



**Nkowua v Independent Electoral and Boundaries Commission & 4 others (Election
Petition E004 of 2022) [2023] KEMC 8 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEMC 8 (KLR)

**REPUBLIC OF KENYA
IN THE NAROK LAW COURTS
ELECTION PETITION E004 OF 2022
SM MWANGI, CM
FEBRUARY 28, 2023
IN THE MATTER OF ARTICLES 90,100 AND 177 OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF SECTIONS 34 AND 36 OF THE ELECTIONS AC,
NO.24 OF 2011
AND
IN THE MATTER OF SECTION 7 OF THE COUNTY GOVERNMENT
ACT, 2012
AND
IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND
COUNTY ELECTIONS) PETITION RULES, 2017
AND
IN THE MATTER OF REGULATION 20 OF THE ELECTIONS (PARTY
PRIMARIES AND PARTY LISTS) REGULATIONS, 2017
AND
IN THE MATTER OF THE NULLIFICATION OF THE AMANI
NATIONAL CONGRESS (ANC) PARTY'S NAROK COUNTY GENDER
TOP UP NOMINATION LIST**

BETWEEN

JENNIFER LANOI NKOWUA PETITIONER

AND



**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

LILIAN MURINGO MBUTHIA 2ND RESPONDENT

AMANI NATIONAL CONGRESS 3RD RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF NAROK 4TH RESPONDENT

THE SPEAKER, COUNTY ASSEMBLY OF NAROK 5TH RESPONDENT

JUDGMENT

1. The petitioner lodged this petition dated 16th September, 2022 seeking the following orders:
 - a. A declaration that the 3rd respondent's political party gender top up list with respect to nominations to the County Assembly of Narok runs contrary to the established tenets as to equality proportional representation of all wards, is undemocratic and lacks inclusivity as it violates Articles 100 and 177 of the Constitution as well as Sections 34 and 36 of the Elections Act
 - b. The Honorable Court be pleased to issue an order quashing and/or invalidating Special Gazette Notice Vol. CXXIV- NO. 86 of 9th September, 2022 to the extent that it specifies that the 2nd respondent is validly nominated and/or elected member of ANC Party to the County Assembly of Narok
 - c. The Honorable Court be pleased to issue an order that the 1st respondent to re-consider and nominate the appropriate gender top-up candidate to the 4th respondent in accordance to the list of persons submitted to it by the 3rd respondent in full appreciation that the said person to be so nominated must be a resident of and a voter from the County of Narok
 - d. The Honorable Court be pleased to award the costs of this petition to the petitioner
 - e. Such other or further or incidental orders, reliefs and or remedies as the Honorable Court shall deem just and expedient
2. The petition was opposed by the respondents vide a response dated 24th November, 2022 by the 1st respondent, a response dated 14th November, 2022 for the 2nd respondent and a joint response dated 25th November, 2022 for the 4th and 5th respondents together with an affidavit in support sworn on 28th November, 2022 while the 3rd respondent did not file any response. The gist of the responses by the 1st, 2nd, 3rd, 4th and 5th respondents was that the petition is lacking in merit and should be dismissed. The court directed the parties to canvass the petition through written submissions which each duly filed

Petitioner's Submissions

3. The petitioner submitted that this petition arises out of the 3rd respondent's political party gender top up list of persons to serve as nominated members of the 4th respondent. The petitioner cited Article 90 and 177 of the Constitution as read with Section 34 of the Elections Act- the Act-, the constitution of the 3rd respondent and nomination rules while arguing that the 2nd respondent ought not to have been nominated because:



