



Katangie v Orange Democratic Movement Party & 2 others; Nchoe & 2 others (Interested Parties) (Election Petition E005 of 2022) [2023] KEMC 7 (KLR) (20 February 2023) (Judgment)

Neutral citation: [2023] KEMC 7 (KLR)

**REPUBLIC OF KENYA
IN THE NAROK LAW COURTS
ELECTION PETITION E005 OF 2022
SM MWANGI, CM
FEBRUARY 20, 2023**

BETWEEN

HELLEN NAIRUKO KATANGIE PETITIONER

AND

ORANGE DEMOCRATIC MOVEMENT PARTY 1ST RESPONDENT

THE ODM NATIONAL ELECTIONS BOARD 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

AND

CYNTHIA SINTEI NCHOE INTERESTED PARTY

CHRISTNE M. LEMEN INTERESTED PARTY

THE CLERK, COUNTY ASSEMBLY OF NAROK INTERESTED PARTY

JUDGMENT

1. The petitioner lodged this petition dated 18th September, 2022 seeking the following orders:
 - a. Spent
 - b. A declaration that the 1st and 2nd Interested parties do not qualify to represent for nomination for gender top-up lists in County Assembly of Narok
 - c. A declaration do issue that the 1st and 2nd Interested parties herein whose nomination for Narok County Assembly gender top up were not validly nominated in accordance with the [Constitution](#) and the [Elections Act](#)



- d. A declaration do issue that to the extent that the respondents failed to implement the judgment and decree of the PPDT in consolidated Complaints No. 21 and 22 of 2022, in nominating the 1st and 2nd Interested parties herein, the same invalidated the said nominations
 - e. A declaration do issue nullifying the nomination of the 2nd interested party for failing to meet the minimum requirement for nomination for not being a member of any political party
 - f. A declaration do issue nullifying the nomination of the 1st interested party since she has benefitted from party nominations more than once contrary to Regulation 60(7) of the ODM Primary Rules, 2021
 - g. An order directing the 3rd respondent to revoke the nomination of the 1st and 2nd interested parties as nominees for the gender top up list in the County Assembly of Narok
 - h. A declaration do issue that fresh nominations be conducted by the respondent for Narok County Assembly gender top up list in compliance with the Constitution and the Election Laws
 - i. An order to the 3rd respondent to nominate duly qualified person to represent the gender minority in the County Assembly of Narok under Article 177(b).
 - j. The respondents, 1st and 2nd interested parties do bear the costs of this petition.
 - k. Such other orders, directions and or reliefs as the Honorable Court shall deem fit.
2. The petition was opposed by the respondents and the interested parties. The 1st and 2nd respondents filed a response to petition dated 1st October, 2022 together with a supporting affidavit sworn by Anthony Moturi Orwochi while the 3rd respondent filed a response dated 30th September, 2022. The 1st interested party filed a response dated 29th September, 2022 while the 2nd interested party filed a replying affidavit sworn on 4th October, 2022 by herself and the 3rd interested party filed a response dated 25th November, 2022. The court directed the parties to canvass the petition through written submissions which each duly filed

Petitioner's Submissions

3. The petitioner submitted that the 1st and 2nd respondents breached their own Constitution and Party Nomination Rules in nominating the 1st and 2nd Interested Parties for Narok County Assembly Gender Top Up List citing Article 90(1) of the Constitution of Kenya which provides that elections for the seats of members of county assemblies under Article 177(1)(b) and (c) shall be on the basis of proportional representation by use of the party lists. She added that under Article 90(2)(c), save for the county assembly seats, IEBC is responsible for the conduct and supervision for the election of the seats provided under clause (1) and shall ensure that each party list reflects the regional and ethnic diversity of the people of Kenya
4. She submitted that the Election Act, No. 24 of 2011 (hereinafter, "the Act") Section 34 provides that a party which nominates candidates for election under Article 177(1)(a) shall submit to IEBC a party list which shall be in accordance with the Constitution or nomination rules of the political party concerned and IEBC may by notice in the gazette issue regulations prescribing guidelines to be complied with in preparation of party lists. In compliance the 3rd respondent issued Gazette Notice No. 6378 of 3rd June, 2022 which prescribed that the said list must have the number of qualified nominees reflecting the number of wards in each of the respective County



