Kalinga v Independent Electoral & Boundaries Commission & 10 others; Orange Democratic Movement & 7 others (Interested Parties) (Election Petition E002 of 2022) [2023] KEMC 12 (KLR) (14 March 2023) (Judgment)

Neutral citation: [2023] KEMC 12 (KLR)

REPUBLIC OF KENYA

IN THE KWALE LAW COURTS

ELECTION PETITION E002 OF 2022

JM OMIDO, SPM

MARCH 14, 2023

BETWEEN

MARY CHARLES KALINGA ..... PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 1ST RESPONDENT

FARTUN MOHAMED MUSA ..... 2ND RESPONDENT

JOSEPHINE WAIRIMU KINYANJUI ..... 3RD RESPONDENT

AUGUSTINE NDEGWA ..... 4TH RESPONDENT

MULKI ABDULLAHI ADAN ..... 5TH RESPONDENT

KHADIJA NGALA ..... 6TH RESPONDENT

MELDER J. NYAKITI ..... 7TH RESPONDENT

KENGO JUDY CHIZI ..... 8TH RESPONDENT

RUWA ELIZABETH MWANGOLA ..... 9TH RESPONDENT

TERESIA B MUOKI ..... 10TH RESPONDENT

RACHEL KATUMBI MUTISYA ..... 11TH RESPONDENT

AND

ORANGE DEMOCRATIC MOVEMENT ..... INTERESTED PARTY

UNITED DEMOCRATIC ALLIANCE ..... INTERESTED PARTY

PAMOJA AFRICAN ALLIANCE ..... INTERESTED PARTY

UNITED DEMOCRATIC MOVEMENT ..... INTERESTED PARTY

JUBILEE PARTY ..... INTERESTED PARTY

SHIRIKISHO PARTY OF KENYA ..... INTERESTED PARTY

UNITED PARTY OF INDEPENDENCE ALLIANCE ..... INTERESTED PARTY

KENYA AFRICAN DEMOCRATIC UNION-ASILI ..... INTERESTED PARTY

JUDGMENT

A. Introduction.

1. The Petitioner herein Mary Charles Kalinga filed the instant Petition dated 7th October, 2022 on even date in which the following reliefs are sought:

    a. The court be pleased to declare that the Special Issue of the Kenya Gazette Notice Volume CXXIV – No. 186, Gazette Notice No. 10712 dated 9th September, 2022 is null and void to the extent that it fails to nominate to the County Assembly of Kwale a representative of Persons Living with Disability.

    b. A declaration that the nomination of the representatives of the County Assembly of Kwale vide the Special Issue of the Kenya Gazette Notice Volume CXXIV – No. 186, Gazette Notice No. 10712 dated 9th September, 2022 is unconstitutional and is glaring breach of the provisions of Article 88, 90 and 177 of *the Constitution* of Kenya and therefore is null and void.

    c. A declaration that the County Assembly of Kwale as currently constituted by reason of the Special Issue of the Kenya Gazette Notice Volume CXXIV – No. 186, Gazette Notice No. 10712 dated 9th September, 2022 do not conform to the provisions of Articles 90 and 177 of *the Constitution*.

    d. The nomination of members of the County Assembly of Kwale be re-gazetted in strict compliance with the provisions of Article 177 of *the Constitution*, Regulation 56(2) of the *Elections Act* and other relevant provisions of the law.

    e. The costs of the Petition to be borne by the Respondents.

2. Service of the Petition, affidavits in support thereof sworn by the Petitioner Mary Charles Kalinga And Mwanauba Omar Mwaphatsa on 7th October, 2022 and the accompanying annextures were served upon all the eleven (11) Respondents and the eight (8) Interested Parties to the satisfaction of the court.

3. Responses to the petition were filed by the Respondents and the 4th Interested Party together with Replying Affidavits sworn by the respective Respondents and 4th Interested Party. It is to be noted that although the Petitioner claimed in the submissions filed that the 11th Interested Party did not file a Response to the Petition, my perusal of the record shows that one was filed.

4. It is instructive from the record that none of the other seven (7) Interested Parties responded to the Petition.

5. It is however to be noted from the Judiciary E-filing System that all the parties that responded to the Petition filed their respective Responses and/or Replying Affidavits outside the timelines provided under Rule 14(1) of the Elections Petitions Rules, 2013 which provides as follows:

> " 14(1). Upon being served with an election petition under Rule 13, the Respondent may oppose the petition by filing and serving a response within a period not more than fourteen days upon service of the petition". (Emphasis mine).

6. With the exception of the 1st Respondent (hereinafter "the Commission"), all the other parties who filed their Responses and Replying Affidavits out of time (after the lapse of the fourteen-day period provided for under Rule 14(1) of the Elections Petitions Rules, 2013) did not move the court for orders to extend and/or expand the time within which to file their respective Responses and Replying Affidavits. Further, apart from the Commission, none of the other parties filed the relevant applications for their Responses and Replying Affidavits to be deemed as filed within the fourteen day period provided for under the above rule.

7. On the part of the Commission, a Notice of Motion application dated 28th October, 2022 was filed on 29th October, 2022 in which the substantive prayers that were sought were as follows:

> 1. .....
>
> 2. That this Honourable Court be pleased to extend the time within which the Respondent ought to (have) filed its Response to Petition and Replying Affidavit.
>
> 3. That upon time being enlarged, the Respondent's response to the Petition and the Replying Affidavit in support thereof be deemed as properly filed and served.
>
> 4. .....
>
> 5. .....

8. The Commission's application proceeded on 3rd November, 2022 and as the same was not opposed by any of the other parties, I allowed it in by stating thus:

> " As the Application dated 28th October, 2022 filed by the 1st Respondent – the IEBC – is not opposed by any of the other parties, I hereby allow the same in its terms. Costs of the application to be in the cause."

9. How then is the court to treat the Responses and Replying Affidavits that were filed by the other Respondents and 4th Interested Party who did not seek for extension of time?

10. First, I will address the question whether this court has power to extend or expand the time within which the Responses and Replying Affidavits are to be filed. The answer to this question, is happily to be found in the authority of Amani National Congress Party & another v Hamida Yaroi Shek Nuri & another [2018] eKLR in which the court addressed itself on the issue as follows:

> " Rule 19 of the Elections Petition Rules grants jurisdiction to the court hearing the petition to extend or reduce time for which time is prescribed by the Rules. It provides that:
>
> "(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as

may be necessary even where the period prescribed or ordered by the Court may have expired.

(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined."

It is clear from the foregoing that other than the time prescribed by statute, any other time prescribed under the Election Petition Rules for an act to be done is amenable for time to be extended provided the court forms the opinion that it is in the interest of justice for such time to be extended."

11. The decision above guides me that this court has the discretion to extend or expand time within which parties ought to have filed their Responses and Replying Affidavits where the court is satisfied that there are grounds that warrant such orders. That in my view then means that a party who desires to be granted an order for such expansion or extension of time must move the court through an application and lay sufficient basis for the same in order that the court exercises discretion in favour of such a party.

12. A perusal of the record leaves no doubt that none of the concerned parties in this Petition filed such an application. In the result, I will be guided by the authority of Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 others [2013] eKLR in which the court (Majanja. J.) rendered itself as follows:

"29. It is to be noted that even where there is leeway for extension of time, such extension is not automatic and discretion must be exercised judicially and this is dependent on the circumstances of each particular case. The burden is thus upon the person seeking the extension to satisfy the court that his circumstances are such that they are deserving of the court's exercise of discretion in his favour." (Emphasis mine).

13. Further guidance is taken from the authority of Elizabeth Jebet Kibor v Isaac Suare Oseur & 5 others [2020] eKLR where it was held that the court may exercise its discretion and extend time within which the petitioner may deposit security for costs if on application by the Petitioner, sufficient reason or cause is shown.

14. In the case of Milton Kimani Waitinga v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR it was held that it is not available to a court to grant prayers that have not been specifically formally sought by a party.

15. The jurisprudence that emerges from the above cases is that even in cases where a court retains discretion to extend or expand time, the party that desires such orders of extension or expansion must move the court with the relevant application and place before the court the grounds upon which such discretion is sought to be exercised.

16. I am bound by the decision of Milton Kimani Waitinga (supra) that it is not available to this court to grant prayers of extension or expansion of time that have not been specifically formally sought by a party. The doctrine of stare decisis also dictates that I follow the dictum in Elizabeth Jebet Kibor (supra) that even where the court has the discretion to extend time, such discretion can only be exercised and the time extended or expanded only where an application for such extension has been filed by that Petitioner and sufficient reason or cause shown. I will address the fate of the Responses and Replying Affidavits that were filed out of time shortly.

