



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT
AT MIGORI
ELECTION PETITION NO 3 OF 2017
IN THE MATTER OF : NOMINATION OF MEMBERS
OF COUNTY ASSEMBLY IN MIGORICOUNTY.
IN THE MATTER OF :PUBLICATION OF THE FINAL ORANGE
DEMOCTRATIC MOVEMENT (ODM) PARTY LIST BY THE INDEPENDENT
ELECTORAL & BOUNDARIES COMMISSION (IEBC), SPECIAL INTEREST CATEGORY.

MOGESI AGNES BANGE.....1ST PETITIONER
MILLICENT AKINYI ODALO.....2nd PETITIONER
FLORENCE ADONGO OCHIENG.....3RD PETITIONER
LILIAN ANYANGO OTIENO.....4TH PETITIONER
ASENATH ADHIAMBO OLOO.....5TH PETITIONER
HALIMA OMAR MARWA.....6TH PETITIONER
HELLEN MORAA OMWOYO.....7TH PETITIONER
HELLEN ATIENO ODOUR.....8TH PETITIONER
GRACE ACHIENG OTIENO.....9TH PETITIONER

INDEPENDENT ELECTORAL &

BOUNDERIES COMMISSION.....1ST RESPONDENT
ORANGE DEMOCTARIC MOVEMENT.....2ND RESPONDENT
CAROLINE AKINYI OKERE.....3RD RESPONDENT

ELIZABETH TALLA.....	4 TH RESPONDENT
ROSE A AORO.....	5 TH RESPONDENT
MARY DEDE ODIGA.....	6 TH RESPONDENT
JUDITH GAD.....	7 TH RESPONDENT
RUTH ATIENO ANYANGO.....	8 TH RESPONDENT
CLARRIS DOLLY OYOO.....	9 TH RESPONDENT
GRACE AKINYI ODHIAMBO.....	10 TH RESPONDENT
FLORENCE ABICH OILE.....	11 TH RESPONDENT
DORINE DANDE.....	12 TH RESPONDENT
ROSELINE ADHIAMBO OYOO.....	13 TH RESPONDENT

JUDGEMENT

Brief background

1]. Consequent to the holding of the general elections on 8/8/2017, and subsequent nomination of members of Migori County assembly by 2nd respondent and subsequently gazetted of the nominated members, the petitioner herein was aggrieved of the nomination thereof . she therefore challenged vide this petition the nomination by the 2nd 2nd respondent, which petition was timeously filed and served upon the respondents.

2].The petition was filed in Chief magistrates Court at Migori. This court was gazetted to hear this petition. The same on 11/10/2017 was transferred to this Court by Migori High Court for disposal. The same was mentioned before this court on 23/10/2017 where pre-trial conference was set for 9/11/2017 by consent of counsel on record for parties herein.

3]. All the respondents filed their respective responses to the petition except the 2nd respondent. No appearance was entered for the 2nd respondent.

4]. The matter came up for directions on 30/11/2017, whereupon the counsel on record for respective parties agreed to have the petition canvassed by way of affidavits on record. The court further directed that parties file and exchange written submission. All parties did file respective submissions, which submissions are considered in this judgement.

The petitioner's case

6]. The petitioner vide petition filed on 25/9/2017 sought the following prayers:-

a) A declaration that the petitioners' right to participate in the 2nd respondent's activities in line with article 38(1)(b) and Article 47 has been violated by the Respondents.

b) A declaration that Gazette Notice No.8380 published by the Independent Electoral Boundaries Commission on 28th August, 2017 in as far as it lists 3rd to 13th respondents as nominated Members of the county assembly of Migori under the gender Top-Up list is illegal and void.

c) An order nullifying the nomination and subsequent gazette of the 3rd-13th Respondents vide gazette No 8380 as nominated Members of the County Assembly in the ODM Party List.

d) An order directed to the Orange Democratic Movement and Independent Electoral and Boundaries Commissions to nominate and gazette respectively the petitioners herein in accordance with the decision of the political Parties tribunal dated 2nd August, 2017 in Complaint no 496 of 2017 to wit:-

- 1) Millicent Akinyi Odalo
- 2) Mogesi Agnes Bange
- 3) Florence Adongo Ochieng
- 4) Lilian Anyango Otieno
- 5) Asenath Adhiambo Oloo
- 6) Roseline Adhiambo Oyoo
- 7) Florence Abich Oile
- 8) Hallima Omara Marwa
- 9) Hellen Moraa Omwoyo
- 10) Hellen Atieno Oduor
- 11) Grace Achieng Otieno
- 12) Doreen Dande.

e) The Honourable Court do issue such orders and give such further directions as it may deem fit to meet the ends of justice.

f) Costs of and incidental to this suit be awarded to the petitioner

8]. The petitioners relied entirely on the petition supported by affidavit sworn by 1st Petitioner and annexures thereto. The Petitioners averred as follows:-

9]. That on or before 6th June,2017, the Petitioners being interested to be nominated as ODM Gender Special seat(For Gender Top Up) nominees to the Migori County Assembly, applied to be nominated.