5. She also referred to the *Political Parties Act* Section 34 which provides that one of the functions of the Registrar of the Political Parties is to certify that the names appearing in a party list are the names of members of the political party representing the party list. She added that Regulation 15 of the Elections (Party Primaries and Party Lists) provides that an aspiring candidate shall submit to an Election Board of the party, a duly filled application on Form 3A set out in the schedule. She then referred to ODM Party Rule 16(5)(b) and (d) which provides that a person seeking nomination for election as a party candidate for the position of a member of a county assembly shall be a member of a party for at least two years preceding the date of the General Elections and be a life member of the Party in good standing
6. Turning to Rule 60(5)(7) and (9) of the said Party Rules she stated that the Party List shall not contain the name of a candidate for an election, a name of a candidate who has benefitted from party list nominations more than once and thirdly each party shall reflect the diversity of the people of Kenya by location in regard to the applicable electoral area, gender, ethnicity, age, disability and other forms of marginalization. She then referred to Rule 63(9) of the same Party Rules which prescribes that the National Party List Nomination Committee shall fill the first five (5) positions in the County Assembly (Gender Equality) Party Lists in accordance with the law arguing that the rules do not specifically indicate that these 5 nominees are to be drawn from the party leadership. She cited the decision of the PPDT which made that pronouncement
7. The petitioner submitted further that from the foregoing as the 2nd interested party was previously nominated in the last Narok County Assembly term she is not eligible for nominations again and she referred to her bundle of documents where she has annexed extract of the Kenya Gazette No. 8380 Vol. CXIX-No. 124 which lists her as duly nominated for the term 2017-2022 and Kenya Gazette No. 10712 Vol. CXXIV- No.186 for the term 2022-2027
8. She went further to state that the 1st respondent failed to adhere to some standards in nominating members of the county assembly Party List which she submitted was pleaded and proved before the PPDT after she demonstrated that nominees 1,3 and 7 are from Narok North Constituency while the first nominee from Narok South is number 12 who is herself. She argued that this demonstrated a lack of some semblance of fairness in regional balance as some members of the party from one area were given priority to the exclusion of the others and relied in the decision of the Court of Appeal in the case of Isaack Osman Sheikh Vs Independent Electoral and Boundaries Commission & 2 Others [2014] e KLR .She went ahead to submit that the PPDT therefore directed the 1st and 2nd respondents to reconstitute the list on 21/08/2022 but they did not comply stuck to same listed of 27/07/2022 which makes the nominations be tainted with illegalities and irregularities and therefore no valid nominations would ensue
9. The petitioner then submitted that secondly the 2nd interested party is not a member of the ODM party and she relied on a letter dated 18/08/2022 which is on page 73 of her Bundle of Documents by the Registrar of Political Parties which disclosed that the said interested party did not belong to any political party. Her submission was that the nomination of the 2nd interested party was illegal ab-initio as she was not qualified for consideration
10. The petitioner submitted that the Notice of Nomination prescribed that the Party List must have the number of qualified nominees reflecting the number of wards in each of the respective County. She added that the Act also under Section 36(e) specifically provides that a party list submitted by any political party under Article 177(1)(b) of the *Constitution* shall include a list of the number of candidates reflecting the number of the wards in the County. Section 36(7) of the Act provides that the IEBC shall draw from the list under subsection (1) (e) such number of special seats members in the order given by the party necessary



The 1st And 2nd Respondents' Submissions

11. They submitted that the 1st and 2nd interested parties applied for party list nomination by ODM party and the duo was shortlisted by the Narok County Party Lists Committee of the ODM Party for nomination to the Narok County Assembly as follows:

- a. Hellen Nairuko Katange -No. 12
- b. Cynthia Sintei Nchoe – No. 1
- c. Christine M. Lemein – No. 3

The list was submitted to the 3rd respondent but it was challenged by the petitioner on various grounds among them being that the 1st and 2nd interested parties were current office bearers and current nominated MCA respectively. They added that the petitioner also challenged the nomination of several other proposed nominees to the Narok County Assembly before the ODM Appeals Tribunal and the Political Parties Disputes Tribunal.