17. The Commission's Response dated 28th October, 2022 and the Replying Affidavit sworn by CHRISPINE OWIYE sworn on even date in support of the Response are properly on record. In precis, the Commission's prayers are that the court reaches the following findings:

    a. The County Assembly of Kwale was duly constituted following the publication of the Gazette Notice No. 10712 of 2022 dated 9th September, 2022.

    b. The gazetted nominees in Gazette Notice No. 10712 of 2022 dated 9th September, 2022, who are the Respondents herein were validly elected by way of nomination to the County Assembly of Kwale.

    c. The 1st Respondent was not in breach and did not contravene the provisions of *the Constitution*, the *Elections Act* or of any other statute in exercising its mandate in publishing Special Issue of the Kenya Gazette Notice Volume CXXIV – No. 186, Gazette Notice No. 10712 dated 9th September, 2022.

    d. The Petition lacks merit and ought to be dismissed.

    e. The Petitioner should bear the costs of the Petition.

B. Directions Of The Court Made On 7Th November, 2022.

18. On 7th November, 2022, the court, upon consultation and with the concurrence of the parties made the following directions on the manner in which the Petition would proceed:

> " DIRECTIONS
>
> Today being the date scheduled for the pretrial of Kwale Chief Magistrates' Court Election Petition No. E002 of 2022, the Court, upon consulting with the parties, hereby issues the following directions with respect to the hearing of the Petition:
>
> i. The hearing of the main Petition will proceed by way of affidavit evidence and the affidavits filed, sworn by the witnesses will form the evidence for each party and are hereby adopted.
>
> ii. The Petitioner to file and serve submissions upon the Respondents within fourteen (14) days from the date hereof.
>
> iii. Each Respondent to file and serve submissions upon all the other parties within fourteen (14) days from the date of receipt of the Petitioner's submissions.
>
> iv. The Petitioner to file and serve further submissions within seven (7) days of receipt of the last of the Respondent's submissions.
>
> v. The matter to be mentioned on 15th December, 2022 at 10am for further directions."

19. Although the directions above were not strictly complied with in as far as the same concerned timelines for filing submissions as a result of delay on the part of the Petitioner, the parties herein filed their respective submissions and proceeded to highlight the same in detail on 12th January 2023.

C. The Petitioner's Submissions.

20. In the Petitioner's submissions dated 19th December, 2022 and filed in court on even date, the Petitioner stated that although the 11th Respondent filed a Replying Affidavit that she swore on 24th October, 2022 she failed to file a Response to the Petition. I have however stated above that there indeed is a Response on record filed by the 11th Respondent.

21. It is at this point apt, I think, that I consider the consequences of the fact that the Respondents (with the exclusion of the Commission) and the 4th Interested Party as hereianbove addressed, filed their Responses and Replying Affidavits out of time and did not secure orders for extension or expansion of time or for the documents to be deemed to have been filed within time. In my view, it is expressly provided that such parties are to be excluded from the proceedings in the Petition as it is clear from the wording of Rule 14(b) that "a respondent who has not filed a response as provided under this rule shall not be allowed to appear or act as a party against the petition in any proceedings." The rule then demands that before I move to determine any other issues, I be clear that the Responses to the Petition and Replying Affidavits filed by the 2nd to the 10th Respondents and those of the 4th Interested Party are for striking out and are therefore hereby expunged from the record and that any other documents filed herein by the said parties, or any submissions made thereof are not available to be considered by this court in line with Rule 14(b).

22. Fundamentally, that then leaves me with the Petitioner's case as against the Commission as the sole Respondent whose Response and Replying Affidavit I will proceed to consider.

23. In urging her case, the Petitioner's presentation regarded compliance with the law by the Commission in gazetting the other Respondents as having been duly elected by nomination by the Interested Parties.

24. The Petitioner submitted that the principles which the electoral systems must specifically comply with are set out under Article 81 of *the Constitution*, and the same include free and fair elections and elections which are transparent and administered in an impartial, neutral, efficient, accurate and accountable manner, fair representation of persons with disabilities, universal suffrage based on the aspiration for fair representation and equality of vote.

25. The Petitioner stated that under Article 177, *the Constitution* sets out the criteria applicable for elections through nominations by political parties pursuant to Article 90 of *the Constitution*. Let us read the said provisions:

> 177. Membership of county assembly
>
> (1) A county assembly consists of –
>
> (a) members elected by the registered voters of the wards, each ward constituting a single member constituency, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year;
>
> (b) the number of special seats members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender;
>
> (c) the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament;
>
> (d) the Speaker, who is an ex officio member.

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

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

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

26. Article 90 provides as follows:-

90. Allocation of party list seats

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

(2) The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that –

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

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

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

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

27. The Petitioner placed reliance on the Court of Appeal case of Lydia Nyaguthii Githendu v The Independent Electoral and Boundaries Commission & 17 others [2015] eKLR in which the court considered Articles 90(1)(c) and 177 of *the Constitution* and expressed itself as follows:

> " Article 90(1) of *the Constitution* makes provision for nomination to County Assemblies to be on proportional basis by use of party lists, and provides
>
> "Elections for the seats in Parliament provided for under Articles 97 (1) (c) and 98 (1) (b) (c) and (d), and for the members of the county assemblies under Article 177(1) (b) and (c), shall be on the basis of proportional representation by use of party lists.
>
> 2. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that:-
>
> a. each political party participating in a general election nominates and submits a list of all the persons who would stand elected if

the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

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

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

There is a rider that with the exception of County Assemblies the National Party lists have to reflect the regional and Ethnic diversity of the people of Kenya. Article 100 of *the Constitution* underscores the need for the promotion of marginalized "groups" especially women, persons with disability, youths, ethnic and other minority and majority communities. Articles 174 and 175 of *the Constitution* enshrines principles on devolution and 2/3rds gender rule. Article 177 on the other hand makes provision for the composition of membership for county governments.

These fall into two categories. The first category is for those acquiring membership through elections. The second category acquires membership through nomination which is meant to cater for the gender equality issue, and marginalized groups including persons with disability and the youth. Article 197 underscores the need to ensure that not more than two-thirds of the members of the county assemblies or committees are of the same gender."

28. The Petitioner invited the court to consider what the law states under Section 36(9) of the *Elections Act* regarding allocation of seats by the Commission. I will reproduce the said provision literatim:

36(9). The allocation of seats by the Commission under Article 177 (1) (b) and (c) of *the Constitution* shall be proportional to the number of seats won by the party under Article 177 (1) (a) of *the Constitution*.

29. It was submitted by the Petitioner that Regulation 56(2) of the Elections (General Regulations) provides that the formula for the allocation of the seats pursuant to Article 177(1)(b) of *the Constitution* and Section 36(9) of the *Elections Act* is the number of seats won by a political party divided by the total number of seats multiplied by the available seats.

30. That in the instant case, the number of seats for the members of the County Assembly of Kwale was 20 and thus, in calculating the number of seats available for allocation to the respective political parties, the number of seats won by the respective political parties must be divided by 20 and which must then thereafter multiplied by the number of seats available.

31. Applying the above formula, the Petitioner was of the view that the number of seats available for allocation was 13. The Petitioner worked out her figures as follows:

Political Party	Total Number of Seats
Orange Democratic Movement (ODM)	5 seats.
United Democratic Alliance (UDA)	5 seats.
Pamoja African Alliance (PAA)	4 seats.
United Democratic Movement (UDM)	1 seat.
Jubilee Party	1 seat.
Shirikisho Party of Kenya	1 seat.
United Party of Independence Alliance	1 seat.
Kenya African Democratic Union – Asili	1 seat.
Independent Candidate	1 seat.
Total	20 seats.

32. It is instructive from the material before me that one seat was won by an independent candidate, making the total number of electoral seats won to be 20, hence the reason I have included the same (in italics) in the table above. The submissions by the Petitioner did not include the independent candidate's seat.

33. The allocation of seats as per the Petitioner's submissions on the applicable formula as submitted in paragraph 29 of this judgement would be as follows:

Political Party	Total Number of Seats
Orange Democratic Movement (ODM)	3 slots.
United Democratic Alliance (UDA)	3 slots.
Pamoja African Alliance (PAA)	2 slots.
United Democratic Movement (UDM)	1 slot.
Jubilee Party	1 slot.
Shirikisho Party of Kenya	1 slot.
United Party of Independence Alliance	1 slot.
Kenya African Democratic Union – Asili	1 slot.
Total	13 slots.

34. From the above, the Petitioner takes the position that the number of seats that were available for allocation to the political parties were 13 and that the Commission grossly erred and flouted the law, particularly Article 177(1)(b) and (c) of *the Constitution*, Section 36 of the *Elections Act* and Regulation 56(2) of the Elections (General) Regulations by allocating the Interested Parties only 10 slots cumulatively, instead of 13.