- a. Her name was never forwarded for nomination by the Narok branch of the 3rd respondent, she never applied to be nominated and is not a registered member of the 3rd respondent
 - b. The 2nd respondent is not and has never been a resident or registered voter in Narok County and she is registered as a voter at Raimu Primary School, Baragwi Ward, Gichugu Constituency in Kirinyaga County and
 - c. Her nomination disenfranchises able residents and voters of Narok County who are better placed to agitate for the interests of the County as opposed to an outsider
4. The petitioner argued that the 1st respondent did not address the allegations in the petition since it only outlined the process on how the party lists were submitted up until when it gazetted the successful nominees to either the Parliament or the 47 County Assemblies. She then stated that the letter from the Chief of Narok Town dated 11th November, 2022 produced by the 2nd respondent indicating that she has been a resident of the town is not true pointing out that the date is written by hand, it does not disclose the duration the said respondent has resided in the town as the wife of Christopher Kuntai Sankei as indicated therein and there is no certificate of marriage to reveal when their marriage was solemnized. The petitioner added that the 2nd respondent secured the letter three months after this petition was lodged to hoodwink the court that she is a resident of Narok County
 5. Turning to her replying affidavit where the 2nd respondent avers that she became a member of the 3rd respondent in year 2022 and was issued with membership No. ANC138114979 the document marked MC3 from the Registrar of Political Parties show that her membership No. is ANC28154739 and it does not disclose when she became a member but confirms her residency as Baragwi Ward aforesaid.
 6. Turning to her application for nomination the petitioner stated that the 2nd respondent in her affidavit indicated that she made the same in June, 2022 but is dated 25th May, 2022 but it is not plausible and looks fishy that the same was made and approved on the same day. The petitioner added that the exact date when the 2nd respondent became a member is not clarified since in her application, she had indicated that she was a member for three years when she made the application. The petitioner added that the application as produced was incomplete and the signature of the 2nd respondent on it differs with the one in the replying affidavit
 7. The petitioner submitted that the party list cannot stand since it is contrary to established tenets as to equality proportional representation of all wards citing the decision in the case of Rose Wairimu Kamau and 3 Others Vs IEBC [2013] e KLR. In that case the court held that nominations to the party list to the County level must reflect the diversity of the communities of the concerned County. She also cited the case of Commissioner for the Implementation of the Constitution Vs Attorney General & 2 Others [2013] e KLR which echoed the same position
 8. She submitted further that although Article 90 aforesaid does not require that the party list reflect regional and ethnic diversity, the Court of Appeal held that a such list can be interfered with where the requirements of intra-county ethnic or regional balance, inclusivity and diversity are flouted by the parties citing the decision in the case of Isaack Osman Sheikh Vs Independent Electoral & Boundaries Commission & 2 Others [2014] e KLR
 9. She also referred to Section 7 of the County Government Act which she argued bounds the 3rd respondent to ensure that in nominating members to the 4th respondent the community and cultural diversity of Narok is reflected and there is adequate representation to protect the minorities in accordance with Article 197 of the Constitution adding that the 2nd respondent cannot be representing the interests of the people of Narok



The 1st Respondent's Submissions

10. The 1st respondent submitted that it has the legal mandate under Article 90 to conduct and supervise elections for the allocation of seats on the basis of the proportional representation through the nomination of candidates by political parties by use of party lists. It stated that the Elections (General) Regulations 2017 – the General Regulations- were promulgated to guide it and the political parties on the nomination process. It added that Regulation 54(1) provides that each political party shall submit to it all persons who would stand elected if the party were entitled to seats in the National Assembly, the Senate or the County Assembly as the case may be on the basis of proportional representation in accordance with Article 90
11. It submitted further that Regulation 55(1) provides that the list should be prepared in accordance with nomination rules of the party and once it certifies that the list is compliant it should publish it to comply with Regulation 56. It added that the 3rd respondent submitted a list which contained the 2nd respondent as a nominee and it was published in the Standard and Star Newspapers per Regulation 54(8) as demonstrated in the supporting affidavit of its legal director sworn on 24/11/2022. The members of the public were then invited to lodge any complaint against the nominees to it and the PPDT- Political Parties Disputes Tribunal- but none was lodged against the 2nd respondent
12. The 1st respondent argued further that the dispute herein is purely a political party dispute between the petitioner and the 3rd respondent and it therefore lacks the mandate to address it as it is obligated to strictly follow the party list as submitted in the order of priority of the nominees as they appear on the party list and it duly complied with it. It cited the Court of Appeal decision on the issue in the case of Aden Noor Ali V Independent Electoral & Boundaries Commission & 2 Others [2018] e KLR
13. The 1st respondent argued further that the petition is fatally and incurably defective for breach of mandatory provisions of Article 87(3) of the Constitution, Section 77(2) of the Act and Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules, 2017- The Petition Rules, 2017- which contemplate a proper service to be either be by direct service or through advertisement vide a newspaper of nationwide circulation and neither was complied with. It cited the case of Abdikham Osman Mohamed & Another V Independent Electoral & Boundaries Commission & 2 Others [2013] e KLR which defined what amounts to proper service. It also argued that the Civil Procedure Act and Rules made thereunder do not apply in disputes relating to election disputes and cited the case of Richard Nchapi Leiyagu Vs Independent Electoral & Boundaries Commission & 2 Others [2013] e KLR

