



**REPUBLIC OF KENYA**  
**IN THE CHIEF MAGISTRATE'S COURT AT NYERI**  
**ELECTION PETITION NO. 2 OF 2017**

MARGARET NYATHOGORA.....1<sup>ST</sup> PETITIONER  
LUCY MUGURE WANYITU.....2<sup>ND</sup> PETITIONER  
ELIZABETH NYAGUTHI MWANGI.....3<sup>RD</sup> PETITIONER  
SALOME WAIRIMU KAGO.....4<sup>TH</sup> PETITIONER  
IMMACULATE WAMBUI KABUTHA.....5<sup>TH</sup> PETITIONER  
ALICE MIRIGO MUCHIRI.....6<sup>TH</sup> PETITIONER

-VERSUS-

THE I.E.B.C.....1<sup>ST</sup> RESPONDENT  
JUBILEE PARTY.....2<sup>ND</sup> RESPONDENT  
BETH NYAWIRA KIMAILI.....3<sup>RD</sup> RESPONDENT  
MUTHONI PATRICK MUTAHI.....4<sup>TH</sup> RESPONDENT  
MILLICENT CHEROTICH.....5<sup>TH</sup> RESPONDENT  
WAMBUGU THIONGO WILLIAM.....6<sup>TH</sup> RESPONDENT  
MUTHONI ANNE CAROLINE.....7<sup>TH</sup> RESPONDENT  
MARY NDIRITU NYAMBURA.....8<sup>TH</sup> RESPONDENT  
LUCY WAMBUI KARIUKI.....9<sup>TH</sup> RESPONDENT  
GATHUA WANJIKU LILIAN.....10<sup>TH</sup> RESPONDENT  
ELIZABETH WANJIKU MUGO.....11<sup>TH</sup> RESPONDENT  
WANJIKU JULIAH MUKAMI.....12<sup>TH</sup> RESPONDENT

**THUMBI WAIHUINI BEATRICE.....13<sup>TH</sup> RESPONDENT**

**KAMAU WAIRIMU ROSE.....14<sup>TH</sup> RESPONDENT**

**NDIRITU NDOMO MARY.....15<sup>TH</sup> RESPONDENT**

## **J U D G M E N T**

### **INTRODUCTION**

1. From their pleadings, this is the petitioners' 4<sup>th</sup> stop in their spirited stab at a slice of the pie that is the coveted table at the County Assembly of Nyeri, from which they hope to dislodge the 3<sup>rd</sup> to 15<sup>th</sup> respondents.

2. As soon as the party list was published on 23/7/2017 they launched the first attack on 4/7/2017 by filing appeal **No.522 of 2017** at the Jubilee Party Appeals Tribunal. Their complaints are more or less those in the present petition.

3. The petitioners state that these appeals were never heard despite some parties being summoned to the 2<sup>nd</sup> respondent's headquarters.

4. Their next stop was at the Political Parties Disputes Tribunal where they filed case **No. 345 of 2017**. Again, the complaints were similar to those raised herein, hence the position taken by the respondents that the matters raised herein are *res judicata*.

5. The Petitioners in the PPDT, Case **No. 345 of 2017**, were **more or less successful**. In the judgment delivered on 27/7/2017, the PPDT allowed the complaint and directed the 2<sup>nd</sup> respondent to reconstitute its party list in compliance with the law.

6. The Applicants' joy was however short lived as the reprieve they got was temporary and cast on sandy shores. For no sooner had they started to celebrate, than the respondents turned the tables on them by the gazettment of the 3<sup>rd</sup> to 15<sup>th</sup> respondents on 28/8/17.

7. That gazette notice and the subsequent swearing in of the 3<sup>rd</sup> to 15<sup>th</sup> respondents as members of the County Assembly of Nyeri is the subject of the present complaint.

8. It's however noted that before this particular Petition was filed, the matter detoured to the High Court where one **Duncan Maina Mathenge filed Nyeri High Court Petition number 7 of 2017**.

9. The basic complaint before the High Court was that the party list runs contrary to the established tenets as to equality proportional representation of all wards and consideration of all special interests per Articles 90 and 177 of the Constitution, Sections 34 and 36 of the Elections Act, 2011 The Elections General Regulations 2017 (as amended), The Elections Party Regulations and Party Lists Regulations 2017 and Jubilee Party Nomination Rules.

