (6), and 34; Elections (General) Regulations, 2012 regulation 54(3)(8), and 55; Elections (Party Primaries and Party List) Regulations, 2017 regulation 26(3).

**Law of Evidence** – burden of proof – burden of proof in electoral disputes – dispute on nomination of Members of County Assembly – claims of procedural improprieties - what was the legal standard of proof in electoral disputes challenging nomination of Members of County Assembly - whether the petitioners presented sufficient evidence to substantiate their claims of procedural irregularities and legal non-compliance in the nomination process - whether the petitioners met the required standard of proof to challenge the nomination process - Evidence Act (cap 80) sections 107(1), 109, and 108.

### **Brief facts**

The case arose from a dispute over the nomination of members to the Mandera County Assembly under the marginalized category. The petitioners, who were listed on the party's original nomination list, alleged that the 3<sup>rd</sup> respondent's inclusion in the gazetted list was fraudulent. They argued that the 3<sup>rd</sup> respondent was not a bona fide member of the nominating political party at the time of the nominations.

The Independent Electoral and Boundaries Commission (IEBC) and the political party offered conflicting explanations for the alterations in the party list. The petitioners sought the revocation of the 3<sup>rd</sup> respondent's nomination and a declaration that they were the rightful nominees, contending that the nomination process violated constitutional and statutory requirements, including the principles of fairness and representation of marginalized groups.

### **Issues**

- i. Whether the nomination process for the nominated Member of Mandera County Assembly (2022) was conducted in accordance with the Constitution, the Elections Act, and relevant regulations.
- ii. Whether the nominee for Member of Mandera County Assembly (2022) was a bona fide member of the political party at the time of nomination.
- iii. Whether the nomination process of Members of County Assembly Mandera, 2022 complied with constitutional principles ensuring representation of marginalized groups.
- iv. Whether the Independent Electoral and Boundaries Commission (IEBC), in its role as the regulator of party nominations, was empowered to amend or alter the party list submitted by a political party.



- v. Whether the gazettelement of a nominee as a nominated Member of County Assembly could be deemed to be legally valid in light of alleged procedural irregularities such as the lack of bona fide party membership and the alteration of the party list.
  - 1. Whether gazettelement of the nominee in the face of the irregularities was null and void.
- vi. Whether the Senior Resident Magistrate Court had jurisdiction to order amendments to a Gazette Notice listing nominated Members of County Assembly and to declare the rightful nominees.
- vii. What was the legal standard of proof in electoral disputes challenging nomination of Members of County Assembly?
- viii. Whether the petitioners presented sufficient evidence to substantiate their claims of procedural irregularities and legal non-compliance in the nomination process
- ix. Whether the petitioners met the required standard of proof to challenge the nomination process.

**Held**

1. The petitioners had discharged the initial burden of proof above the balance of probabilities, though not as high as beyond-reasonable-doubt, by proving that the 3<sup>rd</sup> respondent was not in the certified list of party members that was certified by the Registrar of Political Parties (RPP) for use in nominations.
2. Section 107 (1) of the Evidence Act provided that whoever desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserted must prove that those facts exist. Section 109 provided that the burden of proof as to any particular fact lies on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of the fact shall lie on any particular person. The incidence of burden of proof properly shifted to the 3<sup>rd</sup> respondent to prove to the standard required that he was a duly registered and paid up member or life member of the 2<sup>nd</sup> respondent at the time of nomination as he claimed.
3. The 3<sup>rd</sup> respondent must have more evidence to support his life membership status in addition to the membership card that he had produced in evidence. He was at least required to show that he was a paid-up life member. That was a fact that was particularly within his knowledge and it's not too much or illegal to demand that from him. The failure to do so as provided in section 108 Evidence Act on led to the inescapable finding that the 3<sup>rd</sup> respondent had not proved that he paid any annual contributions and or membership fees even at once or that he was so exempted under the party constitution.
4. The 2<sup>nd</sup> respondent availed evidence as per letter from RPP that the 3<sup>rd</sup> respondent joined the 2<sup>nd</sup> respondent on September 9, 2022 after nominations were closed and even gazettelement of the nominated MCAs had been done on September 9, 2022, it would have been clearer if not easier if the 3<sup>rd</sup> respondent availed evidence of when he was admitted as a member of the UDM Party by any of the methods prescribed under the party constitution.
5. The 3<sup>rd</sup> respondent did not in any way fault the mandate and the role of the RPP in the matter. Section 34 of the Political Parties Act provided for functions of the Registrar of Political Parties. Even if the 2<sup>nd</sup> respondent believed that shadowy figures of the UDM party were maliciously targeting him, the RPP under the law was deemed a neutral party. There was no reason why the RPP should also be prejudiced against him and if he so rightly believes RPP was prejudiced against him, he should invoke the dispute resolution mechanism under the Act. The definitive proof of membership or lack thereof was by the Registrar of Political Parties.
6. If the 3<sup>rd</sup> respondent was dissatisfied with his non-inclusion in the published party membership list presented to and certified by the RPP for use in political party nomination, there were ample legal procedures to be invoked by the aggrieved party. The 3<sup>rd</sup> respondent had not shown any effort in this respect by way of a complaint with the Political Parties Disputes Tribunal to challenge the list published.
7. Membership in political party nominations was such a cardinal issue that any reasonable person seeking nomination under a political party would at least try to verify that he was on the certified list of



- members of the political party. Information on party membership was readily available to any member of the public who so wished to verify. In any event the Political Parties Act did not permit membership in more than one party.
8. It was strange that the 3<sup>rd</sup> respondent denied that the person listed in Isiolo County Jubilee party list was not the 3<sup>rd</sup> respondent yet all the names and ID number are for the 3<sup>rd</sup> respondent. How the 3<sup>rd</sup> respondent was a member of two political parties was well known to him but all in all it was illegal. Furthermore, during oral highlighting of submissions, when the court sought clarification from the counsel if the 3<sup>rd</sup> respondent had taken any (legal) action against IEBC or RPP after being served with the petition documents; it was evident no action has been taken and the explanation given that the proceedings were time bound was not a satisfactory explanation. The issue of membership in the party was so crucial to the 3<sup>rd</sup> respondent perhaps more than to any other party herein since he was the one who stood the greatest prejudice. He was nominated and his nomination was under serious contention and challenge on the very issue of party membership.
  9. Rule 5 under part three of the UDM Elections and Nomination Rules provided for the rules and procedure for nomination of a member of the County Assembly. Rule 5(b) provided for instances where the documentations to be furnished by a member upon application and among them a duly filled Nomination Form signed by two (2) members (proposer and seconder) of the UDM both of whom must be registered voters in the electoral areas.
  10. The 3<sup>rd</sup> respondent's proposers, Mr. Ibrahim Mohamed Alio and Mr. Hassan Derow had not been proved to be members of the UDM Party therefore could not propose and second the 3<sup>rd</sup> respondent as a nominee to the Mandera County Assembly. It had been proved to the required standard by the 2<sup>nd</sup> respondent that the 3<sup>rd</sup> respondent was not a member of the UDM Party at the time of publication of the Party List in the Standard Newspaper of July 27, 2022 or even as at the gazettelement of nominated members of the County Assembly on September 9, 2022 by 1<sup>st</sup> respondent.
  11. The 3<sup>rd</sup> respondent per the law and the party constitution was not eligible to participate in the UDM party nominations as a member and or as a candidate for nomination to the Mandera County Assembly. It would not matter even if it was the 2<sup>nd</sup> respondent who may have by mistake or otherwise submitted the name of the 3<sup>rd</sup> respondent on the UDM party nomination list. That was be illegal as it contravened the clear provisions of the law and party constitution. It the issue about the names and order of priority in the marginalised category in the Standard Newspaper was never addressed by the 1<sup>st</sup> and 3<sup>rd</sup> respondent .
  12. The 3<sup>rd</sup> respondent was was a not bona fide member of the UDM Party at the time of publication of the party list by the 1<sup>st</sup> respondent in the Standard Newspaper of July 27, 2022 and he was not a bona fide a nominee of the 2<sup>nd</sup> respondent party under marginalized category to represent the youth in the list published by the 1<sup>st</sup> respondent on July 27, 2022.
  13. The Elections Act required political parties to submit membership lists to the IEBC 120 days before a general election or 45 days before a by-election, which the IEBC must publicize (section 28). Party lists for proportional representation must prioritize nominees, comply with constitutional and party rules, and remain unaltered once gazetted (section 34). The IEBC must review submitted lists for compliance and may reject non-compliant lists but could not amend them without party authorization. Nominees must be party members at the time of list submission. UDM was entitled to 3 seats for nomination under the marginalised list category. There were obvious differences not only as to the names of the nominees but also the order of priority under the category as published in the Standard newspaper of July 27, 2022 from that appearing in the Kenya Gazette Notice no. 10712 Vol CXXIV no 186 dated September 9, 2022. There were glaring contradictions in the response, reply and submissions of the 1<sup>st</sup> respondent when compared to the reality as to the persons gazetted as nominees under the marginalised category under UDM party in Mandera County.



