



REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT NYERI
ELECTION PETITION NO. 1 OF 2017

OMARI WANJIKU ESHA.....APPLICANT

-VERSUS-

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE JUBILEE PARTY.....2ND RESPONDENT

MILLICENT CHEROTICH.....3RD RESPONDENT

JUDGMENT

PETITIONER'S CLAIM

PLEADINGS

1) This Election Petition, is against the election/nomination of the Member of County Assembly Nyeri County representing Ethnic Minority filed by the Petitioner, **Omari Wanjiku Esha**, against the said member of County Assembly, one **Millicent Cherotich** (the third respondent) following the Gazette Notice **Number 4992** issued on 28th August 2017 nominating the said Millicent Cherotich as a member of County Assembly Nyeri County under the category of Ethnic Minority.

2) The petition was seeking the following declarations;

a) A declaration that the said MILLICENT CHEROTICH was not validly elected/nominated as member of County Assembly Nyeri County representing ethnic minority.

b) A declaration that the election/nomination of MILLICENT CHEROTICH was illegal, unlawful and void and the same should be invalidated as the constitution does not provide for ethnic reflection in county seats.

c) A declaration be made that the petitioner OMARI WANJIKU ESHA was validly nominated as member of County Assembly Nyeri County to represent minority category in the said assembly.

d) THAT costs of the petition be borne by the respondents jointly and severally.

3) The petition has raised 15 issues;

a) That the nominated member of Nyeri County Assembly nominated as an ethnic minority by the Jubilee Party (2nd respondent) one Millicent Cherotich (the 3rd respondent) does not represent any ethnic minority in Nyeri County and is not even a registered voter within Nyeri County in which county the Nyeri County Assembly is situate and governs. That the said Millicent Cherotich (3rd respondent) is also not even a registered voter with the 1st respondent.

b) That Article 90 2(c) of the Constitution of Kenya 2010 does not envisage a party list for purposes of County seats to reflect ethnic diversity and/or ethnic minority under which Millicent Cherotich (3rd respondent) has been elected/nominated.

c) That the Nominated member of Nyeri County Assembly nominated as an ethnic minority by the Jubilee Party (2nd respondent) one Millicent Cherotich (3rd respondent) never appeared on the Jubilee Party (the 2nd respondent) party list submitted to the Independent Electoral and Boundaries Commission (the 1st respondent).

d) That in its publication through Print Media of national circulation as per Article 90 and 177 of the constitution as read with regulations 54(8) of the Elections (General) Regulations, 2012 the commission published Party Lists as submitted by Political Parties Pursuant to Sections 34(6a) and 35 of the Elections Act, 2011 in the Sunday Nation Edition of the 23rd day of July 2017 the 1st respondent for purposes of this petition published the following persons as those in the Jubilee Party, Party list.

1	BETH KIMAILI	NYAWIRA	27917423	FEMALE	27	BUSINESS WOMAN	N/ A	YOUTH CATEGORY	N/ A	JP24824	NYERI	KIKUYU
2	MUTHONI MUTAHI	PATRICK	26667315	MALE	29	KIKUYU	N/ A	YOUTH CATEGORY	N/ A	JP14264	NYERI	KIKUYU
3	OMARI ESHA	WANJIKU	13727925	FEMALE	43	BUSINESS WOMAN	N/ A	MINORITY CATEGORY	N/ A	JP16983	NYERI	KIKUYU
4	WAMBUGUTHIONG'O WILLIAM		0350461	MALE	59	NULL	N/ A	MINORITY CATEGORY	N/ A	JP MEMBER	NYERI	KIKUYU

5	GICHUKI NYOKABI PAULINE	13101145	FEMALE	50	CASUAL LABOURER	N/ A	MARGINALIZED CATEGORY ETHNICITY	N/ A	JP MEMBER	NYERI	KIKUYU
6	NDEGWA ANTHONY NDIRANGU	29687734	MALE	42	DISABILITY SERVICE OFFICER	N/ A	MARGINALIZED CATEGORY ETHNICITY	N/ A	JP13456710	NYERI	KIKUYU
7	NJOROGE DAVID MUNENE	24597282	MALE	31	BUSINESS MAN	N/ A	PERSONS WITH DIABILITY	N/ A	JP7755856	NYERI	KIKUYU
8	KABURU PENINAH WAITHERA	25361041	FEMALE	33	BUSINESS	N/ A	PERSONS WITH DISABILITY	N/ A	JP577	NYERI	KIKUYU

e) That the nominated member of the Nyeri County Assembly nominated as an ethnic minority one MILLICENT CHEROTICH (3rd respondent) by JUBILEE PARTY (the 2nd respondent) does not appear on the said publication which was the last publication immediately prior to the aforementioned of the Kenya Gazette by the Independent Electoral and Boundaries Commission (1st respondent) of the 28th day of August 2017 which Gazettement/nomination/election of one

MILLICENT CHEROTICH (3rd respondent) is the subject of this petition.

f) That in the aforementioned Publication of the Independent Electoral and Boundaries Commission (the 1st respondent) the petitioner has her Jubilee Party (2nd Respondent) number clearly stated as JP16983 and since the 3rd respondent name is not on the list her Jubilee Party (2nd respondent) number is not listed and neither is it listed in the subsequent Kenya Gazette Publication 28th day of August 2017 based on which the Petitioner contends that the 3rd respondent is not a JUBILEE PARTY (3rd respondent) member, to warrant her nomination/election.

g) That as per the Jubilee Party (2nd respondent) all persons seeking to be nominated as members of County Assembly of Nyeri County were required within the Party Regulations to fill in Nomination Application Form to express interest of being nominated where after the said Jubilee Party (2nd Respondent) did publish all the applications it received and in which publication the 3rd respondent name does not appear thereby reaching a conclusion that the 3rd respondent did not apply and as such is not legible to be nominated as such Member of County Assembly of Nyeri County Assembly.