The Petitioners current complaint is more or less the same save to add that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not comply with the decision of the PPDT. That on the contrary, the 2<sup>nd</sup> respondent merely produced a replica of the initial list (its nullification notwithstanding with a few amendments which was published by the 1<sup>st</sup> respondent on 28/8/2017.

10. At Paragraph 17 of the petition, the Petitioners contend that the 3<sup>rd</sup> to 15<sup>th</sup> respondents were not validly nominated and/or elected to the Nyeri County Assembly pursuant to Articles 90 and 177 of the Constitution as read with the Elections Act, 2011 and the 2<sup>nd</sup> respondent's constitution and nomination rules hence this petition.

## **THE PRAYERS**

11. The Petitioners filed this petition seeking the following prayers;

- a. *A declaration that the Political Parties Disputes Tribunal in Political Parties Disputes Tribunal (Case No. 345 of 2017; Margaret Nyathoga & others versus Jubilee Party) quashed the Jubilee Party List of Nominees to the Nyeri County Assembly as published on 23<sup>rd</sup> July 2017.*
- b. *That the Honourable Court be pleased to issue an order quashing and/or invalidating Special Gazette Notice Vol CXIX-No. 124 of 28<sup>th</sup> August 2017 to the extent that it specifies that the 3<sup>rd</sup> to 15<sup>th</sup> Respondents are the validly nominated and/or elected members of the Jubilee Party to the Nyeri County Assembly.*
- c. *That pursuant to the judgement of the Political Parties Disputes Tribunal in Political Parties Disputes Tribunal (Case No. 345 of 2017; Margaret Nyathogora & others versus Jubilee Party), the Honourable Court be pleased to order the 2<sup>nd</sup> respondent to nominate its thirteen (13) nominees to the Nyeri County Assembly in accordance with its constitution and nomination rules as well as applicable provisions of the Constitution and Elections Act, 2011 and to include the names of the Petitioners in such nomination.*
- d. *That the Honourable Court be pleased to award the costs of this petition to the Petitioners.*
- e. *Such other or further or incidental orders, reliefs and or remedies as the Honourable Court shall deem just and expedient.*

## **GROUND IN SUPPORT OF PETITIONERS' CLAIM**

12. The Petitioners contend that the 3<sup>rd</sup> to the 15<sup>th</sup> respondents were not validly nominated by the 2<sup>nd</sup> respondent to serve in the Nyeri County Assembly for various reasons including;

- a. Contrary to the orders of the Political Parties Disputes Tribunal in **Political Parties Disputes Tribunal (Case No. 345 of 2017; Margaret Nyathogora & others versus Jubilee Party)**, the 2<sup>nd</sup> respondent did not conduct any nominations per its constitution, nomination rules, the constitution of Kenya and other applicable laws in purporting to nominate the 3<sup>rd</sup> to 15<sup>th</sup> respondents.
- b. The 2<sup>nd</sup> respondent submitted a party list that does not factor in all relevant considerations under the law including proportional representation, regional balance, representation of all groups-including gender, youth, marginalized and disabled and fulfillment of the set criteria and threshold under all the relevant legal provisions including the Constitution and the Elections Act.
- c. The compilation, submission and gazette of the party list, ignored the principal requirement to have the special seats to the Nyeri County Assembly filled by persons who are duly qualified including the Petitioners herein.
- d. The 2<sup>nd</sup> respondent's party list as gazetted on 28<sup>th</sup> August 2017 is fundamentally flawed and ignores basic constitutional and statutory tenets thus rendering the nomination of the 3<sup>rd</sup> to 15<sup>th</sup> respondents null and void for various reasons including;
  - *There is not a single member of persons with disabilities serving in the County Assembly.*
  - *Inclusion of non-applicants in the Party List.*
  - *Inclusion of nominees who are not members of Nyeri County.*
  - *Nominations based on nepotism, family relations, cronyism and sycophancy; by way of example nomination of personal assistants, chief campaigners and friends of senior Jubilee Party Officials despite them not being qualified or having played any active role in promoting the party.*