14. The 1<sup>st</sup> respondent's position was contrary to the facts as evident in the subject nomination. There was no dispute to the legal position that the 1<sup>st</sup> respondent could not alter and or amend the party list submitted to it by the 2<sup>nd</sup> respondent without authorization by the political party. The list was amended before being gazetted September 9, 2022 contrary to the law. The 1<sup>st</sup> respondent therefore did not comply and or did not ensure compliance with the Constitution, the law and relevant regulations and to the party constitution in the nomination herein.
15. Section 83 of the Elections Act provided that no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appeared that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election. The 1<sup>st</sup> respondent's non-compliance with the Constitution and the law did materially and substantially affect the validity of the election by way of nomination in respect of marginalised categories slots to which the 2<sup>nd</sup> respondent was entitled to in the Mandera County Assembly:
  1. first a person whom the court had found was not eligible to participate in the nominations as a voter or as a nominee under the UDM party ended up being gazetted as a nominee and sworn in as a member of the Mandera County Assembly.
  2. Secondly the order of priority and the persons nominated per the party list of nominees was not strictly honoured contrary to the Elections laws
16. The marginalised category of persons with disabilities (PWD) nominees to which UDM party was entitled to were not at all represented in the Mandera County Assembly. Even if by any dint of imagination, the 2<sup>nd</sup> respondent did forward the name of the 3<sup>rd</sup> respondent as its nominee yet he was not a bona fide member of the party as at time of the nomination then IEBC was bound to reject his nomination. Nevertheless, even the non-rejection by the 1<sup>st</sup> respondent in any event only begot a nullity in the nomination of 3<sup>rd</sup> respondent as per section 34(8) Elections Act.
17. On whether the court should recommend the prosecution of the 3<sup>rd</sup> respondent for perjury and forgery using the powers under section 87 of the Elections Act, the court did not have the opportunity to thoroughly scrutinize the documents in issue in the lenses of establishing a criminal offense, and neither did it have the advantage of expert to assist it determine if indeed the documents were forgeries and that the 3<sup>rd</sup> respondent was culpable. The court did not make any definitive and conclusive findings on the authenticity of the particular documents in issue submitted by the 3<sup>rd</sup> respondent save to have made the overall finding from the facts and the law. It was unsafe to delve into the issue of forgery and perjury in the instant judgment. The matter could be properly initiated and better pursued in the well-established criminal justice system process than through the election court process. The aggrieved parties were all at liberty to lodge formal complaints to the relevant agencies for intervention as appropriate.
18. The nomination of the 3<sup>rd</sup> respondent was not in compliance with the Constitution, the relevant election and nominations laws and regulations and the party constitution. The only issue that needed serious attention was the fact that as per the list of persons who were now nominated, and gazetted on September 9, 2022 and sworn in; that was; Abdow Bishar Maalim – Youth; Sokorey Maalim Isaakow-Special Interest; Bishar Hussein Farah – Youth.



19. In the list as published in Standard newspaper on July 27, 2022 legally the persons entitled to the nomination in order of priority were:
  1. Bishar Hussein Farah -Youth
  2. Suban Ahmed Abdinoor PWD
  3. Abdiweli Haji Bukura - PWD
  4. Khalida Dahir Adan- Woman
  5. Mohamed Hassan Mohamed-worker
  6. Sahara Adan Mohamed - Worker
  7. Mohamednoor Ismail Mohamed – Youth
  8. Mulki Abdulahi Mohamud – Ethnic Minority
20. UDM was allocated 3 seats under special category of marginalised per gazette notice of September 9, 2022; then it followed that the following three people would have stood ‘elected’ by nomination upon the gazette notice on September 9, 2022 were Bishar Hussein Farah -Youth, Suban Ahmed Abdinoor PWD, Abdiweli Haji Bukura - PWD
21. The nomination of Bishar Abdow Maalim was challenged while the nomination of Sokorey Maalim Isaakow who appeared on the gazetted nominated MCA as no.2 was not though it was said that she was nominated under the wrong category. It also appeared that the nomination of Bishar Hussein Farah was not contested. That meant that of the three slots available for the 2<sup>nd</sup> respondent, only one slot was legally factually available to filled up upon the nullification of the nomination of the 3<sup>rd</sup> respondent.
22. Pursuant to section 75(3) Elections Act, the Senior Resident Magistrate Court had jurisdiction to make orders including an order about whether the 3<sup>rd</sup> respondent was validly elected; a declaration of which candidate was validly elected; or an order as to whether a fresh election will be held or not. If the petitioners and the 2<sup>nd</sup> respondent were aggrieved by the nomination of any other person(s) in addition to the 3<sup>rd</sup> respondent, then nothing stopped them from instituting an election petition and to seek appropriate orders against them as they did against the 3<sup>rd</sup> respondent. No adverse orders could issue from the court against a person who was not party to the proceedings. In any section 75(A) of the Elections Act provides that a question as to the validity of the election of a member of county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

*Petition partly allowed.*

### **Orders**

- i. Pursuant to section 75(3) of the Elections Act, declarations issued that:
  1. Abdow Bishar Maalim was not validly elected and his election was nullified.
  2. Suban Ahmed Abdinoor was validly elected.
- ii. Pursuant to section 34(10) of the Elections Act as read with section 75(3) Elections Act, declaration issued that the party list as publicised in the Standard Newspaper of July 27, 2022 was the valid party list for the 2<sup>nd</sup> respondent as required under section 34 of the Elections Act. Any other list save as provided in the instant judgment in respect of Sokorey Maalim Isaakow (whose election had not been contested) was null and void. That list shall be the list available for use by the 2<sup>nd</sup> respondent in the event vacancies arose under the marginalised category in the Mandera County Assembly.
- iii. Direction issued that 1<sup>st</sup> respondent to issue forthwith and publish a gazette notice electing Suban Ahmed Abdinoor to the County Assembly of Mandera to represent PWD under the marginalised category.
- iv. Notice issued to the Commission and the Speaker Mandera County Assembly was duly notified.
- v. Each party was to bear their own costs.