35. The next point taken by the Petitioner is that in her view, the Commission did not comply with the dictates of *the Constitution* as enshrined under Articles 38, 81(1)(c) and 177(1) and Section 36(1) of the *Elections Act* with respect to persons with disabilities. To that end, the Petitioner took the view that as no person living with disability was gazetted as having been duly elected by way of nomination, the Commission failed to meet the principles which an electoral system must specifically comply with as provided for under Article 81 of *the Constitution* and the proportional representation provided for under Article 90(1) of *the Constitution* (which I reproduced earlier in this judgement). Article 81 provides as follows:

> 81. General principles for the electoral system
>
> The electoral system shall comply with the following principles –
>
> (a) freedom of citizens to exercise their political rights under Article 38;
>
> (b) not more than two-thirds of the members of elective public bodies shall be of the same gender.
>
> (c) fair representation of persons with disabilities.
>
> (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
>
> (d) free and fair elections which are –
>
> (i) by secret ballot.

(ii) free from violence, intimidation, improper influence, or corruption.

(iii) conducted by an independent body.

(iv) administered in an impartial, neutral, efficient, accurate and accountable manner.

36. The Petitioner urged that in interpreting Articles 81(c) and 177(1)(c), the court should apply a purposive approach as provided for under Article 259 of *the Constitution* which provides that in construing *the constitution*, the same shall be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of rights, permits the development of the law and contributes to good governance. She added that the purpose and values that Article 81(c) seeks to promote includes the fair representation of persons with disabilities and that the provision does not specifically deal with the marginalized but specifically provides for persons living with disability. She asked the court to be guided by the authority of Millicent Cherotich v Omari Esha Wanjiku & 2 others [2013] eKLR and stated that in that case, the court held and concluded that it is not mandatory for a County Assembly to have a representation of the ethnic minority within that county for it to be properly constituted. However, where the county assembly decides to have a representation of the ethnic minority, that must be justified and the persons so elected by nomination must represent the regional and ethnic minority of the county.

37. The relevant paragraphs of the authority as pointed out by the Petitioner read thus:

> 53. The appellant relied on Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others [2014] eKLR. The ethnicity of the appellant was central to this petition because she was nominated to represent the ethnic minority- Kalenjin in the Nyeri County Assembly. The learned magistrate wondered loudly whether a Kalenjin woman resident of Nyeri County by virtue of her marriage could be heard to champion the rights of her ethnic group in her county of marriage" It was submitted for the appellant that this was an extraneous matter that was not placed before her for determination.
>
> 54. This is not a simple matter. It brings into interplay the provisions of Article 27 of *the constitution*, gender, equality and affirmative action in political representation. It is not disputed that the appellant came to the county by virtue of marriage. It is also not in dispute that it is on the fact of her marriage, as confirmed by her local chief, that the appellant became a registered voter in Nyeri County, and it is on this marriage card that she was nominated as a representative of the ethnic minority known as the Kalenjin resident in Nyeri County.
>
> 55. I think the trial magistrate posed a relevant question that goes to the root of the constitutional requirement for affirmative action, and for counties to put in mechanisms for the protection of minorities within the county. The applicant's ethnicity should not stand against her in the political or any arena, that would be discriminatory. However, this is a case for the representation of special interests' groups within the County assembly. The people of Nyeri County would want to read this from the community and cultural diversity angle and ask whether she would be best placed to champion for the rights of her people, where she came from" Another question they may wish to ask to

> accommodate the appellant would be whether the women from the Kalenjin Community married in Nyeri County could be considered a minority group deserving representation in the county assembly" Or again, whether women married from other communities into Nyeri County could be considered a minority group as envisaged by *the Constitution*" I think these are questions for the people of Nyeri County to ask and respond to. This is the opportunity they were denied when no reconstituted list was published for purposes of public participation.

38. Thus, the Petitioner opines that for the County Assembly of Kwale to be properly constituted, there must be a representative of persons living with disability.

39. The Petitioner further submitted that Section 36(9) of the *Elections Act* anticipates the election by nomination of a person living with disability by imposing on political parties an obligation to submit to the Commission party lists which include two candidates at least two of whom will be persons with disability and the youth.

40. In the third point mooted in the petition, the Petitioner asked the court to determine whether the election by nomination of the 2nd, 3rd and 11th Respondents was in conformity with Articles 38, 81(a), (d), 90(b) and (c) of *the Constitution* and Section 36(1)(e) of the *Elections Act* with respect to the election of persons who are not registered as voters within the County of Kwale.

41. The Petitioner submitted that the election by nomination of the 2nd, 3rd and 11th Respondents was in violation of the law and/or irregular for the reason that the three were not registered voters within the county of Kwale. The Petitioner preferred the argument that by reason of proviso in Article 177(b) and (c) of *the Constitution*, a party list in the case of a county assembly seats is not expected to reflect the regional and ethnic diversity of the people of Kenya but rather the ethnic diversity of the people of the particular county. Thus then, the Petitioner urged, the representation of marginalized groups must therefore be in respect of the diversity of the people within the particular county.

42. In the Petitioner's view, the election by nomination of people registered in other counties other than Kwale County goes against the spirit of Articles 81 and 90(2)(c) of *the Constitution* as the focus of the nomination should be limited to the people registered as voters within the particular county. Counsel for the Petitioner, Mr. Wameyo relied on the authority of Commissioner for the Implementation of *the Constitution* v Attorney General & 2 others [2013 eKLR] as cited in the decision of Millicent Cherotich (supra) where the High Court stated as follows:

> " In Commissioner for the Implementation of *the Constitution* v Attorney General & 2 others [2013 eKLR] the Court of Appeal stated:
>
> "Article 90 of *the Constitution* decrees that the party lists must comply with two discernible principles namely;.....
>
> 2. The requirement of the lists to reflect regional and ethnic diversity of the people of Kenya. This is meant to ensure that no ethnic group or region of the country dominates the lists provided by the parties. The exception to this, naturally, is the county assembly which from the nature of things may be from an ethnic majority or from the one region which the county is located. We would venture that on proper reading of Article 90(2)(c), the requirement for the regional and ethnic diversity should apply so as to reflect the face or

diversity not of the people of Kenya necessarily, but definitely of the county in question."

43. Summing up the foregoing submissions, the Petitioner asked the court to reach a finding that the election by nomination of the 2nd to 11th Respondents violated the express provisions of *the Constitution* and electoral laws and regulations, rendering the outcome as published by the 1st Respondent in the Special Issue of the Kenya Gazette Notice Volume CXXIV – No. 186, Gazette Notice No. 10712 dated 9th September, 2022 is null and void.

D. THE COMMISSION'S SUBMISSIONS

44. Regarding the formula used in the allocation of the seats for nomination to the Interested Parties, the Commission stated that vide the Gazette Notice No. 6378 dated 31st May, 2022 and published on 3rd June, 2022, the Commission published the requirements for submission of Party Lists by Political Parties. The lists were required to be submitted on or before the 25th June, 2022. Although the Political Parties responded by sending to the Commission a cumulative total of 79 lists, none of the lists was in compliance with the relevant electoral laws and the same was communicated to the Political Parties by the Commission.

45. Political Parties resubmitted their lists and the Commission established that the lists were compliant with the relevant electoral legislation subsequent to which the Commission proceeded to publish the various Party Lists in two daily newspapers with nationwide circulation under Regulation 54(8) of the Election (General) Regulations, 2012.

46. The Commission stated that the lists published in the two daily newspapers were not final and the publication was meant to give members of the public, any aggrieved persons or persons interested in the process an opportunity to scrutinize the lists, confirm their veracity and raise with the relevant bodies any disputes or challenges to the said lists.

47. It was further submitted by the Commission that after the August 9, 2022 elections, the Commission published a declaration of persons elected as members of county assemblies on the basis of the party lists submitted, in the proportion to the total seats won by each political party and in accordance with electoral laws.

48. In its submissions dated 13th November, 2022, the Commission submitted and pointed out the Petitioner's complaints as follows:That the Commission employed the wrong formula in the allocation of seats to the Interested Parties;That the 2nd to 11th Respondents were not a true reflection of the categories of persons with whom the special nominated seats were meant to include and/or comprise of as none of the persons elected by nomination to the county Assembly of Kwale were persons living with disabilities and that those elected by nomination under the ethnic minority and gender top up did not qualify to be elected as such as they were neither residents of Kwale County nor registered voters in the county;That the Commission breached the law by allocating 10 as opposed to 13 slots to the Interested Parties.

49. The Commission's foremost point was that this court lacks jurisdiction to handle and determine the dispute as presented by the Petitioner.

50. The Commission referred the court to the first prayer of the Petition in which the Petitioner sought a declaration that the Special Issue of the Kenya Gazette Notice Volume CXXIV – No. 186, Gazette Notice No. 10712 dated 9th September, 2022 is null and void to the extent that it fails to nominate to the County Assembly of Kwale a representative of persons living with disabilities and that the same is a breach of Articles 88, 90 and 177 of *the Constitution*. To that end, the Commission submitted that

as the Petition alleges violation of constitutional rights, it ought to have been filed as a constitutional petition before the High Court and not as an election petition, as currently presented.