- *Nomination of serving civil servants despite the latter not having retired (e.g teachers still on the TSC payroll).*
- *Non-inclusion of diligent and dedicated party members in total disregard of their immense contributions to the party and its campaigns.*
- *Exclusion of minorities including Muslims (religious minorities).*
- *Disenfranchisement of women from the party through failure to be considered for nomination slots contrary to the party's well documented policy of women empowerment as highlighted by no less than the party leader on various occasions.*
- *Allocation of seats different from the categories applied for (e.g youth to gender).*
- *Submission and publication of a list that runs contrary to established tenets as to equality and proportional representation of all wards per Article 177 of the Constitution, Sections 34 and 36 of the Elections Act, 2011 and the Elections (General) (Amendment) regulations, 2017.*
- *Failure to comply with the orders of the Political Parties Disputes Tribunal in (Case No. 345 of 2017; Margaret Nyathogora & others versus Jubilee Party).*

## **RESPONSES**

### **1<sup>ST</sup> RESPONDENT**

13. The 1<sup>st</sup> respondent (IEBC) filed their response to the petition on 9/10/2017. They stated that;

*“The nominations for member of County Assembly for Nyeri County met the threshold set out by Constitution and the elections laws and was conducted in a credible manner as far as concerns the 1<sup>st</sup> respondents”.*

14. In response to the petitioner's allegations that the nominations from Jubilee Party to the Nyeri County Assembly were not done in accordance with the Constitution, Nomination Rules, Elections Act, 2011 and all other enabling provisions, the 1<sup>st</sup> respondent stated that;

*i. Pursuant to Section 35 and 90 of the Constitution it is the mandate of the Party to nominate persons to a party list and submit the same to the 1<sup>st</sup> respondent.*

*ii. Developing of Party Lists in as far as who among party members makes it to the list is an internal party affair.*

*iii. Jubilee Party submitted final party lists (Nominees) on 19<sup>th</sup> July, 2017 in compliance with Section 34 (6A) of Elections Act, 2011 and Regulation 55(3) of the Election (General) Regulations, 2012.*

*iv. The 1<sup>st</sup> respondent after receiving the lists published them as received from Jubilee Party in both the Nation and Standard Newspapers of 23<sup>rd</sup> July, 2017 pursuant to Regulation 54(8) of the Election (General) Regulation 2012 and thereafter Gazetted the final list on 28<sup>th</sup> August, 2017.*

*v. The 1<sup>st</sup> respondent has no mandate to cherry pick nominees on the Party lists as it is bound in line with Section 36(7) and (8) of the Election Act, 2011 the Commission is bound to allocate seats to in terms of the priority of nominees as listed and submitted by the party.*

*vi. Article 177(1) (c) of the Constitution provides for the composition of the County Assembly to include member of members of marginalized groups but does not speak to a particular special interest being inferior or superior to another special interest.*

15. Accordingly, the 1<sup>st</sup> respondent averd that the Jubilee Party nominations were conducted as far as the 1<sup>st</sup> respondent is concerned in a free and fair manner.

16. There was substantial compliance with the electoral laws as concerns Nominations, the process was accountable and impartial in the entire nomination process up to and including the declaration of the nominees.

### **THE SECOND RESPONDENT**

17. The 2<sup>nd</sup> respondent belatedly but with leave, filed the response to the petition on 30/11/2017.

18. They stated that it received numerous applications from thousands of interested party members for consideration and it was therefore obvious that not all applicants would be successful. The discretion was on the respondent to come up with a criteria on how best they could pick the nominees.

19. That nomination of members to the various seats was guided by the law and was done in a fair and justifiable manner as provided by law, party regulations and best practice.

20. The 2<sup>nd</sup> respondent reconstituted the list to include the special interest group on account of ethnicity. In this regard, the 2<sup>nd</sup> respondent reconstituted its party list and submitted it to IEBC pursuant to the Honourable Tribunal's judgment. This was done in consultation with the county leadership.

### **THE 3<sup>RD</sup> TO 15<sup>TH</sup> RESPONDENT**

21. The 3<sup>rd</sup> to 15<sup>th</sup> respondents filed their response to the petition on 10/10/2017. They maintained that they were validly elected pursuant to Article 90 and Article 177 (1) (b) (c) of the Constitution of Kenya 2010, Sections 34, 35 and 36 of the Elections Act (amendment) Act No.1 of 2017 and the 2<sup>nd</sup> respondent's Constitution and Nomination Rules.

22. They also outlined the process that was followed leading up to the gazettelement of their names on 28/8/2017.

23. In response to the decision by the PPDT, they stated that there was no other legislative or constitutional requirement for nomination that had not been satisfied by the 2<sup>nd</sup> respondent except the ethnic diversity which ought to be reflected in the list as special interest group. In compliance with the Honourable Tribunal's judgement the 2<sup>nd</sup> respondent reconstituted the list to include the special interest group on account of ethnicity.