h) That the petitioner did apply to be nominated and her name was published as an applicant and subsequently thereafter nominated for the position Member of the Nyeri County Assembly under Minority Category.

i) That the Independent Electoral and Boundaries Commission (1st respondent) having a mandate to choose the first four Pur

j) suant to Section 36(8) of the Elections Act 2011 as per the list presented by the Jubilee Party (3rd respondent) and Published in the Daily Nation of 23rd July 2017 by the Independent Electoral and Boundaries Commission (1st Respondent) it is only the petitioner who has persistently been listed number 3 who has been dropped and the 3rd respondent positioned in her place while the rest who have been appearing with her have been retained, in their positions.

k) That the petitioner who is a female adult Muslim by faith had been proposed and nominated by the Jubilee Party (2nd respondent) on the basis of protecting the group of Minority Women who practice MUSLIM Faith in Nyeri County a predominantly Christian faith society.

l) That other members of the Jubilee Party (3rd respondent) who were not shortlisted for nominations following the applications mentioned in paragraph G here above did file before the 2nd respondents Tribunal a Dispute over their non-inclusion in the party list, which dispute was heard and determined.

m) That the petitioner did not participate in the Dispute as she had been satisfied with her placement as Number 3 representing marginalized and minority and contends that by Gazetting the 3rd respondent after her nomination and placement in the Party list that was published by the Independent Electoral and Boundaries Commission (1st respondent) on 23rd July 2017 the petitioner has been effectively denied an opportunity to present her dispute to the 2nd respondent Tribunal as following the Gazettement of another person MILLICENT CHEROTICH (3rd respondent) in position 3 under Ethnic Minority which was her position on the category of Minority Category.

n) That as per Article 90(2) of the Constitution of Kenya the Independent Electoral and Boundaries Commission (1st Respondent) is responsible for the conduct and supervision of elections for seats provided for under Article 177(1) (b) and (c) which is the election the subject of this suit.

o) That by publishing a list that included the Petitioner as a Nominee of Jubilee Party (2nd respondent) for Member of County Assembly representing the minority as prioritized as Number 3 and thereafter unilaterally illegally and unlawfully replacing her with the 3rd respondent flies against Article 90(2) of the Constitution thereby failing in its duty to be responsible for the conduct and supervision of the election envisaged in Article 177 (1) (b) and (c).

4) Over and above the said Millicent Cherotich whose nomination/election is being challenged, the petitioner has enjoined **The Independent Electoral and Boundaries Commission** as the 1st respondent and **The Jubilee Party** as the 2nd Respondent.

5) The Petitioner supported her petition with an affidavit sworn on 4/9/17.

6) The affidavit basically outlines the history and circumstances around the complainant. She has drawn the courts attention to the following;

a) The advertisement by the first respondent.

b) Her application.

c) Her qualifications which are;

i. A registered voter.

ii. Registered member of the Jubilee Party.

iii. Her qualification to be nominated as representative of the marginalized group based on the fact that she is a female who professes the Muslim faith within Nyeri County a predominantly Christian faith community which community still had spots of bias against women leadership positions.

She attached copies of the following documents;

i. Her identity card.

ii. Copy of her Jubilee Membership Card.

iii. Receipt in payment of membership fees.

iv. Validation of membership card.

v. Nomination receipt.

vi. Acknowledgement and party list nomination.

vii. Acknowledgement slip of online voter registration slip.

viii. Nomination Application Form.

ix. Letter dated 4/5/17 from Supreme Council of Kenya Muslims showing that she is a woman leader.

x. List of all the applicants for nominations.

xi. First list of party list Applicants.

- xii. Second list of Applicants.
- xiii. Full and final list.
- xiv. Online search of registered voters.
- xv. Gazette Notice No.4992 issued on 28/8/17.

She submitted that the 1st and 2nd respondents' surreptitiously and conivingly sneaked in the 3rd respondents name and they acted capriciously in violation of the law.

7) THE RESPONSES

a) The first Respondent's Response

The first respondent on their part as against the Petition raised 12 grounds in their response which is supported by a Replying affidavit sworn by one Salome Oyugi the Manager Political Parties Campaign and Financing of the 1st respondent.

Attached to the said deponents' affidavits are annexures labeled "SO 1 upto SO 4". The 1st respondent in their response seek that the petition be dismissed.

b) The Second Respondent Response

The second respondent filed a response to the claim dated 22nd November 2017 to which was attached a verifying affidavit and some unmarked documents to wit a letter dated 16th August, 2017, document titled "*Jubilee Party List comments*" and another with the 1st Respondents letter head titled *Political Party list of Special Seats*. The second respondent in their response also seeks that the petition be dismissed.

c) The Third Respondent's Response

The Third Respondent filed a response to the petition in which response there is attached an affidavit to which affidavit there are attached annexures marked "MC 1 upto MC8". In the response to the petition the 3rd respondent seeks that the Petition be dismissed.

THE EVIDENCE

8) The petitioner gave oral evidence and she adopted her affidavit in support. She highlighted that after the application for nominations, all the Applicants were listed then shortlisted and eventually publicized by the 1st respondent in a Sunday Nation of 23rd July 2017 where she was listed as Number 3 under Minority Category.

9) She pointed out that the name of the 3rd Respondent, who eventually took over her coveted position Number 3 and was eventually gazzeted, did not feature in any known list prior to the gazzetement.

10) Her basic complaint is that the respondents used some unknown methods to turn tables against her when all along she was the person to represent the minority.

11) She admitted that she is aware of the case before the political parties Disputes Tribunal whereby the 2nd respondent was ordered to reconstitute its party list.

Her position was that she was not a party in the case before the Tribunal and further the orders did not affect her as they did not specify who should be removed from the list.