10]. The Migori County Electoral College convened with its membership as is prescribed and convened a meeting on 11/6/2017 to deliberate on the list of applicants.

11]. After deliberations by the Migori County Electoral College, the Petitioners were proposed amongst the people proposed as nominees of the ODM Gender Special Seats (for Gender Top Up) in the Migori County Assembly in accordance to Articles 177(1)(b) and 90 of the Constitution of Kenya as read with Section 34 and 36 of the Election Act,2011.

12]. The list of proposed nominees was forwarded to the ODM National Secretariat. The Migori County Electoral College also submitted the full list of applicants and the minutes for the meeting as required by the Guidelines to County Electoral Colleges for Generating party lists.

14]. The petitioners later learnt that Hon. Junet Mohamed sent another list After the 12th June, 2017 deadline. This was contrary to the party guidelines to County Electoral Colleges for Generating Party List and Regulation 55 of the Election(General) Regulation which party list submitted for allocation of special list should be prepared in accordance with the nomination rules of the political party.

15]. Seeing as there were two lists of nominees submitted to the 2nd respondent's NEC Credential Committee called a meeting at Orange House between Hon Junet Mohamend and H.E Gov. Zacharia Okoth Obado. Upon the 2nd Respindent's NEC Credential Committee reaching a compromise, the two lists were harmonized to come up with one list which was forwarded to the 1st Respondent herein. The harmonized list had the following twelve names which names include all the petitioners herein:

- a) Millicent Akinyi Odalo
- b) Mogesi Agnes Bange
- c) Florence Adongo Ochieng
- d) Lilian Anyango Otieno
- e) Asenath Adhiambo Oloo
- f) Roseline Adhiambo Oyoo
- g) Florence Abich Oile
- h) Hallima Omara Marwa
- i) Hellen Moraa Omwoyo
- j) Hellen Atieno Oduor
- k) Grace Achieng Otieno
- l) Doreen Dande.

16]. The petitioners were proposed as nominees for ODM Gender Special Seats (For Gender Top Up) in list submitted to the National Secretariat by the Migori County Electoral College and the harmonized list which also contained the names of the 11th,12th and 13th respondents herein.

17]. The 1st Respondent published in local dailies the names of all nominees as per the party list forwarded to it by the respondent as per section 35 of the Election Act,2011 on Sunday July, 23rd 2017.

18]. To the petitioners' surprise, their names were not amongst the one published by the IEBC despite the fact that their names were amongst the proposed nominees in the meeting held by the Migori County Electoral College and their names being amongst those nominees proposed in the harmonized list.

19]. The 1st petitioner sent a demand letter to the 2nd respondent demanding the correct party list as generated through prescribed party guidelines. This is because as is law, the right of nomination belonged to ODM. A dispute could only be raised as against it. The 2nd respondent did not bother to trigger any internal dispute resolution mechanism to resolve the petitioner's grievance.

20]. The 1st Petitioner through her advocate moved to the Political Parties Tribunal (hereinafter PPDT) through a Complaint No. 497 of 2017 dated 26th july,2017 and filed on 27th July,2017 and sought that the list forwarded by the 2nd respondent to the 1st Respondent be annulled and that the 2nd Respondent be

ordered to reconstitute its list.

20]. When the Complaint was first mentioned before the PPDT on 28/7/17. One Mr. Oduor appearing for the 2nd respondent herein was served with the complaint in Court and he acknowledged receipt.

21]. Despite having been served and participating in the proceedings before the PPDT, the 2nd Respondent chose not to file any response to the complaint. The PPDT delivered its Judgement on 2nd August,2017.

22]. The PPDT made the following orders in its Judgement:-

a) Declaration that the list published by Independent Electoral and Boundaries Commission on July 23rd ,2017 as pertains the gender top up list for Migori County Assembly non-Complaint with ethnic diversity of the people of Migori County and declared the same as null, void and of no effect in law.

b) Orange Democratic movement was directed to reconstitute its party list for nomination to Migori County Assembly by way of harmonized list dated 20th June,2017. The said list was to be forwarded to IEBC within 24 hours of the date of Judgement which was August 2nd ,2017.

c) The Copy of this Judgement was directed to be furnished to the IEBC for necessary action.

23]. The Judgement of the PPDT was served on both the 1st and 2nd Respondents for them to take necessary action.

24]. After 1st Petitioner received no communication from the 1st Respondent or the 2nd Respondent regarding the status of the ODM Gender Special Seats (for gender top-up), she instructed her advocates to write a letter on 14th August to the 1st Respondent requesting it to gazette the harmonized list as per the decision of the PPDT. The said letter was copied to the 2nd Respondent and the Judgement forwarded to both the 1st and 2nd respondents again.

25]. The decision of the PPDT has neither been reviewed nor overturned through an Appeal filed by the 2nd Respondent.

