



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT OF KAJIADO

ELECTION PETITION NO.2 OF 2017

**IN THE MATTER OF NOMINATION OF MEMBER OF THE COUNTY ASSEMBLY IN
KAJIADO COUNTY, SPECIAL INTEREST CATEFORY**

AND

**IN THE MATTER OF CREATION AND PUBLICATION OF PARTY LISTS FOR SPECIAL
SEATS AND ALLOCATION OF SUCH SEATS TO POLITICAL PARTIES**

AND

**IN THE MATTER OF PUBLICATION OF THE FINAL ORANGE DEMOCRATIC
MOVEMENT (ODM) PARTY LIST BY THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (IEBC) SPECIAL INTEREST CATEGORY**

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 90, 35 (1) (B) AND SECTION 38 (1)
OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF REGULATION 54 (8) OF THE ELECTION
(GENERAL) REGULATIONS 2012**

BETWEEN

ELIZABETH JEBET KIBOR.....PETITIONER

-VERSUS-

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

SANDRA MARIO.....3RD RESPONDENT

JUDGEMENT

The Petitioner Elizabeth Jebet Kibor filed her petition against the 3 respondents on 22/9/2017. She prayed for the following orders:

(i) A declaration be issued that the election of special seat member of County Assembly under Article 177 (1) (b) and (c) as read with Article 90 of the Constitution most conform to the constitutional principles of ethnic minorities and marginalized groups pursuant to Article 56 of the Constitution.

(ii) A declaration that the Petitioner's right to be nominated to the County Assembly of Kajiado as the ethnic minority representative has been infringed.

(iii) An order nullifying the nomination and subsequent gazette of the 3rd Respondent vide gazette notice No. 8380 as nominated member of County Assembly of Kajiado in the ODM Party list.

(iv) An order directed to the Independent Electoral and Boundaries Commission to nominate and gazette the Petitioner as ODM nominated member of County Assembly representing the ethnic minority to Kajiado County Assembly.

(v) The Honourable Court do issue such other orders and give such further directions as it may find to meet the end of justice.

(vi) Cost of and incidental to this suit be awarded to the Petitioner.

The Petitioner avers that at the invitation of the 2nd Respondent through its Election Board for deserving and qualified members of the party to apply in order to be considered for slots into the party list of all persons who would stand elected if the party were entitled to seat in the County Assembly of Kajiado as the case may be on the basis of proportional representation in accordance with Article 90 of the Constitution of Kenya 2010 and section 35 of the Election Act No. 24 of 2013 as amended in 2016. She tendered her application and all the relevant documents. The 2nd Respondent considered her application and submitted her name to the 1st Respondent in the party list category for special interest group.

On 23rd July, 2017 the 1st Respondent published the party in the daily newspaper and the Petitioner's name appeared on the same newspaper at position 1. In the list of ODM party list for Kajiado County Assembly falling under the special interest category as the representative for ethnic minority the name of the 3rd Respondent did not appear in the said publication which means she did not qualify to be nominated. That on the 28th August 2017 the 1st Respondent published gazette notice No. 8380 Vol. CXIX No. 124 publishing the nominated member of County Assembly to be 3rd Respondent.

The Petitioner wrote to 1st and 2nd Respondent inquiring the membership status of the 3rd Respondent but no response was received at the time of filing the petition. The 1st Respondent in their affidavit sworn by one Salome Oyugi Manager Political Parties and Campaign Finances at the IEBC over that in compliance with the orders of the 1st Respondent's Dispute Resolution Committee in IEBC/NM/PL/022017, the 2nd Respondent vide a letter dated 17th August, 2017 submitted the list dated 28th July 2017 to the 1st Respondent for gazette.

2nd Respondent's letter dated 17/8/2017 together with the list dated 28/7/2017 annexed SM7. The list as submitted by the 2nd Respondent had the 3rd Respondent as its first nominee for the marginalized, youth and person with disability category. She stated that the decision of the Dispute Resolution Committee in IEBC/NM/PL/022017 and letter dated 28/7/2017 as submitted by the 2nd Respondent has not been challenged by any party therefore 1st Respondent acted in compliance with the constitution of Kenya, the Elections Act 2011 and the Regulations made thereunder. She urged the Honourable Court to dismiss the petition dated 22nd September, 2017 with cost.