12) More importantly, she testified that the 2nd respondent did not send any other list to the 1st respondent, which removed her name and included the 3rd respondent's name.

13) The issue of the reconstituted list featured prominently in the evidence. The 1st respondent introduced a letter dated 16/8/17. The petitioner pointed out that this list was on the 1st respondent's letterhead and had not been forwarded by the 2nd respondent. She questioned where the reconstituted list was to show the replacement.

14) The petitioner questioned the authenticity of the signature of the letter dated 16/8/17 which purportedly sent the reconstituted list. She sought the attendance of Raphael Tuju, the 2nd respondent's secretary General by issuance of court summons.

15) Raphael Tuju did not honor the court summons and this led to an order for the forensic examination of the said signature which was compared against two other documents said to have been signed by the same author.

16) CIP Iranda Masiko – a document examiner gave evidence and produced a report giving his findings on the signature. We will examine it's contents down the line.

17) The petitioner also challenged the 3rd respondent's documents by pointing out that her (3rd respondent) application had no date nor any acknowledgement and that the ward was not indicated as well as the status on the Helb Clearance Certificate.

18) The 1st respondent had indicated that they would call one witness but they did not. They relied on the response, affidavits, documents and submission.

19) The 2nd respondent also did not call any witness. They relied on the responses, affidavits, documents and submissions.

20) The 3rd respondent gave oral evidence in support of her response to the petition. She adopted her affidavit. She confirmed that she is a registered voter in Rugi Ward in Mukurweini Constituency within Nyeri County. She pointed out that she had registered as a voter using her passport number and not identity card. This was in response to the petitioner's position that a search using the 3rd respondent's identity card yielded no results.

21) She maintained that she applied for the nomination and that she was eventually nominated by the 2nd respondent to represent the Ethnic Minority within Nyeri County.

22) She relied heavily on the judgment from the Election Disputes Tribunal which specifically mentioned that the Jubilee list be reconstituted to include Ethnic Minority.

She urged the court to dismiss the petition.

230 ISSUES FOR DETERMINATION

The Petitioner filed a draft contested issues on 16/10/17. By this time the 2nd and 3rd respondents had not filed their responses.

The 1st respondent distilled 4 issues for determination;

a) Whether the special category under which the 3rd respondent MILLICENT CHEROTICH was elected that is, "Ethnic Minority" is Constitutional?

b) Whether the 3rd respondent MILLICENT CHEROTICH ever appeared on any Jubilee Party list submitted to the 1st Respondent.

c) Whether the 2nd respondent did submit any reconstituted list following the ruling in the Political Parties Disputes Tribunal Complaint No.345 of 2017?

d) What if any? Was the effect of the ruling in the Political Parties Disputes Tribunal Complaint No.345 of 2017 with regard to the Petitioner?

24) The court finds the following to be the outstanding issues;

i. What is the scope of this court's jurisdiction in this petition.

ii. What is the import of the Political Parties Disputes Tribunal complaint No. 345 of 2017 with regard to the Petitioner?

iii. Did the 2nd Respondent reconstitute its party list as ordered by the PPDT?

iv. What was the procedure followed by the 2nd respondent in coming up with the reconstituted list if any.

v. Was the 3rd respondent's name procedurally included in the reconstituted list?

vi. Was this reconstituted list forwarded to the 1st respondent by the 2nd respondent for gazetement?

vii. Was the special category under which the 3rd respondent, elected, that is "Ethnic Minority" lawful?

viii. Whether the petitioner having appeared in all the 2nd respondent's lists should be declared the nominated member of the Nyeri County Assembly under minority category.

ix. Who should bear the costs of this petition?

25) ANALYSIS OF THE EVIDENCE

The Petitioner's main issue in the petition is that she applied for nomination as a Member of County Assembly in Nyeri County under the minorities category being a Muslim leader in the community that is predominantly of the Christian faith and was listed as number three (3) in the preliminaries but eventually did not appear on the gazette and final party list.

The petitioner contended that she held number (3) in the list all through the preliminaries and was even listed as the same in the Sunday Nation Edition of 23rd July, 2017 where the 1st respondent published the 2nd respondent's party list.

The petitioner claimed that the tables turned on her when the final list of nominated members of County Assembly was gazetted whereby she discovered that her name was not on the list and moreover that the number three (3) position had been taken over by the 3rd respondent.

26) Furthermore, the petitioner stated that she was always number three (3) in all of the lists save for the list that was gazetted in which the 3rd respondent is on as number three (3).

The petitioner confirmed that there was a case in the Political Parties Disputes Tribunal of which the court ordered the 2nd respondent to reconstitute its party list.

27) The petitioner averred that she never saw the 3rd respondent in any of the lists save the final list that was published on the Kenya Gazette on 28th August, 2017.

28) The petitioner claimed that the 1st respondent had no right to replace her name with that of the 3rd respondent on the party list and that the list gazetted by the 1st respondent was dubious as there are no lines separating the columns and no documentation showing that the 1st respondent got a resubmitted party list from the 2nd respondent.

Upon cross-examination; the petitioner admitted that the 2nd respondent had the discretion to reconstitute its party list.

29) The petitioner also confirmed that there was a case before the Political Parties Disputes Tribunal where the 2nd Respondent was ordered by the court to reconstitute its party list and she further agreed that the orders of the tribunal are still in force.

The petitioner agreed that it was not mandatory that her name be on the party list and that the 1st respondent does not have the mandate to reconstitute a party list. She agreed that she is a Kikuyu and is not sure of whether there is a provision in law for a minority category based on religion. The petitioner confirmed that the predominant tribe in Nyeri is Kikuyu and that other communities have the right to be represented in the county assembly as well. The petitioner also confirmed that the Tribunal found the 2nd respondent's party list to be faulty as it did not represent the interests of ethnic minorities.