51. In buttressing that point, the commission relied on the authority of Isaiah Gichu Ndirangu & 2 others v IEBC & 4 others [2016] eKLR where the court set out to determine the issue of jurisdiction to handle disputes arising from Party List petitions.

52. The court expressed itself as follows:

> "Does this Court have the Jurisdiction to Determine the Instant Petition?
>
> 33. The Respondents maintained the position that this Court lacks the jurisdiction to entertain the matter owing to the availability of the Independent Electoral and Boundaries Commission Disputes Resolution Committee and the Political Parties Disputes Tribunal. They relied on the decisions in Dr. Billy Elias Nyonje vs The National Alliance Party of Kenya and 2 Others, Judicial Review No 61 of 2013; Anthony Salau and Another vs Independent Electoral and Boundaries Commission and 2 Others; and Republic vs Independent Electoral and Boundaries Commission and Another, Judicial Review No 223 of 2013 for that proposition.
>
> 34. It was in addition their submission that election petitions are special proceedings which are regulated under a strict time frame as stipulated under Article 87 (1) and (2) of *the Constitution* and in this regard, their argument was that the 3rd Respondent was declared as a member of the Nandi County Assembly way back in July 2013 and since then no Petition has been filed challenging her nomination. That the Petition has therefore been brought inordinately out of time.
>
> 35. According to the Petitioners on the other hand, while arguing that this Court is the appropriate forum for resolution of the present dispute, they submitted that Articles 258 and 259 of *the Constitution* should be the guide in resolving the instant Petition and that the *Civil Procedure Act* and its Rules do not apply in constitutional Petitions. That the Court therefore has no jurisdiction to apply the *Civil Procedure Act* and Rules for the invocation of the same is simply not provided for and in any event, if the Legislature had wanted to have such a law to be so applicable then *the Constitution* and *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 (the Mutunga Rules), would have said so in simple terms.
>
> 36. Further, the Petitioners argued that the jurisdiction of the Court is to hear and determine any Petition filed, not to strike the same through the application of strained technical rules against the principles stipulated under Article 159 (i) (d) of *the Constitution*. They relied on the decision in John Moses Opiyo vs Attorney General, Kisumu HC Misc Civil Application No 175 of 2006 in that regard and where it was held that *the Constitution* is the supreme law and takes precedence over all other laws and the Civil Procedure Rules cannot reign supreme over *the Constitution* for such would be a reliance on archaic law. On this basis they submitted further that neither under *the Constitution* nor under the Mutunga Rules, is this Court granted the jurisdiction to strike out the Petition and in any case, the only jurisdiction the Court has is to hear

and determine such a Petition as provided for under Rules 20, 21 (3), 23, 26 (2) 27 (2) of the Mutunga Rules.

37. The Petitioners' other position was that the net effect of the said Rules and Articles 2 (4), 10, 47, 50, 159, 258 and 259 of *the Constitution* is that the instant Petition should be determined on its merits and not struck out on a technicality. Further, that until this Petition is heard and determined, this Court cannot determine that the Petition is an election Petition disguised as a constitutional petition or otherwise and so, therein lies the strongest reason why this Petition should be determined on the merits so that this Court may further determine whether the issues raised herein are akin to those in an election petition or a constitutional petition. That whether or not a matter overlaps and may be viewed as both an election related matter or a constitutional related matter may be too close to call for it is a very thin line, a most delicate and intricate difference.

38. Accordingly, they took the view that the Political Parties Disputes Tribunal has no jurisdiction to entertain this Petition since the Tribunal cannot declare the actions of the 1st and 2nd Respondents as unconstitutional; and nowhere in the relevant Act is the Tribunal given powers to try criminal acts, electoral offences, fraudulent acts or unconstitutional acts. They thus contended that it is only this Court that can declare such acts as unconstitutional. In that regard, they relied on Arabe Espanol vs Bank of Uganda [1999] 2 EA and Silas Otuke vs Attorney General and Others, Petition No 44 of 2013 and reiterated the position that this Petition is not an election dispute.

39. In that context, Nyarangi J in The Owners Of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1 made the observation that:

> "Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

40. Further, in Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others Civil Application No. 2 of 2011 the Supreme Court stated thus:

> "[68] A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

41. In that regard the jurisdiction of this Court stems from Article 165(3) of *the Constitution* which is to the effect that subject to Clause (5), the High Court shall have-

> "(a) Unlimited original jurisdiction in criminal and civil matters;
>
> (b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
>
> (d) Jurisdiction to hear any question respecting the interpretation of *the Constitution* including the determination of-
>
> i. The question whether any law is inconsistent with or in contravention with *the Constitution*;
>
> ii. The question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*;
>
> iii. Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;
>
> iv. A question relating to conflict of laws under Article 191; and
>
> v. Any other jurisdiction, original or appellate, conferred on it by legislation.

42 The genesis of the Petitioners' case herein revolves around the question of nominations to Nandi County Assembly pursuant to the General Elections of 2013 and they allege violation of *the Constitution* and the *Elections Act* among others.

43. What then is the law in regard to disputes revolving around questions of nominations to County Assemblies among others?

44. Article 87 of *the Constitution* provides that:

> 1. Parliament shall enact legislation to establish mechanisms for timely setting of electoral disputes.
>
> 2. Petitions concerning an election, other than a Presidential election, shall be filled within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

3. Service f a Petition may be direct or by advertisement in a newspaper with national circulation.

45. Article 88 (4) of *the Constitution* on the other hand outlines the mandate of the Independent Electoral and Boundaries Commission in the following terms:

> "The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-
>
> a. The continuous registration of citizens as voters;
>
> b. The regular revision of the voters' roll;
>
> c. The delimitation of constituencies and wards;
>
> d. The regulation of the process by which parties nominate candidates for elections;
>
> e. The settlement of electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
>
> f. The registration of candidates for election;
>
> g. Voter education
>
> h. The facilitation of the observation, monitoring and evaluation of elections;
>
> i. The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
>
> j. The development of a code of conduct for candidates and parties contesting elections; and
>
> k. The monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties."

46. Parliament has also enacted various legislations on elections among them being the *Elections Act* and the Political Parties Disputes Tribunal Act. In this regard, the *Elections Act* was enacted as an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes. Part VII of this Act is titled "ELECTION DISPUTES RESOLUTION" and Section 74 provides that:

1. Pursuant to Article 88(4) (e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but

excluding election petitions and disputes subsequent to the declaration of election results.

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

3. Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

47. The above position is also reiterated in the *Independent Electoral and Boundaries Commission Act* which was established as an Act of Parliament to make provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission established by Article 88 of *the Constitution*, and for connected purposes. Section 4 thereof provides that:

As provided for by Article 88(4) of *the Constitution*, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by *the Constitution*, and any other elections as prescribed by an Act of Parliament and, in particular, for—

a. The continuous registration of citizens as voters;

b. The regular revision of the voters' roll;

c. The delimitation of constituencies and wards in accordance with *the Constitution*;

d. The regulation of the process by which parties nominate candidates for elections;

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

f. The registration of candidates for election;

g. Voter education;

h. The facilitation of the observation, monitoring and evaluation of elections;

i. The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

j. The development and enforcement of a code of conduct for candidates and parties contesting elections;

k. The monitoring of compliance with the legislation required by Article 82(1)(b) of *the Constitution* relating to nomination of candidates by parties;

l. The investigation and prosecution of electoral offences by candidates, political parties or their agents pursuant to Article 157(12) of *the Constitution*;

48. Other than the *Elections Act* and the *Independent Electoral and Boundaries Commission Act*, the *Political Parties Act* was enacted as an Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes. On this basis, Section 39 (1) of the Act establishes a Tribunal to be known as the Political Parties Disputes Tribunal. The jurisdiction of the Tribunal is provided for under Section 40 of the said Act as follows:

> "The Tribunal shall determine—
>
> a. disputes between the members of a political party;
>
> b. disputes between a member of a political party and a political party;
>
> c. disputes between political parties;
>
> d. disputes between an independent candidate and a political party;
>
> e. disputes between coalition partners; and
>
> f. appeals from decisions of the Registrar under this Act.
>
> Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a) (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms."

53. It was the Commission's submission that there is no evidence presented by the Petitioner as proof that she filed complaints before the Commission or the Political Parties Disputes Tribunal (PPDT), particularly concerning the list submitted to the Commission by the 3rd Interested Party, Pamoja African Alliance (PAA) to which she was a member, in respect to the (intended) nomination of the 3rd Respondent whom she stated not a registered voter in Kwale County but was registered as such in Kilifi County.