26]. The 2nd Respondent filed an Application on 18/8/2017 at the High Court in Milimani Nairobi seeking leave to file a Judicial Review Application to quash the decision of the PPDT. The application JR.Misc.Application No. 513 of 2017 was before court on 21st August,2017 and leave granted on the same day to file a Judicial Review Application, which leave operated as stay of the decision of the PPDT.

27]. The 2nd Respondent was served the order on the 1st Respondent who then went ahead to publish 8 names from the ODM Gender Special Seats(for Gender Top Up) via Gazette Notice number which list was impugned at PPDT and a decision rendered on 21/8/2017. Those 8 names are the names of the 3rd to 13th respondents herein with exception of 11th , 12th and 13th the respondents even though not in the list and in priority as decreed by the PPDT.

28]. The 2nd Respondent herein has since withdrawn JR Misc. Application No.513 of 2017 in its entirety. Consequently the leave operating as stay order obtained on 21st August,2017 and which order the 1st respondent used as a basis to publish the impugned list ceases to exist.

29]. In any case, the 1st and 2nd respondent illegally effected the leave operating as stay of the decision of the PPDT as an order setting aside the decision of the PPDT which had not been set aside by any court of law and published impugned list.

30]. As a matter of fact, the leave operating as stay of the decision of PPDT did not have an effect of quashing the decision of the PPDT nor did the Judicial review Court validate the list that was annulled by the PPDT. This fact was well known to the 1st and 2nd Respondents when they illegally published the impugned list and as a consequence, the 3rd to 13th Respondents have been nominated to the Migori County Assembly.

31]. The Petitioners have brought the petition because the 3rd to the 13th Respondents have already been gazetted by the 1st Respondent as nominated Members of the County Assembly of Migori County and they have been sworn in and a petition has to be filed to remove the 3rd to the 13th Respondents from the Assembly.

The 1st Respondent's Response.

33]. The first Respondent filed its response to the petition on 5/11/2017. The same was supported by Replying affidavit sworn by Salome Oyugi an advocate and the Manager Political parties with IEBC, who reiterated the facts on the response to the petition. The summary of the response was rendered thus:-

34]. The mandate of the 1st respondent was outlined as enshrined in the constitution and Election Act in so far as to the composition of the county assemblies to meet the gender rule. Several Articles of the Constitution which I shall elaborate herein under were cited as well as sections of the Elections (General) Regulations, 2012.

35]. The 1st Respondent on 12/6/17 published the guidelines on submissions of party list vide gazette notice 5735 to guide Political parties in the development and submission of party lists and the formula used in allocation of party lists.

36]. That the 1st respondent fulfilled its obligations and on 19/7/2017 the 2nd Respondent, pursuant to Section 34(6A) of the Elections Act, 2011, Regulations 55(2) and 55(3) of the Elections (General) Regulations, 2012 presented its final party list for nomination for nominations of members of County Assembly which included nominees for Migori County and the 1st respondent on 23/7/2017 published party list on local dailies and further issued notice of aggrieved members of public to lodge complaints on the said list.

37]. The PPDT in Complainant no 527 of 2017 Clinton Muges warema vs ODM ordered that ODM reconstitute its Migori County Party list to reflect ethnic diversity of Migori County and consider including the Complainant an ethnic minority or person with Disability and that High at Nairobi in JR no 513 of 2017 issues stay order to the decision of PPDT as such the 1st respondent was bound to use the final list submitted by the 2nd respondent in view of stay orders.

38]. That the 1st respondent had no mandate to alter party list and it is the prerogative of the parties to come up with the party list and that there were no evidence of inaction or commission of the 1st respondent to warrant grant of orders sought by the petitioners. It was also averred that no evidence was laid to show that petitioners had exhausted internal dispute resolutions mechanisms.

39]. The petition was indicated as lacking merit and petitioners were placed on strict proof on the allegation raised in the petition. Dismissal of the same was thus sought with Costs.

Response by the 3rd, 4th, 5th, 6th, 7th, 8th, 10th and 13th Respondents.

40]. The petitioners opposed the petition in its entirety and petitioners put on strict proof on averments on the petition. Their response was supported by affidavit sworn by 3rd Respondent. The summary of the response is as follows:-

41]. Article 90(3) and 177(2) of the Constitution vest exclusive powers in a political party to nominate its members to the county assembly and that the party list submitted to IEBC was in accordance to the law.

42]. It was averred that the 3rd, 4th,5th,6th,7th, 8th,9th,and 13th respondents were duly nominated and duly gazetted as by law required and all of them were life members of ODM party and they did qualify to be nominated as such.

43]. The internal dispute resolutions had not been exhausted thus the PPDT pursuant to Section 40(2) of Political Parties Act lacked jurisdiction to entertain the complaint. The decision of PPDT dated 2nd of august, 2017 was delivered in excess of its jurisdiction thus null and void.

44]. No evidence was tendered that 2nd respondent's counsel was served with the complaint filed by the 1st Respondent.