12. They stated that the appeals were dismissed by the Appeals Tribunal and the PPDT save for the complaint that the ODM Party List did not reflect the face of Kenya and diversity in Narok County. This prompted the 1st and 2nd respondent to bump the petitioner to No. 9 in the party list bringing to three the number of nominees from Narok South in the top 9 positions of the party list. After the general election and as per the Gazette Notice exhibited by the petitioner the ODM Party, in the light of the ODM elected MCAs in the Narok County Assembly, was entitled to two (2) nominees in the Assembly in the Narok County Party List

13. They submitted further that the County Party List Nominations Committee only nominated those listed from nominee number 6 of the gender top-up list as provided in Rule 63 and the 1st and 2nd respondents were nominated in the slots reserved for party leadership who had a right of nomination like all the other members and this was acknowledged by the PPDT decision. They maintained that the list complied with the gender rule and the membership rule under the Constitution and the Political Parties Act. However owing to the ODM performance in the Election the party was only entitled to 2 nominees and despite her improved position on the list the petitioner could not make it to the top three gender top up nominees who were ultimately gazetted by the 3rd respondent

14. They also submitted that the courts have over the years emphasised the political party autonomy in nominating candidates and cited the Court of Appeal decision in the case of Linet Kemunto Nvakeriga & Another Vs Ben Njoroge & 2 Others [2014] e KLR and the case of Peter Muchiri Mwangi Vs IEBC [2018] e KLR.

15. While insisting that the 2nd respondent was nominated on the strength of her membership among other things, they referred to the National Executive Committee membership list where she appears at No. 8 as the vice-chairperson adding that she a life member and her identity card is No. 0101520 and not 101520 which is reflected in the letter from the Registrar of Political Parties- page 7 of the response to the petition. They referred to Section 17(1)(a) of the PP Act which stipulates that a political party is the custodian of all membership records of the party.

16. They submitted that the petitioner has not therefore discharged the burden of proof as exhaustively enunciated in the case of Raila Amolo Odinga & Another Vs IEBC & 2 Others [2017] e KLR. They quoted Section 107 of the Evidence Act and Halsbury's Laws of England, 4th Edition, Volume 17, paragraphs 13 and 14 which defines the legal burden of proof. They submitted that the 1st interested



party has not benefitted from nomination more than once and nothing bars her and nomination in the absence of evidence to the contrary by the petitioner