### **Citations**

#### **Cases**

#### **Kenya**



1. *Ayako, George Mbogo Ochilo v Independent Electoral and Boundaries Commission & 2 others* Election Petition 13 of 2017; [2017] KEHC 2506 (KLR) - (Applied)
2. *Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* Petition 1 of 2015; [2016] KESC 2 (KLR) -(Applied)
3. *Njoroge, Ben & another v Independent Electoral and Boundaries Commission & 2 others* Election Petition 14 of 2013; [2013] eKLR - (Applied)
4. *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* Election Petition 1 of 2017; [2017] KESC 52 (KLR) - (Applied)
5. *Wanjala, Imelda Nafula v Independent Electoral and Boundaries Commission* Election Petition 329 of 2013; [2013] KEHC 5609 (KLR) - (Applied)

## Statutes

### Kenya

1. Constitution of Kenya articles 10, 38(3)(c); 47(2); 88(4)(e); 177 - (Interpreted)
2. Elections (General) Regulations, 2017 (cap 7 Sub Leg) regulation 54(3)- (Interpreted)
3. Elections (Party Primaries and Party List) Regulations (cap 7 Sub Leg) regulation 26(3)- (Interpreted)
4. Elections Act (cap 7) sections 28(1)(2); 34; 36; 37- (Interpreted)
5. Evidence Act (cap 80) sections 107(1); 109- (Interpreted)
6. Political Parties Act (cap 7D) sections 34, 38C- (Interpreted)

## Advocates

None mentioned

## JUDGMENT

1. This is consolidated election petition of Election Petition No. E006 of 2022 and E007 of 2022 both respectively dated October 1, 2022 filed simultaneously on October 6, 2022. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners respectively contest the election by way of nomination of the 3<sup>rd</sup> respondent to the Mandera County Assembly.

### Petitioners' case

2. Per the petition, affidavit in support of the petition and the affidavit evidence as well as the written submissions as orally highlighted; it is the petitioners' contention that per the law 2<sup>nd</sup> respondent party list submitted by the 1<sup>st</sup> respondent and published in the Standard Newspaper on July 27, 2022 the petitioners were nominated to represent PWDs and were listed as second and 3<sup>rd</sup> respectively in the party list under the marginalized group nominees for Mandera County Assembly.
3. That the 2<sup>nd</sup> respondent party list submitted to the 1<sup>st</sup> respondent and published in the Standard Newspaper on July 27, 2022 does not include the name of the 3<sup>rd</sup> respondent as one of its eight nominees. That the 1<sup>st</sup> respondent vide gazette Notice No. 10712 of September 9, 2022 gazetted the list of nominated members of the county Assemblies and in that gazette notice the 3<sup>rd</sup> respondent who was not a member of the 2<sup>nd</sup> respondent at time of submitting the party list to the 1<sup>st</sup> respondent and the subsequent publication of party List on July 27, 2022 appears as No.1 in the marginalized list representing the youth in Mandera County Assembly. That this led to unlawful alteration of party list for Mandera County Assembly as the petitioner's names are omitted from gazette notice of September 9, 2022. That the gazettement was fraudulent and illegally procured by 3<sup>rd</sup> respondent to prejudice of the petitioner contrary to 1<sup>st</sup> respondent Gazette Notice No 6378, and further in violation of article 10, article 38(3)(c), 47(2) 88(4)(e) of the [Constitution 2010](#).



4. That the 3<sup>rd</sup> respondent was sworn in as member of the Mandera County assembly on September 22, 2022. The petitioners seeks to revoke the fraudulent gazettement of the 3<sup>rd</sup> respondent as nominee to Mandera County Assembly and compel the 1<sup>st</sup> respondent to gazette the correct list of the 2<sup>nd</sup> respondent contemplated under article 90(1)(2) and 177(2) of the Constitution 2010 hence the prayers:
- a. A declaration that the nomination of the 3<sup>rd</sup> respondent was not conducted in accordance with the Constitution, Elections Act, the Political Parties Act and all applicable laws therefore invalid, null and void.
  - b. A declaration that the gazettement of the 3<sup>rd</sup> respondent on September 9, 2022 as a nominee for the United Democratic Movement party in Position No.1 under the marginalized list youth category for mandera county Assembly be declared null and void and of no effect whatsoever, the 3<sup>rd</sup> respondents having been fraudulently included in the Gazette Notice without having been a member of the party nor appeared in the party list submitted to and approved by the 1<sup>st</sup> respondent.
  - c. The fraudulent and illegal nomination of the 3<sup>rd</sup> respondent to the Mandera county assembly be revoked.
  - d. The 1<sup>st</sup> respondent be ordered to cancel and remove Abdow Bishar Maalim from position No 1 as being nominated to the Mandera County assembly under marginalized list youth category and instead reinstate the Petitioner to position No 3 under the marginalized List to the Mandera county Assembly to represent the category of Person with Disabilities (PWD) as submitted by the 2<sup>nd</sup> respondent and approved by the 1<sup>st</sup> respondent in the original party list and uploaded on the IEBC Portal.
  - e. An Order directing the 1<sup>st</sup> respondent to correct gazette notice No 10712 of September 9, 2022 and publish an amended gazette notice reflecting the name of the Petitioners as submitted by the 2<sup>nd</sup> respondent and approved by the 1<sup>st</sup> respondent in the original party list and uploaded on the IEBC Portal.
  - f. The 1<sup>st</sup> and 3<sup>rd</sup> respondents be ordered to pay the costs of the petition in any event
  - g. Any other relief as the court shall deem fit to grant.

#### **1<sup>st</sup> respondent's Case**

5. The 1<sup>st</sup> respondent in its response to the Petition dated November 4, 2022 in principle states that in line with its mandate, it conducted and supervised elections herein per the Constitution, Elections Act and all enabling laws.
6. 1<sup>st</sup> respondent insisted that in respect of the issues raised by the petitioner its role was limited to ensuring that the lists submitted by political parties comply with the Constitution and other applicable electoral laws in respect of the gazettement of the final lists submitted by political parties. That the 1<sup>st</sup> respondent had no role whatsoever in how parties arrive at their party list save for compliance with the Constitution electoral laws and its own nomination rules.
7. That the 2<sup>nd</sup> respondent submitted its initial party list and upon review by the 1<sup>st</sup> respondent pursuant to article 90 of the Constitution section 34 Elections Act 1<sup>st</sup> respondent found that the list was not compliant and invited the 2<sup>nd</sup> respondent to amend it. That the 2<sup>nd</sup> respondent submitted their amended list on July 23, 2022 in accordance with regulation 54(3) of the Elections (General)



Regulations 2017 and regulations 26(3) of the Elections (Party Primaries and Party List) Regulations 2017.

8. That the 1<sup>st</sup> respondent in allocation of seats governed by article 90 certified the list of July 23, 2023 which it used to administer the nomination. That the petitioners and 2<sup>nd</sup> respondent are relying on a list that was not submitted in accordance with regulations 54(3) of the Elections (General) Regulations 2017 and regulations 26(3) of the Elections (Party Primaries and Party List) Regulations 2017.
9. That it followed the order of priority of the list as submitted and approved as per article 90 and section 36(8) of the Election Act and went ahead to gazette the list of all nominees including the 2<sup>nd</sup> respondent per list dated July 20, 2022 in compliance with article 177(1)(b) per Gazette Notice No 10712 vol CXXIV No 186 dated September 9, 2022 and prayed:
  - i. That the petitioner failed to prove that the 1<sup>st</sup> respondent did not comply with the Constitution of Kenya, the Elections Act, 2011 and relevant statutory guidelines and regulations governing elections and nominations in allocation of nomination slots in mandera county assembly.
  - ii. A declaration that the respondent discharged its constitutional mandate as enshrined in the Constitution, Elections Act 2011 and the Regulations made thereunder.
  - iii. A determination that no right of the petitioner has been infringed.
  - iv. The petition presented before court lacks merits and should be dismissed with costs
  - v. Such other orders as the court deems fit.