45]. It was averred that in accordance to ODM Guidelines to County Electoral college for generating party list, the rightful convener of Migori County College is the NEC member Hon Junet Mohammed and not Hon Zacharia Okoth Obado, thus the later did not have capacity to convene any meeting. The names of attendees of alleged meeting Convened by Zacharia Okoth Obado as well as the chairman of ODM Migori County was disputed. It was averred that the chairman is Philip Odero Makabongo and not Festus Mapesa.

46]. Article 7.5.3(1) of ODM, absolutely mandates the Party's National Executive (NEC) to either adopt, alter wholly or partially the list forwarded to it by the Electoral College. The respondents were thus validly nominated by the 2nd respondent and validly gazetted by the 1st respondent their names have been forwarded to NEC by the Electoral College.

47]. The affidavit sworn by 3rd respondent reiterated the grounds relied on by the respondents within this bracket. She averred that they were successful applicants for nomination and they were duly gazetted and thereafter sworn as assembly members.

48]. They were not party to Complaint no. 497 of 2017 filed by 1st petitioner at PPDT and they only came to know about it when they were served with Constitutional Petition filed in the High Court and Judicial Review no 513 of 2017.

49] . She deponed that PPDT acted ultra vires and that they were condemned unheard and that material facts were concealed by the complainant at the PPDT proceedings. The decision of PPDT in complainant no 497 of 2017 was unlawful and cannot stand and irrational in light of Article 90(2)(c) of the constitution and that it had no jurisdiction to entertain the matter had the 1st petitioner had not exhausted internal party mechanisms.

50] . The court was urged to uphold the respondents' nomination and gazettelement.

Response by the 11th Respondent.

51]. The 11th petition gave similar response as those of the 3rd,4th ,5th ,6th,7th 8th ,9th,10th and 13th Respondents and there is no need to reproduce the same.

Response by the 12th Respondent.

52]. The 12th Respondent filed a detailed response and swore an affidavit in opposition of the petition. Her response was as follows:-

53]. The nomination of the 12th Respondent was done in full compliance of the law and that the 12th respondent was validly and lawfully elected and no evidence had been tendered to show or suggest that

nomination of the 12th respondent was done illegally. She was a successfully applicant of the nomination process.

54]. It was pleaded that PPDT has jurisdiction to try and determine disputes as envisaged under section 40 of the Political parties Tribunal Act and that the same could only be invoked prior to and not after, the time lines set out under section 34 of the Elections Act.

56]. The 12th respondent further averred that there is no dispute registered against her by any of the petitioners with the PPDT as relates to and concerning the inclusion of her name in the party list by the 2nd respondent, and/or the decision of 2nd respondent to include her name in party list.

57] . The petitioner was not privy of the PPDT proceedings and was not a party to it and nay orders emanating of the said process is not binding on her and in any case right of fair hearing was violated. Internal dispute resolutions mechanism had not been exhausted prior to the filing of the complainant with PPDT. The PPDT did not have the jurisdiction to issue the orders that it did issue. The said orders are thus null and void and cannot be used to annul the election of the respondent.

58]. The court was bereft of jurisdiction to deal with issues over resolution of disputes related to the process of political parties preparing their list for nomination. The preparation of party list is purely an internal political affair.

59].if the court grants the orders sought by the petitioners it would be tantamount to amending the amended of party list during the pendency of assembly life.

60]. The entire petition and affidavit evidence on which it has been anchored, there is no allegation made against the 12th Respondent which can justify the annulment of her election. No ground envisaged under section 83 of the election Act has been established against the 12th respondent and her rights would be violated should annulment be allowed.

62].it was further averred that the petitioner did not exhaust intra party dispute resolutions before moving to court thus the entire petition was an abuse of the court process. The respondent reiterated grounds of response in her sworn affidavit.

Analysis and determination.

63]. I have considered the entire pleadings on record, the submissions filed by respective advocates on record and authorities thereof, in my considered view the following are the emergent issues for determination:-

- 1. Whether this court has jurisdiction to determine this petition.**
- 2. Whether the Political Parties Dispute Tribunal Judgement dated 2nd August 2017 still stands.**
- 3. Whether or not the 1st and 2nd Respondent while causing the election of the 3rd to 13th respondent acted in utter disregard of the law.**
- 4. Who bears the costs of the petition?**

Court's Jurisdiction.

64].The 12th respondent in her pleadings and her submission has raised an issue of jurisdiction which I must address first. It is deponed and submitted by the 12th respondent that the court does not have jurisdiction over the issues being canvassed in this petition. It is deponed that issues being canvassed are nomination issues which are camouflaged as election disputes. It is also deponed that the issued being

canvassed are pre-election issues which this court has no Jurisdiction.

65].The petitioners on the other hand position are that petition was brought because the 3rd -13th respondents had already been gazetted by the 1st respondent and they had been sworn in thus a petition on had to be filed.

66]. I have looked at the petition before me and the prayers being sought. It is apparent that the petitioners are challenging the validity of the election of the 3rd to 13th respondents as members of the assembly of Migori County. In *Moses Mwicigi & 14 Others v Independent Electoral & 5 Others* [2016], the supreme court renders itself that:-

Gazette notice marks the end of the mandate of IEBC, regarding nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been ‘elected’ to serve as nominated members of the county assembly.