3rd Respondent's Submissions

17. IEBC submitted that Article 90 of Constitution bestows it with the responsibility for the conduct and supervision of election of seats for nomination and to ensure that each party nominates and sends a party list, indicating the appropriate number of qualified candidates and alternates between male and female candidates, in the priority in which they are listed. They referred to Article 177 of the Constitution which stipulates the composition of the County Assembly. They pointed out that paragraph (b) provides the number of seats necessary to ensure that no more than two thirds of the membership of the Assembly are of the same gender while Section 34(5) of the Political Parties Act-the Parties Act, directs that the party list shall be submitted in order of priority and shall not be amended during the term of Parliament or the County Assembly, as the case may be, for which the candidate are elected citing paragraph (10) of the Act
18. Turning to Section 36(9) of the Act they submitted that the allocation of the seats by IEBC shall be proportional to the number of seats won by the party under Article 177(1)(a) of the Constitution. They stated that they issued the formula for allocation of seats for the respective political parties from the party lists in Gazette Notice Number 6378 Vol. CXXIV No. 101 of 3rd June, 2022. The formula was the number of seats won by a party divided by the total number of seats multiplied by the available seats for allocation in the County Assembly of Narok.
- 19.. They added that four (4) members of the Narok County Assembly were elected on the 1st respondent's party ticket -Annexure CO4 page 30- and the party was accordingly allocated two (2) slots for the gender top-up and its nominated candidates being the 1st and 2nd interested parties were published in the Kenya Gazette No. 10712 Vol. CXXIV-Annexure CO5 page 30.
20. IEBC then cited the decisions in the case of Linet Kemunto (supra) and Peter Muchiri Mwangi (supra). They gave the details of the party list which was submitted by the 1st respondent positioning the 1st interested party as No. 1, 2nd interested as No. 3 and the petitioner as No. 12 and submitted that the decision of the PPDT which they have quoted did not direct the 1st respondent to remove the 1st and 2nd interested parties as number one and three and list the petitioner as number one.
21. They also submitted that the issues raised by the petitioner are res judicata citing Section 7 of the Civil Procedure Act arguing that the issues raised before the PPDT which were considered and determined are the same ones which have been raised in this petition. They have argued that as the issues are the same and the parties are also the same as raised here they are therefore res judicata as they have been determined by a competent Tribunal
22. They further argued that the petitioner has raised pre-election nomination issues arguing that the PPDT is the body clothed with jurisdiction to determine pre-election disputes. They proceeded to cite the Supreme Court case Silverse Lisamula Anami Vs IEBC & 2 Others Petition No. 30 of 2018. They argued that the petitioner failed to enjoin the interested parties in the matter before the PPDT adding that their nomination was not challenged and the tribunal did not find anything against them. They argued that if there was any dispute relating to their nomination the same should have been resolved by the PPDT adding that the petitioner should now live with the choices of her political party. On the issue of res judicata they relied in the decision in the case of Samuel Ndiba Kihara & Another Vs Housing Finance Company of Kenya Limited & 2 Others [2006] e KLR and Margaret Wanjiru Ileri & 2 Others Vs Monica Gathoni & 4 Others [2018] e KLR Election Appeal No. 13 of 2018



1st Interested Party's Submissions

23. She submitted that her nomination for the Narok County Gender Top-Up List was done in compliance with the Constitution, Election Laws and the ODM Party Rules. She cited the case of Moses Mwicigi & 14 Others Vs IEBC (2015) e KLR which held that Article 90 of the Constitution bestows upon IEBC the duty to conduct and supervise the nominations...She then referred to Article 177(1) (b) and 177(2) of the Constitution and Sections 34(2), (8) and 36(2) of the Elections Act which sets out the process of the nominations which a party must comply with. She stated that she is a registered voter and life member of the 1st respondent and applied for consideration to the Narok County Gender Top-Up List as required under Section 59 of the 1st respondent's Primaries and Nomination Rules, 2021 and having met the general requirements under Article 193 of the Constitution, Section 25, 60 and 34(8) of the Election Act she was duly nominated to the list and ranked number 1 while the petitioner was ranked number 12.
24. She denied having applied to be nominated in the previous term and hence never served as a nominated MCA then. She submitted further that the allegations by the petitioner that only Narok North has benefitted from the nominations was dealt with by the PPDT which held that nominees 1,3 and 7 were from Narok North.
25. She submitted that the issue of the burden of proof was addressed by the Supreme Court in the case of Mohammed Mahamud Ali Vs IEBC [2019] e KLR which referred to its decision on the issue in the case of the Raila Odinga & 2 Others Vs IEBC & 3 Others Petition Number 5 of 2013. She submitted further that from an overall look of list contested by the petitioner it is impossible to know the sub-counties of the individuals who are listed therein thereby contending that the petitioner has not discharged the burden by demonstrating where they hail from. She added that members of the County Assembly are elected from all wards so the issue of overrepresentation cannot arise and further that the Article 177 aforesaid aims at ensuring that not more than two thirds of the membership of the Assembly are from one gender
26. She also submitted that the 1st respondent duly reconstituted the list as directed by the PPDT and the petitioner was one of the beneficiaries who was moved from number 12 to 9 in the final list but as the 1st respondent was entitled to only two nominees in Narok County not all the applicants could be nominated. She insisted that the party list was well constituted and her nomination was valid adding that the respondents' mandates under the Constitution and the Electoral Laws were well discharged and cited the decision in the case of Asha Abdi Vs IEBC & 2 Others [2018] e KLR