30) The respondents all point at the decision by the PPDT which directed that a new party list be submitted. They all argue that this was done and it was not mandatory for the petitioner's name to be on the reconstituted party list since all the other lists were quashed by the decision of the PPDT.

31) JURISDICTION OF THE COURT.

The 1st respondent submitted that the prayers that the petitioner is seeking are beyond jurisdiction of this court.

That;

32) Section 35 of the Elections Act, 2011 provides that a political party is mandated to submit its party list to the Independent Electoral and Boundaries Commission on the same day as the day designated for submission.

33) Regulation 16(4) and (5) of the Elections (Party Primaries and Party List) Regulations, 2017 clearly show that a political party is obligated to submit a party list to the Independent Electoral and Boundaries Commission and of which list the Commission cannot alter once received.

34) Article 169 of the Constitution establishes the sub-ordinate courts in Kenya which include tribunals as provided for under sub-article (d) of the same.

35) Sections 39 and 40 of the Political Parties Act

Give rise and establishment of the Political parties Disputes Tribunal which has the jurisdiction to hear and determine disputes arising from political parties nominations. Section 41 (2) of the Political Parties Act provides for appeals from a decision of the tribunal to be lodged in the superior courts appropriately.

36) Article 88(4) (e) of the Constitution

Provides that the 1st Respondent had the mandate to determine and settle disputes that arise from party nominations.

37) The Political Parties Disputes Tribunal is also mandated with the task of settling disputes that arise from political parties as provided for in Section 40 of the Political Parties Act.

They submitted that;

38) The petitioner failed to observe procedure by lodging an Election Petition without exhausting all of her options as provided for under the election laws.

39) Further that the petitioner also failed to lodge a complaint within her political party which is the 2nd respondent to seek an explanation and relief as to why her name was taken off the list and instead filed an election petition before this Honourable Court.

40) That Article 165 of the Constitution establishes the High Court of Kenya as having both original and appellate jurisdiction.

41) The High Court had the mandate to hear and determine matters that arise from decisions of the subordinate courts. They cited the case of ***Ernest Kevin Luchidio – versus- Attorney General & 2 Others [2015] Eklr*** which states that “*Jurisdiction is everything. Taking jurisdiction as a cage and a court as an animal, the animal can, but only move within the cage. That is what jurisdiction is all about*”.

42) That the Political Parties Disputes Tribunal is a sub-ordinate court established under Article 169 of the Constitution and its decisions can only be revisited by a superior court.

43) The petitioner’s prayer one (1) in her petition may only be granted by quashing of the decision of the Tribunal. This Honourable Court does not have the jurisdiction to grant such an order. The 2nd and 3rd prayers are also subsequent to quashing the decision of the Tribunal.

The Tribunal in PPDT complaint No. 345 of 2017 ordered the 2nd respondent to reconstitute its party list which it did and resubmitted its party list of nominees for Member of County Assembly in Nyeri County.

44) That if the petitioner’s prayers in her petition are to be granted, the court must nullify the decision of the Tribunal as well as the Gazette Notice.

45) Section 41 of the Political Parties Act provides for appeals from decisions of the tribunal be lodged at the High Court and other appropriate superior courts. The sub-ordinate courts are excluded as their jurisdiction is established together with that of the tribunal under Article 169 of the Constitution.

46) On jurisdiction, the court refers the Supreme Court in the ***Petition Case No. 1 of 2015 –Moses Mwigigi and 15 others –vs- Independent Electoral and Boundaries Commission and another [2013] eKLR***. The apex court referred to Section 75 of the Elections Act and the decisions in ***The 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 2nd 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.

47) On whether this court can overturn the decision of the PPDT, the court agrees totally, that it cannot be an appellate court. That having been said, the court finds that the petitioner has not asked that we examine whether or not the Tribunal was right.

48) Section 75 1A of the Elections Act provides the mandate of the court. It states, “*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 act in addition provides for the appropriate remedies that the court may grant. Section 75 (3) provides, "In any proceeding brought under this section, a court may grant appropriate relief, including;

- 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; or
- c) An order as to whether a fresh election will be held or not.

So, this court will be minded to keep to its mandate, and in so doing may revisit the decision by the PPDT and if it was followed.

THE IMPORT OF THE DECISION BY THE PPDT.

49) On the correctness of the decision of the PPDT, the petitioner referred to Article 90 of the Constitution of Kenya titled "Allocation of Party Seats" which reads as follows;-

i. Election for the seats in parliament provided for under Article 97(1) (c) and 98(1) (b), (c) and (d) and for members of County Assemblies under 177 (1) (b) and (c) shall be on the basis of the proportional representation by use of party lists.

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

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

b. **Except** in the case of the seats provided for under Article 98(1) (b) each party list comprises the appropriate number of qualified candidates in the priority in which they are listed and

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

iii. The seats mentioned in clause (1) shall be allocated to political parties in proportion to the total number won by candidates.

49) For purposes of the Petition herein is paragraph 2(c) of the Article 90 of the Constitution of Kenya 2010 is of concern.

50) The said Article 90 2(c) provides that, **except in the case of County Assembly seats each Party reflects the regional and Ethnic diversity of the people of Kenya.**

51) The Petitioners submitted that the interpretation of the said Article 90 2(c) is to the effect that when it comes to allocation of Party lists in the case of County Assembly Seats the issue of Regional and Ethnic diversity of the people of Kenya is not applicable.

52) That, from Gazette Notice Number 4992 the 3rd respondent was clearly nominated under the category of Ethnic Minority in position Number 3 which position had been allocated to the petitioner and held under minority Category.

53) Having been nominated under the category of "Ethnic Minority" the said nomination was done

against the clear provisions of Article 90 2(c) of the Constitution.