67].The Election Act confers Jurisdiction upon the Magistrates Courts to determine the validity of the election of a member of county assembly; Section 75(1A) of the said Act provides that:-

“A question as to the validity of the election of a member of a county Assembly shall be heard and determined by the Resident Magistrate’s court designated by the chief justice”.

The Election Act lists down under Section 75 the appropriate remedies that the Election Court may grant. These are:-

- a) A declaration of whether or not the candidate whose election is questioned was validly elected;
- b) A declaration of which candidate was validly elected;
- c) An order as to whether a fresh election will be held or not.

68].The Supreme Court in *Moses Mwicigi* case (Supra) held further that:-

It is clear to us that the Constitution provides for two modes of “election”. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.

69]. In the current petition, the respondents have already been gazetted and indeed they have since assumed office having been sworn in. They are thus deemed elected, and any dispute to that election is thus properly before this court. This court is thus seized with jurisdiction to handle this petition.

Whether the political Parties Disputes Tribunal Judgement still stand and what is its effect in respect to the current Petition?

70].From the petitioners pleadings it is clear that their petition is solely anchored on the PPDT Judgement delivered on 2nd day of August, 2017 in their favour. It is their contention that the said judgement still stands and that the 2nd respondent disregarded the express orders emanating from the said judgement thus the gazetting of the respondents by the 1st respondent upon receipt of party list from the 2nd respondent. The disputed list is that of the gender top- up. It is thus the stand of petitioners that 2nd respondent action of submitting another list to the 1st respondent other than that was ordered by the PPDT was null and void thus the subsequent elections of the respondents should be annulled.

71].The common ground of the Respondents is that they were not party to the PPDT proceedings thus any orders that was issued or purported to have been issued have no bearing on their legitimate

elections/nomination. In any event the orders were obtained through opaque way and that the Tribunal had no mandate/ jurisdiction to interfere with internal affairs of the party. Same was indicated as bereft of merit null and void. The 2nd respondent failed to file any response to the petition although the petitioners in my view were aggrieved in the manner the party list was conducted.

72].To tackle the two opposing position it is instructive to settle the following issues:-

- a) Whether the PPDT was moved vide complaint no 497/2017 dated 26th July,2017.
- b) Was there any Judgement delivered in respect to complaint in (a) above?
- c) Whether the 1st and 2nd respondents were aware of the PPDT Judgement in (b) above if any.

73].From the record, it is not disputed that the 1st Petition moved to PPDT through complaint No. 497 of 2017 where she sought that the list as regards Gender top up forwarded by the 2nd respondent to the 1st respondent be annulled and that 2nd respondent be ordered to reconstitute its list. The complaint was filed against the 2nd respondent on 27th July,2017 as captured in annexure marked MAB1. It was therefore established by the petitioners that 1st petitioner did moved the PPDT through Complaint No.497 of 2017.

74].It is also clear that indeed the PPDT dealt with the aforesaid complainant and rendered its Judgement on 2nd August, 2017 . A copy of Judgement Judgement was annexed as Exhibit MAB2. The said Judgement address the issues raised in complaint No.497 of 2017. It was thus established that indeed a judgement in respect of the complainant in question was render by the Tribunal.

75].As to whether the 1st and 2nd respondents were aware of the said Judgement, the petitioners' counsel submitted that indeed the 1st and 2nd respondents were aware of the judgement having been served severally with the judgement. From the evidence on record, the tribunal in its judgement directed that a copy of Judgement be furnished to the 1st respondent for necessary action. I have perused affidavit of services marked as annexure MAB 3 sworn by Chrispine Olengo, a process server on 4/8/2017. In the said affidavit of service, it is clear that indeed the 1st and 2nd respondent was served with the Tribunal PPDT Judgement of 3/8.2107 and 4/8/2017 respectively. It also clear from annexure marked MAB3, a letter by the advocate for the 1st petitioner, that 1st and 2nd respondent were reminded of the PPDT judgement and its implications. Both 1st and 2nd respondents received the said letter and appended their rubber respective rubber stamps on the face of the said letter. It is also clear that 1st respondent was also served with the Judgement vide letter dated 14.8.2017 by petitioners advocate. The said letters were duly received by the 1st respondent as per the rubber stamp imprints on the face of the said letter. The 2nd respondent filed a judicial review against the tribunal judgement thus a clear indication that it was seized of the judgement, in any case, the tribunal judgement at Paragraph 6 indicates that the respondent(in this case 2nd respondent), did not defend the claim despite having been represented by the counsel and afforded opportunity to do so. It is thus clear that 2nd respondent had entered appearance and was seized of the tribunal proceedings.

What is the effect of the PPDT Judgement?