2nd Interested Party's Submissions

27. She submitted that there was no opportunity for representatives from all the five sub-counties to be represented since the 1st respondent had only two nomination slots after the elections were conducted echoing the submissions of the respondents regarding the process of nominations as envisaged by Article 90 and 177 of the Constitution and Sections 34 and 36 of the Act. She referred to the decision in the case of Lydia Nyaguthi Githendu Vs IEBC & 17 Others [2015] e KLR Civil Appeal 224 of 2013 [cited in the case of Rose Moturi Mwene Vs IEBC & 3 Others [2018] e KLR] on the issue of the nominations
28. She insisted that she is a life member of the 1st respondent and even took part in the party primaries vying for the MCA seat for Narok Town and referred to her documents annexed to her affidavit in support of her response and further affidavit. She stated that on the issue of petitioner's claim that the 1st and 2nd interested parties benefitted more than once under Regulation 60(7) of the ODM Party



Primary Election Rules, 2021 the petitioner has only cited a single previous nomination of the 1st interested party to the County Assembly which does not amount to benefitting more than once.

29. She added that the same issue was raised before the PPDT but the ground was not upheld. She echoed the respondents' argument that the PPDT did not direct that she be removed from the party list but directed that the list be reconstituted or that the petitioner be placed at a specific position so the 1st respondent was not under an obligation to place her at the top of the list. She cited the case of Margaret Nyathogora & 5 Others Vs IEBC & 14 Others [2028] e KLR Election Petition No. 2 of 2017 where the court declined to revoke the nomination of several MCAs through a party list despite finding that the Jubilee Party had failed to comply with the orders of the PPDT...She was emphatic that the party list is owned by the party that has prepared it and cited the decisions in the case of Lydia Mathia Vs Naisula Lesuuda & Another [2013] e KLR and Margaret Nyathogora (supra)
30. She further submitted that this court is not empowered to enforce the orders of the PPDT or punish a party for disobedience or non-compliance insisting that the PPDT has the same powers to enforce its decisions in the same manner a magistrate's court can enforce its orders citing the holding in the case of Duncan Ochieng & 3 Others Vs Orange Democratic Movement Party [2017] e KLR Miscellaneous Election Petition Application 4 of 2017. She insisted that she was validly nominated and gazetted as a Member of County Assembly Narok and the same was not invalidated by the failure to comply with the orders of the PPDT
31. She submitted that on the issue of costs Section 84 of the [Elections Act](#) provides that the same is within the discretion of the court which should be guided by the principles of fairness, justice and access to justice as pronounced in the case of Martha Wangari Karua Vs IEBC & 3 Others, Election Petition Appeal No. 1 of 2017

Submissions Of The 3rd Interested Party

32. The 3rd interested party cited Article 177 of the [Constitution](#) which establishes the composition of the county assemblies and Article 90(1) which provides that for the members of the county assemblies under Article 177(1)(b) and (c) shall be on the basis of proportional representation by the use of the party lists and the enforcement is on the 3rd respondent. They further quoted Article 193(1) which sets out the qualifications for one to be eligible for election as a member of a county assembly which includes nomination by a political party and Section 34 of the Act which provides for the nomination of party list members
33. They also cited the case of Linet Kemunto (supra) which held that IEBC must adhere to the to the priority of the names as given by the parties since the same is a closed list. They further cited Section 36(7) of the Act which provides for the allocation of the special seats by itself and quoted the case of The National Gender and Equality Commission Vs IEBC & Another which defined the role of IEBC in the process and stated that it must ensure that the list meets the Constitutional and Statutory criteria
34. They also cited Regulation 54, 55 and 56(1) on the party lists requirements and the criteria and stated that following the concluded elections of 9th August, 2022 the 3rd respondent using the allocation formula allocated the 1st respondent two slots for the nomination to the County Assembly of Narok under the gender top-up category and the same were allocated to the 1st and 2nd interested parties who were the two top candidates of female gender. The two were sworn in on 21/09/2022 during the first sitting of the County Assembly which was gazetted by the Governor of the County Government of Narok