54) The petitioner invited the court to the finding by Honourable Justice Wakiaga in the ***High court of Kenya at Nairobi Election Nomination Appeal No. 22 of 2017, Jubilee Party of Kenya –versus- Mohammed Abdikadir Salah*** wherein the court held that the tribunal from which the appeal emanated failed to appreciate and take into account the provision of Article 90 2(c) of the Constitution as regards to nomination to the County Assembly.

55) The respondents reply to this argument was hinged on Article 177c of the Constitution as read with Section 7(2) of the County Government Act.

56) Article 177 deals with the membership of County Assembly. It provides that 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 marginalized groups, including persons with disabilities and the youth, prescribed by the act of parliament

d) The speaker who is an ex officio member.

57) Section 7 of the County Government Act deals with membership of the County Assembly.

It provides;

i In addition to the members who are elected under Article 177(a), and those who are 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.

ii. 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.

iii. 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).

58) The respondents argued that the 3rd respondent is a representative of the minority, since she is a Kalenjin residing in a predominantly Kikuyu region.

59) The court makes reference to **Article 197** of the Constitution which deals with the County Assembly gender balance and diversity. It provides;

i. Not more than two-thirds of the members of any county assembly or county executive committee

shall be of the same gender.

ii. Parliament shall enact legislation to-

a) Ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and

b) Prescribe mechanisms to protect minorities within counties.

60) Therefore, Section 7 of the County Government Act was enacted to fulfill the provisions of Article 197(2) of the Constitution.

61) The petitioner argues that the provisions of Article 197 of the Constitution do not mention Ethnic Minority but talk of community and cultural diversity.

62) That the constitution remains superior to any other legislation and therefore since Article 90 of the Constitution specifically exempts County Assemblies from Ethnic and Regional balancing then the provisions of the County Governments act cannot super cede the constitution.

63) The court agrees that the constitution is the primary law of the land and any law or decision to the contrary is null and void.

64) That finding flies in the face of the decision of the PPDT but had already found that I cannot sit as an appeal court. We leave that limb of the argument pending.

THE PROCEDURAL DEFECTS

65) The first respondent had also submitted that the petitioner failed to observe procedure by lodging an election petition without exhausting all her other options provided by the election laws.

66) They referred to Article 88(4) (e) of the constitution and section 39 and 40 of the political parties acts.

They argued that the petitioner ought to have lodged her complaint with her political party; that is the 2nd respondent.

67) This question was put to her during cross-examination and her explanation was that her name had appeared in all the lists and she had no reason to complain until after the gazetement and at that point, she could no longer go back to her party or the Tribunal since it was too late in the day.

68) The respondent had also argued that the petitioner was wrong in filing this Petition before invoking the other available

disputes resolution mechanisms that are legally provided for in situations such as these.

69) They referred to several authorities which have held that party list disputes should be left to the parties, the IEBC and the PPDT to resolve.

70) The court agrees with those submissions. There are however some preliquisites which ought to have existed.

71) These were highlighted in the Petition by the **Gender and Equality Commission IEBC Petition No. 147 of 2013 – IBID.**

72) The court set at the procedural steps required for lawful nominations as hereunder;

1. Each political party shall submit to the Commission a party list of all persons who would stand

elected if the party were entitled to seats in the National Assembly, Senate or the County Assembly, as the case may be on the basis of proportional representation in accordance with Article 90 of the Constitution and Sections 34, 35, 36 and 37 of the Act.

2. The party list referred to in sub regulation (1) shall contain the name, address, age, sex, disability and category of disability, phone number, occupation, elective post sought and such other qualifications as are provided under the Constitution and the Act.

3. A party list submitted under Sub regulation (1) shall be in accordance with Section 36 of the act, and shall be-

a) By signed by the authorized official of the political party submitting the party list; and

b) Be submitted in hard copy and in electronic form.

4. Each political party list nominee shall after nomination, submit to the Commission a letter stating his or her intention to serve if nominated.

5. The commission may reject a nominee submitted by a political party for any elective post if that nominee is not qualified to be elected to the office for which the nomination is sought as specified under the Constitution or the Act.

6. The rejection by the commission of a nominee under this regulation shall not invalidate the entire party list submitted by the political party.

7. The Commission, after making the decision to reject a nominee, inform the political party concerned of that decision and request that political party to submit another name within such time as the Commission shall determine.

8. The commission shall publish the final party list in at least two newspapers with nationwide circulation.

73) The bench then concluded that **“What is clear to us and we accordingly so find is that the provisions of regulation 54(8) of the General Regulations were not complied with. The reason for requiring publication of the party lists is not idle. As Mr. Ochola, counsel for the 5th interested party submitted, part of the responsibility of IEBC is to publish the party lists in order to afford the public an opportunity to review the lists to see whether they comply with the Constitution. Further that since voting at the General election affects the manner in which the special seats are to be distributed, it is therefore necessary for members of the public to know the persons proposed to be elected on the basis of party lists and vote according to their preference. We agree with the 5th interested party’s submission that compliance with these provisions enhances the political parties as a tool of propounding good governance, integrity, transparency and accountability”**.

74) They added that **“another important reason for publication of the party lists is, to enable parties invoke the dispute resolution process provided for under the Constitution. Under Article 88(4)(e) of the Constitution, as read with Section 74 of the Elections Act, 2011, the IEBC has the mandate to settle electoral disputes including disputes relating to or arising out of nominations. As a result of failure to publicize the party lists, the public was effectively denied the opportunity to demand accountability on the part of the IEBC. In our view, this litigation would have been avoided had the IEBC complied with this provision and made the list available to the public for scrutiny as contemplated by the General Regulations. It is also through this process that IEBC would have demanded accountability from the political parties and ensured that the party lists comply with the Constitution and the law”**.

75) In this petition, it is interesting that it is the respondent who raised this procedural issue as it throws the ball squarely back to their court.

76) This opens up the next issue on whether the decision of the PPDT was complied with and what was expected of the 1st and 2nd respondents.