76].The petitioner's counsel Submitted that the Tribunal's decision dated 2nd August,2017 was clear in its import. In summary, it was submitted that the following were the consequential implications of the Tribunal's decisions:

- a) The list Published by the 1st respondent on 2rd,July, 2017 containing the 3rd-13th Respondents as ODM nominees was nullified and ceased to exists with immediate effect.
- b) The 1st Respondent had no list of nominees as regards the 2nd respondent as of the 2nd August,

2017.

c) The 2nd Respondents was now to forward the harmonized list dated 20th June,2017 containing the Petitioners names to the 1st respondent for publication within 24 hours.

d) The harmonized list dated 20th June,2017 to be forwarded to the 1st Petitioners herein as nominated MCAs for ODM Gender Special Seats(for Gender Top Up).

77].It was thus submitted that any purported gazettelement of the annulled list by the 1st respondent was an illegal act. It sought to legalize and have elected a group of individuals whose composition and order of priority had been invalidated by a court order it was submitted. It was further submitted that a court order requiring compliance is not a mere suggestion or an opinion or a point of law. It is a command that is issued after much thought and circumspection.

78].It was further submitted that Respondents have raised issues as to the irregularity of the PPDT Judgement, which issues are directed at the wrong forum. Such allegation by the respondents can make good grounds of appeal or reviews and/or setting aside of the Judgement and cannot be a ground for disobeying a valid court order.

79]. Reliance was place on The Court of Appeal decision in the case of **Justus Kariuki Mate & Another v Martin Nyanga Wambora & Another [2014]eKLR** where the Court render itself:-

The duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule of law and the due administration of justice. In **Hadkinson –vs- Hadkinson, (1952) ALL ER 567**, Romer, L.J. stated:

“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in Chuck –vs- Cremer (1) (1 Coop. temp.Cott 342):

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.”

80].The Counsel 3rd, 4th,5th ,6th ,7th ,8th , 9th 10th,11th, and 13 the respondent submitted al length that his clients were no party to Complainant number 497 of 2017 and that they came to learn of it when they were served with a constitutional petition filed in the High Court at Nairobi. It was submitted that the Tribunal violated the provisions of the Fair Administrative of Actions Act,2015 in its decision as his clients were not afforded opportunity to he heard.

It was also submitted that the petitioner in complainant 497/2017 concealed material facts and mislead the PPDT in making their decisions. It was also submitted that PPDT judgement and consequential orders were procured through an opaque process.

81].The 12th respondent’s counsel submitted that the PPDT Tribunal Lacked the Jurisdiction to adjudge the dispute that was taken before it vide Complaint no 497 of 2017, in consequence of which its Judgement therein was void and irredeemable nullity. It was submitted that it has long been settled , in our law, that if a judicial or quasi-judicial body were to adjudged any dispute, in absence of jurisdiction, then its Judgement would he a nullity and , much as it may be convenient to set that decision a side, it’s

still a nullity.

Reliance was placed on the holding of Musyoka J on 4th September, 2017, **In Mauray Asewe Ouko & another v Orange Democratic Movement & Another , Nairobi High Court Election Nomination Appeal No 34 of 2017 eKLR**, that:

3. Before I can consider the appeal before me on merits, I should first of all consider whether the same is properly before me. That was not raised before me, but it is a matter of primary importance that I should take into account nevertheless, bearing in mind the recent decisions in similar matters in such cases as *Jubilee Party of Kenya vs. Catherine Jeptoo Mapingwony* Nairobi Election Nomination Appeal No. 17 of 2017 and *Jubilee Party of Kenya vs. Mohamed Abdikadir Salah* Nairobi Election Nomination Appeal No. 22 of 2017. In my own decision in *Jubilee Party of Kenya vs. Henry Wanyoike Wahu* Election Nomination Appeal No. 33 of 2017, I held that the PPDT had no jurisdiction over a dispute relating to the contents of a party list that has already been submitted to the Interested Party.

4. The matter of nomination of members of the county assembly from party lists to represent special groups has its basis in the Constitution. The relevant provisions are Articles 90 and 177. The starting point is Article 177 which provides as follows –

‘(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 seat 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 marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and

(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.’

5. Article 90 provides that –

‘(1) Elections ... for the members of the 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 supervisions 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 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 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.'

6. Articles 90 and 177 of the Constitution are implemented through the Elections Act, No. 24 of 2011. The relevant provisions being sections 34 and 35, which provide as follows –

'34(1) The election of members of the National Assembly, Senate and county assemblies for party list seats specified in Articles 97(1)(c) and 98(1)(b)(c and Article 177 (1)(b) and (c) of the Constitution shall be on the basis of proportional representation and in accordance with Article 90 of the Constitution.

(2). ...

(3). ...

(4). A political party which nominates a candidate for election under Article 177(1)(a) shall submit to the Commission a party list in accordance with Article 177(1)(b) and (c) of the Constitution.'

35(1) A political party shall submit its party list to the Commission on the same day as the day designated for submission to the Commission by political parties of nominations of candidates for an election before the nomination of candidates under Article 97(1)(a) and (b), 98(1)(a) and 177 (a) of the Constitution.'