The 2nd Respondent vide their affidavit sworn by Olga Karani Chairperson for the ODM appointed National Nomination Committee said that her office was mandated by National Election Commission for ODM. 2nd Respondent in this case was to receive application for nominations. The committee deliberated on the list taking into account the parameters set out in the law on nominations to party list namely gender balancing including youths, workers, marginalized communities, ethnic and regional balancing. She confirmed that the Petitioner's name was included in the list that was submitted to IEBC by herself and published on 23/7/2017 as the first nominee under the marginalized special interest category this is at paragraph 15 of her affidavit dated 3/11/2017. Paragraph 16 she confirmed that the 3rd Respondent's name was never included in the list that was forwarded to the IEBC. She further states that subsequent to the publication of the list in the dailies on 23/7/2017 a number of complaints were filed with the IEBC Dispute Resolution Committee as well as the Political Parties Dispute Tribunal. Neither the Petitioner nor the 3rd Respondent challenging the list as submitted to the IEBC. In any of the named forums pursuant to the orders by the IEBC Dispute Resolution Committee as well as political parties dispute tribunal and party's own internal party mechanisms committee with the approval of NEC (National Election Commission) reviewed and resubmitted the party list to the IEBC.

The Petitioner's name was still included in the latest list as the 1st person. Under the marginalized list while the 3rd Respondent was never included annexure is marked OK2 (copy of the letter forwarding reviewed) list and the list for Kajiado County.

After election on 8/8/2017 commission gazette the successful nominee to the County Assembly under the party list. She was dumb founded when she learnt that the 3rd Respondent had been gazette as a Member of County Assembly for Kajiado County under the 2nd Respondent's list. She wrote to the 3rd Respondent severally to resolve the issue but the 3rd Respondent never took any positive action. She confirmed that the 3rd Respondent was never a member of ODM as at the date of gazette of nominated members of the County Assembly. (Annexure OK3 letter from the Party's Legal Officer. She states that the instant petition ought to be allowed with cost to the 2nd Respondent).

3rd Respondent in her response to the petition stated that she deny all the allegations of facts set out by Petitioner as if the same were herein set out verbatim and traversed seriatim. In her further response to paragraph 18 of the petition she relied on Article 90 (2) (c) in letter and spirit for obvious reasons except County Assembly party list from reflecting the regional and ethnic diversity of the people of Kenya. The provision states that:

90 (c): "Except in the case of County Assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya."

The 3rd Respondent further contends that nomination is not election and as such the petition filed herein challenging nomination of the 3rd Respondent to the County Assembly is incompetent. The 3rd Respondent relied on section 34 (8) of the Election Act.

Section 34 (8): "A person who is nominated by a political party under subsection 2, 3 and 14 should be a person who is a member of the political party on the date of the submission of the party list by the political party."

The 3rd Respondent invites the court to hold that the petition lacks merit and should be dismissed. The Petitioner should bear the cost of the petition.

The Petitioner submits that it is a presumption of the law that elections are properly conducted and as such the burden is always upon the Petitioner to prove otherwise in addition to the foregoing the court has a duty to consider whether there was appearance of compliance with the principles laid down in the constitution and the electoral laws in the nomination of the 3rd Respondent as member of Kajiado County Assembly. The Petitioner contends that the 1st Respondent contravened the constitution and the electoral laws by gazetting the 3rd Respondent. The Petitioner's contention is support by the 2nd Respondent.

The nomination of members of the County Assembly from a party list to present special groups has its basis in the constitution and relevant provisions being Article 90 and 177. Article 177 provides that:

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

(b) The number of special seat members necessary to ensure that no more than two third of membership of the assembly are of the same gender.

(c) The number of members of marginalized groups including persons with disabilities and the youths, prescribed by an Act of Parliament.