77) The court will evaluate the remaining issues together as they are inter-twinned.

78) The kick off point is that the PPDT directed the 2nd respondent to reconstitute its party list and forward it to the 1st respondent.

79) Basically the Tribunal found that the 2nd Respondent's party list was not properly constituted and directed that a new list be submitted in compliance with the law.

80) So did the 2nd Respondent comply with the decision of the PPDT? The list that had been forwarded before the decision of the PPDT had the following persons;

1	BETH NYAWIRA KIMAILI	27917423	FEMALE	27	BUSINESS WOMAN	N/A	YOUTH CATEGORY	N/A	JP24824	NYERI	KIKUYU
2	MUTHONI PATRICK MUTAHI	26667315	MALE	29	KIKUYU	N/A	YOUTH CATEGORY	N/A	JP14264	NYERI	KIKUYU

3	OMARI WANJIKU ESHA	13727925	FEMALE	43	BUSINESS WOMAN	N/A	MINORITY CATEGORY	N/A	JP16983	NYERI	KIKUYU
4	WAMBUGUTHIONG'O WILLIAM	0350461	MALE	59	NULL	N/A	MINORITY CATEGORY	N/A	JP MEMBER	NYERI	KIKUYU
5	GICHUKI NYOKABI PAULINE	13101145	FEMALE	50	CASUAL LABOURER	N/A	MARGINALIZED CATEGORY ETHNICITY	N/A	JP MEMBER	NYERI	KIKUYU
6	NDEGWA ANTHONY NDIRANGU	29687734	MALE	42	DISABILITY SERVICE OFFICER	N/A	MARGINALIZED CATEGORY ETHNICITY	N/A	JP13456710	NYERI	KIKUYU
7	NJOROGE DAVID MUNENE	24597282	MALE	31	BUSINESS MAN	N/A	PERSONS WITH DIABILITY	N/A	JP7755856	NYERI	KIKUYU
8	KABURU PENINAH WAITHERA	25361041	FEMALE	33	BUSINESS	N/A	PERSONS WITH DISABILITY	N/A	JP577	NYERI	KIKUYU

81) The final list that was gazetted had the following persons;

MARGINALIZED LIST

<i>No.</i>	<i>Name</i>	<i>Gender</i>	<i>ID No.</i>	<i>Nature of special interest</i>	<i>Name of party</i>	<i>No. of seats allocated</i>
1.	Beth Nyawira Kimaili	Female	27917423	Youth	Jubilee party	4
2.	Muthoni Patrick Mutahi	Male	26667315	Youth		
3.	Millicent Cherotich	Female	24301970	Ethnic minority		
4.	Wambugu Thiong'o William	Male	0350461	Ethnic minority		

GENDER TOP UP LIST

<i>No.</i>	<i>Name</i>	<i>Gender</i>	<i>ID No.</i>	<i>Name of party</i>	<i>No. of seats allocated</i>
1.	Muthoni Ann Caroline	Female	20611032	Jubilee party	9
2.	Mary Ndiritu Nyambura	Female	12780349		
3.	Lucy Wambui Kariuki	Female	1078245		

4.	Gathua Wanjiku Lillian	Female	23797731		
5.	Elizabeth Wanjiku Mugo	Female	5564767		
6.	Wanjiku Julia Mukami	Female	27733966		
7.	Thumbi Waihuini Beatrice	Female	22835950		
8.	Kamau Wairimu Rose	Female	5780484		
9.	Ndiritu Ndomo Mary	Female	22512090		
10.	Lynette Wanjiru Kinyua	Female	24865909	Party of National Unity	1

82) The petitioner had submitted that there was no new constituted list. It is only her name which was deleted and that of the 3rd respondent added. She argued that there is no list from the 2nd respondent to the 1st respondent as directed by the PPDT.

83) To date we have not seen the reconstituted list by the 2nd respondent.

This 2nd respondent filed a memorandum of appearance and response to claim on 23/11/2017.

84) At paragraph 9 of the said response it is stated, *“In compliance with the Honorable Tribunal’s judgment the 2nd respondent reconstituted the list to include the special interest group on account of ethnicity. In this regard, the 2nd respondent reconstituted its party list and submitted it to IEBC pursuant to the Honorable Tribunal’s judgment. This was done in consultation with the county leadership”*.

85) The 3rd respondent has then attached a letter dated 16/8/2017. This was a letter from Secretary General Raphael Tuju, EGH to the chairman IEBC.

The letter states, *“Jubilee Party is in receipt of court orders in reference to our Party List with comments on sections to be amended as per the orders. The orders affected the National Assembly and the County Assembly Party List. The party has acted on the orders in compliance with the IEBC regulations guiding the Party List. We therefore forward to you the amended Jubilee Party List in the affected areas together with a summary of remarks regarding the changes made”*.

86) So in essence that letter was forwarding the 2nd respondent’s (Jubilee) list to the 1st respondent (IEBC). Attached to this letter is a document titled “Jubilee Party List”. Nyeri appears at page 4 of the document. The document has 3 columns. The entries are;

	<i>Parties and case number</i>	<i>Orders</i>	<i>Jubilee comments</i>
1	PPDT 345 of 2017, Margret Nyathogora –vs- JP	Complaint allowed. JP to reconstitute Party list in accordance to the law. Appeal has been lifted.	THE LIST IS COMPLIANT WITH THE LAW

87) We do not have any list from Jubilee Party and that is why the petitioner was asking how the 3rd Respondent’s name happened to be in the 1st Respondent’s list.

The question that remains is from where did the 1st Respondent get the names that appear on it’s list at page 5 list amongst which is the 3rd Respondent’s name? This question was posed severally to the 1st and 2nd Respondents. The 1st Respondent filed a list of document dated 31/10/2017.