## **2<sup>nd</sup> Respondent's Case**

10. The 2<sup>nd</sup> respondent in its response as well as the replying affidavit and submissions stated that it carried out nominations for party list members for the various elective seats among them the MCA in compliance with the Constitution, Elections Act, UDM Party Constitution and part five of the UDM Elections and Nomination Rules 2021.
11. That it submitted its party membership list to the Registrar of Political parties (RPP) and in compliance to RPP letter dated May 16, 2022. That on June 17, 2022 the RPP wrote a letter to 2<sup>nd</sup> respondents SG informing him that she had verified the party list submitted and returned to the 2<sup>nd</sup> respondent two copies of certified copies of party list in electronic format.
12. That on August 15, 2022 the 2<sup>nd</sup> respondent SG was informed that the party list that had been submitted approved and published by the 1<sup>st</sup> respondent had been altered to include name of the 3<sup>rd</sup> respondent without authorization of the leadership of the 2<sup>nd</sup> respondent.
13. That the 3<sup>rd</sup> respondent was not a member of the 2<sup>nd</sup> respondent (UDM) party until September 11, 2022 which was two days after gazettment of the list of nominated members of the County Assemblies. That the 3<sup>rd</sup> respondent did not pay any registration or nomination fees as required under the party Election Nomination Rules. That it occurred to the 1<sup>st</sup> respondent that there was a different list in records of 1<sup>st</sup> respondent which was different from the list originally submitted and approved. The different list was a forgery.
14. That the 2<sup>nd</sup> respondent did not submit any application for consideration for nomination.
15. That RPP in a letter dated September 14, 2022 upon inquiry by the 2<sup>nd</sup> respondent confirmed that the 3<sup>rd</sup> respondent was registered as a member of UDM party on September 11, 2022 at 1.47pm by one Calvin William Habwe Chitwa under party membership no UDM 2022009001 as a regular member



and he had digitally resigned from Jubilee party using USSD code (\*509#). That it was impossible for the 3<sup>rd</sup> respondent to have been lawfully registered as a member of the 2<sup>nd</sup> respondent and become eligible for nominations herein after elections yet the deadline for submission of party lists to RPP was on June 11, 2022.

16. That the alteration of the list disenfranchised the petitioners due to acts and omissions of 1<sup>st</sup> and 3<sup>rd</sup> respondents hence the prayers in the that the Petition be allowed as prayed with costs being borne by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

### 3<sup>rd</sup> Respondent's Case

17. As per the 3<sup>rd</sup> respondent's response to the petition dated December 13, 2023 and the replying affidavit sworn on December 13, 2022; the 3<sup>rd</sup> respondent insisted that he is a bonafide life member of the 2<sup>nd</sup> respondent and has a life membership card. That he made application to be considered for party list nomination as a member of Mandera County Assembly representing youth.
18. That he is not an official of the 2<sup>nd</sup> respondent and was not given an opportunity to scrutinize the party list submitted to the RPP. That any non-inclusion must have been an oversight or deliberate attempt by malicious officials of the 2<sup>nd</sup> respondent to deny him his recognition as a duly registered member of the UDM and the benefits that accrue thereto.
19. That he is not aware of the precise particulars of when the party list was submitted, and by who to the 1<sup>st</sup> respondent.
20. The 3<sup>rd</sup> respondent denied that the 1<sup>st</sup> respondent was satisfied with the list and that the said list was the list published in the newspapers and uploaded on IEBC website. That he is aware that party list preparation is a preserve of political parties and IEBC usually adopts the party lists submitted by the political party. That his name was submitted to IEBC by 2<sup>nd</sup> respondent after having been duly nominated to represent the youth.
21. That selection of candidate from the party list submitted to IEBC is done strictly in line with provisions of article 90 and 177 of the Constitution, section 36, 37 of Elections Act, and regulation 55 of the Elections (General) Regulations 2012. That the 3<sup>rd</sup> respondent was not involved in the process.
22. That he is a resident of Mandera County, and a young person who represents the interests of the youth. That he was properly nominated by 2<sup>nd</sup> respondent and duly gazetted by 1<sup>st</sup> respondent. That he is not aware of any alteration of the 2<sup>nd</sup> respondent's party list.
23. The 3<sup>rd</sup> respondent raised issue that the petitioner failed to deposit the security for costs within time stipulated and also failed to plead the petition in manner envisaged by the law and at hearing will raise a preliminary objection to be determined in limine and so jurisdiction of the court is denied.
24. That the petition is bad in law fatally defective as its premised-on assumption that since the petitioner's name was among names submitted by the party he is automatically entitled to nomination even head of persons who appeared before his name in the party list. He prays for orders that:
  - a. Mandera County Assembly was duly constituted following the publication of the gazette notice no 10712 of September 9, 2022.
  - b. The 3<sup>rd</sup> respondent was validly elected by way of nomination to the mandera county assembly.
  - c. The 3<sup>rd</sup> respondent was not in breach of and did not contravene the provisions of the Constitution, Elections Act or any statute.



- d. Petition lacks merit and should be dismissed and
- e. The petitioner should bear costs of the petition.

### **Issues for Determination**

The 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent filed respective lists of issues for determination and which were adopted by the parties herein.

#### **1<sup>st</sup> respondent's Issue:**

Whether the 1<sup>st</sup> respondent discharged its constitutional mandate as enshrined in the [Constitution, Elections Act, 2011](#) and the Regulations made thereunder by gazetting the nomination list submitted by the Political Party;

#### **2<sup>nd</sup> respondent's issues, also adopted by the Petitioners:**

- i. Whether the 3<sup>rd</sup> respondent was a bonafide member of the UDM Party at the time of publication of the party List by the 1<sup>st</sup> respondent in the Standard Newspaper of July 27, 2022.
  - ii. Whether the 3<sup>rd</sup> respondent was a nominee of the 2<sup>nd</sup> respondent party under marginalized category to represent the youth in the list published by the 1<sup>st</sup> respondent on July 27, 2022 in Standard Newspaper and the list uploaded in the IEBC Portal.
  - iii. Whether the 1<sup>st</sup> respondent can alter and amend the party list submitted to it by the 2<sup>nd</sup> respondent without authorization by the political party.
  - iv. Whether the nomination of the 3<sup>rd</sup> respondent was conducted in accordance with [Constitution, Elections Act](#) and [Political Parties Act](#).
  - v. Whether the nomination of the 3<sup>rd</sup> respondent to the Mandera County Assembly is null and void.
  - vi. Whether the honorable court can order the 1<sup>st</sup> respondent to publish the correct party list as submitted to it by the 2<sup>nd</sup> respondent.
  - vii. Whether the 1<sup>st</sup> respondent should be ordered to correct Gazette Notice No. 10712 of September 9, 2022 and publish an amended Gazette Notice reflecting the names of the Petitioners as submitted by the 2<sup>nd</sup> respondent and approved by the 1<sup>st</sup> respondent in the original party list and uploaded on the IEBC website.
  - viii. Whether the court should recommend the prosecution of the 3<sup>rd</sup> respondent for perjury and forgery.
  - ix. Whether the 1<sup>st</sup> and 3<sup>rd</sup> respondent should be ordered to pay costs of the petition.
25. The court on 19/12/2023 directed that the petition be disposed by way of written submissions. It was agreed that all parties to ensure they have filed and served their submissions by 24/01/2023. This was complied with and highlighting of the written submissions proceeded on 27/01/2023 virtually.
26. The court has read and considered the submissions filed, the authorities and the documents respectively referred to by the parties in their supporting or replying affidavits as filed in this petition as the case may be and will refer to them as appropriate in the course of the judgment.
27. I note that the 2<sup>nd</sup> respondent filed a list of 9 issues for determination and which issues the petitioner adopted entirely. The 1<sup>st</sup> respondent filed a list with a single issue for determination.



Parties agreed that the court to distil the issues for determination in this petition was filed. The court does adopt all the issues as filed.