The 2nd Respondent's Submissions

14. She reiterated the submissions of the 1st respondent which boiled down to the fact that she was validly nominated by the 3rd respondent which forwarded her name to the 1st respondent who then nominated her after ensuring that all the legal requirements were complied with. She submitted that she is a registered voter and made an application to be nominated thereby complying with the requirements of Article 90, 177 and 193(1) of the Constitution of Kenya and Sections 34 and 36 of the Act. She added that she also complied with the nomination rules of the 3rd respondent. She referred to the documents attached to her affidavit to assert that she is a resident of Narok County where she is married as confirmed by the letter from the Chief of Narok Town.
15. She added that although Article 90(2) of the Constitution exempts County Assemblies from ethnic diversity prescriptions for party lists, Narok County is unique in the sense that it has concentrations of different ethnic identities which ought to be included in the party lists to reflect the face of the County.



- She accused the petitioner of attempting to victimize her by virtue of her tribe and sensationalizing the issue in the local media thereby discriminating and profiling her for hate contrary to Article 27 of the Constitution.
16. She stated that the said Article does not preclude the nomination of a person on the basis of ethnicity adding that Article 100 provides for the ethnic minorities and marginalized communities and nominations are meant to cater for the interests of the people who are represented by either election or nomination in particular assembly. Turning to the case of Isaack Osman Sheikh (supra) which is cited by the petitioner she contended that it actually supports her nomination stating that the Court of Appeal refused to interfere with the party list merely because a name of a certain tribe in that County was not submitted to IEBC.
 17. She submitted further that the petitioner is obliged to present cogent and credible evidence in support of the contested facts citing Sections 107 up to 112 of the Evidence Act. She also referred to Election Petition No. 13 of 2013; Lydia Mathia Vs. Naisura Lesuda and IEBC and Raila Odinga -Vs- IEBC & 3 Others, Election Petition No. 5 of 2013. She also referred to the case of Commissioner for the Implementation of the Constitution (supra) cited by the petitioner adding that the two principles mentioned therein are exclusive of each other and ought to be considered equally and one should not be held above all else. She drew the attention of the court to the finding by the court that the Constitution does not define the marginalized but that they include those whose interests have not been taken care of by election process and included the ethnic minority adding that the intention of the nomination is to avoid entrenching tribal hegemony
 18. She asserted that she is married to one Christopher Sankei who is a resident of Narok explaining that she registered as a voter in her home area using her national identity card as she had travelled and the deadline for registering was going to expire before she returned to Narok. She cited the C.M. Nanyuki case of Dennis Kaniaru Mathenge Vs IEBC & 7 Others [2018] e KLR where the court held that voter registration does not make an individual a resident of that area and by dint of Article 38(3) a person has a right to be registered as a voter which is not limited to any county or constituency
 19. The 2nd respondent submitted further that this petition is incompetent, incurably and fatally defective and relied on Article 88(4), Section 35 of the Act, Regulation 16(4) and (5) of the Elections (Party Primaries and Party List) Regulations, 2017 and Sections 39 and 40 of the Political Parties Act which establishes a dispute resolution procedure that must be strictly followed before a matter is brought to this court. She argued that as the petitioner failed to lodge complaints before the IEBC and the PPDT this court therefore does not have jurisdiction to entertain this matter which has been overtaken by events. She cited the case of Moses Mwicigi & 15 Others (supra)
 20. She stated further that the petitioner did not seek leave to file the further affidavit as required by law and urged the court to strike it out citing the case of Shiyenji Silas Muyeyia & Another Vs Benson Manuni Mulinya & 2 Others [2017] e KLR where the 1st petitioner filed a response and a further affidavit without leave arguing that he was adversely mentioned by the 2nd petitioner and deemed it appropriate to answer in rebuttal but the response and further affidavit were struck out.
 21. She submitted that on the issue of membership of a political party only the political party can tell when a party joined its ranks citing the case of Florence Bwogi Ochieng Versus Orange Democratic Movement Party [2017] e KLR adding that Section 34(8) of the Act stipulates that to be eligible for nomination a person should be a member of a political party on the date of submission of the party list by the party