88) The only document that was filed was the letter dated 16/8/2017 from Raphael Tuju. This letter forwards the Amended Jubilee Party list but again that list is not attached.

89) Now this is the letter from Mr. Raphael Tuju, which was challenged by the Petitioner who pointed out that the signature on this document, even to the naked eye, appeared to be significantly different from the other signatures authored by Raphael Tuju. She pointed out the letter dated 12/10/2017 and the newspaper Advertisement appearing in the Daily Nation of Friday June 2017.

90) As earlier mentioned the petitioner asked for court summons for Mr. Raphael Tuju to come to clarify the differences to the court. These summons were served but never honored and this is what led to the order for an examination of the disputed signature.

91) The document examiner concluded that the signature on the document (A1) letter dated 16/8/2017 was made by a **different author from the signature** on the Daily Nation Newspaper dated 9/6/2017 and the signature on the letter dated 12/10/2017 was by the author of the signature in the Daily Nation Newspaper of 9/6/2017.

92) The court finds that in light of the absence of the evidence of Mr. Raphael Tuju, who was duly summoned to come to court and the finding of the document examiner, this letter is from suspicious sources.

That notwithstanding, the list that it purports to forward is non-existent. So where did the 1st respondent get the 3rd Respondent's name? That remains a mystery.

93) Apart from the mysterious appearance of the 3rd Respondent on the final list; other pertinent issues were raised about her application.

94) The first issue was whether she is a registered voter but she gave some response to that. The next issue was whether she had made any application for nomination.

The Petitioner pointed out that following the Advertisement by the 2nd Respondent, she and other applicants submitted their applications and the 2nd Respondent published a list of all the applicants. The Applicant's name did not feature on that list. The list was published and she attached it to the affidavit – OWE 10. Indeed the 3rd respondent's name is not among the list of applicants.

95) The 2nd and 3rd Respondent did not respond to this allegation. They both stated that the 3rd Respondent appeared in the re-submitted list after the decision of the PPDT's decision.

96) The court was also drawn to the discrepancy in the 3rd Respondent's application form. The Petitioner highlighted the curious inclusion of the hard copy application letter dated 2/6/2017. It was questioned how and why the Applicant made a hard copy application which was received when the Advertisement specifically directed the applicants to complete the online form on the website by 15/6/2017.

It was noted that the Advertisement appeared in the Daily Nation Advertisement on Friday, June 9, 2017 and the 3rd Applicant's application is dated and received by Jubilee on 2/6/2017. So she applied before the Advertisement.

97) When the Petitioner pointed out these discrepancies on 2/11/2017, the 3rd Petitioner filed a online nomination form on 29/11/2017. The Petitioner pointed out that this application did not have a date or acknowledgement by the 1st Respondent. One must also wonder why she did not attach the online application form if at all it existed and was it an authentic document.

These discrepancies and the absence of her name among the published and gazzeted list of applicants do raise some red flags.

98) The 3rd Respondent's position is that her nomination was pursuant to the PPDT order. The key question is, Did this decision waive all the other requirements of electoral process for nominated members of the County Assembly? Especially Regulation 54 of the General Regulations? The regulations required the submissions of party list by the political party to the IEBC and adherence to all the other regulations.

There was no party list from the 2nd Respondent. The list should have included the form the 1st Respondent duly signed as required by regulation 54 3(b) and the Applicant should fulfill Regulation 54 (34).

1. It was also submitted that the online application, which has been challenged, shows that the 3rd Respondent did not meet all the criteria required by her party. For instance the HELB certificate was not verified.

More importantly, the list which has not been shown, was not published and this is what created the scenario the Respondents are complaining about the Petitioner not going to the PPDT. The courts finding is that **there was no resubmitted list and in as much as the 3rd respondents wish to rely on the decision by the PPDT, they did not comply with the direction therein.**

SPECIAL INTEREST SEATS

99) When we examine the decision by the PPDT closely we see it emphasized the ethnic component. At paragraphs 7 and 8 it state, *"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"***.

100) 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.

101) 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.

102) At paragraph 20 of the said Judgment, the court framed the issued that it was to determine and the 2nd 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".

103) 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.

104) 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.”

105) 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”.

106) 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.

107) 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.

108) In this case, the petitioner submitted that she is the one who was to represent the minority within Nyeri County and her constituents were the Muslims and in particular Muslim women.

109) To this the respondents asked her what made the Islamic minority more superior to the ethnic minority. Her response, in her oral evidence was that it has been agreed that the minority seat in Nyeri was reserved for the Muslims. She did not say where it was agreed and neither did she produce any document say a constitution, by laws, minutes, letter or even the ‘legendary political memorandums of understanding (MOUs) which are common in Kenyan politics.

So if such an agreement exists, it is history, legality or enforceability were not brought to the court's attention.

110) That leaves the position of the 3rd Respondent as the representative of the ethnic minority. Millicent was nominated to represent the Kalenjin as a minority in Nyeri County. Now, who are these Kalenjin

minorities that she represents in Nyeri? We were not told. Are these Kalenjin settlers, or for that matter are there, any other immigrants from other ethnic groups, whose interest, the 3rd Respondent represents? We were not told of any.

111) The court would have been persuaded if we had some specific ethnic or interest group, say pastoralists, hunters, traders or any peculiar group with certain cultural/political /economic interests, who reside within Nyeri County whose interest, the 3rd Respondent was to represent.

112) More interestingly still, are the circumstances, which brought the 3rd Respondent to Nyeri. According to her and she has even annexed evidence to this effect, she is a Kalenjin who got married to one Cyrus Kariuki in the year 2010. This is in paragraph 3 of her affidavit and the Chief's letter "MCI".

113) This begs a question, can one get married to a person from different ethnic group, then go and champion her ethnic interests in her husband's background? The court thinks not. This aspect was addressed in the locus classica on inter-ethnic marriages in Kenya.