28. The 1<sup>st</sup> and 2<sup>nd</sup> issues per the list filed by the 2<sup>nd</sup> respondent are actually the background to the case and may substantially determine petition. I will handle the two issues together. I will seek to answer these two issues on the uncontested basis of all parties' averments and submission that the issue of nominations is internal party affairs subject to party constitution and the [Elections Act](#) and the [Political parties Act](#) and the [Constitution of Kenya 2010](#).

Whether the 3rd respondent was a bonafide member of the UDM Party at the time of publication of the party List by the 1st respondent in the Standard Newspaper of July 27, 2022.

Whether the 3rd respondent was a nominee of the 2nd respondent party under marginalized category to represent the youth in the list published by the 1st respondent on July 27, 2022 in Standard Newspaper and the list uploaded in the IEBC Portal.

The two issues above are (inter)related and can safely be disposed of together.

- i. Section 38A of the [Political Parties Act](#) provides for two Methods of conducting party nominations; (a) direct party nomination method; or (b) indirect party nomination method.
- ii. Section 34 (8) of the [Elections Act](#) provides that; "A person who is nominated by a political party under subsection (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."
- iii. Section 38C [Political Parties Act](#) deals with Participation of Registered members in party nominations and provides that
  - (1) A registered member of a political party shall be entitled to participate in the nominations conducted by the political party.
  - (2) A political party that intends to conduct political party nominations under this Act shall use a certified register of members for the nominations.
  - (3) A political party that intends to conduct political party nominations under this Act shall apply in writing to the Registrar for a certified copy of the register of members at least twenty-one days before the date of the nominations.
  - (4) The Registrar shall issue the political party with a certified copy of the register of the political party's members within seven days after the application under subsection (3).
  - (5) A political party shall not allow any person who is not a registered member of the political party to participate in the party nominations.



- (6) Notwithstanding the provisions of subsection (5), a person may only participate in the nominations of a coalition political party if such person is a registered member of a party forming the coalition political party.
29. The above provisions no doubt outline and restrict that only a registered member of a political party is entitled to participate in the political party nominations, and further that a certified copy of the register of members shall be obtained from the registrar of political parties at least twenty-one days before the date of the nominations and this is the list to be used in the political party nomination exercise.
30. The basic issue in this petition is whether the 3<sup>rd</sup> respondent as at the time of nomination was registered member of the 2<sup>nd</sup> respondent (UDM Party). This can be established first by looking at the party constitution on issue of membership. I also proceed on the assumption that there was no contention as to the *Constitution* of UDM party or to the interpretation of any of the relevant sections of the party constitution and relevant rules thereto.
31. Chapter 4 of the party constitution deals with membership.
- i. upon reading of Article 4.1 I note that membership of UDM shall be open and can be done upon application to the Branch executive Committee. The application can be manually or using electronic platforms through e-citizen platform of USSD \*207\*100# or any other mobile phone USSD as may be advised by the party. That before certificate of membership is conferred all members shall pay the prescribed membership fees.
  - ii. Article 4.2 provides for categories of membership subject to payment of membership fees i.e. Ordinary membership (no fees), life member (as prescribed) Bronze (as prescribed), silver (as prescribed), gold (as prescribed), platinum (as prescribed), and group membership.
  - iii. Article 4.3 provides inter alia rights of members to take part in elections by voting and being eligible for party and National Elections at all levels upon nomination.
  - iv. Article 4.5 provides for maintenance of Members register with details of the individual member. The register shall be kept in both electronic and physical format.
32. The 2<sup>nd</sup> respondent in the Response to the Petition as well as the replying affidavit stated that it carried out nominations in accordance with the *Constitution*, the *Elections Act*, the UDM Party Constitution and Part Five of the UDM Elections and Nomination Rules 2021 for Nominations for Party List Members for the various elective seats among them the position of Member of County Assembly of Mandera.
33. It is the position of the 2<sup>nd</sup> respondent that on June 11, 2022 they submitted the Party Membership List to the Registrar of Political Parties as per the Registrar of Political Parties' letter of May 16, 2022. That on June 17, 2022, the Registrar of Political Parties wrote a letter to the 2<sup>nd</sup> respondent's Secretary General informing him that she had verified the Party List that had been submitted and returned to the 2<sup>nd</sup> respondent two (2) copies of the certified copies of the Party List in electronic format. That on or about August 15, 2022, the 2<sup>nd</sup> respondent's Secretary General was informed that the Party List that had been submitted, approved and published by the 1<sup>st</sup> respondent had been altered without the authorization of the leadership of the 2<sup>nd</sup> respondent to include the name of the 3<sup>rd</sup> respondent.



34. The 2<sup>nd</sup> respondent vehemently denies that the 3<sup>rd</sup> respondent was a member of the United Democratic Movement Party until the registration on September 11, 2022 two (2) days after the gazette of the list of Nominated Members of the County Assemblies by the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent insists that the 3<sup>rd</sup> respondent is not a registered member of the UDM Party and did not pay any registration or nomination fees as required under the Party's Elections and Nomination Rules.
35. The 3<sup>rd</sup> respondent in his response to the Petition dated December 13, 2023 and in the 3<sup>rd</sup> respondent's Replying affidavit as well as in the written submissions as highlighted on January 27, 2023 insist he is a registered voter and hails from Mandera County in Mandera South Constituency Kutulo ward. That he is a duly registered and paid up member of UDM. He referred to membership card annexed and marked ABM-1 and that he was also issued life membership card (ABM2) on May 11, 2022.
36. The 1<sup>st</sup> respondent in the Response to the petition, replying affidavit and written submissions as highlighted on January 27, 2023 insists that it issued guidelines as published in Gazette Notice No. 6378 vol. CXXIV No.101 dated June 3, 2022. That consequently the party lists were received on or before June 25, 2022 which was within the 45 days before the general elections as per section 35 of the *Elections Act*. That pursuant to regulations 54(8) *Elections General Elections Regulations 2012* the 1<sup>st</sup> respondent published the final party list as received from the parties in the standard newspaper and subsequently pursuant to Article 90 of *the constitution* and section 34 *Elections Act* undertook review of the submitted list. That the 1<sup>st</sup> respondent consequently picked the person who was listed as per the party list of 2<sup>nd</sup> respondent submitted through their letter dated July 22, 2022.

### Courts Findings

37. The Supreme Court in *Raila Odinga and Another v IEBC* SC Petition No 5 of 2013 held that:

“...a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary.”

The court has duly considered the above and finds that the petitioners have discharged the initial burden of proof above the balance of probabilities, though not as high as beyond-reasonable-doubt, by proving that the 3<sup>rd</sup> respondent is not in the certified list of party members that was certified by the RPP for use in nominations per letter dated June 17, 2022 produced and marked as annexure 'DO-5' in the 2<sup>nd</sup> respondent's Replying affidavit, and was not in the list published by 1<sup>st</sup> respondent in the Standard Newspaper on July 27, 2022.