(d) And the speaker who is an ex officio member.

(2) The members contemplated in 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.

Article 90 (1): **“Elections.....for members of the County Assembly under Article 177 (b) and (c) shall be on the basis of proportional representation by use of party lists.**

(b) Except in the case of the seats provided for under section 98 (1) (b) each party list comprises the appropriate number of qualified candidates and alternate between male and female candidates in priority in which they are listed and

(c) Except in the case of County Assembly seat, each party list reflects the regional and ethnic diversity of the people of Kenya.”

Section 74 of the Election Act and Article 88 (4) of the constitution gives the Electoral Commission (IEBC) the powers to resolve any dispute arising from nominations. The 2nd Respondent's Kajiado County Party list was challenged at the 1st Respondent's Dispute Resolution Committee in IEBC/NM/PL/02/2017 by the ODM Chairperson – Kajiado County Daniel Osoi on account that it was not the rightful list forwarded. The Petitioner alleges that the 3rd Respondent was not a member of the 2nd Respondent when 1st Respondent published the final list on 23/7/2017 in the daily nation and standard newspapers.

Section 34 (8) of the Elections Act 2011 which provides that, **“a person who is nominated by a political party under subsection 2, 3 and 4 shall be a person who is a member of the political party on the date of submission of the party list by the political party.”**

It is undisputed that the 3rd Respondent applied to be a member of the 2nd Respondent on 30/8/2017 a position confirmed by 2nd Respondent through a letter dated 15/11/2017. Moreover, according to the records held by the office of the Registrar of Political Parties (ORPP) the 3rd Respondent was not a member of the 2nd Respondent.

The Petitioner therefore submits that the purported nomination of the 3rd Respondent was unlawful. The Petitioner relies on the case of *Moses Mucigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR* at paragraph 94 and 95 the court held that, **“the IEBC does not have jurisdiction to direct political parties on the manner in which to prepare a party list. The decision of the Supreme Court is precedent that binds all lower courts including this court until such a time when the decisions shall be overturned by the Supreme Court.”**

Daniel Osoi v ODM and IEBC does not in any way have any effect on this election petition and the 3rd

Respondent were never parties in the dispute. The Petitioner urges the court to grant orders as per the prayers listed earlier on.

The 1st Respondent submits that the burden of proof lies squarely on the Petitioner when she broached the allegation of electoral breach, misconduct and or irregularities on the part of the 1st Respondent. He who alleges must prove. In the case of **Gideon Muangangi Wambua & Another v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR** it was held that, “**presumption of the law that elections were properly conducted and as such the burden is always upon the Petitioner to prove otherwise.**”

The court relied on the Supreme Court decision in **Raila Odinga & Others v IEBC & 3 Others Nairobi Petition No. 5 of 2013 [2013] eKLR** where the Supreme Court held that, “**where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of the compliance did affect the validity of the election. It is on that basis that the respondent bears the burden of proving the contrary.**”

In the **Joho v Nyange & Another [2008]** the court upheld the position that, “**the burden of proof lies with the petitioner and stated that election petitions are not ordinary suits but disputes in ream of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence..... The burden of proof in election petition lies with the petitioner as he is the person who seeks to nullify an election.**”

The issues are therefore two:

- (1) Whether the 3rd Respondent was validly elected within the meaning of Article 177 as read with Article 90 of the Constitution.**
- (2) Whether the 1st Respondent disobeyed its mandate under Article 90 of the Constitution.**

The 3rd Respondent averred that the procedures were followed by the 1st Respondent who informed political parties to present their party list which 2nd Respondent provided 45 days to the date to the election as stipulated in section 55 (3) of the Elections (General) Regulations 2012. The 2nd Respondent re-submitted its final party list to the 1st Respondent on 19th July, 2017. The list was published on 21/7/2017. There was a complaint on the list for Kajiado by Daniel Kosoi which was heard and determined on 26/7/2017. 2nd Respondent conceded to complaint and undertook to present the list forwarded by the complainant on or before 28/7/2017. The list which was later provided which put 3rd Respondent as first on the list.