Determination

35. From the pleadings and the submissions of the parties the following are the issues which invite determination:
- a. Whether the 1st and 2nd respondents breached their own Constitution and Party nomination rules in nominating the 1st and 2nd interested parties for Narok County Assembly Gender Top-Up List
 - b. Whether the 3rd respondent was in breach of the Constitution and or other electoral laws in gazetting the 1st and 2nd interested nominees for the Narok County Assembly Gender Top-Up List
 - c. Whether the 1st and 2nd interested parties were validly nominated for the position of Narok County Assembly Gender Top-Up List
 - d. Whether the PPDT directed the 1st respondent to list the petitioner as number one on the Narok County Assembly Gender Top-Up List
 - e. Whether the issues raised in the petition are res judicata and/or raise pre-election nomination issues and what is the import of the PPDT Judgment on the nomination of the 1st and 2nd respondent
 - f. Whether the petitioner deserves the reliefs which she is seeking and finally
 - g. Who should bear the costs of the petition
36. I will handle the issues not necessarily in the order which I have listed them above for reasons which will become apparent later
- Whether the petition raises pre-election issues which are also res judicata and import of the PPDT decision
37. This issue was raised by the 3rd respondent and to determine it, I have sought guidance from the following authorities
- a. David Okeka Oyugi Vs. Muslim Dida & 2 Others [2016] e KLR
 - b. Moses Mwicigi & 4 Others Vs. IEBC [2016] e KLR
 - c. Monicah Gathoni Githae & Anor Vs. IEBC & 5 Others
 - d. Rose Wairimu Kamau & 3 Others Vs. IEBC C.A. No. 169 of 2013 which was quoted in the case of:
 - e. Independent Electoral Boundaries Commission Vs Jane Cheperenger & 2 Others Supreme Court Petition No. 5 of 2016 (UR)
 - f. Jaldesa Tuke Deballo Vs. IEBC & Anor [2015] e KLR
40. There is no dispute on the fact that this court has jurisdiction to hear election petitions arising from the election of a member of a County Assembly by dint of Article 169 of the Constitution of Kenya and Section 75(1)(A) of the Elections Act after been designated and gazetted by the Honourable Chief Justice to determine election disputes. In regard to this petition this court has been specifically gazetted to hear and determine it



41. In the case of *Orange Democratic Movement Vs Yusuf Ali Mohamed & 5 Others* [2018] e KLR the superior court held that this court has original jurisdiction to hear and determine disputes from post-gazettement election disputes on membership of County Assemblies and these includes where the substance of the dispute arises from or is related to nomination or elections. This position is also echoed by the Court of Appeal in the case of *Rose Wairimu Kamau & 3 Others Vs IEBC*, CA No. 16 of 2013 and *Jaldesa Tuke Deballo Vs IEBC & Another* [2016] e KLR
42. In the case of *Moses Mwicigi & 14 Others Vs IEBC & 5 Others* [2016] e KLR the Supreme Court stated and I quote:
- “ [106] The Gazette Notice in this case, signifies the completion of the “election through nomination” and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates returning officer’s mandate, and shifts any issue as to the validity of results from IEBC to the Election Court.
- [107] It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of the County Assembly.” (emphasis)
43. The same court also pronounced itself on the same matter in the case of *Independent Electoral Boundaries Commission Vs Jane Cheperenger & 2 Others* Supreme Court Petition No. 5 of 2016 (UR) when it stated and I quote:
- “ At this juncture, we reiterate and affirm that, upon gazettement of nominated members of County Assemblies, any aggrieved party would have to initiate the process of challenging the said nominations by filing an election petition at the Resident Magistrate Court under Section 75 of the Election Act. In this instant matter therefore, upon the gazettement of the 3rd respondent as a nominated member of the County Assembly for Bungoma County, any aggrieved party ought to have filed an election petition before an Election Court. It is only upon filing and determination by an Election Court, and where a matter rises through the ordinary appellate process, that other courts in the judicial hierarchy can rightly assume jurisdiction with powers to give any consequent orders. To this extent therefore, we agree with the petitioner and the 3rd respondent that indeed the Court of Appeal had no jurisdiction to revoke the nomination and election of the 3rd respondent or to issue any other consequent orders.”
44. The petitioner is pleading with this court to consider the nomination of the 1st and 2 interested parties who were declared validly nominated vide Gazette Notice No. 10712 Vol. CXXIV- No. 186 of 9th September, 2022 challenging the qualifications of the said parties, coupled with the validity and legality of the whole exercise. She is seeking the nullification and revocation of the same and an order directing the repeat of the exercise. The petition is therefore anchored on the said Gazette Notice and to quote the case of *Moses Mwicigi* (supra) its publication signified the completion of the “election through nomination” and marked the end of the mandate of IEBC regarding the party representatives.
45. The verdict of the Supreme Court in the said cases of *Moses Mwicigi* (supra) and *Jane Cheperenger* (supra) was categorical that any consequential dispute regarding the gazetted nominations was shifted