The 4th & 5th Respondents' Submissions

22. They submitted that although the petitioner opposes the nomination of the 2nd respondent one does not need to be a resident of Narok to be nominated. They referred to the procedure set out for nominations of members by political parties in regard to gender top up list in compliance with the Election laws and Political Parties Act to the 1st respondent. They added that they do not have any authority whatsoever under the law to dictate to the political parties on how to draw up their nomination lists
23. They echoed the submissions of the other respondents that the 2nd respondent was validly nominated and cited Article 193 of the Constitution, Section 34 of the Act, Section 17 of the Political Parties Act, 2017 and Regulation 54 and 55 of the Election (General) Regulations, 2012. They also cited the case of National Gender and Equality Commission Versus IEBC (2013) e KLR where the court outlined the process and requirements of the nominations. They further referred to the case of Margaret Wambui Kamau Versus IEBC & Another [2013] e KLR and Moses Mwicigi & 14 Others (supra) where the court pronounced the mandate of the political parties to nominate the members while the role of IEBC is to ensure that the lists submitted comply with the Constitution and electoral law and regulations
24. They submitted further that there is a presumption that once the 1st respondent receives and accepts the party list as it is, it is deemed to be compliant with the Constitution, Electoral Law and Regulations and it is also legitimate expectation that by the time the list is gazetted by the 1st respondent all the parties involved have verified the compliance and this is the case with the nomination of the 2nd respondent. They added that under Regulation 54(8) they are only notified of the nomination through the Gazette Notice published by the 1st respondent and their only duty is to swear in the nominees
25. The petitioner filed a further affidavit without the leave of the court even after the court had explicitly denied her the right to rejoiner for failing to meet the set timelines for the filing of her submissions. This was meant to avoid delaying the disposal of this petition and occasioning inconveniences to the respondents who were ready to file their submissions but were forced to wait when the petitioner failed to serve her submissions on them on time per the set timelines

Determination

26. From the pleadings and the submissions of the parties the following are the issues which invite the court's determination:
 - a. Whether the 2nd respondent was lawfully and validly nominated as a member of Narok County Assembly Gender Top-Up List
 - b. Whether this petition is incompetent, incurably and fatally defective
 - c. Whether the petitioner's further affidavit should be struck out
 - d. Who should bear the costs of this petition

I will handle the issues but not necessarily in the order which I have listed them above for reasons which will become apparent shortly.