### **THE 5<sup>TH</sup> RESPONDENT**

24. She filed her own response and submissions highlighting that her inclusion was pursuant to the decision by the PPDT.

### **DIRECTIONS**

After the preliminaries which included a determination of the costs payable and extension of time, directions were taken. That oral evidence would be taken.

### **EVIDENCE**

25. The petition then proceeded for hearing and the first petitioner gave evidence on behalf of herself and the co-petitioners. She adopted her affidavits and was cross examined by the advocates for all the respondents.

26. The 7<sup>th</sup> respondent gave evidence on behalf of the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 15<sup>th</sup> respondent and was likewise cross examined.

The other respondents opted not to call any witness.

The parties to the petition then filed submissions.

### **ISSUES FOR DETERMINATION**

- a. Jurisdiction of the court.
- b. The import of PPDT case No. 345 of 2017 on the petition.
- c. Whether the respondents 3-15 were validly nominated.
- d. The degree and burden of proof.
- e. Whether the petitioners deserve the orders sought.
- f. Who should bear the costs?

### **27. JURISDICTION**

The 3<sup>rd</sup> to 15<sup>th</sup> respondents' position is that this court lacks the requisite jurisdiction to handle the matter at hand. Their position is that;

*“The settlement of electoral disputes arising from nominations must in the first instance be filed before the 1<sup>st</sup> respondent in accordance with Article 88(4) (e) of the Constitution as read with Section 74 of the Elections Act and Rules of Procedure on Settlement of Disputes. That the petitioners cannot therefore present to this Honourable Court a petition regarding nomination grievances without first lodging it with the 1<sup>st</sup> respondent . They argued that proper reading of **Article 88(4) (k) of the Constitution and Article 82(1) (b) of the Constitution** demonstrates that IEBC is bestowed with the legal mandate of monitoring compliance with legislation relating to nomination of candidates by parties being the Elections Act.*

*Further that it is the IEBC that published the list on 23<sup>rd</sup> July, 2017 and any dispute should have been addressed to them. That no dispute was lodged with IEBC as required by Article 88(4) (e) of the Constitution. There was no evidence tabled before the court to demonstrate that IEBC shied away from its constitutional duty and directed the Petitioners to lodge their complaints before the PPDT. At any length, the Memorandum of Claim (Annexure MN7 in the Petition) is dated and sworn on 21<sup>st</sup> July, 2017 way before the list was published by IEBC.*

*They cited the case of **Isaiah Gichu Ndirangu & 2 others –versus- Independent Electoral and Boundaries Commission and 4 others [2016] Eklr** where the court stated;*

*“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...based on the foregoing, I am inclined to agree with the Respondents' submissions that this court is not the appropriate forum for addressing the issues raised in the Petition. My reasoning is firmly grounded on the nature of the case and the matters raised herein because it is not in dispute that the dispute is in regard to nominations to a County Assembly. The Petitioners' main concern is that the law was not observed by the Respondents in regard to the conduct and the final selection of the nominee. This in my mind is one such dispute in regard to nominations that the legislature contemplated and thus created a dispute resolution body as the first port of call”*

They also cited Justice Olga Sewe in Jubilee Party of Kenya –v- Agnes Ndunge Mutwiwa [2017] Eklr who held that; “...Nevertheless, it was incumbent upon the Tribunal to ensure strict compliance with the law before assuming jurisdiction. **Section 40(2)** of the **Political Parties Act** is explicit that;

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute had been heard and determined by the internal political party dispute resolution mechanisms”.

They argued that, “The above provision is couched in peremptory terms; and therefore that the Tribunal proceeded to entertain the Respondent’s complaint before the party’s internal dispute resolution mechanism was invoked and exhausted, I would agree and find that the Tribunal lacked the requisite jurisdiction in the matter. It is trite that jurisdiction is everything and without it the proceedings of the Tribunal in respect of the Respondent’s Complaint No. 480 of 2017 comes to naught. This case cited The Owners of Motor Vessel Lillian s –vs- Caltex Oil (Kenya) Ltd [1989] KLR 1, Nyarangi, JA, made this point thus;

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

28. These submissions must have been made with the tongue in the cheek as the next complaint is that the matters raised herein are *res judicata*. On the one hand, they argue that the petitioners did not exhaust the laid down mechanism, then also want to argue that those same mechanisms settled the issues at hand. Which is which?

29. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor vessel “Lillian S” –versus- Caltex Oil (Kenya) Ltd* where the late Justice Nyarangi of the Court of Appeal held as follows;

*“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it hold the opinion that it is without jurisdiction”.*

30. John Beecroft in a treatise headed “Words and phrases legally defined” states following about jurisdiction;

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.*

31. A court’s jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in

the matter of the Interim Independent Electoral Commission, at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner, “*Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent.*” Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written laws.

32. In the words of Chief Justice Marshall of the U.S.A, in *cohens -vs- Virginia*;

*“It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approached the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgement, and conscientiously perform our duty.*”

33. On the Jurisdiction of The Magistrates Courts and party list petitions The supreme court of Kenya decision in the case of **Moses Mwicigi & 14 others -vs- IEBC & 5 others** pronounced itself fully on this question.

34. The Apex court referred to Section 75 of the Elections Act and the decisions in **National Gender and Equality Commission -vs- IEBC** and **Hassan Ali Joho and another -vs- Suleiman Said Shallah Supreme petition No. 10 of 2013** where it was held that the mandate of the Returning Officer shifts the jurisdiction to the Election court and that nominees once gazzetted, are deemed duly elected. Consequently the Supreme Court stated that, “*It is clear to us that the constitution provides for two modes of election. The first one is the conventional mode by universal suffrage; the 2<sup>nd</sup> mode is “election” by way of nomination through the party list. It follows from such a conception of the electoral process, that the contest to an election whatever its manifestation, is to be by way of the election petition*”. **They concluded that the Elections Act confers jurisdiction upon the magistrate’s court to determine the validity of the election of a member of the County Assembly.**

#### **IMPORT OF THE PPDT DECISION IN TRIBUNAL NO.345 OF 2017**

35 When we examine the decision by the PPDT closely we see it emphasized the ethnic component. At paragraphs 7 and 8 it states, “*However, the reasons given by the Respondent in this complaint do not speak at all to the special interests taken into account by it when comprising its party list. On the contrary, the respondent’s list is hardly inclusive ethnically and falls short of compliance with Section 7 (2) (a) and (b) of the County Government Act, 2012, which requires county assemblies to reflect ethnic diversity of the county in question. The Respondent’s party list of nominees for County Assembly of Nyeri only contains persons of the Kikuyu ethnic origin. We hold that the Respondent’s party list does not reflect special interests in the sense required by the law*”.

36 As earlier pointed out, this court is not an appellate. I will only point out that the Constitution at Article 197 2(a) and Article 177(11) (a) and Section 7(2) (a) of The County Government Act, all talk of “**Community and cultural diversity**”. None of them refer to ethnicity.

37 I echo Article 90(2) of the Constitution which particularly rules out ethnic considerations in County Assembly Nominations. I also note the issue has been before our courts severally and in particular in the case of **The National Gender and Equality Commission –vs- Independent Electoral and Boundaries Commission & another [2013] eKLR**, the court was specifically asked to make a declaration in respects to the provisions of Article 90 and 91(1) (e) and (f) of the Republic of Kenya together with regulation 54(5) of the Election (General) Regulations 2012.

38 At paragraph 20 of the said Judgment, the court framed the issued that it was to determine and the 2<sup>nd</sup> issue as;

**“Who are the qualified candidates for nomination to the special seats created under articles 97(1) (c) 98(1) (c) and d and 177(1) (b) and c”.**

39 In that Judgment, the court had also been requested to revisit the decision in **Micah Kigen and 2 others -Vs-Attorney General and 2 others Nairobi No.268 and 398 of 2012 (2012) eKLR** where the court had considered the definition of special interests under the provisions of Article 97(1)(c) and held that, “*The nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to times ..... any special interests may emerge in future and which the political party may consider require representation.*” Thus IEBC, in formulating its guidelines, left it to the parties to define the special interests and to indicate in their respective party lists the special kind of interests the person so nominated represented. Counsel for the IEBC, submitted that the IEBC ensured that the list submitted complied with the constitution and the law. In exercising its power to supervise the list, IEBC contended that it drew the parties’ attention to deficiencies in their lists and where necessary, it directed them to rectify the lists.