38. The letter from RPP certified that the 3<sup>rd</sup> respondent registered as a member of UDM vide USSD after party nominations were long closed. The membership cards produced by the 3<sup>rd</sup> respondent have been disowned by the 2<sup>nd</sup> respondent.
39. Indeed, pursuant to section 107 (1) of the *Evidence Act* “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that



- those facts exist.” Further, section 109 of the [Evidence Act](#) provides that “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”
40. With the above facts as clarified by the 2<sup>nd</sup> respondent, the incidence of burden of proof properly shifts to the 3<sup>rd</sup> respondent to proof to the standard required that he was a duly registered and paid up member or life member of the 2<sup>nd</sup> respondent at the time of nomination as he claims.
41. I have keenly read the replying affidavit of the 3<sup>rd</sup> respondent and the UDM Party constitution as well as the nomination rules of the UDM party; I concur with the submissions by the 2<sup>nd</sup> respondent that the 3<sup>rd</sup> respondent must have more evidence to support his life membership status in addition to the membership card that he has produced in evidence. He is at least required to show that he is a paid-up life member. This is a fact that is particularly within his knowledge and it’s not too much or illegal to demand from him. The failure to do so as provided in section 108 [Evidence Act](#) on leads to the inescapable finding that the 3<sup>rd</sup> respondent has not proved that he paid any annual contributions and or membership fees even at once or that he was so exempted under the party constitution.
42. The basic issue herein is whether the 3<sup>rd</sup> respondent was a fully paid up member of UDM party as at the time of the alleged nomination per gazette notice of September 9, 2022 or as at the time of publication of the party list on July 27, 2022 in the Standard Newspaper. Noting that the 2<sup>nd</sup> respondent availed evidence as per letter from RPP that the 3<sup>rd</sup> respondent joined the 2<sup>nd</sup> respondent on September 11, 2022 after nominations were closed and even gazettement of the nominated MCAs had been done on September 9, 2022, it would have been clearer if not easier if the 3<sup>rd</sup> respondent availed evidence of when he was admitted as a member of the UDM Party by any of the methods prescribed under the party constitution.
43. A consideration of the response and the reply of the 3<sup>rd</sup> respondent show that he does not in any way fault the mandate and the role of the RPP in this matter. However his submissions and assertions that the letter from ORPP should not be relied upon but that records must come from 2<sup>nd</sup> respondent to proof that he is not a member of the party is misconceived. I suppose the 3<sup>rd</sup> respondent has not familiarised himself with the provisions of section 34 of the [Political Parties Act](#) which provides for functions of the Registrar of Political Parties among many others to:
- i. verify and make publicly available the list of all members of political parties;
  - ii. keep and maintain a register of members of registered political parties;
  - iii. ensure and verify that no person is a member of more than one political party and notify the Commission of the findings;
  - iv. certify that an independent candidate in an election is not a member of any registered political party;
  - v. certify that the names appearing in a party list are the names of members of the political party presenting the party list;
  - vi. regulate political party nominations in accordance with this Act;
  - vii. investigate complaints received under this Act;
44. Even if the 2<sup>nd</sup> respondent believes that shadowy figures of the UDM party are maliciously targeting him, the RPP under the law is deemed a neutral party. I find no reason why the RPP should also be prejudiced against him and if he so rightly believes RPP is prejudiced against him, he should invoke



the dispute resolution mechanism under the Act. The foregoing position was reinforced in the case of *George Omondi Okoth vs. Independent Electoral & Boundaries Commission & 7 Others* [2017] eKLR where the court opined that; that the definitive proof of membership or lack thereof of the 2<sup>nd</sup> respondent's political party membership is by the Registrar of Political Parties.

45. In my view if the 3<sup>rd</sup> respondent was dissatisfied with his non-inclusion in the published party membership list presented to and certified by the RPP for use in political party nomination, there are ample legal procedures to be invoked by the aggrieved party. The 3<sup>rd</sup> respondent has not shown any effort in this respect by way of a Complaint with the Political Parties Disputes Tribunal to challenge the list published. Membership in political party nominations is such a cardinal issue that any reasonable person seeking nomination under a political party would at least try to verify that he is on the certified list of members of the political party. Information on party membership is readily available to any member of the public who so wish to verify. In any event the *Political Parties Act* does not permit membership in more than one party. It is so strange that the 3<sup>rd</sup> respondent in the submissions seemed to deny that the person listed in Isiolo County Jubilee party list is not the 3<sup>rd</sup> respondent yet all the names and ID number are for the 3<sup>rd</sup> respondent. How the 3<sup>rd</sup> respondent was a member of two political parties is well known to him but all in all its illegal. Furthermore, during oral highlighting of submissions, the court when it sought clarification from the counsel if the 3<sup>rd</sup> respondent has taken any (legal) action against IEBC or RPP after being served with the petition documents; it was evident no action has been taken and the explanation given that the proceedings herein are time bound is not a satisfactory explanation. The issue of membership in the party is so crucial to the 3<sup>rd</sup> respondent perhaps more than to any other party herein since he is the one who stands the greatest prejudice. He was nominated and his nomination is under serious contention and challenge on the very issue of party membership.
46. As it stands now, annexure 'DO-13' of the 2<sup>nd</sup> respondent's affidavit in Response to the Petition where the Registrar confirmed;
- i. That Mr Abdow Bashir Maalim of ID No XXXXXXXXXXXXX was registered as a member of the UDM on 11<sup>th</sup> September 2022 at 1.47 PM.
  - ii. His party Membership Number is UDM202200XXX and is registered as a regular member.
  - iii. He was registered through Membership registration portal by a Mr Calvin William Habwe Chitwa.
  - iv. He personally resigned digitally using the USSD Code (\*509#)."
- Are facts which are uncontroverted and have legal and practical implications:
- i. the registration of the 2<sup>nd</sup> respondent as a member of the UDM Party was done way past the General Elections of August 9, 2022 whilst section 35 of the *Elections Act* requires the 2<sup>nd</sup> respondent to submit its Party List to the 1<sup>st</sup> respondent at least forty-five (45) days before the date of the General Election.
  - ii. the 3<sup>rd</sup> respondent registered as a regular member and is not a Life member of the UDM as he claims.
  - iii. He resigned from his original party Jubilee on 11<sup>th</sup> September 2022.
47. Rule 5 under Part Three of the UDM Elections and Nomination Rules at provides for the rules and procedure for nomination of a member of the County Assembly. Rule 5(b) provides for instance the documentations to be furnished by a member upon application and among them a duly filled



Nomination Form signed by two (2) members (proposer and seconder) of the UDM both of whom must be registered voters in the electoral areas.

48. The 3<sup>rd</sup> respondent's proposers, Mr. Ibrahim Mohamed Alio and Mr. Hassan Derow have not been proved to be members of the UDM Party therefore could not propose and second the 3<sup>rd</sup> respondent as a nominee to the Mandera County Assembly.
49. This court therefore finds that it has been proved to the required standard by the 2<sup>nd</sup> respondent that the 3<sup>rd</sup> respondent was not a member of the UDM Party at the time of publication of the Party List in the Standard Newspaper of July 27, 2022 or even as at the gazettelement of nominated members of the County Assembly on September 9, 2022 by 1<sup>st</sup> respondent.
50. The net and logical effect is that the 3<sup>rd</sup> respondent per the law and the Party constitution was not eligible to participate in the UDM party nominations as a member and or as a candidate for nomination to the Mandera County Assembly.
51. In fact, it would not matter even if it was the 2<sup>nd</sup> respondent who may have by mistake or otherwise submitted the name of the 3<sup>rd</sup> respondent on the UDM party nomination list. Such will be illegal as it contravenes the clear provisions of the law and party constitution.
52. I also note and it was never addressed by the 1<sup>st</sup> and 3<sup>rd</sup> respondent about the names and order of priority in the marginalised category in the Standard newspaper of July 27, 2022. They are listed as follows:
  1. Bishar Hussein Farah -Youth
  2. Suban Ahmed Abdinoor PWD
  3. Abdiweli Haji Bukura - PWD
  4. Khalida Dahir Adan- Woman
  5. Mohamed Hassan Mohamed-worker
  6. Sahara Adan Mohamed - Worker
  7. Mohamednoor Ismail Mohamed – Youth
  8. Mulki Abdulahi Mohamud – Ethnic Minority
53. Consequently on the two issues of : whether the 3<sup>rd</sup> respondent was a bonafide member of the UDM Party at the time of publication of the party List by the 1<sup>st</sup> respondent in the Standard Newspaper of July 27, 2022, and, whether the 3<sup>rd</sup> respondent was a nominee of the 2<sup>nd</sup> respondent party under marginalized category to represent the youth in the list published by the 1<sup>st</sup> respondent on July 27, 2022 in Standard Newspaper and the list uploaded in the IEBC Portal; I find that he was a not bonafide member of the UDM Party at the time of publication of the party List by the 1<sup>st</sup> respondent in the Standard Newspaper of July 27, 2022 and was not a bonafide a nominee of the 2<sup>nd</sup> respondent party under marginalized category to represent the youth in the list published by the 1<sup>st</sup> respondent on July 27, 2022.
54. With the findings of fact and law in respect of the two issues above; I find that they also sufficiently and conclusively resolve the issues Noiv and v i.e. whether the nomination of the 3<sup>rd</sup> respondent was conducted in accordance with [constitution](#), [Elections Act](#) and [Political parties Act](#) and whether the nomination of the 3<sup>rd</sup> respondent to the Mandera County Assembly is null and void.