54. The position the Commission then took is that the Petitioner, if aggrieved by the inclusion of the 3rd Respondent in the PAA's party list that was submitted to the Commission ought to have filed a complaint with her party, the Commission or the PPDT and that as such, it is not available to this court to determine whether (or not) the inclusion of the 3rd Respondent's name by PAA in its list was in compliance with the law.

55. The Commission relied on the case of Isaiah Gichu Ndirangu (supra) where the Court stated thus:

> " 49. My understanding of the laws that I have cited above is that the Legislature intended to enact legislation to govern electoral matters and the resolution of any related disputes therein. Section 74 (1) of the *Elections Act* and Section 4 of the *Independent Electoral and Boundaries Commission Act* as reproduced above makes it explicit that the Commission shall be responsible for settling

disputes arising from or relating to nominations. It therefore follows that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the Commission. The next question then that begs for an answer is whether the Petitioners utilized the Commission's dispute resolution port as required of them before approaching this Court. Based on their pleadings and submissions before this Court, their argument was that the instant Petition has been filed not as an election dispute but rather that the jurisdiction being invoked herein is the one under Articles 165 and 258 of *the Constitution* and no more."

50. I appreciate the Petitioners' ions in that regard but I am however in disagreement with their reasoning. I agree that indeed this Court has unlimited jurisdiction in civil and criminal matters and further the jurisdiction to determine the constitutionality of anything alleged to have been done under *the Constitution*. I also appreciate that Article 258 of *the Constitution* grants every person the right to institute court proceedings, claiming that *the Constitution* has been contravened, or is threatened with contravention. I however take the view that Parliament in its wisdom, being well aware of the existence of the judicial arm of the Government, enacted statutes that made provisions for settling disputes arising from or relating to nominations and elections. In the said enactments, the Legislature anticipated the existence of such disputes and that is why it created necessary and specialized dispute resolution fora.

51. I take the further view that the existence of Articles 165 and 258 of *the Constitution* is not a substitute or a means of excluding such other dispute resolution organs and agencies from exercising their statutory duties. Perhaps it suffices to quote the dictum by the court in Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No 3 of 2010 where the Learned Judge made the observation that:

> "Jurisdiction we all know is everything and once raised it must be confronted from the onset and if successful the court must down its tools. I have no doubt at all that under article 165(3) of *the Constitution*, I have unlimited and inherent jurisdiction. I am also aware that under article 23(1) of the same constitution this court has jurisdiction, in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. I also agree as pointed out by counsel for the petitioner that any interpretation of *the Constitution* that seeks to curtail such wide and unfettered jurisdiction would be contrary to the spirit and letter of *the constitution* and would thus render itself invalid. I do not however agree that the bodies created under the provisions of the CDF such as the 1st respondent are invalid, null and void as per *the constitution*. As I have already stated elsewhere in this ruling, it is not uncommon in this country for a statute to provide the procedure through which proceedings founded under the statute are to be handled. Such is section 52 of the CDF. There is nothing unconstitutional about it. The section does not deny the petitioners

> the right to come to court. It only provides a procedure to be followed when dealing with the disputes under the Act, like the instant dispute. The petitioners have a right to come to this court on whatever matter and howsoever but that must be done in the correct way. It cannot therefore be the case of the petitioners that section 52 of the CDF is in conflict with articles 22, 23, 48 and 50 of *the Constitution*. Similarly, it cannot be their case that section 52 qualifies the right to access justice in this court..."

The Learned Judge went on to state:

> "I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights...
>
> ... Coming to court by way of a constitution petition is not excepted either much as *the Constitution* is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to *the Constitution*. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose." (Emphasis added).

56. The Commission further relied on the case of The National Gender & Equality Commission (supra) and cited the words of the court in the following passage:

> 51. Section 34(6) of the *Elections Act*, 2011 specifically provides that, "The party lists submitted to the Commission under this section shall be in accordance with *the Constitution* or nomination rules of the political party concerned." 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 but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria. We would hasten to add that in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter-alia, to the Political Parties Disputes Tribunal established under section 39, Part VI of the *Political Parties Act*, 2011 or to the High Court in appropriate circumstances."

57. On the basis of the above submissions, it was the conclusion of the Commission that where a Petitioner alleges violations of *the Constitution* and/or electoral laws, the first port of call should be the Commission's Dispute Resolution Committee and that courts ought not characterize constitutional issues raised in election petitions as nomination/election disputes. That such characterization would

go against *the Constitution* and electoral laws, which provide for special dispute resolution mechanisms for electoral disputes.

58. The Commission urged the court to reach a finding that Petitioner ignored the specialized mechanisms arising from nominations and that this court is in the premises not clothed with the requisite jurisdiction to determine such disputes.

59. The second matter that the Commission addressed is whether the Commission acted in accordance with the law governing party list nominations in publishing the Special Issue of the Kenya Gazette Notice Volume CXXIV – No. 186, Gazette Notice No. 10712 dated 9th September, 2022.

60. The Commission submitted that under the Marginalized list for Kwale County, the Commission published the following persons as having been nominated to the Kwale County Assembly in full conformity with the provisions of Articles 88(5), 90 and 177 of *the Constitution* and Sections 34, 35, 36 and 37 of the *Elections Act* and Regulations 54, 55 and 56 of the Elections (General) Regulations, 2012:

	Name	Category	Gender
a	Fartun Mohamed Musa	Youth	Female
b	Josephine Wairimu Kinyanjui	Marginalized	Female
c	Augustine Ndegwa	Minority	Male
d	Mulki Abdulahi Adan	Ethnic Minority	Female

61. The Commission stated in its submissions that on special seats, Article 177(1)(c) of *the Constitution* provides that a county assembly consists of, inter alia, the number of members of marginalized groups, including persons living with disabilities and the youth as prescribed by statute. That when this constitutional provision is read with Section 36(8) of the *Elections Act*, the Commission is required to draw from the list under Section 36(1)(f) four special seat members in the order that the particular political party has drawn its list, as the provision is couched in mandatory terms.

62. The Commission, in addressing the formula applicable, stated that the allocation is determined by the number of seats won by a political party divided by the total number of seats multiplied by the available seats for allocation in the county assembly of Kwale. That the number of seats available for Kwale County must first be considered.

63. In the Commission's submissions, Article 177(1) of *the Constitution* is categorical on the composition of county assembly seats and that the Article provides that a county assembly shall be composed by members elected by registered voters, special seat members to ensure that the two-third gender rule is met, a number of members of marginalized groups as may be prescribed by statute and the speaker, who is ex officio.

64. The Commission proceeded to submit that the above categories are distinct and the allocation to the categories is made separately.

65. The Commission's view was that as the available seats for nomination were ten, four of the ten had to be automatically allocated as special seats under Section 36(8) of the *Elections Act* and pursuant to Article 177(1) of *the Constitution*, which is couched in mandatory terms. The said provision states as follows:

> 36(8). Allocation of special seats.
>
> For purposes of Article 177(1)(c) of *the Constitution*, the Commission shall draw from the list under Section 1(f) four special seat members in the order given by the party.

66. On how the Commission arrived at the number ten for the seats available for allocation, it considered the number of members who had been elected in terms of their gender, which was nineteen male and one female, to make a total of twenty. Thus then, if nineteen elected male members represented two thirds of one gender in the assembly, the whole house would arithmetically require 9.5 more (rounded off to ten) members to make up for the balance of one third for the other gender and that as such, the available seats were ten and not fourteen as per the Petitioner's submissions.

67. It follows then, argued the Commission, that the number of four special seats under the marginalized category under Section 36(8) of the Act cannot be increased or decreased. That in the premises, the known number of seats at this point for Kwale County Assembly becomes twenty-four (i.e. twenty seats as elected by registered voters and four special seats under the marginalized category). The Commission stated that the reason as to why the marginalized category must be dealt with first was because of the express provision of the law that there must be four such seats and the need to avoid dealing with multiple variables.

68. Following the allocation of the four seats, what then is left is six seats for allocation under the gender top up category, which is affected and/or determined by the gender composition of the twenty-four seats already allocated. That based on such gender composition, the Commission stated that in accordance with Regulation 56(2) of the Elections (General) Regulations 2012 and the party lists that had been submitted by the political parties, it proceeded to elect by way of nomination four members under the marginalized category, three of whom were female and one male, making the number of male members twenty and female four.

69. The next category for consideration, as per the submissions by the Commission was the gender top up category, or the number of seats necessary to achieve the two third gender rule. In the case of Kwale County Assembly, having already elected one female member through the ballot and four through the marginalized category, the gender rule required that six more female members be elected by nomination through the gender top up category. At this point, the Commission went back to the party lists for the purpose of selecting as prioritized by the political parties.

70. In a nutshell, from the Commission's perspective, the marginalized and gender top up categories must be treated and allocated separately and distinctly to the political parties and that as per Regulation 56(2), what the Commission is required to do is to take the number of seats won by a political party divided by the total number of seats won by all the political parties multiplied by the available seats for allocation, which was four in the category of the marginalized.