*The court agrees that the constitution is the prima law of the land and any law to the contrary is null and void.*

40 The Judges’ Response was that-

- **“While the parties have submitted at length on the need to define the terms such as “Special interest” to give clarity to the process of nomination, we are of the view that it is not necessary to do so in this case. The constitution imposes the primary obligation to ensure that the lists are compliant with the constitution on the IEBC. The IEBC is required to scrutinize the lists forwarded to it to ensure that the special interests are represented in the said lists.**
- They continued to say that “in the **Micah Kigen Case** it was observed that, **Article 90(2)** .....bestows upon the IEBC the responsibility of ensuring that the party lists meet certain criteria set out in the Constitution and Legislation. The political parties themselves, just as any other person or state organ, are bound to observe all provisions of the Constitution including those that require that the rights of minorities, youth and persons with disabilities be promoted and protected.”

41 They added that, “We have reflected on whether it is necessary to issue guidelines or even reconsider the findings in the **Micah Kigen Case**. We decline to do so”.

42 They also cited the case of **Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC)** at para 20, which states that the Constitutional Court of South Africa warned against making sweeping statements about difficult and complex areas of equality and discrimination. The court observed that in view of the history of that country, they concluded all this reinforces the idea that this Court should be astute not to lay down sweeping interpretations at this stage but should allow the equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises.” We fully adopt these sentiments particularly as we think that laying down definitions of the various terms that govern allocation of special seats would be limiting the authority of the IEBC to do what is required to do under the Constitution. We also decline to take the course suggested by the petitioner as we have not had the opportunity to interrogate specific nominees or persons whose inclusion in the party lists is challenged. We have also not heard from the political parties which submitted and prepared the lists.

43. We therefore note, that the courts have declined to set any hard and fast rules on who qualifies to be on the party lists and left that to the discretion of the parties and IEBC provided they comply with the constitutional and statutory provisions.

44. On the correctness of this decision, the court is minded to note that this is not an Appeal Court. This

court is only exercising its mandate under Section 75 of the Elections Act. In so doing, the court takes special note of the Provisions of Article 197 and 177(1) of the Constitution and Section 7 of the County Assemblies which mandate the assemblies to reflect community and cultural diversity.

Then Article 90 (2) c of the Constitution which specifically exempts the County Assembly from the requirement to have ethnic diversity.

45. We now delve into the issue of whether or not the 13 (No.3-15 Respondents) herein were validly elected.

46. **Article 177(1) (b) and c** deal with representation in the County assemblies. Two categories of seats are recognized; the gender top-up seats and the seats for marginalized groups. **Article 177(1)(b)** provides for special seats necessary to ensure that no more than two-thirds of the membership of the County assembly are of the same gender while 177(1)(c) provides for “*members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament.*”

Additional statutory obligations are imposed by **section 7 of the County Government Act, 2012** which provides that;

1. In addition to the members who are elected under Article 177 (a), or nominated under Article 177 (b) of the Constitution, a County assembly shall comprise

a. Six nominated members as contemplated in Article 177(c) of the Constitution; and

b. The speaker, who is an ex officio member elected in accordance with Article 178 of the Constitution.

2. The political party nominating persons under subsection (1) shall ensure that

**a. Community and cultural diversity of the county** is reflected in the county assembly; and

b. There is **adequate representation to protect minorities** within the county in accordance with Article 197 of the Constitution.

3. The number of members nominated under subsection 1(a) shall be reviewed to accord with the number of Wards determined by the Independent Electoral and Boundaries Commission under section 27(3)(a).

47. These provisions impose on the IEBC an obligation to ensure that the lists submitted by the parties also comply with the Constitution and with statutory provisions that promote the rights of persons with disability and marginalized groups and generally promote community and cultural diversity within the County.

The petitioners in this petition argue that the Constitutional and statutory thresholds were not met.

48. Before we delve into the specific allegations herein, it is important to bear in mind that the issues surrounding the, nature, form and definition of special interests have been raised in our courts severally before.

49. We had mentioned the case of **Micah Kigen and 2 others –Vs- Attorney General and 2 others Nairobi Petition No.268 and 398 of 2012 (2012)Eklr** cited above the court considered the definition of special interests under the provisions of **Article 97(1)(c)** and it held that “*the nature of special interests requiring representation is infinite and various and a political party must be permitted to define those interests from time to times.....any special interests may emerge in future and which the political party may consider require representation.*”

50. The High Court was asked to revisit this position in case of **The Equality Commission -vs- IEBC (ibid)** and their position was **“that we are of the view that it is not necessary to do so in this case. The Constitution imposes the primary obligation to ensure that the lists are compliant with the Constitution on the IEBC.**

51. Therefore, the particular list of requirement to the party list has not been fully defined and is left open.

52. We now move to the specific complaints in this petition.

The petitioners enumerated the various breaches by the Respondents at **paragraph 21 (d) of the petition.**

53. The first complaint is that there is not a single member of persons with disabilities serving in the County Assembly. The court has looked at the various lists and is in agreement that this is a valid issue of concern as we do not have any person with disability.