The burden of proof

27. 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”

28. The obligation to be surmounted by the petitioner in this case was succinctly captured by the Supreme Court in the case of the Raila Odinga & 2 Others Vs IEBC & 3 Others Petition Number 5 of 2013 (supra) when it stated that:

“...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”

Whether this petition is incompetent, incurably and fatally defective

29. This issue was raised first by the 1st respondent on the ground that there was no proper service and therefore offended Article 87(3) of the Constitution of Kenya. He referred to the case of Abdikham Osman Mohamed (supra) which defined what amounts to proper service. This court had occasion to deal with the issue which was raised through the preliminary objection- PO – dated 1st November, 2022 by the 1st respondent and a ruling on the issue was delivered on 14th December, 2022. It appears the 1st respondent is inviting the court to revisit and review its decision on the issue. The court cannot review the ruling at this juncture as it would be tantamount to an ambush to the other parties who have not been given notice and the chance to resubmit on the same.
30. Turning to the ground which the 2nd respondent is relying on it is basically whether this court has the requisite jurisdiction or not to entertain this petition. 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
31. 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
 32. 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
 33. 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)
 34. 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.”



35. The petitioner herein is pleading with this court to consider the nomination of the 2nd respondent who was declared validly nominated vide Gazette Notice No. 10712 Vol. CXXIV- No. 186 of 9th September, 2022 challenging her qualifications coupled with the validity and legality of the whole exercise. She is seeking the quashing and/or invalidation 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.
36. 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 2nd respondent was validly and legally nominated or not. This now puts to rest the issue of the jurisdiction of this court and the bottom line is the merit or otherwise of the petition

Was the name of the 2nd respondent forwarded for nomination

37. The petitioner pleaded and submitted that the name of the 2nd respondent was never presented by the 3rd respondent to the 1st respondent for nomination. She also deponed the same in her affidavit but she never presented any evidence to establish that fact. The onus is on her to prove this ground and more so because the respondents on the other hand were categorical that the name was forwarded. They relied on the affidavit of the legal director of the 1st respondent which averred that the name was forwarded and published in the dailies to notify any person who was opposed to it to lodge a complaint. The 2nd respondent also tendered a copy of her voter details, political party membership registration status and the application to be nominated by ANC Party as Member of the County Assembly of Narok

Whether the 2nd respondent is a resident and voter of Narok County

38. The petitioner averred that the 2nd respondent is not a voter or resident of Narok County and again relied on her pleading and averments in her affidavit. She did not present any evidence to prove that indeed the 2nd respondent is not married to the said Christopher and further that she does not reside within Narok. The said respondent on the other hand tendered a letter dated 11/11/2022 authored by Daniel Ole Sankale the Chief of Narok Township Location which confirms that the 2nd respondent is well known to him and is the wife of Christopher Kuntai Sankei ID. No. 20053708 who is a prominent businessman and permanent resident of Narok Town. No evidence has been put forth by the petitioner to rebut the contents of the said letter

Relationship of petitioner with 3rd respondent

39. The petitioner did not adduce any evidence obtained from the 3rd respondent confirming that the ANC party never nominated the 2nd respondent. Her evidence was that the 2nd respondent failed to prove when she became a member of ANC and she pegged a lot of reliance on the 2nd respondent’s documents as corroboration of her evidence. However, the 2nd respondent explained in her affidavit the circumstances which drove her to register as a voter in her home area. The petitioner failed to rebut these facts on oath as rightly pointed out by the 2nd respondent and the other respondents

Whether the further affidavit of the Petitioner should be struck out

40. There is no disputing the fact that the petitioner first failed to meet the timelines which the court set for filing her submissions and sought extension which was granted but on condition that she would not be allowed to file any rejoinder. This was meant to ensure that the legal timelines of disposing this



petition were complied with. She however proceeded to file a further affidavit without first seeking the leave of the court which if allowed might as well be opening a flood gate this court will not be able to close as the other parties will also want to be allowed to file responses and counter responses as held in the case of Shiyenji Silas Muyeyia (supra) cited by the 2nd respondent. The further affidavit cannot therefore be allowed to stand and it is struck out and expunged from the record