Whether 3rd Respondent was member of the 3rd Respondent:

A copy of Certificate No. 006532 certifies the 3rd Respondent as a life member of 2nd Respondent. The 1st Respondent submits that they discharged their mandate under Article 90 of the Constitution and sections 34 – 37 of the Election Act. They relied on the case of **Ben Njoroge & Another v IEBC & 2 Others [2010] eKLR** where the court held that, “**if there is some appearance of compliance with the principles laid down in the constitution and the law in the conduct of an election, an election court will be slow in upsetting the result in reliance of the Re Kensington North Parliamentary Election [1960] 2 ALL ER 150. The court held that “it is for this court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to election or whether the act of omission affected the result.”**

The 1st Respondent prays that the petition be dismissed with cost to the 1st Respondent.

The 2nd Respondent enumerated the prayers sought by the petition in their petition. They submit that

there are 3 issues to be determined:

- (1) Whether the 3rd Respondent was duly and lawfully nominated by the 2nd Respondent as a member of Kajiado County Assembly.**
- (2) What should be considered by the party when coming up with the party list in the marginalized category?**
- (3) Whether the 1st Respondent complied with the provisions of Constitution 2010, Electoral Laws and all other applicable laws.**

The ODM Party Election and Nomination Rules, 2016 at rule 20 provides procedure for nomination of party list. The 1st Respondent is given mandate to supervise the list forwarded to it by the party when satisfied that it conforms with all written laws then gazette. The 1st Respondent did not gazette the list forwarded to it by the party on the 7/8/2017 but instead gazette names annexed to their further affidavit and marked as SM7. The Respondent submits that the Petitioner on various paragraphs of the petition indicated that the 3rd Respondent is from the Maasai Community and does not qualify to be nominated to represent ethnic minority in the County Assembly. This is demonstrated at paragraph 27, 29, 39, 40, 41, 42, 43, 45 and 48.

Secondly, that the 3rd Respondent did not meet qualifications outlined in the ODM guidelines on the qualification to be nominated as a member of County Assembly as in paragraph 27 and 29 of the petition. Letter marked EJK05 making ongoing on membership status of the 3rd Respondent and letter from Registrar of Political Parties dated 22/9/2017 EJK02 which indicate that 3rd Respondent was party less.

The 3rd Respondent contest that the allegations levelled challenging her nominations were laid on with false allegations and assumption misconceived and misconstrued facts and deliberate concealment of facts where upon the 3rd Respondent sought the petition to be dismissed with costs.

In rebutting the question of her ethnicity she adduced a copy of her identity card and certificate of birth both marked SM1 in the supporting affidavit filed on 9/10/2017. She said in her submissions that there was a meeting held on 11/6/2017 for all members and candidates of the ODM. In the presence of the then governor Hon. Nkedianye where all applications for nominees were considered and an all inclusive list was prepared for all nominees. The list was forwarded to the Executive Director of ODM Party for approval and onward transmission to the 1st Respondent. The minutes for that meeting were taken by ODM chairperson – Kajiado County one Daniel Ole Osoi. The 3rd Respondent appeared in position one in the marginalized, persons with disabilities and youth category. The petitioner appeared at position 20 in the gender top up category.

On 23/7/2017 the 1st Respondent published a different list in the newspaper different from the one approved by the ODM Kajiado County Electoral College. Petitioner appeared at position 1. This necessitated the Dispute Cause No. 2 of 2017 – Daniel Osoi v ODM and IEBC. After the decision of the dispute a fresh list was prepared on 27/7/2017 (list is SM6). 3rd Respondent appeared at position one while the Petitioner was position 8 under the special interest category.

On the issue of party membership the 3rd Respondent adduced payment receipts and life membership certificate SM2 in supporting affidavit dated 9/10/2017 same is not challenged. She relied on several authorities and prayed that the petition be dismissed with cost.