71. In determining the total number of seats won by the political parties, the Commission, while relying on the authority of Ann Potisho Kapasar v Sialo Natanya Tasur & 11 others [2018] eKLR stated that although there were twenty elective positions, the number to use as the base was nineteen and not

twenty, as one of the seats was won by an independent candidate. The relevant part of the authority referred to has the following holding:

> " 28. I agree with Mr. Mutua that in allocating seats to the parties, IEBC must comply with the principle of proportionality in terms of the total seats garnered by each party. Furthermore, I find IEBC is also bound to take into account the total number of seats won by each party in the county assembly in its responsibility of allocating seats to each political party. In other words, it is bound to follow the formula set out in Regulation 56 (2) of the Elections (General) Regulations, 2012. The argument by IEBC that it was necessary to exclude the 3 seats held by independent candidates in the allocation of seats is proper. The reason being that IEBC is only allowed to nominate members to the county assembly from the party lists that are submitted by political parties. The independent candidates are excluded. It seems that the legislature formula of allocation of seats favours political parties and not independent candidates." (Emphasis).

72. With that in mind, the Petitioner debated, when allocating the four remaining seats, the Orange Democratic Party, the United Democratic Alliance, the Pamoja African Alliance, on the application of the formula, received one seat each on the basis of their strength in terms of the number of seats won (five seats, five seats and four seats respectively), which made a total of three seats allocated in the category of gender top up, leaving only one remaining seat for allocation to the parties which won one seat each, i.e. the United Democratic Movement, the Jubilee Party, the Shirikisho Party of Kenya, the United Party of Independent Candidates and the Kenya African Democratic Union.

73. Therefore, as it was not possible to split the remaining one seat under the gender top up to share among the five parties with equal strength in terms of the seats elected through the ballot, there was need to break the tie and that could only be done through considering the strength of the five political parties in terms of the number of votes garnered by each political party at the ballot. As a result, the seat was allocated to the United Democratic Movement as that is the political party that had garnered the highest number of votes, 4192, at the ballot. To this end, the Commission relied on the authority of Ann Potisho Kapasar (supra), where the court referred to submissions by one of the parties as follows:

> " 34. It is clear from the above list that both KANU and NVP were both entitled to an extra seat each due to the fact that they equally tied in priority. "That, the breaker would ordinarily be the total number of votes garnered by the individual party in accordance with article 177 (1) (a)."

74. The Commission then stated that the "formula" used to break the tie as applied in this case pointed out to a lacuna in the law and that the Commission resolved to that solution as it was not mandated by law to increase the number of seats to provide for the five political parties with the same strength or altogether fail to allocate the remaining seat and that indeed, that was one of the reforms to electoral laws that the Commission had proposed to be addressed by the legislature.

75. On the point raised by the Petitioner that some of the parties elected by nomination were not residents of Kwale County, the Commission was of the view that whereas there was a pending bill (Elections (Amendment) Bill No. 41 of 2021) to include that requirement as a qualification, there is currently no requirement under any legislation that a person so elected must be a resident of the particular county.

76. The last point addressed by the Commission concerns the priority in party lists. On this, the Commission told the court that in picking the names for purposes of election by nomination, the

Commission is required to abide by the priority of the list as submitted by the political parties. The Commission based its argument on the authority of Linet Kemunto Nyakeriga & another v Ben Njoroge & 2 others [2014] eKLR in which the Court of Appeal expressed itself as follows:

> "The IEBC issued guidelines to political parties, "The Party List Formula and Rules of Submission," to, among other things, help the parties in the compilation of the party lists. It prescribed the following requirements:-
>
> "(b) Each party list comprises of the appropriate number of qualified candidates; and alternates between male and female candidates in the priority in which they are listed. However, this criterion does not apply to Senate (Women) Party List (Article 98 (1) (b) of *the Constitution*) as all 16 nominees are women.
>
> (c) The names in the party list shall be in the order of priority.
>
> (d) The party list shall be a closed list, that is, the list may not be amended after it has been submitted to the Commission." (Emphasis ours).
>
> Two new concepts have emerged in our electoral laws; party list and priority of the names in the list. Party list voting systems are widely used elsewhere in the world (particularly in Western democracies) and are designed to ensure that parties are represented proportionally in the legislature and all groups are also fairly represented. There are two broad types of party list system; closed list and open list. Whatever the case, in the party list, as the name suggests, each party lists its candidates as it may be entitled.
>
> In an open list system the voters have the freedom of expressing their preference for a particular candidate in the list. The names in the list are not in any order of priority but are randomly arranged. The order of the final list will depend on the number of votes received by each candidate in the list, with the most popular candidate rising to the top of the list thereby enhancing his/her chance of being elected. In contrast, in a closed list system the party fixes the order in which the candidates are listed and ultimately elected and the voter simply casts a vote for the party as a whole as opposed to an individual candidate in the list. Winning candidates are selected in the exact order they appear on the list. A closed list system has been used in Algeria, Angola, Belgium, Burundi, Eritrea, France, Israel, Mozambique, Niger, Portugal and South Africa, among other countries around the world.
>
> From the aforesaid guidelines issued by the IEBC to political parties, it is clear the list system adopted in Kenya is a closed system. We reiterate what the guidelines provide:-
>
> "(b) The party list shall be a closed list, that is, the list may not be amended after it has been submitted to the commission."
>
> It follows that it is the responsibility of the parties to choose their preferred candidate and rank them in order of priority of preference. The seats won by each party are filled by candidates in the order they appear on the parties' respective list. The definition of "party list" under Section 2 of the *Elections Act* suggests ownership of the list by the political party that has prepared it. The practice, indeed the law, in jurisdictions with a closed list system is that the power over who gets the reserved seats resides with the parties themselves and no other authority. (Emphasis).
>
> There is no better explanation for the adoption of the closed party list in Kenya and the role of the IEBC with regard to the list than that provided in the *Elections Act* itself. It provides in Section 37 as follows:-

"37.

(1) If a representative from a political party list dies, withdraws from the party list, changes parties, resigns or is expelled from his or her party during the term of the representative, the seat of the representative shall be allocated to the next candidate of the same gender on the respective political party list.

(2) Notwithstanding the provision of section 34 (10), if there are no more candidates on the same party's list, the Commission shall require the concerned political party to nominate another candidate within twenty-one days.

(3) A vacancy in any seat in a political party list shall not be filled three months immediately before a general election.

(4) Where a political party fails to comply with the provisions of subsection (2) the Commission shall not allocate the seat for the remainder of the term of Parliament or the county assembly."

The list serves as a reservoir of candidates in any of the eventualities enumerated above. It is clear from what we have said up to this point that the IEBC, in a closed list system has no power to rearrange the list or pick out from the list any other candidate apart from the parties' preferred candidate listed at the top of the list if only one candidate is required. In choosing the appellants in place of the 1st and 2nd respondents who were ranked first by their respective parties, the IEBC argued that it has the power in Section 36 (4) of the *Elections Act* to do that, and secondly that it was "constitutionally necessary" to balance the categories of disabilities. It was submitted before the election court that:-

"iv. To achieve the principle of diversity and to ensure the two disabilities (physical and visual) are represented it became constitutionally necessary to allocate the two seats such as to have one physically disabled member and one visually disabled member."

This decision appears to us to have been informed by genuine intentions and logic but it was not a criterion or a consideration of *the Constitution* or statute." (Emphasis).

77. As the Petitioner has not presented any evidence that the issue of priority was contested or challenged within the political parties' disputes resolution mechanisms, the Respondents actions on applying the party lists "as is" cannot be faulted. That moreover, the Petitioner's party, PAA, itself did not nominate in its party list any persons living with disabilities.

E. The Petitioner's Rejoinder

78. The Petitioner stated that the formula applied by the Commission is alien to the provisions of Article 177(1)(b) and (c) of *the Constitution*, Section 36 of the *Elections Act* and Regulation 56(2) of the Elections (General) Regulations. In her view, the total number of seats for allocation should have been 13 and not 10.

79. The Petitioner urges that the Commission's application of the wrong formula breached Article 177(1) (b) and (c) of *the Constitution*, Section 36 of the *Elections Act* and Regulation 56(2) of the Elections (General) Regulations.

80. As regards the election of the 2nd, 3rd, and 11th Respondents, the Petitioner submitted that the three were not registered as voters in Kwale County and were therefore not eligible to be elected by way of nomination to the County Assembly of Kwale and that in electing the three as such, the Commission's violated Articles 38, 81(a), (d), 90(b), (c) of *the Constitution* and Section 36(1)(e) of the *Elections Act*.