7. From the factual background that I set out hereabove, in paragraph 2, the Respondent came up with a party list, which it submitted to the Interested Party and which the Interested Party published in the daily newspapers, including the *Sunday Nation* of 23rd July 2017. The Appellants have unhelpfully, omitted to attach copies of the lists submitted to the Interested Party by the Respondent, limiting themselves to the list published by the Interested Party.

8. The mandate of the Interested Party to resolve election nominations disputes is set out in the Constitution and in the Election Act. The relevant provisions are Article 88(4) of the Constitution and section 74 of the Election Act, which state as follows –

'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) ...

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

f) ...

g) ...'

'74(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) ...

(3) ...where a dispute relates to a prospective nomination or election, the dispute shall be determined before the nomination or election, whichever is applicable.'

9. The party list in question in this matter was submitted to the Interested Party by the Respondent in accordance with section 35(1) of the Elections Act. The Interested Party published the names in the list in daily newspapers, meaning that it was by then seized of it. The disputes taken to the PPDT by the Appellants were after the party list had been submitted to the Interested Party and the Interested Party had taken the step of publishing the same in the daily press.

10. I have not seen any provision in the law which allows scrutiny by the PPDT of processes in the hands of the Interested Party, and I am not aware of any. A party unhappy with the contents of a party list in the hands of the Interested Party has a right of recourse only to the internal disputes mechanisms of the Interested Party, in accordance with Article 88(4) of the Constitution and section 74 of the Election Act. The PPDT has no jurisdiction whatsoever over such lists.

11. The jurisdiction of the PPDT is stated in section 40(1) of the Political Parties Act No. 11 of 2011, which provides as follows –

'(1) The Tribunal shall determine -

(a) disputes between the members of a political party;

(b) disputes between a members of a political party and a political party;

(c) disputes between political parties;

(e) 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 ...'

12. My understanding of section 40(1) of the Political Parties Act is that it only confers jurisdiction on the PPDT over such matters as are set out therein. There is power to handle a dispute over party lists, but only so long as the party list has not been presented to the Interested Party, for once the same is in the hands of the Interested Party, the PPDT loses jurisdiction over any dispute with respect to its contents, for any such dispute is within the province of the Interested Party in accordance with Article 88(4) of the Constitution and section 74 of the Election Act.

13. In view of what I have stated above, it is my conclusion that the PPDT had no jurisdiction to handle the dispute which culminated in the decision the subject of this appeal. If there was no jurisdiction to pronounce the judgement the subject of this appeal, then it follows that the appeal before me cannot be competent. Having held that the appeal before me is not competent, I believe it would be academic to make any findings on the grounds set out in the memorandum of appeal. In view of what I have said here above, the appeal herein must fail. I hereby dismiss the same. Each party shall bear their own costs.

93].The Counsel for the 2nd 1st Respondent submitted in length that PPDT did not have the jurisdiction to which culminated in the decision subject to this Petition. It was submitted that because the petitioners did not challenge the decision of the 2nd respondent in submitting party list between 23rd July,2017 and 8th august,2017 when the election were held the PPDT did not have the jurisdiction to entertain the

PPDT disoute no 497 of 2017 therefore the order dated 2nd August 2017 is null and void. The decision of the PPDT was illegal ab ignition as the Tribunal did no have jurisdiction to recall a party list already submitted by the political party to the 1st respondent under Section 34(10) of the Election Act.

94].Reliance was placed on **Joseph Obiero Ndiege v Orange Democratic Movement & Another [2017] eKLR**, where it was held:

Indeed it is now settled law that where the constitution or statute or party organization have provided for structured method of dispute resolution mechanism, the same must be exhausted first(see the case of Stephen Asura) Ochieng & 2 Others vs Orange Democratic Movement & Others Petition No 294/2011 Nairobi HC) where the Court held “ to my mind, the provisions of Section 40(2) of the political Parties Act must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political parties tribunal where the political party has neglected or refused to activate the internal party resolution mechanism. The section must be read as contemplating assumption of the jurisdiction by the tribunal where internal party dispute resolution mechanism has failed to hear and determine a dispute”. Indeed , I do not believe that this court has jurisdiction to entertain this petition at all in view of the nature of the petitioner’s grievance and the parties involved. Having held as such, the cause of action before me is premature and has no crystallised and on that ground the appeal herein fails and same is dismissed.

Reliance was also placed on the holding of Gabriel Bukachi v Orange Democratic Movement & another. In effect the PPDT should not entertain disputes between members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners, unless such dispute is in the first instance heard and determined by the internal political party dispute resolution mechanisms.