54. The next issue is that of inclusion of non-applicants in the party list. Now, it was upon the petitioners to prove their case. I have not seen any proof of who among the Respondents did not apply and in fact all the other except the 5th Respondents attached their Applications and acknowledgments in their responses and affidavits, and proved that they had applied and been shortlisted.

55. The next complaint is that of inclusion of members who are not of Nyeri County. This was demonstrated against Beatrice Waihuni Thumbi who is said to be registered at Joseph Kangethe Primary School.

56. The court has examined the Jubilee Party Rule Regulations, Election Act, The Regulations and even the constitutional requirement and none of them require a candidate to be registered in that particular County. All they state is one must be a registered voter.

57. The next complaint was that of inclusion of non-Jubilee members in the party lists. Again this was just a blanket statement in the affidavit of Nyathogora. It does not show which of the Respondents does not belong to the Jubilee Party, and no evidence was adduced.

58. The next complaint was nomination based on nepotism, family relatives, cronyism and sycophancy. These are indeed serious allegations that would invalidate the nomination process if proved. What did we have by way of evidence? Apart from her affidavit Margaret Nyathogora on behalf of the other petitioners gave oral evidence and was cross-examined at length. Unfortunately for the petitioners, her evidence was not credible. She adduced no specific or tangible evidence except make sweeping allegations.

59. Infact the same goes for the other serious allegations of nomination of serving civil servants despite the latter having not retired. This is shown in Margaret’s affidavit where she has deponed that Muthoni Anne Caroline is a clinical officer attached to the Nyeri General Hospital, payslip No.2004009941 and also Nyawira. When she was asked to substantiate this, she resulted generalization and said that it is just known.

60. When she was asked if she had any evidence to prove that the nominations were done by favouritism and nepotism- her answer was;

***“I do not have to prove that” somethings are common sense”.***

61. When asked whether she had evidence to prove that some of the others were teachers and clinicians her answer was;

***“Sometimes you rely on hearsay” she may be on the Government pay list.***

62. When asked if she had evidence to show that one was a school principal she said;

***“Elizabeth is a school Principal. She has helped us in that school to admit students. Sometimes the court does not need evidence. Even if you deny it, it remains”.***

63. Unfortunately for the petitioners, there are no instances when the court waves the evidential burden or standard of proof. Infact, the standard of proof in election petitions is very stringent beyond reasonable doubt.

64. The petitioners witness however seems to treat this very casually even stating at some point that-

***”I have no letter to show that I fired her. Politics has no letter. You are hired verbally. “The evidence and proof is what I say”.***

65. She was to later add *“some things you do not need to prove”*. ***I have lived in this town since 1969 so I know these things.***

So, basically according to the petitioner’s witness, the court did require any evidence of the serious allegations made against the Respondents.

66. Unfortunately for them the court cannot be that casual. We rely on hard and evidence and to the highest standards. The Petitioners witness appeared to equate the court to a political rally where one can carelessly throw statements which can later be denied in a fluid mare.

67. There was also the allegation that some wards were not represented but this was not correct. All the wards have a representative. The petitioners pointed out two nominees are from the same polling station but it was demonstrated that they represent different interest groups, and the court is not satisfied that there is a grave anomaly.

## **CONCLUSION**

68. We shall now examine each of prayers that the Respondent were asking for.

69. The first prayer was for a declaration that the PPDT case **No. 345 of 2017, Margaret Nyathogora and others versus Jubilee Party**, quashed the Jubilee Party list to the Nyeri County Assembly as published on 23rd July 2017.

The decision that the court is being requested to declare is annexed to the affidavitit of Margaret Nyathogora.