to the election court thus affirming the mandate of this court to entertain and determine the current dispute on whether the 1st and 2nd respondents were validly and legally nominated or not

46. This now puts to rest the issue of the jurisdiction of this court and the role of PPDT which preceded the gazettelement of the 1st and 2nd interested parties as members of the Narok County Assembly. The bottom line is the merit or otherwise of the petition

The burden of proof

47. The burden of proof lies on the petitioner to prove that she deserves the orders which she is seeking and on this Section 107 of the Evidence Act is categorical that:

- (a) 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
- (b) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person Section 109 and 112 of the Evidence Act

Section 109:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence”

Section 112:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”

48. The case of the Raila Odinga & 2 Others Vs IEBC & 3 Others Petition Number 5 of 2013 (supra) has stated who bears the burden of proof and the degree of the proof when it pronounced itself thus:

“...a Petitioner should be under obligation to bear 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”

Did the 1st and 2nd respondents breach their own Constitution and Party Rules

49. The petitioner is challenging the nomination of the 1st and 2nd interested parties on the ground that it contravened Regulation 60(7) of the ODM Party Primary Election Rules, 2021 which prohibits the nomination of a candidate who has benefitted from party list nomination more than once. In her response to the petition the 1st interested party denied having even applied, let alone serving, as a nominated MCA in the previous term and no evidence was availed by the petitioner to rebut the denial. On the other hand, the petitioner documents attached to the petitioner’s affidavit only reveal that it is the 2nd interested party who was nominated as an MCA during the 2017-2022 term. She has not attached any to establish that the same applied to the 1st interested party so the averments regarding her must fail for lack of proof
50. Turning to the 2nd interested party to reiterate, she admitted that she did serve as a nominated MCA in the previous term but her rejoinder is that the present nomination is not barred by the said Rule 60



because she has not benefited more than once. She has benefitted only once to put it in simple terms so in the absence of evidence to the contrary this ground must also fail

Whether the 1st respondent conducted the nominations fairly and lawfully

51. The petitioner while citing the judgment of the PPDT submitted that the 1st respondent flouted its own rules and regulations adding that although the rules do not specifically indicate that these 5 nominees are to be drawn from the party leadership. A clear reading of the Rule discloses that the National Party Lists Nomination Committee is allowed to choose who is to fill the 5 slots, provided that this is done in accordance with the law. The 1st respondent challenged the petitioner's averment and submitted that there is no rule in the ODM party rules which bars the nomination of the party officials. The respondents buttressed their submission by citing the holding in the case of Linet Kemunto Nvakeriga (supra) which amplified the autonomy of the party while nominating its candidates. The petitioner did not offer any evidence or make any reference to any specific rule of the party to surmount the rebuttal put forth by the 1st respondent so this averment also collapses

Whether the 3rd respondent was in breach of the Constitution and or other electoral laws in gazetting the 1st and 2nd interested nominees for the Narok County Assembly Gender Top-Up List

52. The petitioner submitted that the 1st respondent failed to comply with the order of the PPDT to reconstitute the party list which did not comply with the party's constitution and the party rules. The rejoinder of the 1st respondent was that they complied and reconstituted the list and placed her number 9 up from 13. The 1st respondent stated that on oath vide the affidavit sworn by director legal services Antony Orwochi Moturi and this was not contested or rebutted by the petitioner