Whether the 2nd respondent was legally and validly nominated

41. The petitioner appears to have shifted the burden of proof to the 2nd respondent to establish that she was validly nominated after tendering the copy of records which show that she is registered to vote in Kirinyaga County. She has not cited any provision of the law which stipulates that one can only be nominated in the County where she/he is registered to vote. She has also expressly stated that there are doubts on whether or not the 2nd respondent is a member of ANC Party but she did not take any steps to cast out the said doubts by confirming from the party itself the actual position. As held in the case of Florence Bwogi Ochieng (supra) only the political party can tell when a person joined it and it is not about when the office of the Registrar of Political Parties was informed. This doubt cannot therefore be resolved by the letter from the Registrar of Political Parties which the petitioner is solely relying on.
42. Further despite the petitioner challenging the duration of the 2nd respondent's membership in the ANC Party she has also not cited any legal provision which sets out a minimum period which is required for a member to qualify for nomination. The petitioner also never cited any specific provision of the constitution or rule of the ANC Party which was not complied with to prove that indeed the party did not validly recommend the 2nd respondent for nomination.
43. The respondents have asserted that the membership of the 4th respondent attest to the fact that Narok County has a diverse ethnic, community and cultural diversity contrary to the pleadings and submissions of the petitioner and she did not also rebut this fact. The gist of the petition as submitted by the 2nd respondent seems to be solely anchored on her ethnic background and nothing else in the absence of any other evidence to the contrary. This brings to the fore the question of whether only persons hailing from the petitioner's ethnic background qualify for nomination to sit in the 4th respondent. This is answered by its composition which leaves no doubt that it has a diverse ethnic, community and cultural composition which should be taken in to account.
44. Viewed in this light the reference to Section 7 of the County Government Act which the petitioner argued bounds the 3rd respondent to ensure that in nominating members to the 4th respondent the community and cultural diversity of Narok is reflected and further that there is adequate representation to protect the minorities in accordance with Article 197 of the Constitution seems to favour the 2nd respondent more than herself. Nowhere in her petition has she averred that she is from the minority or marginalized communities but she is insisting that only the residents and people registered to vote in the County of Narok should be nominated. The same reasoning cuts across the two cases of Rose Wairimu Kamau and 3 Others (supra) and Commissioner for the Implementation of the Constitution (supra) which emphasize the necessity of catering for the interests of the ethnic minorities and the marginalized
45. From the foregoing it is clear that that in the absence of any cogent evidence to prove that the nomination of the 2nd respondent violated any provision of the Constitution of Kenya, 2010 any Electoral Laws, the constitution and the rules of the 3rd respondent then the petitioner has failed to discharge the burden which is explicitly enunciated in the case of Raila Odinga & 2 Others Vs IEBC & 3 Others Petition Number 5 of 2013 (supra). The petition must therefore fail and I so find



Reliefs and Orders of the Court

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- a. The prayers a, b, c, d and e in the petition are denied
- b. A declaration is issued that the 2nd respondent was duly qualified for nomination for the gender top up lists in the County Assembly of Narok
- c. The 2nd respondent was validly nominated as a Member of the County Assembly of Narok in accordance with the Constitution of Kenya, 2010 and the Election Laws and Regulations
- d. A certificate to issue accordingly under Section 86(1) of the Elections Act, 2011

Who bears the costs of this Petition

47. 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

48. 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

49. On the issue of costs, the petitioner submitted that the respondents do bear the costs guided by the principle that they follow the events. The 1st respondent urged the court to be guided by the decision in the case of Aden Noor Ali (supra) on the issue of costs. The 2nd respondent pleaded that the costs follow the events while the 4th and 5th respondents pleaded for the costs to be awarded to them by dint of Section 84 of the Election Act and Rule 30(1) of the Election Petition (Parliamentary and County Elections) Petition Rules, 2017

50. 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 28TH FEBRUARY, 2023 IN THE PRESENCE OF:

Petitioner represented by Kamwaro & Kere



1st Respondent represented by Odunga

2ND Respondent represented by Korir

3rd Respondent represented- Absent

4th & 5th respondents represented by M/S Lyona for Maina Ngaruiya