55. Going per the response and reply to the petition it was the position of the 1<sup>st</sup> respondent and which is the legal position is that it has no role in generation of the party list, the content and order of priority of party nominees in the list. Section 28(1) and 28(2) of the [Elections Act](#) was cited. It deals with submission of party membership lists and provides as follows:
- (1) A political party that nominates a person for an election under this Act shall submit to the Commission a membership list of the party —
- (a) in the case of a general election, at least one hundred and twenty days before the date of the election; and
- (b) in the case of a by-election, forty-five days before the date of the by election.
- (2) The Commission shall publicize the membership lists as received from political parties.
56. Section 34 of the [Elections Act](#) deals with Nomination of party lists members and is to the effect that;
- (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](#).
- (4A) In the case of a person nominated pursuant to article 177(1)(c) of the [Constitution](#), the party list shall include a certification in the manner prescribed by the Commission.
- (5) The party lists under subsection (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.
- (6A) Upon receipt of the party list from a political party under subsection (1), the Commission shall review the list to ensure compliance with the prescribed regulations and —
- (a) issue the political party with a certificate of compliance; or
- (b) require the political party to amend the party list to ensure such compliance failing which the Commission shall reject the list.
- (6B) For purposes of subsection (6A), the Commission may, by notice in the gazette, issue regulations prescribing guidelines to be complied with in preparation of party lists. (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 subsection (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.



(10) A party list submitted for purposes of subsection (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

57. The point of reference which is the gist of the current consolidated petitions is the Gazette Notice No 10712 Vol CXXIV No186 dated September 9, 2022 which every party herein agrees to its final determination of persons as gazetted thereon effectively stand elected as reiterated by the supreme Court in *Moses Mwigigi & 14 Others vs Independent Electoral and Boundaries & 5 others* [2016] eKLR. In this Gazette Notice at Page 7069 for Mandera county -009 under marginalised list the following are listed as nominates under UDM:

1. Abdow Bishar Maalim- Youth
2. Sokorey Maalim Isaakow- Special Interest
3. Bishar Hussein Farah – Youth

58. It is evident that UDM was entitled to 3 seats for nomination under the marginalised list category. A look at the list of party nominee under this category as listed under paragraph 52 of this judgement (per Standard Newspaper dated July 27, 2022) no doubt show obvious differences not only as to the names of the nominees but also the order of priority under this category as published in the Standard newspaper of July 27, 2022 from that appearing in the Gazette Notice No 10712 Vol CXXIV no 186 dated September 9, 2022.

59. I find glaring contradictions in the response, reply and submissions of the 1<sup>st</sup> respondent when compared to the reality as to the persons gazetted as nominees under the marginalised category under UDM party in Mandera County.

60. I have keenly looked at the reply of the 1<sup>st</sup> respondent particularly at EX IEBC 2 and note that there is a list said to have been submitted by the 2<sup>nd</sup> respondent to 1<sup>st</sup> respondent vide a letter dated July 20, 2022 where in the list printed on July 23, 2022 under marginalised group nominee to the county assembly for Mandera County lists Abdow Bishar Maalim- Youth, Sokorey Maalim Isaakow- no Special category, Bishar Hussein Farah – worker among others.

61. What is interesting and which the 1<sup>st</sup> respondent didn't care to clarify is that this list in which the 3<sup>rd</sup> respondent appears is said to have been received by the 1<sup>st</sup> respondent on July 23, 2022 yet the list published as per the Standard newspaper of July 27, 2022 the names and order of priority published by 1<sup>st</sup> respondent is different. The 1<sup>st</sup> respondent very broad and generalised response that it relied strictly on the list and order of priority per the list submitted by 2<sup>nd</sup> respondent on July 23, 2022 in allocation of nomination seats; and that as such the 1<sup>st</sup> respondent complied with the *Constitution*, the law and relevant regulations in the nomination now in dispute did not make the issue any clearer. I find the 1<sup>st</sup> respondent's position is contrary to the facts as evident in the subject nomination. There is no dispute to the legal position that the 1<sup>st</sup> respondent cannot alter and or amend the party list submitted to it by the 2<sup>nd</sup> respondent without authorization by the political party. That issue is beyond argument yet the facts show the list was amended before being gazetted on September 9, 2022 contrary to the law. The 1<sup>st</sup> respondent therefore did not comply and or did not ensure compliance with the *Constitution of Kenya*, the law and relevant regulations and to the party constitution in the nomination herein.

62. Section 83 of the *Elections Act* which provides:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the



principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

It is clear that the 1<sup>st</sup> respondent’s non-compliance with the Constitution and the law did materially and substantially affect the validity of the election by way of nomination in respect of marginalised categories slots to which the 2<sup>nd</sup> respondent was entitled to in the Mandera County Assembly:

- i. First a person whom the court has found was not eligible to participate in the nominations as a voter or as a nominee under the UDM party ended up being gazetted as a nominee and sworn in as a member of the Mandera County Assembly.
- ii. Secondly the order of priority and the persons nominated per the party list of nominees was not strictly honoured contrary to the Elections laws and jurisprudence which is now settled. As it stands now, it is a fact that the marginalised category of PWD nominees to which UDM party was entitled to are not at all represented in the Mandera County Assembly. In *National Gender and Equality Commission vs. The IEBC and another*[2013] eKLR at paragraph 50 held that :

“The Party Lists submitted to the Commission under section 34(6) of the Election Act shall be in accordance with the Constitution or the nomination rules of the Party concerned. This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties.....

In the case of *Imelda Nafula Wanjala v IEBC* [2013] eKLR the court held that;

“Under the provisions of article 177 of the Constitution and section 34 of the Elections Act, the respondent was required to nominate persons on the basis of priority from the list submitted to it prior to the elections and it could only come and consider other lists under section 37(2) of the Constitution once the original list was exhausted. A failure on its part to act in accordance with these provisions would be irregular and in breach of the law.”

- iii. Even if by any dint of imagination, the 2<sup>nd</sup> respondent did forward the name of the 3<sup>rd</sup> respondent as its nominee yet he was not a bonafide member of the party as at time of the nomination then IEBC was bound to reject his nomination. Nevertheless, even the non-rejection by the 1<sup>st</sup> respondent in any event only begets a nullity in the nomination of 3<sup>rd</sup> respondent as per section 34(8) Elections Act.

63. All the above dispose issues number iii, iv and v per the 2<sup>nd</sup> respondent’s list of issues as well as the 1<sup>st</sup> respondents’ sole issue in its list of issues.
64. On whether the court should recommend the prosecution of the 3<sup>rd</sup> respondent for perjury and forgery using the powers under section 87 of the Elections Act, I note this matter proceeded by way of written submissions. The court did not have the opportunity to thoroughly scrutinize the documents in issue in the lenses of establishing a criminal offense, and neither did it have the advantage of expert to assist it determine if indeed the documents are forgeries and that the 3<sup>rd</sup> respondent is culpable. In this judgment I have not made any definitive and conclusive findings on the authenticity of the particular documents in issue submitted by the 3<sup>rd</sup> respondent save to have made the overall finding from the facts and the law. In that respect I find it unsafe to delve into this issue of forgery and perjury in this judgment. I believe the matter can be properly initiated and better pursued in the well-established criminal justice system process than through this election court process. The aggrieved parties are all at liberty to lodge formal complaints to the relevant agencies for intervention as appropriate.