114) That is ***Virginia Edith Wambui Otieno Vs Joash Ochieng & Another (1987) Eklr*** where it was stated that *"To that it say this:.....The plaintiff, a kikuyu by birth, chose to be married by a man who was not from her tribe. She was not marrying a Luo. He at no time, at least according to the evidence renounced this tribe or declared that, apart from marriage, he would not be bound or be subject to customary law where its application is permissible, and is not in conflict with a written law or repugnant to justice and morality. No condition has been shown to have attached to their contract that apart from their marriage, he would not be subject to his customary laws and traditions. She chose to be married by the deceased, a Luo by birth, knowing him to be such. She had seen him participate in burial ceremonies which were customary or potentially customary in nature, although evidence was let that the ceremonies were a blend of Christian and customary rites. She cannot now complain that the Umira Kager people are uncivilized or have a lifestyle quite different from her concept of civilization, because they did not, at all, force her to be married into their clan."*

115) *She cannot now complain that the Umira Kager people are uncivilized or have a lifestyle quite different from her concept of civilization because they did not, at all force her to be married to their clan.*

116) The judge added that *"Even in Western countries, which Mr. Khaminwa and his client considered to be civilized, the position has been, and still is, that where for instance, an English woman domiciled in England marries a man of a polygamous race in his homeland. "Knowing that she is entering into a marriage that is potentially polygamous (the) **validity of that marriage depends on the personal law of the husband and not on the personal; law of the wife...if he in his own country takes to himself another wife, the English wife cannot complain**".*

117) This clearly shows that a wife who marries a man from a different ethnic community, assumes his customs and therefore it is absurd for the Respondents to argue that a married Kalenjin woman is validly elected in Nyeri to champion Kalenjin rights.

118) The court's finding is that Millicent Cherotich, the 3rd Respondent does not represent any known constituent or defined group in Nyeri County and she does not qualify to represent any minority group. It was not established that there are any ethnic minorities within Nyeri County who require special representation and if they did exist, then Millicent does not qualify to represent them as she is in Nyeri County by virtue of her marriage to a kikuyu and consequently, her interests cannot lay elsewhere.

119) Apart from the fact that Millicent's constituents of ethnic minority is doubted, the court also finds that she did not apply for the nomination. Her application form was challenged and the court is persuaded since her name does not appear on the list of Applicants or in any shortlist thereafter or even the "Jubilee party list reconstituted list".

120) This would mean that the 1st and 2nd Respondents did not adhere to the statutory provisions and

regulations which set out the entire procedure which lead to a valid nomination.

So what's the court's verdict?

We shall go by each of the prayers in the petition.

A. The First prayer was that the court declares that Millicent Cherotich was not validly nominated as a member of the County Assembly Nyeri representing the ethnic minority.

The court has considered all the constitutional and statutory requirements and is in agreement that Millicent was not validly nominated. This is because;

- 1) We have seen that her application procedure was opaque. This was demonstrated in the body of the judgment.
- 2) She did not appear in any of the lists that Jubilee Party published. That is the list of those shortlisted and even the list that was published in the newspapers as per the statutory requirements.
- 3) Infact even when the PPDT ordered that the Jubilee list be reconstituted, this court did not see the list from the said Jubilee party to IEBC and even the letter purporting to forward that "invisible list" to IEBC was from suspicious sources.
- 4) Millicent's name only emerged in the list by IEBC which appeared in final gazette notice and this is unprocedural.
- 5) The decision by the PPDT was therefore not followed and the court declares that Millicent Cherotich was not validly elected/nominated as a member of the County assembly of Nyeri County.

B. The 2nd Prayer was for a declaration that the election /nomination of Millicent Cherotich was illegal ,unlawful and void and the same should be invalidated as The Constitution does not provide for ethnic reflection in county seats.

- 1) The court has examined Article 90 (2) [c] of the Constitution which specifically exempts County Assembly seats from requirement to reflect regional and ethnic diversity of the people of Kenya.
- 2) The court also notes that Article 197 [2] a of the Constitution and Section 7(2) (a) of the County Assembly Act specifically refer to "Community and Cultural Diversity " and not ethnic consideration.
- 3) The court finds that the "inclusion" of "ethnic diversity" especially Kalenjin interests within Nyeri County is illegal and more so, Millicent who is married in Nyeri County cannot purport to champion other ethnic interests. Accordingly, the court declares her nomination illegal, unlawful and void and accordingly nullifies her nomination and election as gazzetted in the Kenya Gazzette Notice No.4992 of 28th August, 2017.

C. The 3rd Prayer was for a declaration that the petitioner was validly nominated as a member of the County Assembly to represent the minority category.

1) The court findings are that, the petitioner applied the nomination and she was shortlisted and her name appears on all the published lists save for the final gazette notice.

In all these lists she was position number 3 and was shown to represent the minority. Her evidence

was that in Nyeri, the seat for the minority was reserved to the Muslims. She was however, challenged as to how that reservation came up and she did not do that.

The reliefs the court may grant are provided for under Section 75[3] of the Elections Act.

They include;

- a) A declaration of whether or not a 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.

In the instant case, the court will throw the ball back to the 1st and 2nd Respondents to determine whether or not the Petitioner herein remains as their choice for the minority, and complete her election by gazzeting her name or conduct a fresh nomination on that particular post, taking into account all the constitutional and statutory requirements.

- The court therefore, declines to grant the 3rd prayer.
- As for the costs, the court has considered all the circumstances of this case including the argument that the respondents were enforcing the judgment of the PPDT and accordingly orders each party to bear its costs.

Dated and delivered at Nyeri this 31st day of January 2018

Signed by Wendy. K. Micheni

CHIEF MAGISTRATE

Delivered in the presence of;

- 1) For the Petitioner –
- 2) For the 1st Respondent -
- 3) For the 2nd Respondent -