F. Issues For Determination

81. The Petitioner and the Commission framed the issues for determination, which I merge and narrow down as follows:

    a. Whether this court is clothed with jurisdiction to entertain and determine this petition in so far as it relates to settlement of electoral disputes brought after the declaration of results that may have arisen prior to such declaration of election results.

    b. Whether the 2nd, 3rd and 11th Respondents were residents of Kwale County and whether the three were registered voters in Kwale County and subsequent thereto, whether the election by nomination of the three to the Kwale County Assembly was in conformity with electoral laws.

    c. Whether the Commission applied the proper formula in allocating the nomination seats to the Interested Parties.

    d. Whether the County Assembly of Kwale is properly constituted in the absence of a person living with disability as a member.

    e. Ultimately, after considering and determining issues (a) to (e) above, whether the election by nomination of the Respondents conformed with *the Constitution* and electoral laws.

82. The first issue that I will look at is whether court is clothed with jurisdiction to entertain and determine this petition in so far as it relates to the settlement of electoral disputes brought after the declaration of results, which disputes may have arisen prior to such declaration of election results. Such issues, narrowed down include whether a person had the necessary qualifications to be nominated by his/her political party.

83. The points that precisely concerns this petition under this issue are as follows:

    a. Whether the party lists submitted to the Commission by the Interested Parties breached *the Constitution* and electoral laws by failing to include persons living with disabilities.

    b. Whether the inclusion in the party lists, of persons that were not registered as voters in Kwale County, (i.e. the 2nd, 3rd and 11th Respondents), that were submitted to the Commission breached *the Constitution* and electoral laws.

    c. Whether the political parties lists submitted to the Commission conformed with the law in terms of prioritizing the different categories.

84. The three points raised above under the first issue for determination are obviously matters that must have arisen before the August 9th, 2022 general elections, and thus before the Special Issue of the Kenya Gazette Notice Volume CXXIV – No. 186, Gazette Notice No. 10712 dated 9th September, 2022 was published. In other words, those are matters that arose before the 2nd to 11th Respondent herein were elected by way of nomination to the Kwale County Assembly.

85. What then this court is to determine is whether this is the proper forum for such matters to be addressed and if this court has the requisite jurisdiction to entertain the same.

86. As properly submitted by the Commission, the forum and mechanism for the resolution of such disputes is provided for under Section 74 of the *Elections Act*, which provides that:

> 74. Settlement of certain disputes
>
> (1) Pursuant to Article 88 (4) (e) of *the Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
>
> (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.
>
> (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.
>
> Section 4 of the *Independent Electoral and Boundaries Commission Act* has a similar provision, literatim.

87. In the instant petition, one of the complaints raised by the Petitioner as I understand it is that a member of her party PAA, who is the third Respondent herein, was included in the list submitted to the Commission yet she was not eligible to be nominated for the reason that she was not a registered voter in Kwale County. The other complaint that concerns the Petitioner's party PAA, (although also directed at all the other Interested Parties herein) was that the list submitted to the Commission did not include a person living with disability as one to be elected by way of nomination.

88. My understanding of the statutory provisions reproduced above is that they provide that the proper forum to present such disputes arising from nominations between a member of a political party and the political party is the Commission or the Political Parties Disputes Tribunal, established under Section 39(1) of the *Political Parties Act*. It is therefore, in my view, not available for the Petitioner, who opted not to present her complaints to the proper forum at the time the Commission received the lists from the political parties, to then later file the same within an election petition. The courts in the cases of Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others [2011] eKLR, Isaiah Gichu Ndirangu (supra) and National Gender Commission (supra) all relied upon by the Commission are clear that a party who fails to utilize the special dispute resolution mechanisms that are provided for by law cannot present his dispute before the election court. There is also the case of Ben Njoroge & another v Independent Electoral Boundaries Commission (I.E.B.C) & 2 others [2013] eKLR, where the court proceeded to express itself thus:

> "This court appreciates that the petitioners and the Respondents underwent the nomination exercise in their respective parties to have emerged successful in the lists. Indeed, it is the petitioners' submission that they emerged tops in their respective lists followed by the respondents.
>
> This court in making the finding on whether or not the 2nd Respondent was a registered member of TNA and whether she was qualified for the nomination, is of the view that this allegation is an allegation that should have been raised before the general elections were conducted as they are referred to as pre-election disputes and the 1st Respondent should have arbitrated on this issue. I say so because the 1st Respondent through its Gazette Notice No 139 dated 3rd December 2012 had published the Rules of procedure on settlement of disputes. This instrument defined a dispute to mean a complaint, challenge, and claim

or contest relating to any stage of the electoral process and includes an objection to the acceptance of the nomination papers of a candidate by the Returning Officer. The 1st Petitioner had the right to lodge this complaint under Rule 5 where he would have been heard and a determination made by the 1st Respondent. This court therefore will not determine the issue of the registration and qualification of the 2nd Respondent since the 1st Petitioner had not exhausted other dispute resolution mechanism that have been provided by the law under Article 88 (4) (e) of *the Constitution* and Section 74 (1) of the Elections. The court also notes that the 1st Petitioner acknowledged that the party list that was presented by TNA was valid and went ahead and stated that he was listed as No 1 followed by the 2nd Respondent. It cannot therefore be possible for the 1st Petitioner to affirm that the 2nd Respondent was validly in the list then turn around again and say she was not qualified. The 1st Petitioner has produced a letter purportedly authored by the 2nd Respondent stating that she acknowledged her nomination to the Senate despite her not being a Member of TNA. There are facts that need to be looked at in this letter; The 2nd Respondent is visually blind, it is the 2nd Respondents submission that she was told that the letter contained a congratulatory message. I will therefore take the s of this letter with a pinch of salt and chastise her brother for lying to her since it seems that this letter was meant to be used against her in this petition. There is also the affidavit of George Onyango Oloo the Secretary General of TNA stating that the 2nd Respondent is a registered member of TNA. This goes in line with the requirements of section 17 (a) and 18 of the *Political parties Act*. Section 17 (1) (a) states that, "A political party shall maintain at its head office and at each of its county office in the prescribed form an accurate and authentic record of a register of its members in a form prescribed in the second schedule. Further Section 18 (1) of the *Political Parties Act* state that the Registrar may issue a written notice in the prescribed form to the chairperson or secretary general of a political party to furnish for inspection by the Registrar the records required to be maintained under section 17 or such information as is reasonably required by the Registrar to ensure compliance with the provisions of this Act. This confirms that each political party was a custodian of the registers of their members. Therefore, the 1st Petitioner's claim that the 2nd Respondent was not a member of TNA and was not validly nominated by the party fails for lack of sufficient proof in this claim."

89. The jurisprudence that I get from the authorities above is that the court lacks jurisdiction to entertain and determine such disputes where a party fails to exhaust other dispute resolution mechanism that are provided for by the law under Article 88 (4)(e) of *the Constitution* and Section 74 (1) of the *Elections Act*.

90. The above position notwithstanding, the authority of Esther Okenyuri Angwenyi v Mukumi Edmond Anthony & 3 others [2018] eKLR is helpful in determining the issue of eligibility for a person to be elected by way of nominations where such a person is not a registered voter in the same county to whose assembly he is so elected. The court in that case observed as follows:

> "It is clear from both *the Constitution* and the *Elections Act* that IEBC is responsible for the conduct and supervision of elections in the party lists under Articles 97(1) (c) and 98 (1) (b) as well as those of the members of the County Assembly under Article 177 (1) (b) and (c). Further Article 193 provides that,
>
> (1) Unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person—
>
> (a) is registered as a voter;

(b) satisfies any educational, moral and ethical requirements prescribed by this Constitution or an Act of Parliament; and

(c) is either—

(i) nominated by a political party; or.

The said Article does not provide that a voter who is to be nominated must be from the said county. The Article refers to a registered voter. The 1st respondent demonstrated that he was a registered voter, his political party confirmed the same he was not disqualified and therefore he was a proper candidate for nomination. If Parliament intended to specify that the voter must be from a specific county, then Parliament could have stated so specifically. Article 90 (1) provides that, "Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98 (1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists.

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

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

Under Article 90 (2) IEBC is to ensure that the political party submits the nomination list within the prescribed time. This is what the 3rd respondent did and it cannot be faulted on this. I therefore find that the Trial Magistrate did not err in holding that the nomination form by Jubilee party cannot supersede *the Constitution* and the written laws. The rules of any political party cannot supersede the supreme law *the Constitution* and the Election laws. All in all the appeal fails, it is dismissed."

91. In the result, on the guidance of the foregoing authorities, the finding of this court is that it lacks jurisdiction to entertain and determine the issues raised by the Petitioner as outlined in paragraph 83 above.

92. The other issue is whether the 2nd, 3rd and 11th Respondents were residents of Kwale County and whether the three were registered voters in Kwale County and subsequent thereto, whether the election by nomination of the three to the Kwale County Assembly was in conformity with electoral laws.