The issue for determination which were conceded to by all the parties on record that is counsel for the Petitioner, 1st Respondent, 2nd and 3rd Respondent on 6/12/2017 and filed on 7th December, 2017 are as follows:

- 1. Whether this court has jurisdiction to hear and determine this election petition.**

2. Whether the 3rd Respondent was eligible for nomination by the 2nd Respondent as a member of Kajiado County Assembly by virtue of the membership.
3. Whether the 3rd Respondent was duly and lawfully nominated by the ODM party as a member of Kajiado County Assembly.
4. Whether ethnicity as a factor for consideration in membership of County Assembly taking cognizance of Article 90 (2) (c) of the Constitution of Kenya 2010.
5. Whether the 3rd Respondent was duly and lawfully gazette by the 1st Respondent as a member of Kajiado County Assembly on the ODM party list.
6. Whether the decision by the Dispute Cause No. 2 of 2017 – Daniel K. Osoi v ODM and IEBC has any hearing on the instant petition.
7. Whether this court can overturn the decision in Dispute Cause No. 2 of 2017 – Daniel K. Osoi v ODM and IEBC in any other way than by way of appeal.
8. Whether the 1st Respondent gazette the final ODM list as submitted by the 2nd Respondent.
9. Whether the entire ODM party list published by the 1st Respondent for Kajiado County Assembly was illegal null and void.
10. Whether the 1st and 2nd Respondents complied with the provisions of the Constitution 2010; Electoral Laws, ODM Constitution, ODM Guidelines for application for party list.
11. What consequential orders, declarations and relief should this court grant if any.

DECISION

(a) Whether this court has jurisdiction to hear and determine this election petition:

Section 75 (A) of the Election Act No. 47 of 2012 provides that, “a question to the validity of the election of a member of a County Assembly shall be heard and determined by the Resident Magistrate Court designated by the Chief Justice. The Resident Magistrate’s Court so designated is the election court.”

The Chief Justice of Kenya vide a gazette notice Vol. XIX No. 147 dated 6/11/2017 gazetted this court at page 5483 to handle this election petition. This court is therefore properly seized of the powers to hear and determine this petition – *Elizabeth Jebet Kibor v IEBC, ODM and Sandra Mario*.

The court in election case where a member has been gazetted is set out in the case of *Rosemary Njeri Nyambua v Independent Electoral and Boundaries Commission & 2 Others [2015] eKLR* at paragraph 28 and 29 where the court held that, “there is already a clear process under the Elections Act for the Petitioner and this is the process that she ought to have followed. The invocation of the constitution does not assist her, once the interested party was gazette as a member of Kiambu County Assembly, she could only be removed by way of an election petition lodged in accordance with the provisions; section 75 (1) (A) of the Elections Act and Rule 6 (1) of the Election (Parliamentary) and County Elections Petition Rules, 2013.”

In a recent decision by Chief Magistrate’s Court at *Kisii in Rose Moturi Mnene v IEBC & 3 Others [2017] eKLR* the court held that, “where the person included in a party list have assumed the relevant office their nomination can only be challenged by way of an election petition therefore the court found that it had jurisdiction to hear and determine an election petition.”

(b) Whether the 3rd Respondent was eligible for nomination by the 2nd Respondent as a member of Kajiado County Assembly by virtue of the membership:

The Petitioner contended that the 3rd Respondent was not a member of ODM at the time of her gazettelement on 28/8/2017. The same was confirmed by a letter from Registrar of Political Parties dated 22/9/2017 which was never contested by the 3rd Respondent and a letter from Legal Officer for ODM dated 5/11/2017 in which it was confirmed that the 3rd Respondent applied for membership on 30/8/2017 and was later issued with certificate of life membership on the 3rd day of November, 2017. Other than the letters the actual documents has not been tendered in court to form part of the evidence.