Paragraph 2 of that decision contains the two prayers that were being sought. That is

1. *An order setting aside the said Respondent’s party list of nominees published on 23/7/2017.*

2. *An order compelling the Respondents to conduct fresh nomination. The orders of the Tribunal are at paragraph 8 and they are;*

*[a] That the complaint be and is hereby allowed.*

*[b] That the Respondent be and is hereby directed to reconstitute its party list of nominees to Nyeri County Assembly in compliance with the law*

*[c] Each party to bear its own costs*

70. The court is not sure why it is being requested to declare what another court stated as the record is there for all to see.

71. Apart from repeating the decision, by the PPDT this court has sought to examine the constitutional

and statutory requirements for valid nominations, as well as the legality of the decision by the PPDT, which was basically hinged on the non-inclusion of 'ethnic minority'.

72. Having done so, the court then examined the validity of the nomination of the 3rd to 15th Respondents.

73. The 2nd prayer was an order quashing and/or invalidating special gazette notice Vol CLX-No. 124 of 28th August 2017 to the extent that it specifies that the 3rd to 15th Respondents are the validly nominated and/or elected members of Jubilee Party to the Nyeri County Assembly.

74. To determine whether or not the 3rd to 15th Respondents were validly nominated, the court has examined all the constitutional and statutory requirements and weighed against the actions of the Respondents.

75. These are -The qualifications for one to be nominated and the procedure steps as provided by Articles 96, 97, 98, 177, 197 of the constitution as well as Section 7 of the County Governments Act and Regulations 57.

76. The court also examined the relevant case law especially the definition of minority as set out in the **Micah Kigen case** and the reluctance of the court especially in The Equality and Gender Commission Case, to set out hard and fast rules.

77. These decisions emphasized that it is best if the IEBC is left to check compliance with the constitutional guidelines.

78. In this case, the court found that the outstanding omission is the lack of inclusion of a person living with disabilities in the list.

The 1st and 3rd Respondents however, followed all the other procedural steps and advertised, received applications, shortlisted names and published them as required by law.

79. The only name that was not included in this procedure was that of the 5th Respondent, Millicent Cherotich, whose name only appeared at the tail end of the process without meeting the other statutory requirements.

80. The court has in a separate judgement, invalidated her nomination and will repeat the same herein. Of particular interest was her nomination to represent the 'ethnic minority' which this court has found to be absurd inclusion.

81. The court therefore, finds that there is no basis for invalidating the nomination of the 3rd, 4th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th Respondents as the petitioners did not prove the allegations that they had made against them, and accordingly the court declines to quash/and or invalidate Special Gazette Notice Vol CXIX No.124 of 28<sup>th</sup> August, 2017 to the extent that it specifies that the 3<sup>rd</sup> to 15<sup>th</sup> Respondents are the validly nominated and/or elected members of the Jubilee Party to the Nyeri County Assembly.

82. The court found that Margaret Nyathogora was not a credible witness and she actually exhibited open hostility especially against one Lucy Wambui Kariuki against whom she brought up unsubstantiated claims, which had not even been pleaded in the petition or any of the petitioner's affidavits or documents.

83. The last prayer was that pursuant to the judgment in PPDT Case no. 345 of 2017, Margaret Nyathogora and others versus Jubilee Party, the honourable court be pleased to order the 2nd respondent to nominate its 13 nominees to the Nyeri County Assembly in accordance with its constitution and nomination rules as well as applicable provisions of The Constitution and Elections Act 2011 and to include the names of the petitioner in such nomination.

**84.** Having declined to invalidate the gazette notice and subsequently the election and nomination of the 3rd, 4th then 6th to 15th Respondents, this prayer collapses.

**85.** The only order that this court can make is in respect of the 5th respondent.

This court therefore, directs the list and 2nd Respondent to procedurally fill in the space left by the 5th Respondent, bearing in mind all the constitutional requirements especially the requirement to have a representative of persons living with disabilities, which is an especially vulnerable group.

As regards the costs, the court awards costs to all Respondents payable by the petitioners jointly.

***Dated at Nyeri this 31<sup>st</sup> day of January,2018.***

Signed by Wendy K.Micheni

**CHIEF MAGISTRATE**

Delivered in open court in the presence of;

1. Petitioners- Mr.Ndungu
2. 1<sup>st</sup> Respondent-Mr.Macharia holding brief for Mr.Kariuki
3. 2<sup>nd</sup> Respondent-
4. 3<sup>rd</sup>-4<sup>th</sup>-6<sup>th</sup>-15<sup>th</sup> Respondents-Mr.Kamotho
5. 5<sup>th</sup> Respondent-Mr.Macharia