Section 40(1)(fa) of the Act relating to “***disputes arising out of party primaries***” was introduced through an amendment to the Act with the object of addressing “***the challenge of concurrent jurisdiction with other bodies handling electoral disputes.***” [See the memorandum of objects and reasons of the Political Parties (Amendment) Bill]. Section 40(1)(fa) of the Act did not, altogether, introduce an entirely new category of disputes. As this Court held recently in the case of **Dr. Lilian Gogo vs. Joseph M Nyamuthe and 4 others, Civil Appeal No. 135 of 2017 Nairobi**, disputes arising out of party primaries between members of a political party or between a member of a political party and a political party, or between political parties or between coalition partners were already catered for under paragraphs a, b, c, and e of Section 40(1) of the Act. Such disputes are subject to Section 40(2) of the Act and must first be subjected to the internal party dispute resolution mechanism before the PPDT takes cognizance of them. As the Court stated in that case:

“A common denominator of the categories of disputes that must in the first instance be submitted to the internal political party dispute resolution mechanism is that the disputants would all be subject to the political party and therefore subject to such party’s internal party dispute resolution mechanism. It is also instructive that under Section 9 of the Act as read with paragraph 23 of the 2nd Schedule to the Act, it is a mandatory statutory requirement that every political party must have provision in its constitution and rules for “internal party dispute resolution mechanism in accordance with Article 47 and 50 of the Constitution.” Also noteworthy is Section 13(2A) of the Elections Act, No. 24 of 2011 that requires a political party to hear and determine “all intra party disputes arising from political party nominations” within thirty days.”

In that case the Court acknowledged that there may be disputes that fall outside of the categories set out under paragraphs a, b, c, and e of Section 40(1) of the Act that can be taken directly to the PPDT. In this case, however, the dispute is between a member of the political party and the political party and falls under Section 40(1)(b) of the Act and is required, under Section 40(2) of the Act to be heard by the party’s internal dispute resolution mechanism before the PPDT can take

cognizance of it. There is ample authority for the proposition that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be followed. [See **Speaker of the National Assembly vs. Hon. James Njenga Karume, Civil Application No. 92 of 1992 (2008) 1KLR 425** and also **Kimani Wanyoike vs. Electoral Commission & another [1995] eKLR.**]

The learned Judge of the High Court was therefore right in upholding the decision of the PPDT that the complaint before the PPDT was premature. As submitted by the respondents, no material was presented either before the PPDT or the High Court by the appellant to support the assertion that the 1st respondent's National Appeals Tribunal was not operational as at 5th May 2017 when the appellant says he learnt with shock that the 2nd respondent had been declared to be the 1st respondent's nominee for the position in question. We are however in agreement with counsel for the appellant that having found that the complaint was premature, the PPDT should have stopped there and „downed its tools“.

95]. From the foregoing the Jurisdiction of PPDT in handling party list has been settled. The question to be addresses therefore is whether the issue of jurisdiction of PPDT can be raised at in this Court. I have looked at the authorities relied on by the Respondent. They were all dealing with appeals emanating from PPDT decision . I noted that this court is not an appellate court. There was no appeal against the decision of PPDT. A judicial review proceeding was filed by 2nd respondent and thereafter the same was withdrawn .. In my view, there issues raised by the respondents ought to have been litigated at the PPDT or in the high Court through an appeal. It is true save for the second respondent the respondents were not party to the proceedings in PPDT , however the 2nd respondent which is charged with the party list was aware of the proceedings thus its omission to raise the issues being raised by the respondent especial on jurisdiction and right to heard definitely will have affected the elected respondents herein as the decision of PPDT still stand , which decision this court cannot overturned as the decision of PPDT has equal status as decision of Magistrates Court by dint of Section 41 of the Political Parties Act. An appeal of the Determination of PPDT shall lie on the high Court on facts and Points of Law and points of law on the Court of Appeal and the Supreme Court. An aggrieved party can also seek review in the same Tribunal.

96].The upshot of the above is that 3rd -13th Petition are in office illegally, the Tribunal having mad an express order for gazetted of the person in the harmonized lists as per PPDT Judgement. The 1st and 2nd respondent clearly went against the order of PPDT. They were duly served with the order but went ahead to gazetted 3rd -13th Respondents.

The petitioners Petition thus succeed in the following terms:

1. A declaration do hereby issue that Gazette Notice No.8380 published by the Independent Electoral Boundaries Commission on 28th August, 2017 in as far as it lists 3rd to 13th respondents as nominated Members of the county assembly of Migori under the gender Top-Up list is illegal and void.
2. The nomination and subsequent gazette of the 3rd-13th Respondents vide gazette No 8380 as nominated Members of the County Assembly in the ODM Party List is hereby nullified.
3. The Orange Democratic Movement and Independent Electoral and Boundaries Commissions is hereby directed to adopt and gazette respectively the petitioners herein in accordance with the decision of the political Parties tribunal dated 2nd August, 2017 in Complaint no 496 of 2017 to wit:-

1. Millicent Akinyi Odalo
2. Mogesi Agnes Bange

3.Florence Adongo Ochieng

4.Lilian Anyango Otieno

5. Asenath Adhiambo Oloo

6. Roseline Adhiambo Oyoo

7. Florence Abich Oile

8. Hallima Omara Marwa

9. Hellen Moraa Omwoyo

10. Hellen Atieno Oduor

11. Grace Achieng Otieno

12. Doreen Dande.

97].The first and second Respondents to jointly bear costs for the Petition.

Dated and Delivered at Rongo this 4th day of January 2018.

R.K.LANGAT.

(S.R.M)

In Presence of :-

1.

2.

3.