The 3rd Respondent on the other hand has produced a copy of official receipt dated 2/1/2017 for Ksh.20,000 receipt No. 32944 for life membership; her birth certificate dated 12/10/2005 and copy of her identity card. 3rd Respondent's birth certificate indicates she was born of Kikuyu mother and Italian father. She is therefore not Masaai as alleged by the Petitioner. It is worth noting that the receipt is dated 2/1/2017 meaning it was issued 8 months before 28/8/2017 the date of gazettelement. The 3rd Respondent was therefore qualified to be nominated as a member of County Assembly.

Section 34 (8) of the Electoral Act 2011 which provides:

“A person who is nominated by a political party under subsection 2, 3 and 4 shall be a person who is a member of political party on the date of submission of the party list by the political party.”

The 3rd Respondent therefore met the above criteria for nomination.

(c) Whether ethnicity is a factor for consideration in membership of County Assembly taking cognizance of Article 90 (2) (c) of the Constitution of Kenya, 2010:

Article 90 of the Constitution provides as follows:

“The independent electoral and boundaries commission shall be responsible for the conduct and supervision of election for seat provided under clause (1) and shall ensure that:

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

(b) Except in the case of the seats provided 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.”

The case of *Commissioner for Implementation of the Constitution v the Attorney General & 2 Others Civil Appeal No. 351 of 2012* where the court stated that, **“the coming into place of a new constitution order that attempt to inject equality, rationality, objectivity and inclusivity into the process consistent with the dictates of participatory democracy and an attempt, through affirmative populace in the peripheries of the political process.”**

In *Rose Wairimu Kamau v IEBC & 3 Others [2013]*:

“.....Article (2) (c) is one of balancing the “regional and ethnic diversity of the people of Kenya.” That is not to be understood as obviating any balance in the communities of the

county concerned. The selection for nomination from the women, the youth and the people with disabilities at the county level should be done fairly and equally.”

Ethnicity and regional balance is a factor for consideration in nominating persons into the party list.

(d) Whether the 3rd Respondent was duly and lawfully nominated by ODM party as a member of Kajiado County Assembly:

The Petitioner contends that the 3rd Respondent was not eligible for nomination by the party as she was not an ODM party member at the time of submissions of the party list to the 1st Respondent as well as during the gazette of the party list by the 1st Respondent on the 28/8/2017 as substantively discussed by the petitioner.

Section 34 (8) of the Elections Act 2011 which provides that:

“A person who is nominated by a political party under subsection 2, 3 and 4 shall be a person who is a member of the political party on the date of submission of the party list by the political party.”

ODM Party Election and Nomination Rules 2016 at rule 20 provide an elaborate procedure for nomination of party list members and that Party’s National Executive Committee and present the list of members to the 1st Respondent in the category of the party list members a position that has not been disputed by 1st Respondent and 3rd Respondent.

The first and revised published list confirmed that the Petitioner was No. 1 on the list for marginalized special interest category. 3rd Respondent was not a member of the ODM party at the time of application. The receipt produced by the 3rd Respondent dated 2/1/2017 proves otherwise together with her life membership certificate from ODM office.

(e) Whether the 3rd Respondent was duly and lawfully gazette by the 1st Respondent as a member of Kajiado County Assembly on the ODM party list:

The finding in (d) above applies here. Having found that the 3rd Respondent was a member of ODM as at the time application was made, she was therefore duly and lawfully gazette by the 1st Respondent.

(f) Whether the decision by the Dispute Cause No. 20 of 2017 Daniel Osoi v ODM and IEBC has any bearing on the instant petition:

In *Moses Muciai & 14 Others v IEBC & 5 Others [2016] eKLR* the Supreme Court held that:

“A political party has the obligation to present the party list to IEBC which after ensuring compliance takes the requisite steps to finalise the “election” for this special seats. In the event of non compliance by a political party IEBC has powers to reject the party list and to require the omission to be rectified by submitting a fresh party list or by amending the already submitted.”