65. Issues no vi, and vii ie on whether the court can order the 1<sup>st</sup> respondent to publish the correct party list as submitted to it by the 2<sup>nd</sup> respondent; and whether the 1<sup>st</sup> respondent should be ordered to correct Gazette Notice No 10712 of September 9, 2022 and publish an amended Gazette Notice reflecting the names of the Petitioners as submitted by the 2<sup>nd</sup> respondent and approved by the 1<sup>st</sup> respondent in the original party list and uploaded on the IEBC website. I start with section 75 [Elections Act](#) on County election petitions which provides that
1. ...
    - (1A) A question as to the validity of the election of a member of 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.
66. It was the submissions of the petitioner and the 2<sup>nd</sup> respondent that nomination and subsequent gazette of the 3<sup>rd</sup> respondent as a member of the County Assembly of Mandera vide Gazette Notice No 10712 is a nullity in law as it was not done in compliance with the [Constitution](#) and the electoral laws, a position this court has found in the affirmative.
67. I was urged by the petitioner and the 2<sup>nd</sup> respondent that this court has the inherent jurisdiction to order the 1<sup>st</sup> respondent to gazette the correct names of the members of the UDM Party elected by nomination in accordance with the Party List as submitted to the IEBC and published in its website. That the 1<sup>st</sup> respondent should therefore be ordered to publish the correct Party List as submitted to it by the 2<sup>nd</sup> respondent and in order of priority as the names appear.
68. The 1<sup>st</sup> respondent submitted that the court should find that he was duly gazetted by the 1<sup>st</sup> respondent, has assumed office and is now well into sittings of the assembly and that the court should not disturb the status quo.
69. The 1<sup>st</sup> respondent adopted the assertion in the submissions that it complied with the law and discharged its mandate in the nomination of the 3<sup>rd</sup> respondent from the 2<sup>nd</sup> respondent party list.
70. As I found out, the nomination of the 3<sup>rd</sup> respondent was not in compliance with the [Constitution](#), the relevant election and nominations Laws and regulations and the party constitution. The only issue that need serious attention is the fact that as per the list of persons who are now nominated, and gazetted on September 9, 2022 and sworn in i.e. Abdow Bishar Maalim- Youth, Sokorey Maalim Isaakow- Special Interest, Bishar Hussein Farah – Youth.
71. In the list as published in Standard newspaper on July 27, 2022 legally the persons entitled to the nomination in order of priority are:
- Bishar Hussein Farah -Youth  
Suban Ahmed Abdinoor PWD  
Abdiweli Haji Bukura - PWD



Khalida Dahir Adan- Woman

Mohamed Hassan Mohamed-worker

Sahara Adan Mohamed - Worker

Mohamednoor Ismail Mohamed – Youth

Mulki Abdulahi Mohamud – Ethnic Minority

72. UDM was allocated 3 seats under special category of marginalised per gazette notice of September 9, 2022; then it follows that the following three people would have stood ‘elected’ by nomination upon the gazette notice on September 9, 2022: Bishar Hussein Farah -Youth, Suban Ahmed Abdinoor PWD, Abdiweli Haji Bukura - PWD
73. In the current petition I note that only the nomination of Bishar Abdow Maalim is challenged while the nomination of Sokorey Maalim Isaakow who appears on the gazetted nominated MCA as No 2 is not though it was said that she was nominated under the wrong category . It also appears that the nomination of Bishar Hussein Farah is not contested. This means that of the three slots available for the 2<sup>nd</sup> respondent, only one slot is legally factually available to filled up upon the nullification of the nomination of the 3<sup>rd</sup> respondent as held in this judgement.
74. In the circumstances and pursuant to section 75(3) *Elections Act*, I find that this court has jurisdiction to make orders including: as to,
- i. whether the 3<sup>rd</sup> respondent was validly elected,
  - ii. a declaration of which candidate was validly elected; or
  - iii. an order as to whether a fresh election will be held or not.
75. I am not convinced that the jurisdiction of the court in this petition too wide to cover the whole nomination list of nominees by UDM to the Mandera County Assembly as strenuously submitted by the petitioners and the 2<sup>nd</sup> respondent. If the petitioners and the 2<sup>nd</sup> respondent were aggrieved by the nomination of any other person(s) in addition to the 3<sup>rd</sup> respondent then nothing stopped them from instituting an election petition and to seek appropriate orders against them as they did agsonst the 3<sup>rd</sup> respondent. (see *Ben Njoroge & another vs IEBC and 2 others* [2013] eKLR). No adverse orders can issue from this court against a person who is not party to the proceedings . In any section 75(A) of the *Elections Act* provides that a question as to the validity of the election of a member of county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.
76. Consequently, and pursuant to section 75(3) of the *Elections Act*, I hereby declare that the Abdow Bishar Maalim was not validly elected and his election is hereby nullified.
77. As to who is validly elected, I have looked at the publication in the Standard newspaper of July 27, 2022 which shows the party nomination priority listing of (i) Bishar Hussein Farah -Youth, (ii) Suban Ahmed Abdinoor PWD, (iii) Abdiweli Haji Bukura – PWD. I note that Bishar Hussein who is listed No.1 is already nominated and his nomination is not contested here. Then the next person in the order of priority is Suban Ahmed Abdinoor.
78. Consequently, and pursuant to section 75(3) I hereby declare that Suban Ahmed Abdinoor was validly elected.
79. Further and pursuant to section 34(10) of the *Elections Act* as read with section 75(3) *Elections Act*, I find and hold that the Party List as publicised in the standard Newspaper of July 27, 2022 is the



valid party list for the 2<sup>nd</sup> respondent as required under section 34 of the *Elections Act*. Any other list save as provided in this judgement in respect of Sokorey Maalim Isaakow (whose election has not been contested) is found null and void. This list shall be the list available for use by the 2<sup>nd</sup> respondent in the event vacancies arise under the marginalised category in the Mandera County Assembly.

80. Pursuant to paragraphs 75 and 79 of this judgement it follows that a necessary order is needed to enable the implementation of the orders in paragraph 76 and 78 above but preserving the nomination of Sokorey Maalim Isaakow whose nomination was not contested as noted above.
81. I hereby direct the 1<sup>st</sup> respondent to issue forthwith and publish a gazette notice electing Suban Ahmed Abdinoor to the County Assembly of Mandera to represent PWD under the marginalised category.
82. Section 86(1) *Elections Act* provides that an election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission and the Speaker. Consequently, the notice to issue forthwith to the Commission and the Speaker Mandera County Assembly is duly notified.
83. Looking at the nature of the proceedings herein and issues that came up for consideration which I find to be of public interest as it concerns the nomination of marginalised category of persons in the Mandera county Assembly; the court directs that each party will bear own respective costs in respect of both petitions.
84. I appreciate all the respective parties' counsels in this matter for cooperating with one another and the court to ensure expeditious, fair and just determination of the consolidated petitions.

**JUDGEMENT SIGNED, DATED AND READ VIRTUALLY VIA TEAMS PLATFORM THIS 2<sup>ND</sup> FEBRUARY 2023**

**P.W. WASIKE**

Senior Resident Magistrate

In the presence of

Court Assistant .....

For the Petitioner .....

1<sup>st</sup> respondent .....

2<sup>nd</sup> respondent .....

3<sup>rd</sup> respondent .....