93. The first part of this issue, as addressed by the Commission is that there is no legislative requirement that a party who is elected by nomination must be a resident of the county in which he is so elected. The Petitioner did not point out the provision of the law, if any that states as much. It therefore would not matter whether that the 2nd, 3rd and 11th Respondents may not have been residing within Kwale County as that is not a requirement for making it into a party list.

94. The second part of the issue is that the Petitioner complains that the three Respondents were not registered voters within Kwale County and were for that reason not eligible to be nominated by their

respective parties. In the case of the 3rd Respondent who was nominated by the Petitioner's own party Pamoja African Alliance, I have stated in paragraph 83 to 91 of this judgement that that is a matter this court has no jurisdiction to entertain and determine as it has been presented before the wrong forum. The issue ought to have been presented before the proper institution at the opportune time.

95. As regards the 2nd and 11th Respondents who were nominated by political parties to which the Petitioner is not a member, I doubt that the Petitioner would have the necessary locus to challenge a list that is preferred by a political party that she does not belong to. Moreover, taking guidance from the case of Ben Njoroge (supra), this court does not have the jurisdiction to determine the particular complaint by the Petitioner. (See the holding of the court as reproduced under paragraph 89 of this judgement).

96. As can be seen from the authority of Linet Kemunto Nyakenga (supra). Party lists are closed lists and may not be changed after submission to the Commission. The court in that case expressed itself as follows:

> "It follows that it is the responsibility of the parties to choose their preferred candidate and rank them in the order of priority of preference. The seats won by each party are filled by candidates in the order they appear on the parties' respective list. The definition of "party list" under Section 2 of the *Elections Act* suggests ownership of the list by the political party that has prepared it. The practice, indeed the law, in jurisdictions with a closed list system is that the power over who gets the reserved seats resides with the parties themselves and no other authority."

97. The court went on to state as follows:

> "The list serves as a reservoir of candidates in any of the eventualities enumerated above. It is clear from what we have said up to this point that the IEBC, in a closed list system has no power to rearrange the list or pick out from the list any other candidate apart from the parties' preferred candidate listed at the top of the list if only one candidate is required."

98. The next issue for this court to consider and determine is whether the Commission applied the proper formula in allocating the nomination seats to the Interested Parties.

99. On this issue, my view on the manner in which to determine the available seats heavily leans towards the submissions of the Commission. In this particular case, the number of elective seats was twenty. Out of these, nineteen were won by political parties while one was won by an independent candidate. Out of the twenty seats, nineteen elected candidates were male and one was female.

100. Under Article 177(1)(c) of *the Constitution* a party list must include eight candidates, at least two of whom shall be persons with disability, two of whom shall be the youth and two of whom shall be persons representing a marginalized group. It is instructive under Section 36(8) of the *Elections Act* that the Commission is required to draw from the above list of eight four special seat members in the order given by the party. That then means that the four special seats are mandatory and the Commission cannot fail to allocate the same, as this number cannot be altered as it is specifically provided for by the law.

101. As the four seats are mandatory as seen above, the Commission was in my view first required to allocate them before proceeding to consider the number of gender top up seats for the reason that such allocation was necessary in determining the number of gender top up seats available for allocation. The necessity arises out of the fact that before allocating the four seats, it would not be possible for the

Commission to determine how many seats would be required to balance off the gender equation, for the simple reason that the gender of the four would remain unknown before such allocation was done.

102. Once done with the allocation of the four seats, the Commission would then be able to ascertain the number of seats required for gender top up. It is then on that basis that the Commission, in my view, rightfully allocated the four special seats to three political parties in accordance with the strength in terms of the votes received, whereby the political party that had five elected seats (ODM and UDA) each received one seat while the one that had four elected seats (PAA) was allocated one seat. One seat remained for allocation to one of the other five political parties (UDM, Jubilee, Shirikisho, UPIA and KADU). The formula for the allocation of the special seats was to take the number of seats won by a political party divided by the number of seats won by all the political parties multiplied by the number of seats available for allocation, which was four for the case of marginalized special seats.

103. It is to be noted that the Commission allocated the remaining seat to UDM party. In its explanation, the Commission stated that as it was not possible to share the single seat among each of the five political parties that won one elective seat, there was need to break the tie and that could not be lawfully done by increasing the seats for allocation. In the circumstances, the Commission considered the number of votes each of the five political parties had garnered and on that it is on that basis that the remaining seat was allocated to UDM, being the party, among the five, that had garnered the most votes.

104. It would seem that the Commission was faced with a situation in which it had to determine the party to which the remaining seat was to be allocated and it is in my finding, backed up by the authority of Harold Kimuge Kipchumba v Independent Electoral & Boundaries Commission & another [2017] eKLR, the Commission had the mandate to make a decision out of the exigent situation. In that case, the court had the following to say:

> "I do not think that it is the intention of the law to leave the body that is mandated to regulate and oversee elections without a solution when faced with a difficult situation like this one. To my mind it is given latitude in designating nominees to do so in a way that complies with *the Constitution*, the electoral laws and the regulations made thereunder. I think a distinction needs to be made between elections by registered voters and elections through nominations. In the former the IEBC will have no mandate to refuse to declare a candidate who has won the elections by the majority as duly elected, but in the latter, to take the list as it is and designate nominees as listed may in some cases lead to two men or two women being declared elected to occupy seats under Article 98(1) (d) in violation of *the Constitution*, the *Elections Act* and the Regulations."

105. The above decision steers me to be guided that the Commission, being the body that is by law mandated to carry out elections, acted within the law to make a decision in a situation where there is no legislation such as the one it was faced in this case, as the situation presents a lacuna in the law.

106. Having considered that the four seats above, it was then incumbent upon the Commission to address the next category, being the gender top up group. From the material before me, the four seats I have addressed above were all allocated to female candidates. That then meant that when one added that number to the one elected female candidate, the County Assembly of Kwale had at this stage five a total of five female members and nineteen male members. If nineteen male members represented two thirds of the assembly, it then meant that for female members to make up the one third remainder, they had to be in total 9.5 (rounded off to ten) members. But as the four seats above had already been allocated, that left six seats for allocation under the gender top up.

107. Again, in accordance with the strengths of the political parties in terms of the number of seats that each got through the ballot, the six available gender top up seats would be shared. The formula applicable was then to take the number of seats won by each political party divided by the total number of seats won by all the political parties multiplied by the number of seats available for nomination, which was six for the gender top up category. Applying that formula, the six seats were allocated and ODM received two seats, UDA two seats, PAA one seat and UDM one seat.

108. In my view, from the foregoing, my understanding of Regulation 56(2) of the Elections (General) Regulations, 2012 is that the Commission, while allocating seats correctly dealt with the two categories of marginalized and gender top up separately thus arriving at four seats for allocation in the first category and six in the second category, making a total of ten seats. The formula that the Petitioner applied in arriving at fourteen or thirteen seats was wrong, considering that under Section 36(8) of the *Elections Act* and pursuant to Article 177(1)(c) of *the Constitution*, four seats were mandatorily reserved for the first category, which had to be determined in terms of its gender composition before the number of seats for topping up to satisfy the gender requirement could be reached.

109. In the result, I reach the conclusion that the election by nomination of the Respondents conformed with *the Constitution* and electoral laws. Consequently, this Petition lacks merit and I proceed to make the following orders in respect thereof:

    a. The Petition is hereby dismissed.

    b. On the issue of costs, as the Responses of the 2nd to the 11th Respondents and the 4th Interested Party were struck out, the said parties will bear their own costs of the Petition. The Petitioner will bear the costs of the 1st Respondent which I hereby cap at Ksh.400,000/=.

    c. A certificate of this determination in accordance with Section 86 of the *Elections Act* shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the County Assembly of Kwale.

    d. Orders accordingly.

DELIVERED virtually, DATED and SIGNED this 14th day of March, 2023

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OMIDO, JOE MKUTU

SENIOR PRINCIPAL MAGISTRATE

ELECTION COURT

KWALE.

Mr. Wameyo for the Petitioner.

Mr. Amimo for the 1st Respondent.

Mr. Oluga for the 2nd Respondent.

Mr. Oduor for the 3rd Respondent.

Sen. Chimera & Mr. Mbwiza for the 4th, 8th & 9th Respondents.

Mr. Injairu holding brief for Mr. Masake for the 5th Respondent.

Mr. Gitonga for the 6th & 7th Respondents.

Ms. Njeru for the 10th Respondent.

Mr. Mbatai for the 11th Respondent & the 4th Interested Party.

No appearance for the 1st, 2nd, 3rd, 5th, 6th, 7th & 8th Interested Parties.

Mr. Kessy – Court Assistant.

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OMIDO, JOE MKUTU

SENIOR PRINCIPAL MAGISTRATE

ELECTION COURT

KWALE.