Whether the PPDT directed the 1st respondent to list the petitioner as number one on the Narok County Assembly Gender Top-Up List

53. The petitioner did not aver that the PPDT directed that she be placed as number one on the said list but this was inferred by the respondents and the interested parties following her failure to be nominated. This issue cannot be divorced from the averment that the nomination of the 1st and 2nd interested parties contravened the Constitution, the Electoral Laws and the Party Nomination Rules. The order which is cited in the submissions did not direct that the petitioner be placed as number one on the Party Top-Up List but directed that the party in the exercise of its discretion should consider the 1st complainant, meaning the petitioner, being the top nominee from Narok South.
54. The order did not also direct the 1st respondent to remove the 1st and 2nd interested parties from their respective numbers and this is informed by the fact that the PPDT could not interfere with the party's autonomy while exercising its discretion while nominating the members who it deemed fit to advance its interests in the County Assembly. [see the decisions in the case of Linet Kemunto (supra) and Peter Muchiri Mwangi (supra)]

Were the 1st and 2nd Interested Parties validly nominated

55. From the foregoing it is clear that in the absence of any evidence to prove that the nomination of the 1st and 2nd interested parties did violated any provision of the Constitution of Kenya, 2010 any Electoral Laws, the Constitution and the rules of the 1st respondent or failed to abide by the orders of the PPDT then the petitioner has failed to discharge the burden which is explicitly elucidated in the case of Raila Odinga & 2 Others Vs IEBC & 3 Others Petition Number 5 of 2013 (supra)

19. Reliefs and Orders of the Court



- a. The prayers b, c, d, e, f, g, h, I, j and k in the petition are denied
- b. A declaration is issued that the 1st and 2nd interested parties qualified for nomination for the gender top up lists in the County Assembly of Narok
- c. The 1st and 2nd interested parties were validly nominated as Members of the County Assembly of Narok in accordance with the Constitution of Kenya, 2010 and the Election Laws
- d. A certificate to issue accordingly under Section 86(1) of the Elections Act, 2011

Who bears the costs of this Petition

56. Section 84 of the Election Act provides;

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause”

57. Rule 30(1) of the Election Petition (Parliamentary and County Elections) Petition Rules, 2017 provides:

30

- (1) The election court may, at the conclusion of a petition make an order specifying-
 - a. the total amount of costs payable;
 - b. the maximum amount of costs payable;
 - c. the person who shall pay the amounts in (a) and (b); and
 - d. the person to whom the amounts payable under paragraphs (a) and (b) shall be paid

58. On the issue of costs, the petitioner respondents, the 1st and 2nd interested parties do bear the costs. The 1st respondent submitted that the sums deposited by the petitioner as security for costs should be equally shared between the respondents’ advocates on record as they await to pursue the balance of the costs. The 2nd and 3rd respondents pleaded for the costs to award them the costs by dint of Section 84 of the Election Act and Rule 30(1) of the Election Petition (Parliamentary and County Elections) Petition Rules, 2017

59. The 1st interested party pleaded that the petition be dismissed with costs while the 2nd interested party urged the court to be guided by the case of Martha Wangari Karua (supra) which they have cited on the issue of costs aforesaid. The 3rd interested party pleaded that the petition be dismissed with costs

60. Guided by the law on costs as specified above I proceed to find and direct that as the costs follow the cause the costs are awarded to the respondents who are the successful parties in this petition. I do not find any justifiable ground to deny them the same.

The right of appeal is explained

SAMWEL M.MUNGAI

CHIEF MAGISTRATE NAROK

RULING DELIVERED DATED AND SIGNED IN OPEN COURT VIA TEAMS LINK THIS 20TH FEBRUARY, 2023 IN THE PRESENCE OF:



Petitioner represented by Maina

1st Respondent & 2nd Respondents represented by Nderitu

3rd Respondent represented by Opwaka

1st Interested Party represented by M/S Orego

2nd Interested Party represented M/S Naibei h/b for Mrs Rotich

3rd Interested Party- Absent

Crt. Asst.-Dennis