The IEBC does not have jurisdiction to direct political parties the manner in which to prepare a party list. The Petitioner contends that the Osoi case has no bearing in the present petition. Brief fails of the Daniel Osoi case is that Daniel K. Osoi disputed the list published by IEBC not to emanate from his office. Osoi being ODM chairman at Kajiado. The matter was handled by dispute resolution mechanism where a consent was reached between Osoi and ODM. ODM conceded that the list for Kajiado published was not the one submitted from Kajiado County. Osoi was allowed to submit a fresh list where 3rd Respondent appeared No. 1 among the marginalized and physically disabled and youths. Where 3rd Respondent was gazette as the nominee of Kajiado in the marginalized category. This is the genesis of this petition so it

goes without saying that the Dispute Cause No. 2 of 2017 has bearing in the present petition.

(g) Whether this court can overturn the decision in Dispute Cause No. 2 of 2017 – Daniel K. Osoi v ODM:

The Petitioner submits that the dispute in this election petition does not overturn the Dispute Cause No. 2 of 2017 – Daniel K. Osoi v ODM and IEBC which decision is null and void as the court lacked jurisdiction to entertain the dispute.

The 1st Respondent’s mandate to resolve nomination dispute is set out in the constitution and in Election Act, the relevant provision being Article 88 (4) of the Constitution and section 74 of the Election Act which states as follows:

“Article 88 (4) the Commission is responsible for conducting or supervising referenda and elections to any elective body or established by this Constitution and any other election prescribed by an Act of Parliament and in particular for:

(a).....

(b).....

(c).....

(d) The settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petition and subsequent to the declaration of election result.”

The Dispute Cause No. 2 of 2017 heard by 1st Respondent was therefore valid. Section 74 (1): **“Pursuant to Article 88 (4) (c) of the Constitution the commission shall be responsible for the settlement of election disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election result.”**

In the case of *Macuray Asewe Ouko & Another v ODM & Another [2017] eKLR* the court further held that, **“(PPDT) has no jurisdiction whatsoever over such lists.”**

The Dispute Resolution in Cause No. 2 of 2017 was properly handled and within Article 88 (4) and section 74 of Election Act. This court therefore has no jurisdiction to overturn the decision in Daniel Osoi – Dispute Resolution Cause No. 2 of 2017 in any other way than by appeal.

(h) Whether the 1st Respondent gazette the final ODM list as submitted by the 2nd Respondent:

After the 1st Respondent Dispute Resolution in Daniel Osoi and the consent thereof. The 1st Respondent gazetted the final list as submitted by the 1st Respondent.

(i) Whether the entire ODM party list published by the 1st Respondent for Kajiado County Assembly was illegal, null and void:

From the explanation in (g) above I find that the list was valid as final list by Chairman Kajiado County Assembly – Daniel K. Osoi.

(j) Whether the 1st and 2nd Respondents complied with the provisions of the Constitution, 2010, Electoral Laws, ODM Constitution, ODM Guidelines for Application for party list:

I find the 1st and 2nd Respondent complied with the provisions of Article 90, 177, 88 (4), section 34 and

section 74 of the Election Act 2011.

(k) What consequential orders, declaration and relief should this court grant if any:

I have relied on the *Joho v Nyange & Another [2008] eKLR* where the court held that, **“the burden of proving any allegation of electoral misconduct and or irregularities lies squarely upon the Petitioner.”**

The court in upholding the position that the burden of proof lies with the Petitioner held as follows:

“(a) Election petitions are not ordinary suits but disputes in ream of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent credible and consistent evidence.

(2) The burden of proof in election petition lies with the Petitioner as he is the person who seeks to nullify an election....”

The Petitioner herein has failed to discharge the burden of proof. The petition is dismissed with cost to the 1st and 3rd Respondent.

30 days right of appeal granted to the Petitioner to file an appeal.

Judgement read in open court at Kajiado Chief Magistrate’s Court on 23rd day of January, 2018.

.....

HON. M. KASERA

PRINCIPAL MAGISTRATE

In the presence of:

Ms Osiemo for the Petitioner

Mr. Sankale and Mr. Sankale for 3rd Respondent

Mr. Kariuki holding brief for Mr. Mungai for 1st Respondent

Ms Osiemo holding brief for Ms Olendo 2nd Respondent

Court Clerk Mutisya